OUT OF THE MOUTH OF STATES: DEFERENCE TO STATE ACTION FINDING EFFECT IN FEDERAL LAW

*BY DAVID B. EDWARDS**

INTRODUCTION

Absent an applicable federal statute criminalizing a particular action, the federal criminal law of a federal enclave directly incorporates the criminal law of the individual state in which the enclave is located.[1] If the Wyoming legislature defines murder differently from the Kansas legislature, the federal crime of murder is different in the federal enclaves located in Kansas and Wyoming.[2] Therefore, unless Congress has passed substantive federal criminal law in a particular area, state legislatures are able to prevent federal criminal law from operating uniformly throughout the United States simply by enacting their own criminal law. This system reflects the fact that the goal of Congress is often uniformity between state law and federal law within a given state rather than federal uniformity across the entire country.[3]

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1. *See* 18 U.S.C. § 13 (2000); United States v. Sharpnack, 355 U.S. 286, 293–94 (1958). A federal enclave is "[t]erritory or land that a state has ceded to the United States. Examples of federal enclaves are military bases, national parks, federally administered highways, and federal Indian reservations. The U.S. government has exclusive authority and jurisdiction over federal enclaves." BLACK'S LAW DICTIONARY 568 (8th ed. 2004).

2. There are several federal statutes criminalizing the various degrees of murder, so the incorporation of state murder statutes is purely illustrative. *See* Lewis v. United States, 523 U.S. 155, 158 (1998) (holding that the ACA did not incorporate a state murder statute because a federal enactment punished substantially similar criminal activity).

3. *See, e.g.*, *Sharpnack*, 355 U.S. at 293–94 (describing Congress's decision to conform federal criminal law to state law rather than enacting uniform federal legislation).

There is little question of the power of Congress to forgo reliance on states and create a more uniform federal law.[4] However, utilization of state action has long been a mechanism through which the federal government has implemented a significant portion of federal law. Instead of expounding every minute detail, preempting all state action within its constitutional reach, the federal government has allowed the states leeway to be laboratories of experimentation.[5] The Supreme Court has readily upheld this congressional approach even though allowing for state action within a federal statute dredges up many questions relating to federalism and separation of powers.[6]

Specifically, it is fully within Congress's power to decide that states' experience and comprehensive law should find effect in federal enactments, empowering purely state action to have widespread federal effect.[7] This holds true even when Congress acts prospectively without knowing the details of future state action.[8] Under these types of federal statutes, state action will be given federal effect by courts[9] unless the state action is repugnant to the

4. *See* New York v. United States, 505 U.S. 144, 159–60 (1992) (noting Congress's ability to preempt state law under the Supremacy Clause). *But see* United States v. Morrison, 529 U.S. 598, 612–16 (2000) (citing United States v. Lopez, 514 U.S. 549, 563 (1995)) (explaining that there are limits on Congress's use of the Commerce Clause power).

5. *See* FERC v. Mississippi, 456 U.S. 742, 787–89 (1982) (O'Connor, J., concurring in part and dissenting in part) (providing examples of successful state experimentation); New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

6. *See New York*, 505 U.S. at 188 ("The Federal Government may not compel the states to enact or administer a federal regulatory program. . . . The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes."); *see also Sharpnack*, 355 U.S. at 293–94; Jerome v. United States, 318 U.S. 101, 104 (1943) ("At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law.").

7. *See Sharpnack*, 355 U.S. at 293–94.

8. *See id.*

9. *See id.* at 293 ("Whether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves."); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (citing cases for the proposition that the judiciary must give legal effect to the expressed intent of Congress); *Jerome*, 318 U.S. at 104 ("But we must generally assume, in the absence of a plain indication to

framework of the federal statute, in which case the state action will be per se invalid.[10]

Unlike Congress, which has been willing to rely on state action, the judiciary does not generally defer to other institutions. It is traditionally the province of the judiciary to interpret the law.[11] However, in interpreting federal statutes, the judiciary primarily strives to give effect to Congress's meaning and intent.[12] When a statute is ambiguous, the judiciary uses tools of statutory interpretation to determine Congress's most likely meaning.[13] This is the way the constitutional baseline operates: Congress creates the law, the judiciary interprets it. However, Congress is often intentionally ambiguous, a necessary byproduct of its utilization of entities outside itself, such as agencies, to fill in the particulars of a general statutory framework.[14] When federal administrative agencies are involved, the judiciary is less likely to make itself the sole determiner of the ambiguity, but is instead open to the possibility that deferring to agency interpretations of federal law may be the surest route to implementing congressional intent.[15] Under current law, however, this type of deference by the judiciary, referred to as *Chevron* defer-

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the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide and at times on the fact that the federal program would be impaired if state law were to control.") (citation omitted).

10. *See* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108 (1991) ("[F]ederal courts should incorporate *state* law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute."); North Dakota *ex rel.* Flaherty v. Hanson, 215 U.S. 515, 525 (1910) ("[A] state may not so exert its police power as to directly hamper or destroy a lawful authority of the Government of the United States."). *But see* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995) ("And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law.").

11. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

12. *See Chevron*, 467 U.S. at 842–43 (describing interpretation by the courts as the baseline, with an exception in this particular case for the existence of an interpretation by a federal agency).

13. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353–54 (1990).

14. *See Chevron*, 467 U.S. at 843–44.

15. *See id.*

ence, applies only when Congress delegates to federal administrative agencies[16] and not when it delegates to or relies on state action.

Under current law, the judiciary will find state action controlling in a federal statute when Congress has expressly stated its intent for this result.[17] The judiciary, however, does not give deference to state action when Congress's intent is ambiguous.[18] The gray area between the extremes of Congress's granting full authority to the states, and preempting all state law, is the subject of this Note. This realm exists where state action provides some of the legal substance of a federal statute but Congress has not clearly expressed its intent on what the full effect of that state action should be in regards to the federal statute at issue. The question explored by this Note is: given that Congress has the power to affirmatively preempt state action or otherwise define the bounds within which states may operate to affect federal law, should courts give deference to a state action which becomes the content of a federal statute only through congressional action? I believe they should. In this Note, I propose a new form of deference, "Passive Use Deference," to be used by courts when evaluating state action where Congress has made the substance of a federal statute dependant on state law.

