HOW COURTS CAN PROTECT STATE AUTONOMY FROM FEDERAL ADMINISTRATIVE ENCROACHMENT

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ABSTRACT

Unlike the federalism cases typical of the Rehnquist Court, modern federalism cases will not involve interpretation of the Commerce Clause or the Tenth Amendment, particularly after Gonzales v. Raich *refused to expand the Commerce Clause to protect state autonomy. Instead, modern federalism cases will involve basic statutory construction. The Supreme Court has become increasingly interested in cases dealing with the intersection of federalism and statutory construction, deciding two such cases during the October 2007 Term and granting certiorari in two other cases for the 2008 Term.*

Federalism concerns in statutory construction arise most frequently in administrative law, as modern federal agencies produce an enormous amount of laws. As a result, the hard questions about federalism now appear in administrative law cases. Courts and commentators are becoming wary of the ability of federal agencies to encroach on state autonomy, given the underenforced constitutional norms of federalism and the nondelegation doctrine.

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The Supreme Court recently examined the intersection of federalism and administrative law in Gonzales v. Oregon*, but adopted an inadequate approach (*"Chevron *Step Zero") to protecting state autonomy from administrative encroachment. Instead of using* Chevron *Step Zero to protect federalism in administrative law, courts should expand federalism-based clear-statement canons of statutory construction. Specifically, courts should expand the scope of* Gregory v. Ashcroft *in the administrative law context to adopt a clear-statement canon that applies to administrative interpretations made in areas of traditional state regulation. Such a canon finds support in preexisting clear-statement canons and the Supreme Court's continued reliance on the "areas of traditional state regulation" dichotomy. This canon would be a direct, effective approach to protecting state autonomy from administrative encroachment.*

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I. INTRODUCTION

The Rehnquist Court's federalist revolution increased state autonomy by limiting the federal government's powers through constitutional provisions such as the Commerce Clause and the Tenth Amendment.[1] But after *Gonzales v. Raich* refused to expand the Court's Commerce Clause jurisprudence to protect state autonomy,[2] it is highly unlikely that the current Court will vigorously protect state autonomy through substantive constitutional provisions. And yet, even if the Court underenforces the constitutional norm of federalism by not providing significant limitations on Congress's enumerated powers, this does not mean that the Court has completely given up on protecting state autonomy.

Rather, the hard questions about federalism now involve basic statutory construction instead of interpretations of the Commerce Clause or the Tenth Amendment. This shift recently caused Justice Breyer to observe,

1. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (placing substantive limits on congressional power under the Commerce Clause); Printz v. United States, 521 U.S. 898 (1997) (holding that Congress unconstitutionally commandeered state officers); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress could not abrogate states' sovereign immunity under the Indian Commerce Clause); United States v. Lopez, 514 U.S. 549 (1995) (restricting Congress's power under the Commerce Clause); New York. v. United States, 505 U.S. 144 (1992) (holding that Congress unconstitutionally commandeered a state legislature). *See also* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1099 n.1 (2006) (collecting articles discussing the Rehnquist Court's federalist revolution).

2. Gonzales v. Raich, 545 U.S. 1 (2005).

"the true test of federalist principle may lie . . . in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law."[3] Indeed, the Court has become increasingly interested in cases dealing with the intersection of federalism and statutory construction, deciding two such cases during the October 2007 Term[4] and granting certiorari in two others for the 2008 Term.[5]

Federalism concerns in statutory construction, in turn, will arise most often in administrative law: every time an agency acts, it must interpret the federal statute that delegates power to the agency, and "the sheer amount of law . . . made by the [administrative] agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process."[6] Although Congress has broad enumerated powers,[7] the assumption is that states retain tremendous authority when Congress does not exercise these powers. But even if Congress does not directly exercise one of its enumerated powers, it can delegate its powers to administrative agencies without any significant limits. After all, the Court has essentially abandoned and underenforced the nondelegation doctrine[8]—the view "that Congress may not constitutionally delegate its legislative power to another branch of Government."[9]

Administrative agencies can therefore intrude on state autonomy as readily as Congress. In fact, because agency interpretations are accorded substantial deference under *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*,[10] it may be easier for agencies to do so. As the law currently stands, it is possible for federal administrative regulations to reduce state autonomy without Congress ever addressing these federalism concerns. It may be most important to protect federalism in the administrative law context, as administrative law frequently deals with

3. Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (citations omitted).

4. Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008); Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989 (2008).

5. Good v. Altria Group, Inc., 501 F.3d 29 (1st Cir. 2007), c*ert. granted*, 128 S. Ct. 1119 (2008); Levine v. Wyeth, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (2008).

6. INS v. Chadha, 462 U.S. 919, 985–86 (1983) (White, J., dissenting).

7. *See, e.g.*, *Raich*, 545 U.S. at 35 (Scalia, J., concurring) ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.").

8. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (holding that the nondelegation doctrine only requires Congress to provide agencies with an intelligible principle, and that such intelligible principles require very little specificity).

9. Touby v. United States, 500 U.S. 160, 165 (1991).

10. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

minute, technical matters, and local control of these matters could allow states to respond to the "diverse interests and preferences" held by citizens across the United States.[11]

The Supreme Court's 2006 decision in *Gonzales v. Oregon*[12] is a great example of how post-*Raich* federalism cases will involve an agency's construction of a statute. In *Gonzales v. Oregon*, the Court had to determine whether the Controlled Substances Act allowed the U.S. Attorney General to supersede the State of Oregon's decision to legalize the use of controlled substances for ending a patient's life.[13] The Court protected state autonomy by invalidating the Ashcroft Directive, a federal administrative interpretive rule that essentially prohibited dispensing controlled substances for the purpose of ending a patient's life.[14]

Gonzales v. Oregon, however, did not invoke substantive limits on Congress's enumerated powers. Instead, the Court employed a *procedural* limit on congressional power to invalidate the Ashcroft Directive. Procedural limits on congressional power require Congress to provide specific indicia of its intent for a statute to accomplish a certain result. For example, if Congress wants to abrogate a state's sovereign immunity, Congress must clearly state this intent in the statute, or else courts will interpret the statute as preserving the state's sovereign immunity.[15] In other words, procedural limits on congressional power do not categorically prevent Congress from regulating certain fields; they merely require Congress to jump through the requisite hoops.

The procedural limit invoked by *Gonzales v. Oregon* is an administrative law doctrine known as "*Chevron* Step Zero."[16] *Chevron* Step Zero is a complex doctrine that essentially denies *Chevron* deference to certain administrative interpretations: Congress must provide specific indicia of its intent to "delegate[] authority to the agency generally to make

11. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (book review).

12. Gonzales v. Oregon, 546 U.S. 243 (2006).

13. *Id.* at 248–49.

14. *Id.* at 253–54.

15. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* Lane v. Pena, 518 U.S. 187, 197–98 (1996) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

16. The phrase "*Chevron* Step Zero" was originally coined in Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001), and then solidified in Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) [hereinafter Sunstein, Chevron *Step Zero*].

rules carrying the force of law,"[17] otherwise the administrative interpretation at issue will not get *Chevron* deference. *Chevron* Step Zero can apply to administrative interpretations that have nothing to do with federalism,[18] although *Gonzales v. Oregon* infused federalism concerns into *Chevron* Step Zero.[19] As a result, *Gonzales v. Oregon* rejected any deference to the Ashcroft Directive because of federalism concerns.

This Article, however, argues that *Gonzales v. Oregon* should have chosen a different procedural limit on congressional power to protect state autonomy, as *Chevron* Step Zero is a malleable doctrine that does not even protect state autonomy from the vast number of federal regulations made through notice-and-comment rulemaking.[20] Instead, courts should expand preexisting clear-statement canons of statutory construction in the context of administrative law.[21] Clear-statement canons require Congress to

17. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

18. *See infra* Part V.A.

19. *See* Gonzales v. Oregon, 546 U.S. at 268 ("[T]he CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement *with the force of law*." (emphasis added)). *See also infra* notes 96–99 and accompanying text.

20. *See infra* Part V.B.

21. There has been little commentary on the intersection of *Chevron* Step Zero and clear-statement canons. Jacob Gersen has focused on *Gonzales v. Oregon* and *Chevron* Step Zero through the lens of presumptions based upon "overlapping and underlapping jurisdiction." Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201. Nina Mendelson explored how clear-statement canons intersect with *Chevron* Steps One and Two, but not *Chevron* Step Zero. *See generally* Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004) (arguing that federalism values can be protected through political processes and advocating for a functional approach to reconciling preemption doctrine with *Chevron* when Congress has not expressly delegated preemptive authority to an agency). Relatedly, Peter Smith has addressed clear-statement canons and *Chevron* deference. *See* Peter J. Smith, Essay, Pennhurst*,* Chevron*, and the Spending Power*, 110 YALE L.J. 1187, 1201 (2001).

Cass Sunstein has briefly addressed clear-statement canons of statutory construction (what he calls "nondelegation canons") as an alternative to *Chevron* Step Zero. *See* Sunstein, Chevron *Step Zero*, *supra* note 16, at 244–47. *See also* Cass R. Sunstein, Essay, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2607–10 (2006) [hereinafter Sunstein, *Beyond* Marbury] (discussing the clear-statement canon as a limit on the executive's interpretive discretion). But he only examined them under the rubric of the nondelegation doctrine—not in relation to federalism concerns. He briefly raised three objections to such clear-statement canons: (1) "the uncertain foundations of the argument for the nondelegation doctrine itself"; (2) "the difficulty of administering the line that the principle would require courts to maintain"; and (3) clear-statement canons would not account for agency "expertise and accountability." Sunstein, Chevron *Step Zero*, *supra* note 16, at 245–46.

As this Article shows, however, there are sound counterarguments to all three of these objections. First, seeing that substantive limits on congressional power—in addition to the nondelegation doctrine—are underenforced supports the use of clear-statement canons premised on federalism. *See infra* Part II.A–B. Second, while the difficulty in creating a test for what triggers a clear-statement canon may be the strongest objection to the use of such a canon, there are countervailing reasons supporting a clear-statement canon based on federalism concerns. *See infra* notes 217–27 and accompanying text. Third, even if agencies have expertise and accountability, giving them a great

provide a clear statement of its intent to regulate a certain field; otherwise, courts will interpret the statute as not permitting regulation of that field.[22]

The Supreme Court has already identified clear-statement canons of statutory construction based on both federalism and nondelegation concerns.[23] Nevertheless, the Court has treated federalism-based clear-statement canons of statutory construction as arguments of last resort that merely bootstrap other arguments. Even *Gonzales v. Oregon* made it painstakingly clear that it was not invoking a clear-statement canon.[24] If courts want to apply meaningful procedural limits to protect federalism, the clear-statement-canon approach is a more direct and workable doctrine than *Chevron* Step Zero.

This Article therefore proposes a clear-statement canon of statutory construction that only applies to administrative interpretations made in areas traditionally regulated by the states. The foundation for this canon was laid by the early Rehnquist Court case *Gregory v. Ashcroft*.[25]

degree of institutional competence in some situations, it is not clear that they possess such institutional competence in making decisions impacting the federal-state balance. *See infra* note 55.

22. For a discussion of clear-statement canons of statutory construction, including their background and current application, see *infra* Part VI.

23. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." (citation omitted)); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion . . . ."); Gregory v. Ashcroft, 501 U.S. 452, 460, 464 (1991) (creating a clear-statement canon when the law at issue would "upset the usual constitutional balance of federal and state powers"); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* Lane v. Pena, 518 U.S. 187, 197–98 (1996) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (articulating the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

24. *See* Gonzales v. Oregon, 546 U.S. at 274 ("It is unnecessary even to consider the application of clear-statement requirements, or presumptions against pre-emption, to reach this commonsense conclusion." (citations omitted)).

25. *Gregory*, 501 U.S. at 460–61 (articulating a "plain statement rule" that "acknowledge[s] that

Admittedly, this canon would revive a formalistic federalism rule based on areas of traditional state regulation, a concept that was essentially rejected in *Garcia v. San Antonio Metropolitan Transit Authority*.[26] But as this Article will show, the revival of this formalistic federalism rule is justified in this context because this canon will only be applied to administrative interpretations. Moreover, notwithstanding *Garcia*, the Court has continued to invoke the areas-of-traditional-state-regulation dichotomy.[27]

This Article proceeds in five parts. Part II discusses why the hard questions of federalism now arise in administrative law. Part III then makes the normative case for protecting federalism. Part IV briefly describes how *Gonzales v. Oregon* is the paradigmatic example of a modern federalism case, especially now that the Court appears unlikely to provide significant limits on Congress's Commerce Clause power. Part V examines *Gonzales v. Oregon*'s *Chevron* Step Zero approach to protecting state autonomy from federal administrative encroachment and ultimately rejects *Chevron* Step Zero as an inadequate and unreliable doctrine for protecting state autonomy. Finally, Part VI analyzes clear-statement canons in general and

the States retain substantial sovereign powers under our constitutional scheme," such that "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'" (quoting *Atascadero State Hosp.*, 473 U.S. at 242)).

26. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

27. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 738 (2006) (plurality opinion) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."); Gonzales v. Oregon, 546 U.S. at 274 ("Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power."); Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 544 (2002) ("[A]llowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States . . . ."); *SWANCC*, 531 U.S. at 173 ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."); BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'"); *Gregory*, 501 U.S. at 460 ("Congress may legislate in areas traditionally regulated by the States. . . . It is a power that we must assume Congress does not exercise lightly."); Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 643 (1986) ("The need for a proper evidentiary basis for agency action is especially acute in this case because Congress has failed to indicate . . . that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance."); Heublein, Inc. v. S.C. Tax Comm'n, 409 U.S. 275, 281 (1972) ("Congress, then, did not address . . . the problem of taxing a business when it undertook local activities simply in order to comply with the requirements of a valid regulatory scheme. Such regulation is an important function of local governments in our federal scheme."); United States v. Bass, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

then uses *Gregory v. Ashcroft* to propose a clear-statement canon that only applies to administrative interpretations made in areas of traditional state regulation.

II. WHY THE HARD QUESTIONS ABOUT FEDERALISM WILL NOW ARISE IN ADMINISTRATIVE LAW: THE UNDERENFORCED CONSTITUTIONAL NORMS OF FEDERALISM AND NONDELEGATION, EXACERBATED BY *CHEVRON* DEFERENCE

It was by no means a preordained consequence that the modern questions on federalism should involve administrative law. Rather, this is due to three developments whereby the Supreme Court crafted the current structure of the U.S. government: first, the Court does not place many substantive limits on congressional power; second, the Court largely rejects the nondelegation doctrine; and third, *Chevron* accords broad deference to administrative interpretations, thus exacerbating the underenforced constitutional norms of federalism and nondelegation.[28]

A. FEW SUBSTANTIVE LIMITS ON CONGRESS'S ENUMERATED POWERS

After *Gonzales v. Raich*,[29] the Supreme Court appears unwilling or unable to interpret the Constitution to impose meaningful, substantive limits on Congress's enumerated powers. Although the Rehnquist Court flirted with substantive limits on congressional power,[30] the specter of such meaningful limits "is now water over the dam."[31] *Raich* therefore signals that the "political safeguards of federalism"[32] will largely drive the Court's

28. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–28 (1978) (stipulating that courts underenforce constitutional norms because of institutional concerns). *See also* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 126 (2004) ("[A]s Larry Sager has demonstrated, the fact that a norm is 'under-enforced'—that is, enforced through something short of a strong invalidation norm—does not mean the norm lacks grounding in the Constitution.").

29. Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the federal criminalization of medicinal marijuana).

30. *See generally* United States v. Morrison, 529 U.S. 598 (2000) (placing substantive limits on congressional power under the Commerce Clause); United States v. Lopez, 514 U.S. 549 (1995) (same).

31. Gonzales v. Oregon, 546 U.S. at 301 (Thomas, J., dissenting).

32. The phrase "political safeguards of federalism" was originally coined in Herbert Wechsler's influential 1954 article. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that courts should generally be weary of intervening when Congress overrides the states because the constitutional structure, which gives states the power to influence representation in Congress, already protects state autonomy from congressional overreaching, and that Congress only overrides the states when there is a strong need for a national approach to a particular problem).

Commerce Clause jurisprudence.[33] According to this view, there are *procedural* limits on Congress's enumerated powers inherent in congressional representation. Thus, because the states are represented in the national political process, Congress can adequately protect the federal-state balance of power.[34]

Before the Rehnquist Court, *Garcia v. San Antonio Metropolitan Transit Authority* relied on the political safeguards of federalism to reject all substantive limits on congressional power.[35] Justice Powell's strong dissent in *Garcia* chastised the Court for "abdicat[ing] responsibility" by refusing to place substantive limits on congressional power.[36] He criticized the majority for relying on Herbert Wechsler's influential 1954 article, *The*

33. *See, e.g.*, *Morrison*, 529 U.S. at 660 (Breyer, J., dissenting) ("[W]ithin the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance."). *But see Raich*, 545 U.S. at 35 (Scalia, J., concurring) (arguing, without invoking the political safeguards of federalism, that Congress's authority to federally criminalize medicinal marijuana under the Commerce Clause was based on the Necessary and Proper Clause).

34. Saikrishna Prakash and John Yoo attribute a stronger position to this view—that "federal courts are not to exercise review over questions that involve the balance of power between the federal government and the states." Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001).

Some commentators do take the view that the Court should not impose substantive limits on congressional power. *See, e.g.*, Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 826 (2005) ("In order to rescue federalism after *Raich*, the Court should return to the clear statement strategy for determining the scope of congressional power it began to articulate in the 1980s and early 1990s. The clear statement strategy prescribes a much more constructive and workable role for the courts in determining the balance between stability and change in the assignment of powers between the federal government and the States. Moreover, under a clear statement approach, *Raich would have been an easy case for upholding federal power*." (citation omitted) (emphasis added)).

Others, however, take the position that while substantive limits on congressional power would be preferable, procedural limits based on the political safeguards of federalism are at least a second-best alternative. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (opting for a clear-statement rule in light of the Court's unwillingness to provide substantive limits on Congress's Commerce Clause power); Young, *supra* note 28, at 127 (recognizing that "sometimes courts should employ categorical restrictions on government practices that undermine the 'political safeguards of federalism,'" while simultaneously defending the use of clear-statement procedural limits).

Likewise, even Wechsler himself admitted that there should be some substantive limits on Congress. *See* Prakash & Yoo, *supra*, at 1461 ("[Wechsler] fleetingly suggested that judicial review of the scope of federal power might still remain appropriate, but only if done gingerly and reluctantly."); Young, *supra* note 28, at 71 ("Wechsler seemed to insist that the limits on federal power in the Constitution itself, such as the doctrine of enumerated powers, remain supreme law that courts must enforce.").

35. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) ("Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983))).

36. *Id.* at 567 n.12 (Powell, J., dissenting).

Political Safeguards of Federalism, as Wechsler's argument made "assumptions that simply do not accord with current reality"—namely, the "proliferation of national legislation over the past 30 years."[37]

One can accept Justice Powell's argument for substantive limits on congressional power and also accept procedural limits as a second-best alternative to protecting state autonomy.[38] In fact, the early Rehnquist Court did just this when it created federalism clear-statement canons of construction before there were five votes for reimposing substantive limits on Congress's enumerated powers.[39] These canons forced Congress to give

37. *Id.* at 565 n.9.

38. Analogously, an analysis that separates constitutional *meaning* from constitutional *doctrine* could justify procedural limits on congressional power that are triggered beyond the substantive limits of Congress's enumerated powers. *See generally* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004) ("[T]his Part introduces a conceptual distinction between constitutional operative propositions (essentially, judge-interpreted constitutional meaning) and constitutional decision rules (rules that direct courts how to decide whether a given operative proposition has been, or will be, complied with)."). Basically, the meaning/doctrine distinction provides that the Court first interprets a meaning for a constitutional provision, and then creates a doctrine or rule for enforcing that meaning.

The Court's *meaning* of Congress's enumerated powers may be something like Congress cannot regulate "areas of traditional state regulation." *Morrison*, 529 U.S. at 615–16 (expressing concern that petitioner's reasoning would result in no limits on Congress's ability to regulate "areas of traditional state regulation"). The Court's *doctrine* is underenforcing this meaning, largely because the Court cannot or will not create a workable test (that is, a doctrine) for the Commerce Clause. *See id.* at 642–43 (Souter, J., dissenting) (explaining that prior Commerce Clause limits were unworkable because "adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937"). In fact, the Court's doctrine may be purposely underenforcing the meaning of the Commerce Clause to give Congress adequate powers to regulate the modern economy. *See* United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) (arguing that this "fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy" and "also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system").

Interestingly, even Justice Breyer noted that the *Morrison* Court's Commerce Clause test was underenforcing insofar as it did not account for all areas of traditional state regulation. *Morrison*, 529 U.S. at 658 (Breyer, J., dissenting) ("Most importantly, the Court's complex rules seem unlikely to help secure the very object that they seek, namely, the protection of 'areas of traditional state regulation' from federal intrusion. The Court's rules, even if broadly interpreted, are underinclusive." (citation omitted)). Thus, the Court's interpretation of what the Commerce Clause actually *means*—as opposed to the Commerce Clause doctrines that it has adopted—could justify procedural limits based on this meaning as a second-best doctrine. *Cf.* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting) (recognizing that constitutional doctrine may be influenced by "a court's institutional limitations").

39. *See* Merrill, *supra* note 34, at 825 ("Looking back, we can see that the Rehnquist Court's campaign to define a new role for courts in federalism controversies falls into roughly two periods. The first period, which predated the beginning of the Rehnquist Court by a few years and ran into the mid-1990's, was characterized by an effort to prescribe clear statement rules in federalism controversies."). It was not until the later years of the Rehnquist Court that it began implementing substantive limits on congressional power. *Id.* ("The second period, which ran from the mid-1990s to the waning days of the

explicit instructions in order to alter the federal-state balance of power. Under a political-safeguards-of-federalism approach, these canons make perfect sense because they ensure that members of Congress, who are elected from the various states, directly account for federalism concerns when enacting laws.[40] For example, in *Gregory v. Ashcroft*, the Court created a clear-statement canon that was triggered when either Congress or an agency attempted to regulate a traditional state governmental function.[41] Noting that this was a second-best alternative for protecting federalism, the Court used the canon to construe the Federal Age Discrimination in Employment Act so as not to apply to a Missouri State Constitution provision requiring judges to retire at a certain age.[42]

In essence, these procedural limits on congressional power are premised on the view that "constitutional doctrine undervalues federalism"—or, stated differently, federalism is an underenforced constitutional norm.[43] The Court has not limited Congress's enumerated powers largely because the Court (1) wants to give Congress adequate

Rehnquist Court, saw a shift from the articulation of clear statement rules to the imposition of prohibitory limitations on the powers of Congress.").

In *Gonzales v. Raich*, 545 U.S. 1 (2005), however, the Court refused to place additional limits on Congress's Commerce Clause power—possibly marking an end to Chief Justice Rehnquist's federalist revolution. *See* Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. 1, 39–40 ("*Raich* most likely marks the outer bound of the Court's ambition in Commerce Clause cases. Apocalyptic predictions notwithstanding, many of us have long argued that the Court's Commerce Clause jurisprudence was primarily symbolic in its importance and unlikely to go far. A rollback of the national regulatory state was never in the cards; there are simply too many precedential, institutional, and political constraints pressing the Court to uphold relatively broad federal power. *Raich* may indicate that even minor incursions on the federal edifice are unlikely, and that except in cases where to uphold the federal act would remove any limit whatsoever, the Court will condone national action." (citations omitted)).

40. *See* Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) ("'[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'" (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 480 (2d ed. 1988))); Young, *supra* note 28, at 121 (explaining that clear-statement canons "enhance states' political representation in Congress by providing notice when federalism values are threatened"). *See also* Young, *supra* note 28, at 126 ("[Clear statement canons] likewise function well in areas in which the relevant constitutional principles are designed primarily to be *self*-enforcing, through the political processes at work in the coordinate branches of government. Certain kinds of soft limits—particularly clear statement canons of statutory construction—function effectively by increasing the political costs of particular kinds of government action. Requiring Congress to state its purpose with special clarity both imposes an additional drafting hurdle and may serve to mobilize opposition by highlighting the proposed intrusion on state authority.").

41. *Gregory*, 501 U.S. at 460–61.

42. *See id.* at 464 (opting for a clear-statement rule in light of the Court's unwillingness to provide substantive limits on Congress's Commerce Clause power).

43. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 364 (1997).

powers to regulate our modern economy[44] and (2) has not been able to create a workable Commerce Clause test.[45] Given these "questions of propriety or capacity," the Court has created a "judicial construct of a constitutional concept" that is different from the "concept itself."[46] But this does not mean that the "understanding of [federalism] itself"[47] cannot be enforced through other means—such as procedural limits on congressional power.[48]

B. REJECTION OF THE NONDELEGATION DOCTRINE

If Congress could not delegate legislative authority to administrative agencies, the modern debate over federalism would not be unfolding in administrative law. While the Court has invoked the nondelegation doctrine on a few occasions in our country's history,[49] the modern Court largely rejects or does not enforce the nondelegation doctrine.[50] The nondelegation doctrine is therefore a separate, underenforced constitutional norm.[51]

44. *See* United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) ("That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system.").

45. *See* United States v. Morrison, 529 U.S. 598, 639–40 (2000) (Souter, J., dissenting) (observing that the history of the Commerce Clause "has shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory"); *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause.").

46. *See* Sager, *supra* note 28, at 1217–18.

47. *Id.*

48. *See* Ilya Somin, *A False Dawn for Federalism: Clear Statement Rules After* Gonzales v. Raich, *in* CATO SUPREME COURT REVIEW: 2005–2006, at 113, 134 (Mark K. Moller ed., 2006) ("To be sure, the avoidance canon might be resuscitated if federalism is viewed as an 'underenforced constitutional norm.'"); Young, *supra* note 28, at 101 (arguing that courts should be permitted "to impose *some* restraint in areas where constitutional norms would otherwise be 'underenforced'"). *See also* Young, *supra* note 28, at 126 ("We should also forthrightly acknowledge that these clear-statement doctrines are *constitutional* in nature; as Larry Sager has demonstrated, the fact that a norm is 'underenforced'—that is, enforced through something short of a strong invalidation norm—does not mean the norm lacks grounding in the Constitution.").

49. *See, e.g.*, Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

50. *But see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring) (stating that Justice Thomas would be "willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers").

51. *See* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[W]hile the

At the same time, this means that the underenforcement of federalism is exacerbated in the administrative law context because Congress can freely delegate its broad Commerce Clause powers to unelected federal agencies, which can then easily encroach on state autonomy. The Court's rejection of the nondelegation doctrine "appears to stem from the judiciary's limited institutional competence rather than any fundamental disagreement with the doctrine's goal."[52] So, just as the Court underenforces federalism as a means of giving Congress adequate power,[53] the Court has found that "common sense" allows Congress to delegate what it cannot practicably do itself.[54]

Members of Congress, though, can blatantly evade the political safeguards of federalism and electoral accountability by delegating authority to agencies.[55] As Justice Stevens, joined by Chief Justice Roberts

doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."). *See also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 338 (2000) [hereinafter Sunstein, *Nondelegation Canons*] ("The difficulty of drawing lines between prohibited and permitted delegations makes it reasonable to conclude that for the most part, the ban on unacceptable delegations is a judicially underenforced norm, and properly so." (citing Sager, *supra* note 28, at 1213–28)).

52. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1374 (2001).

53. *See supra* note 44 and accompanying text.

54. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407–08 (1928).

55. *See* Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 517 (1988) ("[L]egislators who want to avoid controversial or indeterminate decisions as to which interest groups to favor can forfeit vast amounts of discretion (and thus responsibility and accountability) to administrative agencies, which function outside of the tripartite legislative process envisioned by our constitutional structure."); Young, *supra* note 28, at 75 ("Even if we concede that Congress represents the states, Congress no longer makes most federal law. Federal administrative agencies now produce the bulk of federal law, and they lack any particular mechanisms for representing State interests.").

In response, Nina Mendelson has argued that federal administrative agencies can account for state interests as good as—if not better than—Congress can. Thus, a procedural limit on agencies would not serve the function of providing the optimum federal-state balance. According to Mendelson, the fact that "members of Congress are elected in regional or state-based elections" does not give Congress any "special advantage with respect to a number of important federalism values, and may result in Congress undervaluing these interests relative to the agencies." Mendelson, *supra* note 21, at 766–67. And agencies are accountable to both congressional and presidential oversight. *Id.* at 769.

But even Mendelson noted that the "relative institutional competence of agencies in considering federalism values weighs against deferring to agency interpretations on preemption questions." *Id.* at 779. In other words, while agencies can sometimes take state interests into account—on questions invoking the federalism balance (whether in preemption cases or not)—the institutional competence of agencies proves that they do not have the most expertise and knowledge in setting the proper federalism balance.

Brian Galle and Mark Seidenfeld have similarly argued that in some cases, "the agency is a better arena for state influence than Congress alone." Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933,

and Justice Scalia, recently noted, "[U]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad preemption ramifications for state law."[56] John Hart Ely may have put it best: "on most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat, or perhaps some independent regulatory commission, 'take the inevitable political heat.'"[57]

Regardless of what one thinks about the nondelegation doctrine in general, there is a strong argument for the substantive limit that Congress cannot delegate the legislative power to alter the federal-state balance of power. This Article, though, simply relies on the weaker position that, given the underenforcement of the nondelegation doctrine, the Court should apply procedural limits in the administrative law context "as a second-best surrogate" for the substantive enforcement of the nondelegation doctrine.[58]

C. BROAD *CHEVRON* DEFERENCE TO ADMINISTRATIVE INTERPRETATIONS

Courts currently accord substantial *Chevron* deference to agency interpretations of ambiguous statutory terms, thus exacerbating the

1985 (2008). This argument is largely premised on the fact that agencies can operate with more transparency and deliberation, *id.* at 1954–61, 1971–79, and the fact that "elections are fraught with imperfections that potentially interfere even with basic accountability," *id.* at 1979. Assuming, arguendo, that both observations are true, they seem to be decent policy arguments for electoral reforms or for changing certain congressional procedures. But it does not follow that federal agencies should have the power to alter the federal-state balance simply because of perceived flaws in the federal legislative process—especially when this very legislative process created federal agencies in the first place.

56. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 21 (2007) (Stevens, J., dissenting) (quoting Geier v. Am. Honda Motor Co., 529 U.S. 861, 908 (2000) (Stevens, J., dissenting)). *See also Geier*, 529 U.S. at 907 ("The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement." (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985))).

57. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–32 (1980). *See also id.* ("As Congressman Levitas put it, 'When hard decisions have to be made, we pass the buck to the agencies with vaguely worded statutes.'" (quoting 122 CONG. REC. H10,685 (daily ed. Sept. 21, 1976) (statement of Rep. Levitas))).

58. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2112 (1990) [hereinafter Sunstein, *After* Chevron]. In fact, Cass Sunstein eventually began referring to clear-statement canons applied to administrative interpretations as "nondelegation canons." Sunstein, *Nondelegation Canons*, *supra* note 51, at 316.

underenforcement of the nondelegation doctrine and federalism. Before *Chevron*, the law on agency deference "remained complex and confused,"[59] as the question of agency deference was an open-ended inquiry that examined various factors. Most importantly, under *Skidmore v. Swift & Co.*, an administrative interpretation received deference if it had the "power to persuade."[60]

But in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court announced a two-step inquiry for reviewing an "agency's construction of the statute which it administers."[61] First, courts "must give effect to the unambiguously expressed intent of Congress" ("*Chevron* Step One").[62] Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute" ("*Chevron* Step Two").[63] *Chevron* therefore explained that "a court may not substitute its own construction of a statutory provision for a *reasonable interpretation* made by the administrator of an agency."[64]

Notably, *Chevron* stated that the Court was not interested in the reason why Congress left ambiguity in the statute. The Court gave three possible reasons why Congress would leave a statutory term ambiguous: (1) it may do so to allow an agency with more expertise to define the term, (2) it may not have addressed the question at all, or (3) it may not have been able to create a coalition to define the term.[65] Regardless, "[f]or judicial purposes, it matters not which of these things occurred."[66]

Chevron has been understood as a legal fiction, as courts will presume that Congress intended to delegate law-interpreting authority by leaving the terms of an administrative delegation ambiguous.[67] Justice Scalia, while not yet on the Court when *Chevron* was decided in 1984, championed *Chevron* as a simple rule that "replaced . . . statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-

59. Sunstein, *Beyond* Marbury, *supra* note 21, at 2585.

60. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (highlighting the importance of "all those factors which give [the agency] power to persuade").

61. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

62. *Id.* at 843.

63. *Id.*

64. *Id.* at 844 (emphasis added).

65. *Id.* at 865.

66. *Id.*

67. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–71 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

the-board presumption that, in the case of ambiguity, agency discretion is meant."[68]

Nevertheless, *Chevron* exacerbates the underenforced nondelegation doctrine, as *Chevron* is "an emphatically prodelegation canon."[69] In turn, this has the potential to exacerbate the underenforcement of federalism by making it even easier for agencies to alter the federal-state balance of power.[70] An agency can supersede state law in an area of traditional state regulation by simply giving a broad—yet reasonable—interpretation to an ambiguous statutory term, as *Chevron* dictates that such an interpretation will generally receive deference.

III. THE NORMATIVE CASE FOR ENFORCING FEDERALISM THROUGH PROCEDURAL LIMITS

While Part II established the descriptive claim that three developments have forced the hard federalism questions into administrative law, Part III briefly establishes the normative claim for enforcing federalism through procedural limits. While some find the descriptive claim alone to be ample reason to enforce federalism,[71] the normative argument for enforcing federalism bolsters the reasons for imposing procedural limits to protect state autonomy from federal administrative encroachment.

As Barry Friedman has argued, the normative case for federalism must "maximize[] the benefits of shared governmental regulation" by making "a serious attempt to identify and measure the values on both sides of the federalist balance."[72] In other words, it must not only explain why giving a specific power to the states is advantageous, but also why it would be

68. Scalia, *supra* note 67, at 516. As this Article shows, federalism can be protected from federal administrative encroachment without tinkering with *Chevron*'s simple rule. In other words, clear-statement canons can address the underenforcement of federalism and the nondelegation doctrine directly, while leaving the "across-the-board presumption" of *Chevron* deference intact. *Chevron* Step Zero, though, necessarily complicates *Chevron*'s simple rule. *See infra* Part V.A.

69. Sunstein, *Nondelegation Canons*, *supra* note 51, at 329.

70. *See supra* notes 51–53 and accompanying text.

71. *See, e.g.*, New York v. United States, 505 U.S. 144, 157 (1992) (requiring the enforcement of federalism "even if one could prove that federalism secured no advantages to anyone"); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1844 (2005) ("[F]idelity to the Constitution requires enforcement of federalism whether or not we think it is good, useful, or otherwise normatively attractive.").

72. Friedman, *supra* note 43, at 325, 386. As Friedman notes, "the constitutional plan does not seem to require the question be answered, or even to be asked at all." *Id.* at 405. Friedman's normative argument assumes that the mere descriptive argument of the underenforcement of federalism would not suffice to justify enforcing federalism.

worse to give that power to the national government.

As catalogued by the Court and multiple commentators, there are five main virtues of a federalist system that decentralizes power: (1) accountability,[73] (2) responsiveness,[74] (3) innovation (that is, using states as 'experimental laboratories'),[75] (4) public participation in democracy,[76] and (5) protection of liberty.[77] These virtues are even more pronounced when federal power is exercised by agencies rather than by Congress. State power would promote accountability, whereas federal agencies are comprised of unelected officials that are almost exclusively located "at the distant national capital."[78] Likewise, states would be more responsive to "the diversity of interests and preferences"[79] of a "heterogeneous society,"[80] while federal agencies are constrained to formulate national policy by accounting for interested parties throughout the nation as a whole. Federal regulation also displaces the innovative ability of states to function as experimental laboratories. Public participation is also drastically decreased as the "federal government is too distant and its compass too vast to permit extensive participation by ordinary citizens in its policy formulations."[81] Finally, as seen in *Gonzales v. Oregon*, federal regulations stifle the "many recent state government decisions [that] afford greater liberty to citizens than they receive under the federal constitution."[82]

On the other hand, there are three primary situations "when national power should be exercised": (1) to eliminate externalities, (2) to prevent the race to the bottom, and (3) to promote uniformity.[83] First, and most importantly, national power may be necessary to eliminate externalities.[84]

73. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); Friedman, *supra* note 43, at 394–97; McConnell, *supra* note 11, at 1509–10.

74. *See, e.g.*, *Gregory*, 501 U.S. at 458; Friedman, *supra* note 43, at 394–95; McConnell, *supra* note 11, at 1493–94.

75. *See, e.g.*, *Gregory*, 501 U.S. at 458; Friedman, *supra* note 43, at 397–400; McConnell, *supra* note 11, at 1498–1500.

76. *See, e.g.*, *Gregory*, 501 U.S. at 458; Friedman, *supra* note 43, at 389–94; McConnell, *supra* note 11, at 1510.

77. *See, e.g.*, *Gregory*, 501 U.S. at 458–59; Friedman, *supra* note 43, at 402−04; McConnell, *supra* note 11, at 1500–07.

78. McConnell, *supra* note 11, at 1509.

79. *Id.* at 1493.

80. *Gregory*, 501 U.S. at 458.

81. McConnell, *supra* note 11, at 1510.

82. Friedman, *supra* note 43, at 403. The Ashcroft Directive in *Gonzales v. Oregon* is a perfect example of this. *See infra* Part IV.

83. Friedman, *supra* note 43, at 405–09.

84. *See* McConnell, *supra* note 11, at 1495 ("Externalities present the principal countervailing

Externalities arise in two situations: (1) when the "benefits of regulation are felt within the borders of the state, but the burdens or costs are exported";[85] and (2) when "the costs of government action are borne" by one state, but the benefits are shared by other states.[86] Second, a related problem is the race to the bottom, where "states may disadvantage themselves by raising the cost of doing business in the state, thus driving the business to states that regulate less rigorously."[87] Even if a regulation is desirable for efficiency or social welfare, the race to the bottom could prevent states from enacting this regulation.[88] Third, uniformity can be beneficial, as nonuniformity can result in inefficiencies that raise costs for firms doing business in multiple states.[89]

On balance, procedural limits that protect federalism will enhance the virtues of state power more than they will detract from the advantages of national authority.[90] Under procedural limits, Congress retains substantive authority to make administrative delegations that address externalities, the race to the bottom, and disuniformity. These procedural limits simply impose an additional burden on Congress to provide clear indicia of its intent.[91] This additional burden on Congress enhances accountability—one of the virtues of state power. On the flip side, the virtues of state power will be retained when Congress has not met the corresponding procedural limit. But that does not foreclose Congress from subsequently enacting legislation that satisfies the procedural limit. In other words, given the

consideration in favor of centralized government . . . .").

85. Friedman, *supra* note 43, at 407. Examples of this are environmental protection and federal spending. *See id.* ("A common example here is environmental protection."); McConnell, *supra* note 11, at 1496 ("Familiar examples are environmental laws . . . ."); McConnell, *supra* note 11, at 1496 ("But the effect is especially obvious in the case of federal spending. If the national treasury is seen as a common pool resource for financing schemes of predominantly local benefit, it will be oversubscribed. Current budgetary woes are largely attributable to this fiscal 'tragedy of the commons.'").

86. McConnell, *supra* note 11, at 1495. This situation involves "public goods"—goods "that would not be provided if it were not for the existence of some central authority to fund them" because of the free-rider problem. Friedman, *supra* note 43, at 406–07. The most prominent example of a public good is the national military. *See id.*; McConnell, *supra* note 11, at 1495.

87. Friedman, *supra* note 43, at 408.

88. *Id.*

89. *Id.* at 408–09.

90. *See* Somin, *supra* note 48, at 139 ("Even if clear statement rules are an inadequate substitute for substantive judicial review, they could still serve a useful function by giving Congress an incentive to draft clearer and less ambiguous laws. And it is certainly possible that they do restrict the growth of federal power slightly. These benefits might be sufficient to justify the continued use of federalism clear statement rules. Even if such rules have relatively few benefits, they also do not seem to impose significant costs.").

91. In other words, under procedural federalism limits, the states would *not* "possess prescribed areas of jurisdiction that cannot be invaded by the central authority." Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 911 (1994).

virtues of decentralized state power, courts should be weary of inferring federal power through unclear congressional action—particularly in the context of administrative law.

IV. *GONZALES V. OREGON*: THE PARADIGMATIC EXAMPLE OF A POST-*RAICH* FEDERALISM CASE

Gonzales v. Oregon is the perfect illustration of how modern cases with considerable federalism implications will not involve the interpretation of constitutional provisions, but will instead deal with agency interpretations of federal statutes. *Gonzales v. Oregon* also confirms that the Supreme Court is genuinely concerned about federal administrative agencies encroaching on state autonomy.

The issue in *Gonzales v. Oregon* was whether, under the Controlled Substances Act ("CSA"), the U.S. Attorney General could supersede an Oregon law that permitted physicians to dispense or prescribe a controlled substance for the purpose of ending a patient's life.[92] In 2001, Attorney General Ashcroft promulgated a rule (without notice-and-comment rulemaking procedures)—by interpreting both a 1971 regulation promulgated under the CSA[93] and a 1984 congressional amendment to the CSA[94]—forbidding dispensing or prescribing controlled substances for the purpose of ending a patient's life.[95] The Supreme Court, by a 6-3 margin,[96] invalidated this 2001 interpretive rule (the "Ashcroft Directive") by applying a procedural limit on congressional power.[97] This preserved Oregon's autonomy over the use of controlled substances in ending a patient's life.

Unlike most of the federalism cases typical of the Rehnquist Court, *Gonzales v. Oregon* was based on a procedural limit dealing with statutory construction—not on any substantive federalism or nondelegation limits. Yet, this statutory construction was a direct result of federalism and nondelegation concerns, even if the majority simultaneously attempted to invalidate the Ashcroft Directive through a "strained textual analysis" of

92. Gonzales v. Oregon, 546 U.S. 243, 248–49 (2006).

93. *Id.* at 250 (citing 21 C.F.R. § 1306.04(a) (2005)).

94. *Id.* at 261 (citing 21 U.S.C. § 823(f) (2006)).

95. *See id.* at 253–54.

96. The majority opinion written by Justice Kennedy was joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. *Id.* at 247. Justice Scalia's dissenting opinion was joined by Chief Justice Roberts and Justice Thomas. *Id.* at 275 (Scalia, J., dissenting). Justice Thomas also wrote a separate dissenting opinion. *Id.* at 299 (Thomas, J., dissenting).

97. The procedural limit used in *Gonzales v. Oregon* is called *Chevron* Step Zero. *See infra* Part V.

the CSA.[98] The majority wanted to protect both "the federal-state balance and the congressional role in maintaining it."[99] Indeed, a sampling of quotes from the final four pages of the opinion reads like a primer on federalism:

- "[T]he *background principles of our federal system* also belie the notion that Congress would use such an obscure grant of authority to regulate *areas traditionally supervised by the States' police power*."[100]
- "[T]he *structure and limitations of federalism* . . . allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'"[101]
- "The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a *radical shift of authority from the States to the Federal Government* . . . ."[102]
- "[R]egulation of health and safety is 'primarily, and historically, a *matter of local concern* . . . .'"[103]

Likewise, the majority raised nondelegation concerns on multiple occasions by emphasizing Congress's role in the lawmaking process:

- "[W]hen Congress wants to regulate medical practice in the given scheme, it does so by *explicit language in the statute*."[104]
- "[T]he conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through *muffled hints* . . . ."[105]
- "[T]he background principles of our federal system also belie the notion that Congress would use such an *obscure grant of authority* to regulate areas traditionally supervised by the States' police power."[106]

98. *See The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 361, 362 (2006).
99. Gonzales v. Oregon, 546 U.S. at 275 (emphasis added).
100. *Id.* at 274 (emphasis added).
101. *Id.* at 270 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)) (emphasis added).
102. *Id.* at 275 (emphasis added).
103. *Id.* at 271 (quoting Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985)) (emphasis added).
104. *Id.* at 272 (emphasis added).
105. *Id.* at 274 (emphasis added).
106. *Id.* (emphasis added).

- "Beyond this, however, the *statute manifests no intent* to regulate the practice of medicine generally. The *silence* is understandable given the structure and limitations of federalism . . . ."[107]

Gonzales v. Oregon is therefore an excellent illustration of the types of federalism cases that will arise post-*Raich*: it has major federalism implications, but it deals with statutory construction of administrative delegations instead of Congress's enumerated powers. Statutory construction leaves room to introduce procedural limits that compensate for the underenforcement of federalism and the nondelegation doctrine.