The next six sections of this Note provide an in-depth analysis of Passive Use Deference. Section I introduces *Wyoming ex rel. Crank v. United States* ("*Wyoming v. United States*"),[19] a case recently decided in the Federal District Court of Wyoming that illustrates the need for a clearly defined judicial standard of deference regarding state action finding effect in federal law. In the case, Congress had given both the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATF") and the individual states power to develop the substance of the Gun Control Act of 1968.[20] In question was Wyoming's power to pass legislation that would affect the application of federal law.[21] Section II examines the historical and legal background of

16. *See id.* at 844 ("[This practice] has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.") (internal quotation marks and citation omitted).

17. *See* cases cited *supra* note 9. R

18. *See, e.g.*, Jerome v. United States, 318 U.S. 101, 104 (1943).

19. No. 06-CV-0111-J (D. Wyo. May 7, 2007).

20. *See* Brief of Appellant at 7–8, *Wyoming*, No. 06-CV-0111-J; Response Brief of Defendants at 7, *Wyoming*, No. 06-CV-0111-J.

21. *See Wyoming*, No. 06-CV-0111-J, slip op. at 18–19.

judicial deference and the structure of government. Although Passive Use Deference cannot be found in the text of the Constitution, this section discusses how it is as well grounded as other accepted aspects of our practical, modern legal system. To demonstrate this, Section II explores the judiciary's deference to interpretations of federal law by other governmental entities, the ample evidence of power-bleeding from one government institution to another, and the modern increase of federal and state cooperation in achieving complicated goals. Section III parses the different interactions between the federal and state governments so that one particular interaction may be more closely examined: passive federal use of state action. Passive federal use is where deference to state action finds its most constitutionally sound foothold. The state actor functions as originally intended by the Constitution, and the action of the federal government gives the state action federal effect.

After limiting the discussion to passive federal use, Section IV proposes a new form of deference to state action: Passive Use Deference. Passive Use Deference is a mix between the *Chevron* deference given by courts to administrative agencies and the general judicial review doctrine of rational basis deference, the strengths of one buttressing the weaknesses of the other for use outside their historical applications. Section IV also addresses an inherent restriction on Passive Use Deference: state action cannot defeat the purpose of federal legislation. Section V applies Passive Use Deference to *Wyoming v. United States* to demonstrate the difference in outcome compared to the current choices available to federal courts. Section VI concludes by examining the possible wider implications of the introduction of Passive Use Deference.

I.
CASE STUDY

Before I introduce Passive Use Deference, the basic facts of *Wyoming v. United States* illustrate why the entire exercise is necessary. *Wyoming v. United States* is a case of dueling interpretations of federal law. On one side, the state of Wyoming, a sovereign legislative authority, enacts laws within the framework of a federal statute.[22] On the other, the BATF, a federal administrative agency, operates as the designated administrator of the same federal statute.[23]

22. *See* Brief of Appellant, *supra* note 20, at 7-8; Response Briefs of Defendants, *supra* note 20, at 7. R R

23. *See* Brief of Appellant, *supra* note 20, at 7-8; Response Briefs of Defendants, *supra* note 20, at 7. R R

In 1996, Congress amended the Gun Control Act of 1968 ("GCA")[24] to close what it saw as a loophole allowing violent criminals to possess firearms.[25] That amendment added conviction for misdemeanor domestic abuse to a list of conditions restricting the possession of firearms.[26] However, the amendment was paired with a savings clause of sorts, allowing those previously convicted to regain their rights of possession if their convictions are expunged or set aside, they are pardoned, or their civil rights are otherwise restored.[27]

Wyoming's reaction to the amendment was not especially swift (occurring eight years later), but it was certainly decisive. The Wyoming state legislature created a new and directed type of expungement solely for the "purposes of restoring firearm rights that have been lost to persons convicted of misdemeanors."[28] The new expungement statute allows one-time misdemeanor offenders to petition to have their records sealed and expunged for the purposes of restoring firearm rights.[29] All other impacts of the conviction, including implications for enhancement of penalties associated with future convictions, are left untouched by the provision.[30] In effect, Wyoming fashioned an elaborate system with the singular function of returning firearm rights to a subset of criminals on a case-by-case basis.

The BATF did not look kindly on Wyoming's newly minted creation. In an August 2004 letter, the BATF informed the Wyoming Attorney General that the Wyoming statute did not act as an expungement under federal law, and that any person invoking the provision would "continue to be prohibited, by 18 U.S.C. § 922(g)(9), from shipping, transporting, receiving, or possessing firearms and ammunition."[31] The BATF further upped the stakes by alerting Wyoming that if the statute were not changed or its ef-

24. Gun Control Act of 1968, Pub. L. No. 90-618 (1968), *amended by* Pub. L. 104-208, Div. A, Title I, § 101(f), 110 Stat. 3009–371 (1996) (current version at 18 U.S.C. §§ 921–930 (2000)).

25. *See* 142 CONG. REC. 22,956, 22,988 (1996) (statement of Sen. Feinstein) ("Outdated or ineffective laws often treat domestic violence as a lesser offense. Sometimes, victims are reluctant to cooperate for fear of more violence. And sometimes victims just don't want to pull themselves through the ordeal of a trial. And finally, plea bargains often result in misdemeanor convictions for what are really felony crimes.").

26. 18 U.S.C. § 922(g)(9) (2000).

27. *Id.* § 921(a)(33)(B)(ii).

28. WYO. STAT. ANN. § 7-13-1501(k) (2007).

29. *Id.* § 7-13-1501(a)(ii), (g).

30. *Id.* § 7-13-1501(k).

31. Brief of Appellant, *supra* note 20, at 3. R

fects nullified, Wyoming's concealed-carry weapons ("CCW") permits would no longer be honored as an exception to the National Instant Criminal Background Check System ("NICS").[32] Under this exception, firearm dealers are legally obligated to accept Wyoming's CCW permits as viable alternatives to the NICS system.[33]

Wyoming's refusal to comply with the BATF's interpretation would result in over 10,000 CCW permit holders' losing their presumptive pass under the NICS system as well as the possible federal prosecution of any person "expunged" under the Wyoming statute.[34] Wyoming filed suit against the BATF claiming that the agency's interpretation of the state statute and decision to refuse to honor CCW permits were arbitrary and capricious actions, and that the BATF's ultimatum to Wyoming to choose between a Wyoming statute that would not be federally honored and the federal acceptance of Wyoming CCW permits was federal commandeering in violation of the Tenth Amendment.[35]

The ultimate arguments made by the parties are informative only inasmuch as they develop two disparate visions of how the GCA should be interpreted. Wyoming's vision is illustrated by its continual references to Congress's reliance on state action and the non-uniform results it intended to accept.[36] The BATF instead paints a picture of the uniform rule of federal law with standards to be met by states, presided over by an administrative body given deference in its decisions.[37]

Under the current law, the court in *Wyoming v. United States* was entitled to independently interpret the meaning of "expungement" through statutory interpretation or, if appropriate, defer to the BATF's interpretation.[38] The court ultimately sided with the BATF,

32. *See id.* at 2. Under this exception, firearm dealers are legally obligated to accept Wyoming's CCW permits as viable alternatives to the NICS system. *See* 18 U.S.C. § 922(t)(3)(A) (2000).

33. *See* 18 U.S.C. § 922(t)(3)(A) (2000).

34. *See* Affidavit of Christopher W. Lynch at 2, Wyoming *ex rel.* Crank v. United States, No. 06-CV-0111-J (D. Wyo. May 7, 2007). .

35. *See* Brief of Appellant, *supra* note 20, at 7, 17, 21. R

36. *See, e.g.*, *id.* at 10–11.

37. *See* Response Brief of Defendants, *supra* note 20, at 11–12, 16, 22. R

38. In this case, the BATF did not argue for *Chevron* deference. *See Wyoming*, No. 06-CV-0111-J, slip op. at 32–33. The reason for this omission is likely that the agency believed it would not garner deference because of the informal nature of its official action. Policy letters, like the ones issued here by the BATF, have been held to not amount to the type of formal procedure entitled to *Chevron* deference. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000). The agency action did receive *Skidmore* deference, a related but much lesser form of deference. *See Wyoming*, No. 06-CV-0111-J, slip op. at 32–33; *see also* United States v. Mead Corp., 533

holding that although "[s]tate law may determine whether a person's rights have been restored or their conviction expunged, under state law, . . . federal law determines whether that procedure is sufficient for federal purposes."[39] This decision and the current law leave the states—the creators of the law in question and the choice of Congress to fill out the federal law—out of the decision entirely. The District Court of Wyoming, therefore, in its attempt to uphold federal law, has circumvented the will of Congress to rely on state law. To properly take into account the power and position of all the institutional players, it is necessary to consider whether states should also be given deference in these circumstances.

II.
BACKGROUND

Engineering a new form of deference is a weighty task. Deference changes the power structure for all of the parties involved, which, depending on the statute, may be every branch and level of the government. Such a change in status quo does not necessarily implement a different conception of government, turning legal reasoning on its head. Rather it is an extension of the modern changes in the relationships among the various government institutions that have already occurred in our legal system. Three particular aspects of these modern changes are important to the foundation of this Note: the concept and history of judicial deference, the bleeding of power between government institutions, and the advent of cooperative structures between the federal and state governments. Passive Use Deference, introduced by this Note, is a form of deference, power-bleeding, and cooperative federalism all at once. As such, it relies heavily on the existence and propriety of all three, which I examine below.

A. Deference

The judicial branch has self-consciously struggled with two related problems since its inception: its correct institutional place within the functioning of government and its relative lack of expertise.[40] The question of the proper role of the judiciary has raged

U.S. 218, 234–35 (2001) (explaining reasoning and application of *Skidmore* deference to informal agency action). However, *Skidmore* deference is not relevant to the argument made in this Note.

39. *Wyoming*, No. 06-CV-0111-J, slip op. at 24–25.

40. *See* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 24–25 (2006).

since Chief Justice Marshall fathered judicial review.[41] The Court has asserted that the judiciary has "an obligation to insure that constitutional bounds are not overreached[;] [they] may not act as judges as [they] might as legislatures."[42] The founders designed the judiciary as a much-needed independent check on the representative branches of government, free from political sway and the passions of the day.[43] But this freedom simultaneously enabled the judiciary to be the worst sort of tyrant, creating a dilemma, described as the countermajoritarian difficulty, for conscientious judges.[44] Because courts are not representative bodies, their "judgment is best informed, and therefore most dependable, within narrow limits."[45] Instead of "resolution by decree,"[46] the courts, through the self-imposed restraint of deference, allow the legitimate policy choices of representative bodies to govern, reserving judicial action to define the outside limits of permissible action.[47]

A competing and more practical concern for judges is their lack of ability and time to adjudicate matters requiring expert

41. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* United States v. Morrison, 529 U.S. 598, 617 n.7 (2000) ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 431–33 (1998) (encapsulating the history of judicial review and the Court's varying power since its inception) [hereinafter Friedman, *Part One*]; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1452–55 (2001) (discussing the legal and social legitimacy of judicial review); William N. Eskridge, Jr. & Phillip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631–32 (1992) (surveying more recent developments in judicial review and proposing that although the Court has been more reluctant to overturn legislation it has developed different means of exerting its power).

42. Gregg v. Georgia, 428 U.S. 153, 174–75 (1976).

43. *See* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the judiciary as a necessary check on the representative branches, preventing individual representatives from "substitut[ing] their *will* [for] that of their constituents").

44. *See generally* Friedman, *Part One*, *supra* note 41 (reviewing the "countermajoritarian difficulty"). R

45. Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); *see also* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (discussing the repudiation of the intrusiveness of the judiciary during the *Lochner* era).

46. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349–50 (1987) ("[Deference to prison officials] avoids unnecessary intrusion of the judiciary into problems particularly ill suited to 'resolution by decree.'").