But the fact that statutory construction *could* be used to introduce procedural limits to safeguard federalism simply raises the question of which procedural limit can adequately protect state autonomy from federal administrative encroachment. And even after selecting a certain procedural limit, the precise boundaries of that doctrine will need to be defined. The remainder of this Article addresses these issues.

V. *CHEVRON* STEP ZERO: AN INADEQUATE DOCTRINE FOR PROTECTING STATE AUTONOMY FROM ADMINISTRATIVE ENCROACHMENT

In *Gonzales v. Oregon*, the Supreme Court opted to protect state autonomy through a recently created procedural limit on congressional power called *Chevron* Step Zero. *Chevron* Step Zero is a complex threshold question to the *Chevron* deference inquiry that can apply even when there are no federalism concerns.[108] After examining multiple factors (including federalism concerns), if the Court determines that Congress actually intended to delegate interpretive authority to the agency, then the Court will examine the interpretation at issue under the *Chevron* inquiry.[109]

107. *Id.* at 270 (emphasis added).

108. For quite some time, *Chevron* was largely viewed as only having two steps. *See supra* Part II.C. But even *Chevron* itself recognized some threshold question to reaching the *Chevron* inquiry. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (explaining that the *Chevron* two-step inquiry would follow from an "agency's construction of the statute which it administers"). *See also* Sunstein, Chevron *Step Zero*, *supra* note 16, at 208 (explaining that no one believes *Chevron* deference should be given "[*w*]*henever an agency makes an interpretation of law*"). Even more generally, if the case does not involve an administrative interpretation, then *Chevron* will not apply. While obvious, this would be a threshold question to applying the *Chevron* framework.

109. *See* Gonzales v. Oregon, 546 U.S. at 255–56 (according *Chevron* deference "'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law'" (quoting United States v. Mead Corp., 533 U.S. 218, 226–27 (2001))). The phrase "force of law" was the linguistic hook from precedent that the Court used to create *Chevron* Step Zero, but it is unclear whether this phrase is simply the label signifying that *Chevron* Step Zero is being used or whether it adds another factor to the *Chevron* Step Zero inquiry.

But if the Court determines that Congress did not intend to delegate interpretive authority, *Skidmore* will be applied and the administrative interpretation will only receive deference if it is persuasive.[110]

Chevron Step Zero is thus a procedural limit on congressional power, as it requires Congress to explicitly show its intent to delegate interpretive authority to an agency before the Court will accord *Chevron* deference to the agency's interpretation. In other words, *Chevron* Step Zero does not categorically bar Congress from accomplishing any results; it simply requires Congress to jump through all the right hoops in order for an agency's interpretation to receive the degree of *Chevron* deference that agency interpretations are normally accorded.[111]

Chevron Step Zero could therefore protect state autonomy by denying *Chevron* deference to an agency interpretation that alters the federal-state balance of power. As this part shows, however, *Chevron* Step Zero is really only a band-aid for protecting state autonomy because it does not focus directly on the underenforced constitutional norms of federalism and nondelegation.[112] After briefly examining the background and current application of the *Chevron* Step Zero doctrine, Part V concludes by showing that *Chevron* Step Zero is an inadequate procedural limit for protecting federalism.

A. THE CURRENT *CHEVRON* STEP ZERO DOCTRINE

Together, *Christensen v. Harris County*,[113] *United States v. Mead Corp.*,[114] and *Barnhart v. Walton*[115] articulate the Court's current *Chevron* Step Zero doctrine.[116] Essentially, *Chevron* Step Zero proceeds in two substeps. At the first substep, the Court examines the format of the agency interpretation at issue.[117] If the interpretive method used is more formal

110. *Id.* at 256; *Mead*, 533 U.S. at 221; Christensen v. Harris County, 529 U.S. 576, 587 (2000).

111. *See supra* Part II.C.

112. *See supra* Parts II.A–B.

113. *Christensen*, 529 U.S. 576.

114. *Mead*, 533 U.S. 218.

115. Barnhart v. Walton, 535 U.S. 212 (2002).

116. Cass Sunstein labeled these cases the "Step Zero Trilogy." Sunstein, Chevron *Step Zero*, *supra* note 16, at 211.

117. Justice Breyer argued that this first substep, which analyzes the interpretation's format, should not be a separate substep; rather, the format should simply be analyzed under the agency deliberation factor in *Chevron* Step Zero's second substep (the balancing test). *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) ("Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue."). But as Justice Scalia noted, the Court has not adopted this position. *Id.*

(that is, involves formal adjudication, formal rulemaking, or informal/notice-and-comment rulemaking), the Court will skip ahead to *Chevron* Step One and ask whether the statute is ambiguous—thus bypassing the second substep of *Chevron* Step Zero.[118] Subformal agency pronouncements, on the other hand, are subjected to the second substep of *Chevron* Step Zero.[119]

The second substep of *Chevron* Step Zero is a balancing test that determines whether "Congress delegated authority to the agency generally to make rules carrying the *force of law*."[120] This balancing test uses five primary factors[121]: (1) breadth of the statutory delegation;[122] (2) agency

at 1015 n.9 (Scalia, J., dissenting).

118. *See Mead*, 533 U.S. at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. . . . Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.").

119. *See* Christensen v. Harris County, 529 U.S. 576, 587–88 (2000) (explaining that *Chevron* deference is warranted for "an agency interpretation contained in a regulation," but not for "opinion letters[,] policy statements, agency manuals, and enforcement guidelines").

120. *Mead*, 533 U.S. at 226–27 (emphasis added). *See also Christensen*, 529 U.S. at 587 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which *lack the force of law*—do not warrant *Chevron*-style deference." (emphasis added)).

121. The development of the *Chevron* Step Zero factors has been quite erratic. *Christensen*, *Mead*, and *Barnhart* each seem to contemplate three distinct *Chevron* Step Zero tests.

The *Christensen Chevron* Step Zero test turned on the interpretation's format (using formal procedures probably produced acceptable formats for *Chevron* deference). *See Christensen*, 529 U.S. at 587 ("[I]nterpretations contained in *formats* such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co*. . . . ." (emphasis added)); *id.* ("Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking."). But even if *Chevron* deference were not accorded due to the format of the interpretation, the interpretation could still receive *Skidmore* deference. *Id.*

Mead, though, replaced the rule-like *Chevron* Step Zero test based on format with the indeterminate force-of-law test based on the binding character of the interpretation. *Mead*, 533 U.S. at 226–27. As Sunstein has shown, "The Court has not explained what it means by the 'force of law.'" Sunstein, Chevron *Step Zero*, *supra* note 16, at 222. Worse yet, this force-of-law test came from *Christensen*'s dicta, which only used the language "lack the force of law" *once* in a hyphenated clause. *See Christensen*, 529 U.S. at 587.

Then, *Barnhart* ignored the *Mead* force-of-law test and its open-ended factors, instead looking at factors such as the interstitial nature and importance of the legal question. *See* Barnhart v. Walton, 535 U.S. 212, 221–22 (2002). Thus, even though these three decisions were only two years apart, *Barnhart* drastically diverged from the origin of the Court's *Chevron* Step Zero doctrine in *Christensen*'s dicta. Most notably, *Barnhart* never cited the *Christensen* force-of-law or format language that opened the door to a complex *Chevron* Step Zero doctrine in the first place.

122. *See Mead*, 533 U.S. at 237 (explaining that unlike the majority's *Chevron* Step Zero test, Justice Scalia's *Chevron* threshold question did not account for the "breadth of delegation"). S*ee also* Gonzales v. Oregon, 546 U.S. 243, 258 (2006) ("The starting point for this inquiry is, of course, the language of the delegation provision itself.").

expertise;[123] (3) consistently observed past agency interpretations;[124] (4) agency deliberation, including procedures used for current agency interpretation;[125] and (5) nature of the question addressed by the current agency interpretation.[126]

On balance, if these factors suggest that Congress delegated interpretive authority to the agency, then a court will proceed to *Chevron* Step One. Alternatively, if Congress did not delegate such authority, then the agency interpretation will instead be analyzed under the less-deferential *Skidmore* inquiry. Nevertheless, the interpretation could theoretically receive *Skidmore* deference[127] if it is persuasive.[128]

123. *See Barnhart*, 535 U.S. at 222 (according *Chevron* deference given "the related expertise of the Agency"); *Mead*, 533 U.S. at 228 (listing "relative expertness" as a *Chevron* Step Zero factor). Factors relating to how technical or complex the case is probably fall under the agency expertise factor. *Cf. Barnhart*, 535 U.S. at 222 (according *Chevron* deference given the "complexity" of the administration of the statute). *See also Christensen*, 529 U.S. at 597 (Breyer, J., dissenting) (explaining that *Chevron* deference should have been accorded in this "rather technical case").

124. *Mead*, 533 U.S. at 228 (listing "consistency" as a *Chevron* Step Zero factor).

125. *Id.* (listing "degree of the agency's care" as a *Chevron* Step Zero factor). *See Barnhart*, 535 U.S. at 222 (according *Chevron* deference because of the "careful consideration" of the agency). The format of the interpretation (the first substep) could also be accounted for here, as format is an easily identifiable proxy for agency deliberation. After all, an agency is required to go through certain procedures in order to promulgate an interpretation in the format of a regulation. *See Christensen*, 529 U.S. at 590 (Scalia, J., concurring in part).

126. *See Barnhart*, 535 U.S. at 222 (explaining that "whether a court should give such deference depends in significant part upon . . . the nature of the question at issue," and according *Chevron* deference because of "the interstitial nature of the legal question"). *See also* Gonzales v. Oregon, 546 U.S. at 267–68 (rejecting *Chevron* deference because of the "importance of the issue").

127. *Skidmore*'s persuasiveness standard for deference may be no deference at all. *See* Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 8–9 (2006) (calling *Skidmore* "deference in name but not in practice" because the "power to persuade . . . is exactly what every litigant attempts to accomplish").

128. The *Skidmore* persuasiveness inquiry may actually be an additional *Chevron* Step Zero factor, because the *Barnhart Chevron* Step Zero factors are nearly identical to the factors articulated in *Skidmore* for determining whether an agency interpretation has the power to persuade. *Compare Barnhart*, 535 U.S. at 222, *with Mead*, 533 U.S. at 228 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Of course, this would mean that *Barnhart* essentially transplanted the *Skidmore* deference test to *Chevron* Step Zero—without ever citing *Skidmore*. After *Barnhart*, if the interpretation fails the *Chevron* Step Zero test, it is hard to imagine how the interpretation would then somehow be accorded deference under *Skidmore*. Thus, Justice Scalia is probably correct in arguing that this sleight of hand allows the Court to "resurrect[], in full force, the pre-*Chevron* doctrine of *Skidmore* deference" without having to explicitly overrule *Chevron*. *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

Even worse, if *Skidmore* deference will rarely be accorded, then a persuasiveness analysis at *Chevron* Step Zero will produce even less deference than *Skidmore*. After all, *Chevron* Step Zero examines both the breadth of the statutory delegation and the nature of the question, whereas *Skidmore* purportedly does not look at these factors. *See Skidmore*, 323 U.S. at 139–40. That said, the Court in *Gonzales v. Oregon* analyzed both of these factors under its *Skidmore* inquiry; of course, the Court had already examined these factors at *Chevron* Step Zero. *See* Gonzales v. Oregon, 546 U.S. at 257, 266–69 (recognizing, during its *Chevron* Step Zero inquiry, that the statutory delegation was limited and the

B. *CHEVRON* STEP ZERO AND FEDERALISM

Gonzales v. Oregon used *Chevron* Step Zero to invalidate the Ashcroft Directive and protect Oregon's decision to allow the use of controlled substances to end a patient's life.[129] Because the Ashcroft Directive was a subformal interpretive rule (substep one), the Court applied the balancing test (substep two) and essentially found that all five balancing factors showed that Congress did not intend to "give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law."[130] The *Skidmore* persuasiveness inquiry was therefore used instead of the *Chevron* reasonableness inquiry. As confirmed by the plethora of quotes previously cited,[131] the Court did not accord the Ashcroft Directive even *Skidmore* deference because of federalism and nondelegation concerns.[132]

While *Chevron* Step Zero may have protected state autonomy under the facts of *Gonzales v. Oregon*, there are two major problems with relying on *Chevron* Step Zero to safeguard federalism in future cases. First, even

question was not interstitial); *id.* at 269–71 (recognizing these same factors during its *Skidmore* inquiry).

129. At first glance, *Gonzales v. Oregon* does not appear to be a *Chevron* Step Zero case. If anything, the *Gonzales v. Oregon* majority tried to hide the fact that it was invoking Chevron Step Zero; the majority used the force-of-law label many times but only cited *Mead* three times. Gonzales v. Oregon, 546 U.S. at 256, 258, 268. Rather, given the majority's and the dissent's emphases on parsing the congressional delegation contained in the CSA, it could appear that *Gonzales v. Oregon* is actually a *Chevron* Step One case.

The majority admits, however, that the delegation at issue is ambiguous (*Chevron* Step One). *See id.* at 258 ("All would agree, we should think, that the statutory phrase 'legitimate medical purpose' is a generality, susceptible to more precise definition and open to varying constructions, and *thus ambiguous in the relevant sense*. *Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official." (citing *Mead*, 533 U.S. at 226–27) (emphasis added)). The majority also agrees that the administrative interpretation is reasonable (*Chevron* Step Two). *Id.* at 272 (recognizing that the administrative interpretation at issue "is at least reasonable"). Thus, if the *Gonzales v. Oregon* majority reached the *Chevron* inquiry, it would be forced to accord deference to the Ashcroft Directive. *See id.*

130. Gonzales v. Oregon, 546 U.S. at 268. First, the majority began its discussion of *Chevron* deference with several pages of textual analysis of the CSA addressing the breadth of the statutory delegation factor. *Id.* at 258–66. Second, the majority noted that the Attorney General "lacks medical expertise." *Id.* at 266. Third, the Court noted that the Ashcroft Directive was a direct departure from Attorney General Janet Reno's previous interpretation of the CSA. *Id.* at 253–54. Fourth, the Court highlighted that the Attorney General's deliberation was lacking because he only consulted an Office of Legal Counsel memo instead of consulting others outside the Department of Justice. *Id.* at 267. Fifth, the majority provided two paragraphs implicating the major question factor. *Id.* at 267–68.

131. *See supra* notes 100–07 and accompanying text.

132. *See* Gonzales v. Oregon, 546 U.S. at 268–74 (denying *Skidmore* deference because of federalism concerns).

under *Chevron* Step Zero, many administrative interpretations altering the federal-state balance will still get *Chevron* deference, thereby offering no protection of federalism in such cases. Under substep one of *Chevron* Step Zero, all regulations made through, for example, notice-and-comment rulemaking will still get *Chevron* deference—unless, of course, Congress left no ambiguity (that is, clearly stated that the agency could *not* alter the federal-state balance).[133] In other words, had the Ashcroft Directive in *Gonzales v. Oregon* been promulgated through notice-and-comment rulemaking—as opposed to being issued as an interpretive rule—it would have received *Chevron* deference and would have superseded Oregon's law.

As a result, *Chevron* Step Zero completely ignores the *Garcia* rationale that justified abandoning substantive limits on Congress's enumerated powers because of the political safeguards of federalism.[134] And even if one is in favor of more limitations on Congress's enumerated powers than the political safeguards of federalism, at a minimum, one would want to ensure that the federalism limits that do exist (such as the political safeguards of federalism) are enforced through effective

133. The prime example of this consequence would be the position taken by the four dissenting Justices (who were all in the majority of *Gonzales v. Oregon*) in *Rapanos v. United States*, another case decided in 2006. The four dissenting Justices would have upheld the U.S. Army Corps of Engineers' regulation that interpreted "the waters of the United States" in the Clean Water Act to give the Corps jurisdiction over "immense stretches of intrastate land." Rapanos v. United States, 547 U.S. 715, 737–38 (2006) (plurality opinion). Without mentioning *Chevron* Step Zero or citing *Christensen*, *Mead*, *Barnhart*, or *Gonzales v. Oregon*, they would have accorded *Chevron* deference to the Corps's regulation—even calling it "a quintessential example of the Executive's reasonable interpretation of a statutory provision." *Id.* at 786–87 (Stevens, J., dissenting) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)).

The dissenters should at least have raised the possibility that *Chevron* Step Zero could deny *Chevron* deference. *See Barnhart*, 535 U.S. at 222 (Breyer, J.) (examining *Chevron* Step Zero factors even after determining that *Chevron* deference applied). But had they done so, under substep one of *Chevron* Step Zero, they probably would have quickly moved on to the *Chevron* inquiry because the format of the interpretation in *Rapanos* was a regulation. *See Rapanos*, 547 U.S. at 724 (plurality opinion). Of course, this would not explain Justice Breyer's position, as he rejects substep one of *Chevron* Step Zero. *See supra* note 117. Instead, he would still require a balancing of the all of the factors under substep two. *See supra* note 117.

Thus, *Chevron* Step Zero would not have protected federalism in *Rapanos*. Regardless of federalism concerns, because of the nature of the question, the *Chevron* Step Zero factor would not have mattered because the format of the interpretation was a regulation. Instead, federalism could only be protected in *Rapanos* by using a clear-statement canon. *See Rapanos*, 547 U.S. at 737–38 (plurality opinion) (stating that the four-Justice plurality would have applied a federalism-based clear-statement canon to strike down the regulation). Granted, the regulation was struck down at *Chevron* Step One. *See id.* at 737; *id.* at 758 (Roberts, C.J., concurring). But *Chevron* Step One itself does not offer any judicial protection of federalism—it simply requires construing the plain text of a statute. *See* Sunstein, *After* Chevron, *supra* note 58, at 2083–85.

134. *See supra* notes 35–37 and accompanying text.

procedural limits on agency power.

Second, like other balancing tests, manipulating the balancing test at substep two of *Chevron* Step Zero could still permit agencies to alter the federal-state balance of power through less formal means.[135] For example, the *Gonzales v. Oregon* majority believed that if the administrative delegation in the CSA had been made to the Secretary of Health and Human Services instead of the Attorney General, the case may have come out differently because the agency would have had more expertise in making medical decisions.[136] This additional agency expertise may have been enough to outweigh the major federalism question. Thus, through the balancing at substep two, even some interpretive rules that alter the federal-state balance of power could be accorded *Chevron* deference under *Chevron* Step Zero.

In sum, while *Chevron* Step Zero could theoretically protect state autonomy from federal administrative encroachment, the approach taken in *Gonzales v. Oregon* only really worked in the particular circumstances of that case.[137] In the complex realm of administrative law, it is easy to reach for the most salient doctrines relating to administrative deference, such as *Chevron* and *Skidmore*. But if courts are really concerned about federalism, they need to look beyond *Chevron* Step Zero and directly address the underenforced constitutional norms of federalism and the nondelegation

135. *Cf.* Sunstein, Chevron *Step Zero*, *supra* note 16, at 248 ("The Court seems to have opted for standards over rules in precisely the context in which rules make the most sense: numerous and highly repetitive decisions in which little accuracy is to be gained by a more particularized approach."). The best example of stretching the factors that go into the balancing test in substep two of *Chevron* Step Zero probably comes from Justice Breyer's dissent in *FDA v. Brown & Williamson Tobacco Corp.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). There, Justice Breyer ironically would have granted *Chevron* deference because the question was "very importan[t]" with much "publicity," so the President would be held politically accountable. *Id.* at 190–91 (Breyer, J., dissenting). In other words, because the issue was a *very* major question, *Chevron* deference would be accorded—even though, under the usual *Chevron* Step Zero inquiry, a major question would mean less administrative deference.

136. *See* Gonzales v. Oregon, 546 U.S. at 269 ("The deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment.").

137. The author, therefore, disagrees with Gillian Metzger's suggestion that "ordinary administrative law" doctrines, like *Chevron* Step Zero, are adequate for protecting state interests. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2107–09 (2008). Metzger is largely concerned with not creating "something more exceptional like constitutional or subconstitutional federalism doctrines," because this will "undermine administrative law's federalism potential insofar as it suggests that federalism concerns are not a legitimate focus of ordinary administrative law." *Id.* at 2107–08. But as this Article argues, constitutional federalism doctrines can be created specifically for administrative law, and such doctrines are the most direct way to protect state autonomy from federal administrative encroachment.

doctrine.

VI. CLEAR-STATEMENT CANONS OF STATUTORY CONSTRUCTION: THE PROCEDURAL LIMIT ON CONGRESSIONAL POWER THAT DIRECTLY PROTECTS STATE AUTONOMY FROM FEDERAL ADMINISTRATIVE ENCROACHMENT

Unlike *Chevron* Step Zero, clear-statement canons are procedural limits on congressional power that directly address the underenforcement of federalism and the nondelegation doctrine. Clear-statement canons are judicially created doctrines of statutory construction that require Congress to provide a clear statement in order to accomplish certain results. Although they have been created to compensate for both the underenforcement of federalism and the nondelegation doctrine, courts have had difficulty in consistently applying these canons in a manner that meaningfully protects state autonomy. In many cases, clear-statement canons only bootstrap other arguments that alone would be sufficient to protect state autonomy, as these canons are seen as almost illegitimate arguments of last resort.

Federalism-based clear-statement canons are neither an inferior nor an illegitimate means of preserving state autonomy. By appreciating that federalism and the nondelegation doctrine are underenforced constitutional norms, courts can expand existing federalism-based clear-statement canons to create a canon that protects state autonomy from federal administrative encroachment. First, this part analyzes where courts get the authority to create clear-statement canons and how clear-statement canons intersect with *Chevron* deference. Then, existing clear-statement canons based on federalism and nondelegation concerns are examined.

Ultimately, this part proposes a clear-statement canon that only applies to administrative interpretations made in areas of traditional state regulation. Support for this canon can be found in the early Rehnquist Court case *Gregory v. Ashcroft*. By limiting the application of the canon proposed in this part to administrative interpretations, courts can ensure that Congress has adequate power to regulate our modern economy while also protecting state autonomy from federal administrative encroachment. This part concludes by briefly applying this canon to a few recent Supreme Court cases.

A. BACKGROUND ON CLEAR-STATEMENT CANONS OF STATUTORY CONSTRUCTION

It is not self-evident that courts should have the authority to create clear-statement canons of statutory construction.[138] Courts must necessarily interpret the language of statutes, so *textual* canons of statutory construction (based on logic and the use of language) are simply short-hand presumptions that do not grant courts any substantive powers.[139]

But in addition to textual canons, courts have created "*substantive canons* encoding some sort of value judgment."[140] These value-based substantive canons—such as federalism clear-statement canons—"load the dice for or against a particular result" by requiring a clear statement to accomplish a certain result.[141] Value-based canons of statutory construction therefore give courts the power to favor or augment certain results, like protecting state autonomy.[142] To prevent judges from simply infusing their own policy preferences into statutory construction, there needs to be some limit on the authority of courts to create clear-statement canons.[143]

As Justice Scalia noted, one can accept some clear-statement canons as simply "exaggerated statement[s] of what normal, no-thumb-on-the-

138. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28–29 (Amy Gutmann ed., 1997) ("[T]here is also the question of where the courts get the authority to impose [clear-statement canons].").

139. Textual canons include rules of syntax. For a good discussion of textual canons, see *id.* at 25–27. For example, one textual canon is *expressio unius est exclusio alterius*—"[e]xpression of the one is exclusion of the other." *Id.* at 25. To use Justice Scalia's example, if a statute exempts children under the age of twelve, under this canon, that statute would be interpreted so that children twelve or older are not exempted. *Id.*

140. Mendelson, *supra* note 21, at 745 (emphasis added). Both textual and clear-statement canons have existed for quite some time, and a "large number of canons of construction predat[e] *Chevron*." *Id.*

141. SCALIA, *supra* note 138, at 27. In addition to federalism clear-statement canons, the Court has created some clear-statement canons based on public policy: tax exemptions, anticompetitive practices, veteran benefits, and agency actions that have high costs but low benefits. Sunstein, *Nondelegation Canons*, *supra* note 51, at 334–35 (noting that the Court has relied on the nondelegation doctrine and utilized the clear-statement rule to implement "perceived public policy . . . by requiring Congress itself to speak if it wants to compromise policy that is perceived as generally held").

142. *See generally* Brian D. Galle, *Can Federal Agencies Authorize Private Suits Under Section 1983?*, 69 BROOK. L. REV. 163, 193–94 (2003) (arguing that "[t]he principle of federalism . . . derives its constitutional authority from the fact that it was a widely-shared assumption of the founding generation").

143. One view would essentially place no limits on a judge's ability to create clear-statement canons. Under this view, the authority to create such canons stems from the fact that "judges are competent to identify and incorporate public values into statutory interpretation." Mendelson, *supra* note 21, at 747. But as Justice Scalia has argued, this would introduce "unpredictability, if not . . . arbitrariness" into the interpretation of any statute. SCALIA, *supra* note 138, at 28. Judges could arbitrarily create virtually any canon they wanted to, thereby evading *Chevron* deference. *See id.*

scales interpretation would produce anyway."[144] This "normal interpretation" rationale alone could provide the basis for a federalism clear-statement canon applied exclusively to administrative interpretations. After all, it would be an "extraordinary act"[145] for a *congressional delegation of authority to an administrative agency* to result in an alteration of the federal-state balance of power.[146]

In addition, courts could have the authority to create federalism clear-statement canons as a means of partially enforcing the otherwise underenforced constitutional norms of federalism and nondelegation.[147] In other words, courts could create clear-statement canons to prevent results that would only have been allowed because of underenforced constitutional norms.[148] This rationale would permit the creation of federalism clear-statement canons (particularly in the administrative law context) without accepting the premise that judges have the discretion to incorporate whatever public values they want into statutory construction.[149] This justification even finds support in earlier Rehnquist Court cases, such as *Gregory v. Ashcroft*, where the Court used federalism clear-statement canons without imposing any substantive limits on congressional power.[150]

While courts therefore have the authority to create clear-statement

144. SCALIA, *supra* note 138, at 29. *See also* Mendelson, *supra* note 21, at 747 (positing that clear-statement canons might "represent a reasonable set of assumptions about what Congress might mean in passing statutory language").

145. SCALIA, *supra* note 138, at 29.

146. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly."). *See also* Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001) (assuming "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority").

147. The Court has created clear-statement rules for the retroactive application of statutes, lenity in the criminal law context, the extraterritorial application of federal statutes, and laws applying to Native Americans. *See* Sunstein, *Nondelegation Canons*, *supra* note 51, at 332–33 (identifying three categories of nondelegation canons and, through specific examples, explaining how requiring a clear statement operates as a constraint on administrative power). These canons may be addressing underenforced constitutional norms. *See* Sunstein, *After* Chevron, *supra* note 58, at 2112.

148. *See* Somin, *supra* note 48, at 134 ("To be sure, the avoidance canon might be resuscitated if federalism is viewed as an 'underenforced constitutional norm.'"); Young, *supra* note 28, at 101 (arguing that courts should be permitted "to impose *some* restraint in areas where constitutional norms would otherwise be 'underenforced'"). *See also* Young, *supra* note 28, at 126 ("We should also forthrightly acknowledge that these clear-statement doctrines are constitutional in nature; as Larry Sager has demonstrated, the fact that a norm is 'underenforced'—that is, enforced through something short of a strong invalidation norm—does not mean the norm lacks grounding in the Constitution." (emphasis omitted)).

149. *See supra* note 143.

150. *See supra* note 42 and accompanying text.

canons of statutory construction, such canons are at odds with *Chevron* deference.[151] These canons[152] tell courts that, given statutory ambiguity, a specific result cannot be reached.[153] In contrast, *Chevron* deference tells courts that, given statutory ambiguity, they should defer to an agency's reasonable interpretation of the statute.[154] While clear-statement canons are not administrative law doctrines per se, whether a canon trumps *Chevron* deference certainly is an administrative law doctrine.[155]

Courts should hold that clear-statement canons trump *Chevron* deference.[156] *Chevron* itself contemplated this,[157] and each Justice on the Rehnquist Court agreed that clear-statement canons trump *Chevron*

151. Assume, for example, that an agency interpretation tried to accomplish a result that triggers a clear-statement rule, and Congress did not provide a clear statement that permits the agency to accomplish that result. Also assume, however, that the agency tried to accomplish this result by interpreting ambiguous statutory language, and the agency's interpretation of that ambiguous language was reasonable (which would normally give rise to *Chevron* deference). In this circumstance, the congressional delegation of power will be construed to forbid such a result, *Chevron* deference will be denied, and the federal agency will not have such a power—the power will be retained by the states.

152. Clear-statement canons apply regardless of whether Congress is legislating or delegating authority to administrative agencies. Nina Mendelson questions this position: "[r]espect to *Chevron* should oblige a court at least to explain why substantive canons should prevail over an approach in which courts defer to agency interpretations." Mendelson, *supra* note 21, at 746.

Chevron itself, however, can be seen as a competing canon of statutory interpretation. *See* Sunstein, *Nondelegation Canons*, *supra* note 51, at 329 (describing *Chevron* as "an emphatically prodelegation canon"). It would be odd to allow Congress to evade clear-statement requirements by simply delegating authority to administrative agencies. The Court has implicitly, if not explicitly, adopted this view. *See infra* notes 157–58 and accompanying text.

153. With clear-statement rules, the statutory ambiguity at issue is Congress's lack of a clear statement allowing a result. *See* Sunstein, *After* Chevron, *supra* note 58, at 2114–15. This ambiguity is different from the statutory ambiguity that *Chevron* is looking for: with *Chevron* deference, the statutory ambiguity at issue is whether Congress used terms (in the statute that an agency administers) that are open to various interpretations. *Id.* at 2086–87.

154. *See* Sunstein, *Nondelegation Canons*, *supra* note 51, at 329 ("Indeed, *Chevron* establishes a novel canon of construction: In the face of ambiguity, statutes mean what the relevant agency takes them to mean." (citation omitted)).

155. Likewise, if a certain clear-statement canon of statutory construction only applied to administrative delegation, then it would also be an administrative law doctrine.