47. *See* Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1715–17 (2001).

knowledge and investigation.[48] In the process of creating a law, legislatures explore its need, foundation, and possible effects through committees, testimony, and experts. The judiciary, while having many of the same tools at its disposal, uses them only in a narrow, case-by-case adjudicatory context[49] and is not as able to fully develop the underlying facts or policies.[50] The complexity of expertise has increased dramatically as the government has divided action into the smaller and more expert sections of administrative agencies with knowledge and investigatory powers beyond even that generally invoked by Congress.[51] In response, the judiciary has often deferred to those institutions, including legislatures and administrative agencies, with a special expertise or knowledge that the judiciary does not possess.[52]

Two forms of deference to expertise are particularly pertinent in the following discussion and form the basis of the Passive Use Deference I propose later: rational basis and *Chevron* deference. Rational basis deference was developed in response to early twentieth-century actions by the Supreme Court holding "laws unconstitutional when they believe[d] the legislature [had] acted unwisely."[53] The Court subsequently repudiated this interpretation of the Constitution and explained that it would allow legislatures free rein in law-making so long as they did not violate the Constitution;[54] legislation will be "presumed to be valid and will be sustained if . . . the statute is rationally related to a legitimate state interest."[55] As the Court has stated, "[w]e have returned to the original constitutional

48. *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1005–06 (1999) ("The Court recognizes that 'the nature of the judicial process makes it an inappropriate forum for the determination of complex factual question[s] of the kind so often involved in constitutional adjudication,' and thus, deference is the proper method of judicial review given the limitations of the judiciary." (quoting Oregon v. Mitchell, 400 U.S. 112, 247-48 (1970) (Brennan, White, & Marshall, JJ., concurring in part and dissenting in part))).

49. *See* U.S. CONST. art. III, § 2, cl. 1 (extending judicial power to "cases" and "controversies").

50. *See* ROOSEVELT, *supra* note 40, at 24–25. R

51. *See* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 481–82 (2005) (describing federal agencies as specialists devoting significant resources and expertise to "particularly difficult or intractable economic or social problems" beyond the capacity of Congress).

52. *See* ROOSEVELT, *supra* note 40, at 25 ("So even if the goal is simply to get R the right answer, the Court may do better in the ordinary case by deferring to . . . implicit legislative judgment . . . .").

53. *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

54. *See id.*

55. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."[56]

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[57] introduced *Chevron* deference in 1984, although the case was actually the culmination of a long judicial practice of affording administrative agencies some deference in their actions.[58] *Chevron* held that courts should defer to the reasonable decisions of federal agencies when the agency has been given power by Congress to administer the federal statute in question.[59] Subsequent Supreme Court decisions have made the availability of *Chevron* deference depend on fairly formal actions by the federal agencies, but the core concept has changed little in three decades.[60]

Courts' giving deference to other bodies' interpretation of federal law is often criticized as the judiciary's abdicating its constitutional responsibility to engage in judicial review.[61] Critics argue that judicial deference elevates practicality and necessity over constitutional principle, stunts the growth of the judiciary, allows the representative branches of government to become static, and conflates evaluation of law with its activist creation.[62] Hindsight and modern moral standards make deference an easy target when considering many cases in which it has played a major role. *Plessy v. Ferguson*, relying on the expertise and experience of the legislature in refusing to overturn legislation promoting segregation even after the Fourteenth Amendment,[63] amply illustrates that subsequent developments in constitutional law and moral ideals can make deference seem unreasonable. However, though commentators have questioned the intelligence of, and need for, the deference principle, actual use by the judiciary continues.[64] Whether the continued

56. *Ferguson*, 372 U.S. at 730.

57. 467 U.S. 837 (1984).

58. *See id.* at 843–45.

59. *Id.*

60. *See* United States v. Mead Corp., 533 U.S. 218, 229–30 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000).

61. *See, e.g.*, Solove, *supra* note 48, at 1009 ("Most critiques of deference talk past the justifications for deference and merely emphasize that it is an abdication of the judiciary's responsibility of engaging in judicial review."). R

62. *See, e.g.*, *id.* at 1009–21 (evaluating the arguments against the various justifications for judicial deference).

63. 163 U.S. 537, 550–51 (1896).

64. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 247 (6th ed. 2006) ("As of December 2005, *Chevron* had been cited in federal courts nearly 8000 times—far more than three far better known and much older cases, *Brown v. Board of Education* (1829 cites), *Roe v. Wade* (1801 cites), and *Mar-*

use of deference is due to theoretical or practical concerns, it has continually led to a hands-off approach by the courts.[65]

B. Power-Bleeding

The particular powers of a segment, level, or branch of government are almost never static. The "hydraulic" pressure inherent within each of these governmental units exerts influence on the others.[66] Consequently, powers arguably not originally intended to be exercised by their new masters bleed over time from one unit to the other.[67] The history of the Interstate Commerce Clause[68] gives the most concrete example of this pressure. Originally the clause was fairly circumscribed, but has now, with very rare exception, become a nearly unlimited congressional power.[69] Other examples include the judiciary's asserting itself through judicial review,[70] the executive's attempting to become more prominent through reliance on the Vesting Clause,[71] Congress's utilization of the Neces-

bury v. Madison (1559 cites)—and indeed far more often than the three of them combined! In terms of sheer number of citations, *Chevron* may well qualify as the most influential case in the history of American public law.").

65. *See* Solove, *supra* note 48, at 968 ("[J]udicial deference has escalated, in part, to help alleviate the caseload crisis.") (citing RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 176 (1996)). R

66. *See* Mistretta v. United States, 488 U.S. 361, 382 (1989).

67. *See*, *e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) ("[The Constitution] must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.").

68. U.S. CONST. art. I, § 8, cl. 3.

69. *See* United States v. Morrison, 529 U.S. 598, 607–08 (2000) (discussing the expansion of congressional power through the changes in the Interstate Commerce Clause, but limiting its effect when applied to crimes without an interstate character); United States v. Lopez, 514 U.S. 549, 552–57 (1995) (examining the progression of the Interstate Commerce Clause, but holding that the statute at issue was unconstitutional because Congress had not included a jurisdictional hook demonstrating the effect on interstate commerce). *See generally* Bradford C. Mank, Note, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375 (2007) (examining the current state of the Commerce Clause and the effects of *Lopez* and *Morrison*).

70. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

71. U.S. CONST. art. II, § 1, cl. 1; *see, e.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 30–32 (1866) (rejecting one such attempt and saying "[m]uch confusion of ideas has been produced by mistaking executive power for kingly power").

sary and Proper Clause to increase its reach,[72] and the states' claiming their stake through the police power.[73] There are two basic forms of power-bleeding: between branches of the same level of government (horizontal) and between different levels of government (vertical).

The modern administrative agency is the prototypical model of the horizontal bleeding of power across the federal government. Forms of the administrative agency differ, but in general, Congress grants control of a federal statute to an agency in the executive branch, empowering the agency to implement the statute through regulations or rulings.[74] The rise of the "fourth branch" of federal government was long in coming, but its actions have been ubiquitous for more than half a century.[75] Administrative agencies are not mentioned in the Constitution, but the pragmatism of modern life has brought them into full force.[76] When administrative agencies have been challenged on constitutional grounds, the Supreme Court has focused the majority of its energy on the creation of governing principles rather than questioning their legitimacy.[77] Even in laying ground rules to check unwarranted transfers of power, only two delegations of authority have been held unconstitutional, both in 1935.[78] Recent judicial action has constricted the technical

72. U.S. CONST. art. I, § 8, cl. 18; *see, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324–25 (1819).

73. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996).

74. *See* Masur, *supra* note 51, at 481–82; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581–83 (1984). R

75. *See* FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.") (citation omitted).

76. *See* Patrick M. Garry, *The Unannounced Revolution: How the Court has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 700–01 (2006).

77. *See* Masur, *supra* note 51, at 494–98; *cf.* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 62–63 (1990) (explaining that courts have reined in the agencies so infrequently that Congress has reacted by trying to control the growth of the administrative agencies). R

78. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire econ-

aspects of delegation to agencies, requiring a more explicit showing of congressional intent, but has done little, if anything, to call the appropriateness of delegation into question.[79]

In addition to the horizontal power-bleeding between the legislature and agencies, there is also vertical power-bleeding through the federal incorporation of state law. This is handily illustrated by the substance and history of the Assimilative Crimes Act ("ACA"), discussed in *United States v. Sharpnack*.[80] The ACA effectively turns the bulk of federal criminal law applied in federal enclaves over to the legislature of the state in which the enclave is located.[81] As alluded to in the Introduction, the federal crime of murder in an enclave would be copied directly from the state murder statute, but applied as federal law. Initially, beginning in 1825, the assimilation was static, incorporating by reference only those laws in force at the time of the latest congressional reenactment of the ACA.[82] In 1948, however, Congress decided to implement constant conformity of federal enclaves to the laws of their host states, amending the ACA to make it dynamic, incorporating even state laws passed subsequent to the most recently enacted ACA.[83]

The Supreme Court, in *Sharpnack*, upheld this concept of constant conformity created through dynamic incorporation.[84] The Court concluded that through dynamic incorporation Congress had merely exercised its power to prospectively adopt future state law.[85] *Sharpnack* effectively authorized a highly specialized bleeding of power from Congress to the states, allowing states to affect federal law by doing nothing more than enacting local law.[86] The Court did not blindly accept that any state law proffered as valid was ripe for incorporation, but first inquired whether a state law was

omy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935))).

79. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (holding that while express delegation by Congress is generally required to find congressional intent that the agency's interpretations have the force of law, express delegation is not always necessary); Christensen v. Harris County, 529 U.S. 576, 587 (2000) (stating that an agency's informal decision-making does not have "the force of law").

80. 355 U.S. 286, 286 (1958).

81. *See id.* at 289, 291.

82. *See id.* at 291–92 (surveying static incorporation through multiple incarnations of the ACA from 1825 to 1948).

83. *See id.* at 292.

84. *Id.* at 297.

85. *Id.* at 293–94.

86. *See id.* at 292–93.

inconsistent with the federal statute or the policies underlying it.[87] Congress, simply by writing in a preemptory section defining specific crimes it did not wish to incorporate or by subsequently disbanding a statute altogether, determined the full effect of state influence on federal law.[88] So although the states act freely within the federal framework of a federal statute, Congress is the final arbiter of what law will be in force in the federal enclaves.[89]

Through both horizontal and vertical bleeding, illustrated by the operation of administrative agencies and incorporation of state law, Congress has made clear that it does not believe that intricate federal legislation is always the most appropriate solution.[90] Alternatively, in those cases where congressional intent to allow for power-bleeding is not express, the judiciary has refused to assume that it exists.[91] So, absent constitutional violations, congressional intent is the determining factor of the bleeding of power across governmental institutions. However, although the judiciary's initial response to state law influencing federal law may be cautious, the numerous examples of power-bleeding show that rigidly avoiding the interaction of state and federal law is an antiquated approach.

C. Cooperative Structures

In *New York v. United States*, the Court encountered the question of the proper interaction between the federal and state governments.[92] "The Federal Government may not compel the States to enact or administer a federal regulatory program," but it may "preempt state regulation contrary to federal interests" or "hold out in-

87. *See id.* at 289 (listing examples of federal crimes that have not been turned over by Congress to the states for legislation in the enclaves); *see also* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108 (1991) ("[F]ederal courts should incorporate *state* law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute.")

88. *See Sharpnack*, 355 U.S. at 293–94.

89. *See id.* at 296.

90. *See id.* at 291–92 (expressing congressional intent to keep the law of federal enclaves in step with local legislation); *see also* Joshua D. Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 212–14 (1997) (discussing reasons Congress sometimes chooses collective federalism statutes rather than creating uniform federal legislation).

91. *See*, *e.g.*, Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920) (refusing to allow incorporation of state law where a tradition of harmony and uniformity of federal law existed and no congressional intent to the contrary was found). *But see* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 762–63 (10th Cir. 2005) (discussing the use of state law as a possible guide for the judicial interpretation of federal law and creation of federal common law).