156. *See* Sunstein, Chevron *Step Zero*, *supra* note 16, at 244. *See also* Sunstein, *After* Chevron, *supra* note 58, at 2111–14 (stating that "constitutionally inspired" clear-statement canons probably trump *Chevron* deference); Sunstein, *Beyond* Marbury, *supra* note 21, at 2607–10 (arguing that an exception to the *Chevron* deference principle should be made for nondelegation—or clear-statement—canons). *See also* Damien J. Marshall, Note, *The Application of* Chevron *Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 265 (1998) (arguing that *Chevron* deference should not apply in regulatory preemption cases).

157. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). *But see* Mendelson, *supra* note 21, at 746 n.37 (suggesting that the Court's "cases suggest that rather than substantive canons," this *Chevron* language was only aimed at "textual canons").

deference.[158] Moreover, if *Chevron* deference applied notwithstanding a clear-statement canon, Congress could evade all clear-statement requirements by making administrative delegations, thereby frustrating the political safeguards of federalism.[159]

Because clear-statement canons should trump *Chevron* deference, it makes theoretical sense to treat the clear-statement canon inquiry as a threshold question to the administrative-deference inquiry (that is, *Chevron* Step Zero, *Skidmore*, and *Chevron*), rather than a part of it.[160] In that case,

158. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." (citation omitted)); Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–74 (2001) (determining that a clear-statement canon trumped *Chevron* deference); *id.* at 174 ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference."). *See also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part) ("I would resolve these cases by assuming, without deciding, that the EEOC was entitled to [*Chevron*] deference on the particular point in question. But deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable *in light of the principles of construction courts normally employ*. Given the presumption against extraterritoriality that the Court accurately describes, *and the requirement that the intent to overcome it be 'clearly expressed,'* it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC has done." (emphasis added)).

159. *See supra* note 40 and accompanying text.

160. There has been confusion as to whether clear-statement canons apply (1) as a threshold question to *Chevron*, Mendelson, *supra* note 21, at 746 (arguing that clear-statement canons should apply as a threshold question to *Chevron*); (2) at *Chevron* Step One, *St. Cyr*, 533 U.S. at 320 n.45 (applying a clear-statement canon at Chevron Step One); Sunstein, *Beyond* Marbury, *supra* note 21, at 2607 (same); or (3) at *Chevron* Step Two, *Arabian Am. Oil Co.*, 499 U.S. at 260 (Scalia, J., concurring in part) (applying a clear-statement canon at *Chevron* Step Two).

This confusion stems from the fact that clear-statement canons and *Chevron* are looking for different types of statutory ambiguity. Clear-statement canons are looking to see whether Congress provided something approaching "magic words" that would allow the result triggering the canon. *Cf. St. Cyr*, 533 U.S. at 327 (Scalia, J., dissenting) (criticizing the majority for "fabricat[ing] a superclear statement, 'magic words' requirement for the congressional expression of such an intent, unjustified in law and unparalleled in any other area of our jurisprudence"). *But cf.* SCALIA, *supra* note 138, at 28 (noting that there are "no answers" to the question of "how clear is an 'unmistakably clear' statement?").

Chevron, though, is looking for ambiguity in the statutory words that an agency purportedly based its interpretive authority on—and the fit between such ambiguity and the resulting interpretation. To clarify this point, assume that an agency, while purporting to interpret the statute that it administers, creates an interpretive rule that citizens can sue states for employment discrimination claims, which triggers a preexisting clear-statement canon. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* Lane v. Pena, 518 U.S. 187, 197–98 (1996) (requiring a clear statement for Congress to abrogate state sovereign immunity). Also, assume that the statute the agency administers only said that the agency has "the authority to create regulations abolishing college football's Bowl Championship Series and implementing a true college football playoff system"—thus,

courts would still be construing statutes; they would just be examining a different aspect of the statute than the *Chevron* inquiry.[161] This also makes practical sense. If one were only to look at *Chevron* Steps One and Two, it would be easy to simply insert the clear-statement canon inquiry at *Chevron* Step One. In fact, sometimes even if a clear-statement canon is triggered, it would be much easier for courts to invalidate an administrative interpretation by skipping ahead to the *Chevron* inquiry.[162] If the Supreme Court retains its complex *Chevron* Step Zero inquiry, however, some cases decided on shaky *Chevron* Step Zero grounds could be decided under a firmer clear-statement canon.[163]

B. PREEXISTING CLEAR-STATEMENT CANONS OF STATUTORY CONSTRUCTION: COMPENSATING FOR THE UNDERENFORCEMENT OF FEDERALISM AND THE NONDELEGATION DOCTRINE

Courts have created clear-statement canons to compensate for the underenforcement of federalism and the nondelegation doctrine, but they hesitate to invoke them. Instead of having a dispositive effect on cases, clear-statement canons are usually thrown in at the end of opinions to bootstrap other arguments.[164] Even *Gonzales v. Oregon* specifically disavowed any use of clear-statement canons—implying that "commonsense conclusion[s]" are mutually exclusive from the application

the statute contained no clear statement that Congress or the agency could abrogate state sovereign immunity.

For the clear-statement canon inquiry, given that a canon was triggered, the statutory delegation at issue is unimportant—except to check whether Congress provided a clear statement permitting the agency to abrogate state sovereign immunity. In other words, while the interpretive rule in this hypothetical dealt with employment discrimination and the statutory delegation dealt with a college football playoff system—both of which are completely unrelated—the clear-statement-canon inquiry does not care that the statutory delegation dealt with a college football playoff system, only that it did not clearly abrogate state sovereign immunity. On the other hand, under the *Chevron* inquiry, this would be an easy case, and the regulation would be invalidated because the interpretive rule is not a reasonable interpretation of the statutory delegation.

161. *See supra* note 160.

162. The hypothetical regarding abrogation of state sovereign immunity for employment discrimination suits and the statute relating to a college football playoff system would be such a case. *See supra* note 160.

163. *Cf.* Sunstein, Chevron *Step Zero*, *supra* note 16, at 245 n.245 (suggesting that *Gonzales v. Oregon* "may depend on a nondelegation canon to the effect that federal intrusions on state authority must be explicit").

164. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 737–38 (2006) (plurality opinion) (invoking clear-statement canons only after determining that a statute was unambiguous at *Chevron* Step One); Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001) (same).

of clear-statement canons.[165] That said, preexisting clear-statement canons provide a foundation for expanding the use of clear-statement canons to adequately protect state autonomy from administrative encroachment.

Even with the potential problems surrounding clear-statement canons, the Supreme Court has created such canons based on federalism concerns. The Court currently requires a clear statement if the legislation or interpretation at issue:

- regulates a traditional state governmental function;[166]
- raises a constitutional doubt;[167]
- preempts state law;[168]
- imposes conditions on grants of federal funds;[169] or
- abrogates state sovereign immunity.[170]

Each individual federalism canon is drastically limited in scope, though, so these canons do little to protect federalism in their current forms. For instance, the *Gregory v. Ashcroft* canon for traditional state governmental functions has only been applied to a small set of cases.[171] The *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*") constitutional-doubt canon only has teeth with corresponding substantive limits on Congress's enumerated powers; but

165. Gonzales v. Oregon, 546 U.S. 243, 274 (2006).

166. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (creating a clear-statement canon when the law at issue would "upset the usual constitutional balance of federal and state powers").

167. *See, e.g.*, *SWANCC*, 531 U.S. at 172–73 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." (citation omitted)).

168. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (articulating the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

169. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

170. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, *as recognized in* Lane v. Pena, 518 U.S. 187, 197–98 (1996) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

171. *See, e.g.*, United States v. Lot 5, Fox Grove, 23 F.3d 359, 362 (11th Cir. 1994) ("[T]he *Gregory* plain statement preemption rule is limited to federal laws impacting a state's self-identification as a sovereignty."); Gately v. Massachusetts, 2 F.3d 1221, 1230 (1st Cir. 1993) (explaining that *Gregory* is limited to protecting "a core function going to the 'heart of representative government'").

after *Gonzales v. Raich*, constitutional doubt over federalism will rarely arise.[172] The *Rice v. Santa Fe Elevator Corp.* presumption against preemption has not been applied with much force.[173] And the clear-statement canons relating to conditions on federal funding and abrogation of state sovereign immunity only protect federalism in the specific instances where Congress or agencies choose to use conditional funding or abrogate sovereign immunity.

Consequently, federalism clear-statement canons are underdeveloped, to say the least. The modern Court's interpretation of the Commerce Clause has left a gaping hole in the enforcement of Congress's enumerated powers. The lack of substantive limits on congressional power makes federalism a ripe area for implementing clear-statement canons—particularly under *Garcia*'s political-safeguards-of-federalism rationale.[174] But instead of creating broad canons to plug the leaking dam and prevent federal administrative regulations from washing state autonomy away, courts have resorted merely to sticking their fingers in a few of the dam's smaller holes.

In addition to federalism concerns, the Court's clear-statement canons have also recognized the underenforcement of the nondelegation doctrine. In a series of three cases,[175] the Court essentially developed a clear-statement canon for administrative interpretations that implicate major questions.[176] The Court's most cogent statement of this canon came in *Whitman v. American Trucking Ass'ns*: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[177] Put another way, the Court wants to ensure that

172. *See* Somin, *supra* note 48, at 134 ("If *Raich* is correct and congressional Commerce Clause power is essentially unlimited, a statute that relies on a broad interpretation of that power cannot 'raise serious` constitutional problems.' After *Raich*, there can be no 'problem' because there are no constitutional limits for Congress to infringe." (citation omitted)).

173. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085 (2000) ("Notwithstanding its repeated claims to the contrary, the Supreme Court's numerous preemption cases follow no predictable jurisprudential or analytical pattern.").

174. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985).

175. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994).

176. This major-question canon is essentially also a factor in *Chevron* Step Zero's balancing test. *See supra* note 135 and accompanying text. Indeed, in *Gonzales v. Oregon*, the Court quoted the *Whitman* canon in its discussion about *Chevron* Step Zero. Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (quoting *Whitman*, 531 U.S. at 468).

177. *Whitman*, 531 U.S. at 468. The *Whitman* major-question canon was premised on statements from two other cases: *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so

Congress—not agencies—decides larger policy questions.[178]

The Supreme Court's willingness to create a clear-statement canon that applies exclusively in the administrative law context, makes it all the more likely that courts can fashion a federalism-based clear-statement canon that only applies to administrative law. Even if courts would not want to constrain *Congress* directly by imposing federalism clear-statement canons, they should have significantly less qualms about constraining Congress's ability to delegate to *administrative agencies*—particularly because the underenforcement of the nondelegation doctrine exacerbates the underenforcement of federalism.[179]

Questions of federalism are one type of major question. For example, questions of the federal-state balance necessarily implicate the "fundamental details of a regulatory scheme,"[180] as they will always involve setting the outer limits of an agency's power and jurisdiction. As Cass Sunstein explained, "nondelegation canons represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree."[181] Federalism is arguably the area that should garner the most concern that "certain choices are made by an institution with a superior democratic pedigree," given the Court's reliance on the political safeguards of federalism.[182] Therefore, the *Whitman* line of cases supports a federalism-based clear-statement canon applied exclusively in the context of administrative law.

C. CREATING A CLEAR-STATEMENT CANON THAT ONLY APPLIES TO ADMINISTRATIVE INTERPRETATIONS MADE IN AREAS TRADITIONALLY REGULATED BY THE STATES

Up to this point, this Article has explained several important concepts: the underenforcement of federalism, particularly in the administrative law

cryptic a fashion."), and *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. at 231 ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion . . . .").

178. The *Whitman* major-question canon parallels the nature-of-the-question factor in the balancing test of *Chevron* Step Zero's substep two. But the *Whitman* canon is dispositive, whereas the existence of a major question is simply one factor to balance under *Chevron* Step Zero. Additionally, the *Whitman* canon would apply to all agency interpretations, including those made through notice-and-comment rulemaking, unlike *Chevron* Step Zero's balancing test.

179. *See supra* Part II.B.

180. *Whitman*, 531 U.S. at 468.

181. Sunstein, *Nondelegation Canons*, *supra* note 51, at 317.

182. *See supra* notes 32–35 and accompanying text.

context; the normative reasons for enforcing federalism; that procedural limits on congressional power are justifiable second-best alternatives for enforcing federalism; that *Chevron* Step Zero is not an adequate procedural limit; that clear-statement canons could be adequate procedural limits; and that preexisting canons provide a foundation for tailoring a canon to protect federalism in the administrative law context. The hardest part—delineating the boundaries of a federalism clear-statement canon that applies exclusively in the administrative law context—still remains.

Gregory is an ideal touchstone for determining the scope of the federalism clear-statement canon that can best protect state autonomy from federal administrative encroachment. Even though *Gregory* did not involve an administrative interpretation, its reasoning exemplifies the foundation for federalism clear-statement canons. In *Gregory*, a provision in the Missouri State Constitution providing that "[a]ll judges other than municipal judges shall retire at the age of seventy years" was challenged as a violation of the federal Age Discrimination in Employment Act ("ADEA").[183] The ADEA made it "unlawful for an 'employer' 'to discharge any individual' who is at least 40 years old 'because of such individual's age.'"[184] Recognizing the lack of substantive limits on Congress's enumerated powers,[185] the Court nonetheless rejected the challenge and upheld the Missouri State Constitution provision by invoking a federalism clear-statement canon.[186]

The important question after *Gregory*, though, is the precise boundaries of this canon.[187] The operative passage from the *Gregory*

183. Gregory v. Ashcroft, 501 U.S. 452, 455 (1991) (quoting MO. CONST. art. V, § 26).

184. *Id.* at 456 (quoting 29 U.S.C. §§ 623(a), 631(a) (2006)).

185. *See id.* at 464 ("We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise." (citation omitted)).

186. *Id.* at 460–61.

187. Of course, another view of *Gregory* is that it is wrong. Four Justices on the *Gregory* Court refused to create this clear-statement canon. *See id.* at 474 (White, J., concurring in part and dissenting in part) ("I cannot agree with this 'plain statement' rule because it is unsupported by the decisions upon which the majority relies, contrary to our Tenth Amendment jurisprudence, and fundamentally unsound."); *id.* at 486 (Blackmun, J., dissenting) ("I agree entirely with the cogent analysis contained in Part I of Justice White's opinion."). These Justices did not want "to carve out areas of state activity that will receive special protection from federal legislation." *Id.* at 477 (White, J., concurring in part and dissenting in part).

But at least in the administrative law context, the Justices on the current Court seem to disregard this view. The *Gonzales v. Oregon* majority specifically protected federalism while citing the "federal-

opinion spells out the problem of trying to determine the *Gregory* canon's scope:

> Congress may legislate in *areas traditionally regulated by the States*. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.
>
> . . . [The Missouri State Constitution] provision goes beyond an area traditionally regulated by the States; it is a *decision of the most fundamental sort for a sovereign entity*.[188]

Some have interpreted this passage as limiting the *Gregory* canon, which applies to both congressional acts and administrative interpretations, to situations involving traditional state *governmental functions* that implicate "a core aspect of state sovereignty."[189] This view seizes on the facts of *Gregory* and emphasizes the phrase "decision of the most fundamental sort for a sovereign entity."[190] In many ways, this reading could simply be the path of least resistance, considering how the Supreme Court had previously created substantive federalism limits based on "areas of traditional governmental functions" in *National League of Cities v. Usery*, which was overturned by *Garcia*.[191]

But it would be a mistake to limit a federalism clear-statement canon that applies exclusively to administrative interpretations in this way. Such a canon would offer little protection for federalism, as it would only apply to the small set of regulations that qualify as traditional state *governmental* functions.

Additionally, the reasoning in *Gregory* itself anticipates a broader clear-statement canon. Instead of focusing on a single phrase from the *Gregory* opinion, the entire passage must be examined. *Gregory* explained that the Court would not lightly assume that Congress legislated in "areas traditionally regulated by the States" because this is an "extraordinary power in a federalist system."[192] The facts of *Gregory* easily triggered the

state balance" and relying on the dichotomy of "areas traditionally supervised by the States' police power." Gonzales v. Oregon, 546 U.S. 243, 274–75 (2006).

188. *Gregory*, 501 U.S. at 460 (emphasis added).

189. Gonzales v. Oregon, 546 U.S. at 291 (Scalia, J., dissenting). *See also* United States v. Lot 5, Fox Grove, 23 F.3d 359, 362 (11th Cir. 1994) ("[T]he *Gregory* plain statement preemption rule is limited to federal laws impacting a state's self-identification as a sovereignty."); Gately v. Massachusetts, 2 F.3d 1221, 1230 (1st Cir. 1993) (explaining that *Gregory* is limited to protecting "a core function going to the 'heart of representative government'").

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

191. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

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

clear-statement canon because the Missouri State Constitution provision dealing with the age of judges went "*beyond* an area traditionally regulated by the States."[193] This suggests that the boundaries of the *Gregory* clear-statement canon could be much broader than only those "decision[s] of the most fundamental sort for a sovereign entity."[194] Rather, a federalism-based clear-statement canon could apply to regulations implicating an "area traditionally regulated by the States,"[195] not just traditional state governmental functions.

In sum, a "decision of the most fundamental sort for a sovereign entity"[196] *is merely one easily identifiable, specialized example of an area traditionally regulated by the states*. In other words, a "decision of the most fundamental sort for a sovereign entity" is *sufficient* to trigger the *Gregory* federalism clear-statement canon, but it should not be *necessary*. Thus, when placed in context, the widely accepted reading of *Gregory*—that it only applies to traditional state governmental functions—may lack support under the reasoning of *Gregory* itself.

Perhaps the *Gregory* canon should be applied more broadly even to congressional acts as well. Indeed, three subsequent Supreme Court cases expanded the *Gregory* canon beyond traditional governmental functions.[197] For purposes of this Article, however, it is enough to note that *Gregory* provides a basis for expanding the scope of a federalism clear-statement canon that applies solely to administrative interpretations, particularly given the underenforcement of both federalism and the nondelegation doctrine.

Under this expanded reading of *Gregory*, a federalism clear-statement canon that applies exclusively to administrative interpretations would be triggered whenever an agency regulates in *an area traditionally regulated*

193. *Id.* (emphasis added).

194. *Id.*

195. *Id.*

196. *Id.*

197. First, *BFP v. Resolution Trust Corp.* expanded the *Gregory* clear-statement canon to cover "traditional state regulation[s]." BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994). Second, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* applied the *Gregory* canon and explained that its concern was "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001). Third, *Raygor v. Regents of the University of Minnesota* applied the *Gregory* canon because Congress had legislated in a "'traditionally sensitive area[]' that 'affect[s] the federal balance.'" Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 543–44 (2002) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989)).

by the states.[198] This canon is not as novel as one might think. The Rehnquist Court's Commerce Clause cases noted that federalism should be protected in areas of traditional state regulation,[199] and the dispositive Commerce Clause issue for the Rehnquist Court may very well have been whether a law involved an area traditionally regulated by the states.[200]

Moreover, three sources other than *Gregory* provide a strong foundation for a clear-statement canon that applies to administrative interpretations made in areas traditionally regulated by the states. First, Justice Frankfurter's influential 1947 article, which was subsequently adopted by the Supreme Court, advocated for statutory construction to protect the federal-state balance:

> The task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. . . . The history of congressional legislation . . . justif[ies] the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically *readjusts the balance of state and national authority*, those charged with the duty of legislating are reasonably explicit . . . .[201]

In 1947, Justice Frankfurter was writing against the backdrop of the Court's recent refusal to provide any substantive limits on Congress's enumerated powers.[202] Of course, Justice O'Connor was in a very similar position when she wrote the majority opinion in *Gregory*. And Justice Frankfurter's concerns ring even truer today with our modern administrative state.

Second, in 1971, *United States v. Bass* cited Justice Frankfurter's article while explaining that "unless Congress conveys its purpose clearly,

198. There is historical support for the area-of-traditional-state-regulation dichotomy. As early as 1837, the Supreme Court was protecting the states' police powers, even if they involved commerce among the states. *See* Mayor of N.Y. v. Miln, 36 U.S. 102, 128–29 (1837).

199. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 615–16 (2000) (expressing concern that following petitioner's reasoning would result in no limits on Congress's ability to regulate "areas of traditional state regulation").

200. Lynn A. Baker, *Federalism and the Spending Power from* Dole *to* Birmingham Board of Education, *in* THE REHNQUIST LEGACY 205, 218–21 (Craig M. Bradley ed., 2006).

201. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–40 (1947) (emphasis added), *quoted in* Kelly v. Robinson, 479 U.S. 36, 49 n.11 (1986).

202. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (upholding a law regulating the personal growing and consuming of wheat under the Commerce Clause); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (upholding the National Labor Relations Act under the Commerce Clause).

it will not be deemed to have significantly changed the federal-state balance."[203] As a result, *Bass* lends support for a clear-statement canon based on federalism concerns:[204] "[i]n traditionally sensitive areas, *such as legislation affecting the federal balance*, *the requirement of clear statement* assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[205]

Third, the *Rice* presumption against preemption[206] supports a clear-statement canon that applies to any administrative alteration of the federal-state balance.[207] In *Rice v. Santa Fe Elevator Corp.*,[208] the Court

203. United States v. Bass, 404 U.S. 336, 349 & n.16 (1971).

204. A few other cases not involving criminal statutes cite *Bass* for its federalism clear-statement canon. *See, e.g.*, Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 643–44 (1986) ("The need for a proper evidentiary basis for agency action is especially acute in this case because Congress has failed to indicate . . . that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance."); Heublein, Inc. v. S.C. Tax Comm'n, 409 U.S. 275, 281–82 (1972) ("Congress, then, did not address . . . the problem of taxing a business when it undertook local activities simply in order to comply with the requirements of a valid regulatory scheme. Such regulation is an important function of local governments in our federal scheme.").

205. *Bass*, 404 U.S. at 349 (emphasis added).

206. The debate on the presumption against preemption has become convoluted due to equivocation with the word "preemption." *See, e.g.*, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203–04 (1983) (using the terms "supersede" and "displace[]" interchangeably with "preempt[ion]" while discussing the various types of preemption).

Preemption, as defined by the Court, is a much more limited concept than supremacy. Preemption is merely one way in which federal law can supersede state law. *See* Dinh, *supra* note 173, at 2102 ("Conflict preemption thus represents the paradigmatic operation of the Supremacy Clause . . . ." (citing Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1751 (1992))). The Court's definition of preemption is therefore narrower than how the word is used in ordinary language. As Caleb Nelson points out, there is a difference between the "logical-contradiction test" that triggers the Supremacy Clause and the Court's "physical impossibility" test for conflict preemption. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 260 (2000). Most importantly for our purposes, in situations where "one sovereign's law purports to give people a right to engage in conduct that the other sovereign's law purports to prohibit," the Supremacy Clause's logical-contradiction test is satisfied (so federal law would supersede state law)—but the physical impossibility test for conflict preemption is *not* satisfied (so the presumption against preemption would not be triggered). *Id.* at 228 n.15, 260–61. Rather, the physical impossibility test will only be met when "federal law requires what state law prohibits (or vice versa)." *Id.* at 228 n.15. Returning to *Gonzales v. Oregon*, Justice Scalia was correct to recognize that the Ashcroft Directive did not involve preemption—as the term has been used by the Court—because Oregon law did not *require* doctors to use controlled substances to end a patient's life. Gonzales v. Oregon, 546 U.S. 243, 289–90 (2006) (Scalia, J., dissenting).

To put it another way, the basic operation of the Supremacy Clause is not "preemption" under the Court's definition of preemption. *See* Dinh, *supra* note 173, at 2103. This could explain why Justice Scalia and other commentators have opposed the view that all preemption cases raise federalism concerns. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.6 (1999) (Scalia, J.) (finding an invocation of "States' rights" to be "most peculiar" in the preemption context). *See also* Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 117 (2002) ("Preemptive statutes are inherently less intrusive than regulatory statutes. Thus, there is no functional justification for subjecting them to a judicial test of the devastating force of the clear statement rule.").

207. When some commentators refer to preemption, they are actually referring to supremacy. *See,*

announced the clear-statement canon[209] that has become known as the "presumption against preemption":[210] "we start with the assumption that the *historic police powers of the States* were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[211]

Even with this substantial support, two main objections exist to applying a clear-statement canon to administrative interpretations made in areas traditionally regulated by the states. First, such a canon would expand the power of courts and decrease predictability in statutory interpretation.

e.g., Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 739 (2008) ("Conflict preemption can be regarded as equivalent to what I call trumping: application of state law would nullify federal law and hence state law must give way."); Christopher R.J. Pace, Essay, *Supremacy Clause Limitations on Federal Regulatory Preemption*, 11 TEX. REV. L. & POL. 157, 170 (2006) (arguing that administrative interpretations "extend[ing] the reach of federal authority beyond the parameters outlined by Congress with any clarity or ascertainability" should not "displace state law under the Supremacy Clause"); Young, *supra* note 39, at 49 (insinuating that *Gonzales v. Oregon* involved preemption and that it is "critical that federal preemptive authority actually be exercised by Congress").

These commentators are rightly concerned about reducing the amount of federal administrative regulation that supersedes state law, and an expanded clear-statement canon for administrative interpretations made in areas traditionally regulated by the states could be a sufficient alternative to the presumption against preemption. After all, even *Rice v. Santa Fe Elevator Corp.* seemed to limit the presumption against preemption to laws implicating the "historic police powers of the States." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Additionally, this canon would provide a simple answer to those who oppose the *Rice* presumption against preemption on the grounds that it would underenforce the Supremacy Clause: the clear-statement canon this Article proposes is really grounded in the underenforcement of federalism and the nondelegation doctrine. Furthermore, even opponents of the presumption against preemption have accepted federalism-based clear-statement canons. *See, e.g.*, Dinh, *supra* note 173, at 2092–93 ("Positing that the federal structure does not support a general preemption presumption does not mean the Court cannot rely on specific interpretive canons based on core federalism principles.").

208. *Rice*, 331 U.S. 218.

209. On its face, it is unclear whether the *Rice* presumption against preemption requires a clear statement or some lesser showing of congressional intent. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 544 (1992) (Scalia, J., concurring in part and dissenting in part) ("Under the Supremacy Clause, our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." (citation omitted)); Nelson, *supra* note 206, at 230 (explaining that some commentators have proposed to strengthen the *Rice* presumption against preemption by instituting clear-statement rules). *But see* Sunstein, *Nondelegation Canons*, *supra* note 51, at 331 (discussing a clear-statement rule for preempting state laws); Young, *supra* note 28, at 18 & n.78 (describing the *Rice* presumption as a clear-statement canon of statutory construction).

210. The first time the phrase "presumption against preemption" appears in the United States Reports is in a dissenting opinion authored by Justice Stevens. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 421 (1992) (Stevens, J., dissenting). One year later, the phrase made its way into a near-unanimous opinion. *See* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 668 (1993). But *Cipollone v. Liggett Group, Inc.*, is the most cited case for the presumption against preemption. *Cipollone*, 505 U.S. 504. While the phrase did not appear in the portion of Justice Stevens's opinion that commanded a majority, the portion of the opinion laying out the rationale behind the presumption against preemption (Part III) received seven votes. *Id.* at 516–17.

211. *Rice*, 331 U.S. at 230 (emphasis added).

As a result, a court could invalidate many federal administrative interpretations by manipulating a potentially confusing doctrine.

Even if courts were to abuse this power under a clear-statement canon approach, however, Congress would still have the final say: if the Court invalidates a federal administrative interpretation by using the clear-statement canon, Congress can subsequently amend the statutory delegation to provide a clear statement. The costs of incorrectly invoking a canon are therefore drastically reduced when the consequence is simply to "remand" the question back to Congress instead of categorically prohibiting Congress or agencies from acting.[212] As Ernest Young explained:

> [A] court applying the *Gregory* clear statement rule must identify the "traditional state functions" to be protected. These judgments necessarily entail the same sort of subjective decisionmaking that got the nondelegation and *National League of Cities* doctrines into trouble in the first place. But that kind of ambiguity in defining the relevant boundaries is more tolerable when Congress can override the Court's judgment. In other words, we can afford to be less precise in setting the trigger because less turns on it.[213]

For example, one of the proffered reasons for underenforcing the Commerce Clause is to give Congress adequate powers to regulate the modern economy.[214] Under a traditional state regulation clear-statement canon, Congress would still retain the power to regulate the modern economy and to delegate this authority to agencies; Congress would simply need to provide a clear statutory statement to delegate the authority to regulate in areas of traditional state regulation.[215] Furthermore, applying the canon only in the administrative law context would allay concerns that

212. Young, *supra* note 28, at 91. *See id.* at 114 ("[W]e can tolerate a bit more indeterminacy in the operative definitions if the only consequence of a finding that the line has been transgressed is to refer the decision back to Congress for clarification.").

213. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1606–07 (2000) (citations omitted).

214. *See* United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) ("That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system.").

215. *See* Somin, *supra* note 48, at 139 ("Even if clear statement rules are an inadequate substitute for substantive judicial review, they could still serve a useful function by giving Congress an incentive to draft clearer and less ambiguous laws. And it is certainly possible that they do restrict the growth of federal power slightly. These benefits might be sufficient to justify the continued use of federalism clear statement rules. Even if such rules have relatively few benefits, they also do not seem to impose significant costs.").

an expanded federalism clear-statement canon would not allow Congress to adequately regulate the modern economy.

Moreover, the *Chevron* Step Zero approach that the Court is currently headed down is more susceptible to manipulation than the expanded *Gregory* canon.[216] The functionalist balancing test of substep two of *Chevron* Step Zero invites manipulation, whereas a formalistic, expanded *Gregory* canon for administrative interpretations would only require courts to catalog which areas of regulation count as areas of traditional state regulation.