92. 505 U.S. 144, 149 (1992).

centives to the States as a means of encouraging them to adopt suggested regulatory schemes."[93] *New York*'s holding and vision of the federal structure has left Congress with temptation, through the Spending Clause,[94] or replacement, through preemption, as virtually the only tools to elicit state action.[95] But Congress has often chosen to use these tools lightly to elicit coordination with state governments, a tactic often described as "cooperative federalism."[96] This approach is spurred by a modern need for different levels of government to work together to create a cooperative legal structure that could not otherwise exist under a rigidly exclusive conception of federalism.[97] The substance of the Constitution, particularly the tension between a national legislature's enumerated powers and the states' plenary police powers, allows for, and at certain points demands, such a cooperative approach.[98]

In contrast with the situations in which Congress's reach has extended too far by forcing states to act,[99] cooperative federalism frameworks that are more inclusive of state interests have passed constitutional muster.[100] Congress has implemented these uses of

93. *Id.* at 188.

94. U.S. CONST. art. I, § 8, cl. 1.

95. *See id.*

96. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981).

97. *See* Pamela Tate, New Directions in Co-operative Federalism: Referrals of Legislative Power and Their Consequences (Feb. 18, 2005), http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/5_PamelaTate.pdf (describing cooperative structures utilized by Australia, and why they are employed). *But see* Sarnoff, *supra* note 90, at 214–17 (discouraging the use of cooperative federalism structures because they rely on faulty assumptions and arguing that federal action would be more efficient, maximize social welfare, and be more accountable to the people). R

98. *See* United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation."); *New York*, 505 U.S. at 166 (listing cases demonstrating Congress's lack of power to directly compel certain state action).

99. *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997).

100. *See, e.g.*, *New York*, 505 U.S. at 168 ("[T]he residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not preempted."); *cf.* Younger v. Harris, 401 U.S. 37, 44–45 (1971) ("What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and

state government in acknowledgement that the states play a major role in the development of law.[101] While the substance and structure of federalism has changed drastically since its inception, the original ideal of "Our Federalism"[102] and the practical substance of a nation in need of massive governmental oversight have combined to form cooperative federalism.[103] The *raison d'être* of cooperative federalism is striking a balance between a governing federal framework and the state's freedom of action.[104] A cooperative federalism regime must then respect both spheres of power, allowing the full operation of the individual government units.

Currently, judicial philosophy in regard to state action does not embody the more fluid and modern influences of deference, power-bleeding, and cooperative federalism. Instead, the courts restrict the full influence of state actors by applying antiquated and simplistic standards that hamper the intermingling of state and federal law. Passive Use Deference asks the judiciary to give deference to a cooperative federalism regime where power bleeds from Congress, the judiciary, and federal agencies to the states. This new form of deference operates successfully, in large part, because of the interlocking nature of deference, power-bleeding, and cooperative federalism. The remaining sections of this Note attempt to show how they converge and intermix to form the basis of a workable approach to state-law deference.

National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.").

101. *See* Sarnoff, *supra* note 90, at 212–14. R

102. *See Younger*, 401 U.S. at 44.

103. *See* Weiser, *supra* note 47, at 1698 ("Put simply, the cooperative federalism regulatory strategy makes sense where the benefits of allowing for diversity in federal regulatory programs outweigh the benefits of demanding uniformity in all situations."). R

104. *See* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 128 (2005) (Breyer, J., concurring) (explaining the balance struck in this case); Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting) (discussing a balancing failure when states are relegated to "mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect").

III.
TAXONOMY

For the purpose of delimiting the boundaries of Passive Use Deference, the interaction between the federal government and the states must first be broken down. Although there are various ways to categorize the interactions bred through federalism, here it is sufficient to say that the federal government uses state actors in two ways: actively and passively.

Active federal use is best described as the federal government either directly influencing the choices of state actors or imposing affirmative duties upon them. This type of use is the kind generally found in cooperative federalism regimes. Examples include state legislatures acting under the coercive direction of Congress and state agencies enforcing and implementing federal law.[105] This type of federal use generally comes with many conceptual problems as the state institutions are acting outside of their original constitutional powers. The foremost problem with active federal use is the threat of commandeering.[106] The state actors become subordinate to a particular federal branch, implicating concerns for both separation of powers and federalism.[107]

Conversely, passive federal use occurs when the state actor operates in the same manner as it would if its actions were not being utilized by the federal government. Therefore, all that is required for passive federal use is that federal and state governments each rely on their original and independent grants of power. Passive use occurs far less than active use and has most commonly occurred in

105. *See New York*, 505 U.S. at 167 (listing federal regulatory programs with heavy state enforcement); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665–66 (2001).

106. *See* Printz v. United States, 521 U.S. 898, 935 (1997).

107. *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 518 (Kennedy, J., dissenting) ("Under the majority's reasoning, these other statutes, too, could be said to confer on federal agencies ultimate decisionmaking authority, relegating States to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect. If cooperative federalism is to achieve Congress's goal of allowing state governments to be accountable to the democratic process in implementing environmental policies, federal agencies cannot consign States to the ministerial tasks of information gathering and making initial recommendations, while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight.") (citations omitted); *Printz*, 521 U.S. at 935 (stating that commands given by the Federal Government to State officers are "fundamentally incompatible with our constitutional system of dual sovereignty"); *New York*, 505 U.S. at 188.

the form of the express federal incorporation of state law.[108] However, passive use is not theoretically limited to incorporation, and Congress could conceivably institute a federal aid program that gave funding in direct proportion to similar state funding implemented by state agencies.[109] This type of use sparks none of the complications found in active use, because the Court has declared that no delegation has occurred, but instead that Congress has implemented a "deliberate continuing adoption" of state action.[110]

IV.
PASSIVE USE DEFERENCE[111]

A. Introduction to a New Form of Deference

The question remains how the judiciary should treat state action within schemes of federal passive use when interpreting an ambiguity within federal law. This Note proposes that courts should institute a new form of deference, Passive Use Deference, to passive uses of state action because the individual states are no less deserving of deference than administrative agencies in similar positions.