This, though, raises the second objection: courts may not be able to create a workable test for what counts as an area of traditional state regulation.[217] For example, in many respects, the Supreme Court's Commerce Clause jurisprudence has struggled in defining formalistic categories, such as what constitutes an area traditionally regulated by states,[218] and the Court in *Garcia* specifically overturned *National League of Cities v. Usery* because of this concern.[219] Given these difficulties, clear-statement canons could "amount to a 'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced,"[220] as "it is impossible to say that the substantive canons constrain the Court in the norm-charged cases."[221]

There are two significant responses to this objection. First, contrary to *Garcia*'s criticism that there is no workable definition for "area of

216. This point is illustrated best by *Rapanos v. United States*, 547 U.S. 715 (2006), where the Justices in the majority of *Gonzales v. Oregon*—who had protected federalism in that case through *Chevron* Step Zero—refused to protect federalism in *Rapanos* through a clear-statement canon. *See infra* notes 235–37 and accompanying text.

217. *See* Somin, *supra* note 48, at 135 ("This difficulty underscores the crucial point that defenders of the federalism clear statement rule lack a coherent theory that can determine where the rule should apply.").

218. *See* United States v. Morrison, 529 U.S. 598, 639–40 (2000) (Souter, J., dissenting) (observing that the history of the Commerce Clause "has shown that categorical exclusions have proven as unworkable in practice as they are unsupportable in theory"); *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause.").

219. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537–41 (1985).

220. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992).

221. William N. Eskridge, Jr. & Kevin S. Schwartz, Commentary, Chevron *and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623, 2632 (2006). *See also Garcia*, 469 U.S. at 546 ("Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.").

traditional state regulation," the Supreme Court uses this formalistic dichotomy anyway.[222] Courts should either abandon their reliance on areas of traditional state regulation or genuinely accept this dichotomy so that they can better define its scope.

If one believes that judges are simply using their policy preferences to invoke this federalism canon,[223] one solution would be to eliminate the use of the canon; but given the countervailing explanations presented throughout this Article, another solution would be for courts to join the debate and produce a workable definition for areas of traditional state regulation.[224] This solution is augmented by the fact that, after *Gonzales v. Oregon*, virtually every current Supreme Court Justice has at one time relied on the area-of-traditional-state-regulation dichotomy.[225]

Second, as described above, the costs of erring by incorrectly defining "area of traditional state regulation" are drastically reduced when discussing procedural limits applied exclusively in the administrative law context.[226] *Garcia*'s warning that "case-by-case development" would not "lead to a workable [formalistic federalism] standard"[227] is therefore undermined because not as much would be riding on a perfect definition of areas of traditional state regulation. Unlike when courts interpret the Commerce Clause, they can afford to experiment in finding the correct definition of "area of traditional state regulation" without prohibiting Congress from regulating the national economy.

Ultimately, it makes perfect sense to use *Gregory* to create a clear-statement canon for administrative interpretations made in areas of traditional state regulation. Given that the Supreme Court continues to use the area-of-traditional-state-regulation dichotomy, and the costs of

222. *See supra* note 27.

223. *See supra* note 221 and accompanying text.

224. Justice Scalia's answer has been to look for a narrower set of cases triggering this federalism clear-statement canon. As he explained in *Gonzales v. Oregon*, Justice Scalia would use a clear-statement canon for intrusions "upon an area traditionally reserved *exclusively* to the States." *See* Gonzales v. Oregon, 546 U.S. 243, 292 (2006) (Scalia, J., dissenting) (citing BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994)) (emphasis added).

225. The five Justices on the Rehnquist Court who supported the Chief Justice's federalist revolution relied on federalism clear-statement canons—usually over dissents by the remaining four Justices. *See, e.g.*, Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). In fact, Justice Souter provided the fifth vote supporting *Gregory*'s federalism clear-statement rule. Gregory v. Ashcroft, 501 U.S. 452 (1991). Then, in *Gonzales v. Oregon*, Justices Stevens, Souter, Ginsburg, Breyer, and O'Connor joined Justice Kennedy in relying heavily on the area-of-traditional-state-regulation dichotomy. *See* Gonzales v. Oregon, 546 U.S. at 274.

226. *See supra* notes 213–16 and accompanying text.

227. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 540 (1985).

incorrectly defining what counts as an area of traditional state regulation are drastically reduced by using a procedural limit that only applies to administrative interpretations, a clear-statement canon would provide meaningful protection of state autonomy from federal administrative encroachment.

D. APPLYING THE CLEAR-STATEMENT CANON FOR ADMINISTRATIVE INTERPRETATIONS MADE IN AREAS TRADITIONALLY REGULATED BY THE STATES TO RECENT SUPREME COURT CASES

This section briefly shows how this expanded clear-statement canon for administrative interpretations provides a single, coherent doctrine for protecting state autonomy by applying the canon to three recent Supreme Court cases: *Gonzales v. Oregon*, *Rapanos v. United States*,[228] and *AT&T Corp. v. Iowa Utilities Board*.[229] *Gonzales v. Oregon* and *Rapanos* make for an intriguing comparison and highlight how indeterminate the Supreme Court's current approach to federalism concerns in statutory construction really is. *Iowa Utilities Board* is also a timely example, even though it was decided nine years ago, because the case involved federalism concerns related to Federal Communications Commission ("FCC") regulations of local telephone service, and the Supreme Court has its eye on federalism issues in the telecommunications context.[230]

Returning to our illustrative case, *Gonzales v. Oregon*, it should be apparent that a clear-statement canon for administrative interpretations made in areas traditionally regulated by the states would have invalidated the Ashcroft Directive without reference to the complex *Chevron* Step Zero doctrine or a "strained textual analysis" of the CSA.[231] *Gonzales v. Oregon* explicitly described the use of controlled substances to end a person's life as an "area[] traditionally supervised by the States' police power."[232] Given that the case involved an administrative interpretation, the Ashcroft

228. Rapanos v. United States, 547 U.S. 715 (2006).

229. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

230. The Court called for the views of the Solicitor General in a case addressing whether FCC regulations related to local telephone service preempt state laws, although certiorari was ultimately denied. Nat'l Ass'n of State Util. Consumer Advocates v. FCC, 457 F.3d 1238 (11th Cir. 2006), *cert. denied*, 128 S. Ct. 1119 (2008) (No. 06-1184); Supreme Court of the United States, Docket for 06-1184, http://supremecourtus.gov/docket/06-1184.htm (last visited Nov. 5, 2008).

231. *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 361, 362 (2006). *See also* Gersen, *supra* note 21, at 244; Sunstein, Chevron *Step Zero*, *supra* note 16, at 245 n.24 (suggesting that *Gonzales v. Oregon* "may depend on a nondelegation canon to the effect that federal intrusions on state authority must be explicit").

232. Gonzales v. Oregon, 546 U.S. 243, 274 (2006).

Directive, this would trigger the clear-statement canon proposed by this Article. Then, the only question would have been whether the CSA provided a clear statement giving the Attorney General the power to issue the Ashcroft Directive.

As the previously quoted portions of the opinion show,[233] the Court would have concluded that there is nothing in the CSA explicitly stating that the Attorney General has the power to regulate areas of traditional state regulation, so the Ashcroft Directive would have been struck down under the canon proposed by this Article. There would have been no need for a strained reading of the CSA or references to *Chevron* Step Zero. In fact, had *Gonzales v. Oregon* adopted a clear-statement canon for administrative interpretations made in areas of traditional state regulation instead of relying on *Chevron* Step Zero, the Supreme Court could have announced a uniform doctrine for protecting state autonomy from federal administrative encroachment. Given *Chevron* Step Zero's difficulties in protecting federalism, there is a lot to be said for Justice Thomas's point that the majority selectively applied principles of federalism in *Gonzales v. Oregon* without binding itself to a rule, such as a clear-statement canon, that could be applied in future cases.[234]

Indeed, later that Term, the Court again addressed federalism in the context of administrative law in *Rapanos*. The issue in *Rapanos* was whether the Clean Water Act permitted the U.S. Army Corps of Engineers to regulate "immense stretches of intrastate land."[235] The Court struck down the Corps's regulation, and a four-Justice plurality invoked a clear-statement canon for "an unprecedented intrusion into traditional state authority."[236] Reinforcing Justice Thomas's point in *Gonzales v. Oregon*, the Justices in the majority of *Gonzales v. Oregon* (Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer) all refused to apply a federalism clear-statement canon in *Rapanos*.[237] Instead of a fractured 4-1-4 decision, *Rapanos* could have been decided under the plurality's rationale that Congress had not provided a clear statement in the Clean Water Act permitting the Corps's regulations to encroach on an area traditionally regulated by the states. The clear-statement canon proposed by this Article

233. *See supra* notes 100–07 and accompanying text.

234. *See* Gonzales v. Oregon, 546 U.S. at 300–01 (Thomas, J., dissenting).

235. Rapanos v. United States, 547 U.S. 715, 723, 738 (2006) (plurality opinion).

236. *Id.* at 738. The plurality, though, simply used the canon as an alternative argument to its main argument denying *Chevron* deference. *See id.* at 737–38 (invoking clear-statement canons only after determining that a statute was unambiguous at *Chevron* Step One). Interestingly, the three dissenting Justices in *Gonzales v. Oregon* (plus the newly confirmed Justice Alito) made up this *Rapanos* plurality.

237. *See id.* at 776 (Kennedy, J., concurring); *id.* at 803–04 (Stevens, J., dissenting).

would certainly have supported such a result.

When analyzed together, *Rapanos* and *Gonzales v. Oregon* are intriguing. Between the two cases, each Justice recognized federalism concerns and employed a procedural limit on congressional power to prevent federal administrative encroachment on state autonomy; but no coherent doctrine emerged from the two cases. Even though the canon proposed by this Article would reconcile both cases, all nine Justices in *Gonzales v. Oregon* and five Justices in *Rapanos* refused to apply a federalism clear-statement canon. This lack of application could simply stem from the underdevelopment of clear-statement canons. If so, courts can begin to develop federalism clear-statement canons in the administrative law context by appreciating that such canons are premised on the underenforcement of federalism and the nondelegation doctrine.

Iowa Utilities Board also highlights how underdeveloped federalism clear-statement canons are in administrative law. *Iowa Utilities Board* held that the Telecommunications Act of 1996 gave the FCC rulemaking authority to implement the local competition provisions of the Act.[238] This decision marked a drastic change in the federal-state balance of power over phone service, an area that had been traditionally regulated by the states. As Justice Thomas's dissent (joined by Chief Justice Rehnquist and Justice Breyer) in *Iowa Utilities Board* made clear, since the telephone was invented in 1876, "States have been, for all practical purposes, exclusively responsible for regulating intrastate telephone service."[239] While the Act did alter that "century-old tradition," "the Act [did] not *unambiguously indicate* that Congress intended for such a transfer to occur."[240] Therefore, the dissent would not have given "the FCC unbounded authority to regulate a matter of state concern."[241]

Justice Thomas's dissent in *Iowa Utilities Board* did not expressly invoke a clear-statement canon like the one proposed by this Article, but it was certainly headed down that path. After determining that local phone service was an area traditionally regulated by the states, the dissenters wanted an unambiguous indication—a clear statement—that Congress delegated power to the FCC to regulate local phone service. This is precisely the same approach that could have been used in *Gonzales v. Oregon* and *Rapanos* to protect federalism.

238. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 377–78 (1999).
239. *Id.* at 402 (Thomas, J., concurring in part and dissenting in part).
240. *Id.* (emphasis added).
241. *Id.* at 412.

As *Gonzales v. Oregon*, *Rapanos*, and *Iowa Utilities Board* confirm, the Supreme Court does not have a consistent approach to dealing with federalism concerns in administrative law. Nonetheless, both the Supreme Court and lower courts could bring consistency to this increasingly important area of the law by applying a clear-statement canon for administrative interpretations made in areas traditionally regulated by the states.

* * *

Admittedly, a clear-statement canon triggered by administrative interpretations made in areas of traditional state regulation could infuse arbitrariness and unpredictability into statutory construction while expanding the power of courts. These are meaningful objections, but they must be weighed against the costs of systematic underenforcement of federalism. Currently, unelected officials in federal agencies have the significant power to encroach on state autonomy. This reduces the ability of states to respond to the divisive needs of a diverse citizenry, eliminates the ability of states to serve as experimental policy laboratories, decreases public participation in democracy, and undermines liberty. Also, *Gonzales v. Oregon*'s method of protecting federalism from administrative encroachment through *Chevron* Step Zero would increase arbitrariness and unpredictability more than the canon proposed by this Article.

Gonzales v. Oregon was right to look for procedural limits on congressional power to protect state autonomy from federal administrative encroachment. But the next step in crafting an effective procedural limit is to utilize clear-statement canons of statutory construction in order to safeguard federalism in a more uniform and expansive manner than *Chevron* Step Zero ever could. Having already identified federalism-based clear-statement canons, courts should now develop the principles behind such canons to create an additional canon that protects state autonomy from federal administrative encroachment.

VII. CONCLUSION

Modern federalism cases will be full of complex doctrinal choices, but these cases will not be as flashy as the Commerce Clause and Tenth Amendment cases decided by the Rehnquist Court.[242] After *Gonzales v.*

242. *See*, *e.g.*, Printz v. United States, 521 U.S. 898 (1997) (holding that Congress unconstitutionally commandeered state officers); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress could not abrogate states' sovereign immunity under the Indian Commerce Clause); United States v. Lopez, 514 U.S. 549 (1995) (restricting Congress's power under the

Raich in 2005, the days of those cases may be over. Instead, the debates over federalism will be resolved in cases of statutory construction, which have become the "true test of federalist principle."[243] Given the pervasiveness of federal administrative regulation, most of these statutory construction cases will probably appear in the context of administrative law.

Gonzales v. Oregon may therefore be remembered as a much more important federalism case than recent history suggests.[244] *Gonzales v. Oregon* represents a fork in the road, where courts will have to choose which doctrine they use to protect "Our Federalism"[245] from administrative encroachment. On that particular day, the Supreme Court protected state autonomy through *Chevron* Step Zero, a doctrine that was never designed to protect federalism.[246] The Court's underlying concerns in *Gonzales v. Oregon*, however, combined with those principles repeatedly applied by the Court in other situations, provide a solid foundation for courts to develop federalism clear-statement canons in the context of administrative law. Accordingly, courts should use this foundation to create a federalism-based clear-statement canon of statutory construction for administrative interpretations made in areas of traditional state regulation.

Going forward, the Roberts Court will have to address whether the Rehnquist Court's federalist revolution was merely a blip on our constitutional radar screen or an enduring constitutional revolution. Regardless of whether the Roberts Court places substantive limits on Congress's enumerated powers or continues to reject the nondelegation doctrine, an appreciation that those two constitutional norms are underenforced can lead to doctrines that provide meaningful protection of state autonomy. Such an appreciation justifies expanding federalism-based clear-statement canons of statutory construction for administrative interpretations.

Commerce Clause); New York v. United States, 505 U.S. 144 (1992) (holding that Congress unconstitutionally commandeered a state legislature).

243. Egelhoff v. Egelhoff *ex rel.* Breiner, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting).

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

245. Younger v. Harris, 401 U.S. 37, 44 (1971).

246. Gonzales v. Oregon, 546 U.S. 243 (2006).