Passive Use Deference is the combination of two of its well-established forbears: *Chevron* deference and rational basis deference. Ultimately, Passive Use Deference more closely resembles *Chevron* deference, but rational basis deference is required to bridge the gap between *Chevron* deference's original application and the more novel application to state action argued for here. Rational basis deference has long been applied by the judiciary to legislative action; its use increased dramatically at the end of the *Lochner* Era when the Court refused to disturb legislative actions if determined

108. *See, e.g.*, United States v. Sharpnack, 355 U.S. 286, 292–94 (1958) (explaining the basis of the current incorporation doctrine).

109. There are several examples of the federal government supplementing state payouts in a similar manner. *See, e.g.*, Rose v. Ark. State Police, 479 U.S. 1 (1986). However, the federal statutes in these cases do not rely passively on state action but rather act without any regard to state action, preempting state law. *Id.* at 4 ("The Benefits Act does not require a State to set a particular benefit level for its citizens; it simply prohibits a State from reducing the compensation it otherwise would provide to account for the federal payment."). This type of action would fall closer to active use than passive as it puts limitations on the initial state action rather than on the state's effects in the federal sphere.

110. *Sharpnack*, 355 U.S. at 294.

111. Although there are arguments to be made about the proper effect of all state action within a given federal scheme, Passive Use Deference addresses only passive, not active, federal use of state actions.

to have a rational relation to asserted government interests.[112] Although subject to slightly different limitations due to its place in the federal structure, state legislative action also receives rational basis deference.[113] However, traditional rational basis deference has been logically limited to the bounds of power within which a respective legislature resides: state legislatures create state law; Congress creates federal law. Passive Use Deference, however, requires that courts examine state legislation that finds effect outside its usual bounds, not only in the operation of state law, but in federal law as well.[114] Rational basis deference does not, therefore, squarely apply in situations of passive federal use of state action, but the gap is bridged when combined with *Chevron* principles.

Unlike rational basis deference, courts have never applied *Chevron* deference to legislative or state action; *Chevron* deference was created for and has been applied only to federal administrative agencies.[115] However, the basic principle behind *Chevron* deference is that reasonable actions by a body legitimately given power through Congress should be left untouched by the courts.[116] This principle is buttressed by the general purposes of deference, deferring to an actor with both institutional and experiential competence.[117] Furthermore, the argument for application of *Chevron* principles to state legislative actions is amplified by the deference already afforded to the actions of these independent, sovereign bodies under rational basis deference as well as the Court's reliance on congressional intent as the threshold question for both *Chevron* deference and federal incorporation of state law.

112. *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (discussing the repudiation of the intrusiveness of the judiciary during the *Lochner* era). *But see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating that legislative action receives less deference when interfering with constitutional principles).

113. *See* Gregg v. Georgia, 428 U.S. 153, 175–76 (1976); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) ("This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference.").

114. *See Sharpnack*, 355 U.S. at 293; Jerome v. United States, 318 U.S. 101, 104 (1943).

115. *See* David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 328–29 (2000) (discussing the history of courts' use of *Chevron* deference in evaluating administrative agency action).

116. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984).

117. *See* discussion *supra* Part II.A.

While *Chevron* and rational basis deference do not naturally intermingle, there is a common thread found in the Court's approach to the principle behind *Chevron* deference and the federal incorporation of state law which receives rational basis deference: congressional intent.[118] In both instances, the Court has stated that it acts to give effect to the intent of Congress, even if that requires allowing a third-party government entity to be involved in the creation of federal law usually promulgated by Congress.[119] So when congressional intent to rely on the action of states is clear and unmistakable, the Court should give the state action effect just as it would give to an administrative agency in the same situation.[120] In the context of passive federal use, congressional intent promotes a lack of national uniformity by giving states the power to determine the substance of particular aspects of a statute.[121] This lack of uniformity is valuable to Congress when it wishes federal law to rely on the experience and comprehensiveness of state action.[122] This is

118. *See Chevron*, 467 U.S. at 843 n.9 (citing cases for the proposition that the judiciary must give legal effect to the expressed intent of Congress). *Compare Jerome*, 318 U.S. at 104 ("But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law."), *with* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 762 (10th Cir. 2005) ("[I]t may be determined as a matter of choice of law, even in the absence of statutory command or implication, that, although federal law should 'govern' a given question, state law furnishes an appropriate and convenient measure of the content of this federal law." (quoting Wilson v. Omaha Indian Tribe, 442 U.S. 653, 672 n.19 (1979))).

119. *See Chevron*, 467 U.S. at 842–43; *Sharpnack*, 355 U.S. at 293–94.

120. *See Sharpnack*, 355 U.S. at 293; *see also Chevron*, 467 U.S. at 843 n.9; *Jerome*, 318 U.S. at 104.

121. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 487–88 (1981) (describing congressional incorporation of state law as an act "specifically reject[ing] national uniformity" (quoting Chevron Oil v. Huson, 404 U.S. 97, 104 (1971))); United States v. Restrepo-Aguilar, 74 F.3d 361, 366 (1st Cir. 1996) ("To the objection that the result reached today could mean variations in federal criminal sentences for illegal aliens based on whether the 50 states classify offenses as felonies or not, the response is that any such lack of uniformity is the consequence of a deliberate policy choice by Congress and the Commission that we cannot disregard."), *abrogated by* Lopez v. Gonzales, 127 S. Ct. 625, 632–33 (2006) (dismissing the lower court's interpretation of the statute, but implying agreement with the principle stated if the lower court's interpretation of Congress's intent had been correct)).

122. *See Sharpnack*, 355 U.S. at 293 (discussing Congress's choice between national uniformity through the time-consuming creation of a separate criminal code for all federal enclaves and uniformity between the enclaves and the states they occupy through the incorporation of the already existing and comprehensive state law in which each enclave is located).

no less true when the language being examined in a statute is ambiguous than when it is clear.

It is not a stretch of the imagination to determine that the judiciary should extend similar treatment to its approach to the ambiguous portions of the statutes. In fact, the Court has found it unremarkable that state action may have federal consequences upon ambiguous language when Congress has structured a federal statute to passively use state actors.[123] Specifically, the Court has said it is acceptable for Congress to legislate a consequence for committing a state felony, while leaving it to the state to decide what constitutes a felony.[124] This allows the states to affect which crimes or offenders receive the federal consequence. Administrative agencies in this exact situation are given deference because of their institutional expertise.[125] States should be given no less leeway when acting within congressional intent and relying on a combination of *Chevron* principles and rational basis deference.

There has been commentary by some scholars calling for extension of *Chevron* deference to active federal use of state agencies,[126] but the argument has yet to materialize in the courts. The lack of traction may be because applying *Chevron* deference outside of the federal context requires the courts to defer to delegations that arguably violate federalism and separation of powers.[127] But the Court has determined that passive federal use is not a delegation at all, but rather a continuing adoption of state action or incorporation of state law by Congress.[128] The distinction is based upon who actually enacts the federal law. In incorporation, the states enact only state law and it is the actions of Congress that give state

123. *See Lopez*, 127 S. Ct. at 632 ("It may not be all that remarkable that federal consequences of state crimes will vary according to state severity classification when Congress describes an aggravated felony in generic terms, without express reference to the definition of a crime in a federal statute . . . .").

124. *Id.*

125. *See supra* notes 13–15 and accompanying text. R

126. *See, e.g.*, Weiser, *supra* note 47, at 1692. R

127. *See* Krent, *supra* note 77, at 76 ("[D]elegations of authority outside the federal government may be virtually unrestrained. Although the initial delegation decision must be made with the concurrence of Congress and the President, subject to a congressional override, the ultimate implementation of government policy is unchecked in a constitutional sense."); Sarnoff, *supra* note 90, at 221 ("To be effective, federalism must provide 'two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.'" (quoting United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring))). R R

128. *See* United States v. Sharpnack, 355 U.S. 286, 294 (1958).

action force in federal law.[129] This may lessen the judiciary's concerns as Congress is in constant control of state effects in federal law. The basic *Chevron* principle may also hold more weight when applied to passive federal use of state legislatures since their constitutional position is more closely related to that of federal administrative agencies than to that of state agencies. For example, even though the dissent in *Sharpnack* railed against the majority's decision and what it saw as allowing states to create federal law out of whole cloth, it nevertheless likened states to federal agencies, able to affect federal law under the policy direction of Congress.[130]

B. Restriction—Disallowance of State Law Repugnant to Federal Law

Deference to state action cannot exist absent constraint, however. There must be logical bounds within which state action may be allowed to roam.[131] In *Chevron* deference, the bound of administrative action is the reasonableness test.[132] Rational basis deference, on the other hand, is reined in by constitutional restrictions.[133] The Court's historical approach to both the federal incorporation of state law and preemption doctrine inform what restriction must be applied to Passive Use Deference: conflict with federal policy.[134] State action repugnant to authorized federal law

129. *See id.*

130. *Id.* at 298–99 (Douglas, J., dissenting) ("Also Congress could, I think, adopt as federal law, governing an enclave, the state law governing speeding as it may from time to time be enacted. The Congress there determines what the basic policy is. Leaving the details to be filled in by a State is analogous to the scheme of delegated implementation of congressionally adopted policies with which we are familiar in the field of administrative law. But it is Congress that must determine the policy, for that is the essence of lawmaking.").

131. *See* Gregg v. Georgia, 428 U.S. 153, 174–75 (1976); *cf.* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (citing cases for the proposition that the judiciary must reject statutory constructions contrary to clear congressional intent, implying an inherent limitation on how divergent the states could be).

132. *See Chevron*, 467 U.S. at 844 (stating that courts will defer to agency regulations that are not "arbitrary, capricious, or manifestly contrary to the statute").

133. *See* Lawrence v. Texas, 539 U.S. 558, 579–80 (2003) (O'Connor, J., concurring in judgment) (explaining that rational basis deference ends when confronted with a constitutional conflict and that a "more searching form" of rational basis review is applied when the challenged legislation "exhibits . . . a desire to harm a politically unpopular group" or "inhibits personal relationships"); *see also* Solove, *supra* note 48, at 991–92 ("'The judicial function,' Thayer claimed, 'is merely that of fixing the outside border of reasonable legislative action.'"). R

134. *See* Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108 (1991) ("[F]ederal courts should incorporate *state* law into federal common law unless the particular state law in question is inconsistent with the policies underlying the fed-

will not be tolerated, even under the frequently shielding banner of plenary police power.[135] State officials act with the understanding that any enactment, enforcement, or interpretation of state law that conflicts with federal law is "*ipso facto* invalid."[136]

The utilization, rather than the suppression, of state action through passive federal use complicates the difficulty in determining whether conflict with federal policy has occurred. This complication arises because in federal statutes that contain federal passive use, states are expressly entitled to act in a divergent and non-uniform manner, making conflicts with federal law more difficult to discern and decreasing the possibility of explicit conflicts.[137] For example, as discussed in *Wyoming v. United States*[138], the GCA expressly entitles the State of Wyoming to determine the number of its residents who have their federal firearm rights disabled because it relies on both what the state identifies as a crime and at what level the state determines the crime is punished. Because the GCA relies on Wyoming to determine the substance of the federal law, the chance of conflicts between Wyoming state law and the GCA is more remote.

Additionally, the judiciary expresses a heavy presumption against the preemption of state law, creating the assumption that state law fills the field until it comes into conflict with a clear and manifest purpose by Congress to the contrary.[139] However, the cases that apply a presumption in favor of state law exist in the typical state/federal regime where state law has no direct federal effect,[140] whereas Passive Use Deference allows state action to have direct federal effect. In these circumstances, because of its particular federal effect, any conflict with federal policy must have weightier implications than when operating under the presumption of a

eral statute."); *see also* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 559 (2006) ("[F]ederal law may implicitly limit the range of answers that state law can give. In particular, courts often understand federal statutes to displace state laws that would 'stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

135. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause); North Dakota *ex rel.* Flaherty v. Hanson, 215 U.S. 515, 525 (1910) ("[A] state may not so exert its police power as to directly hamper or destroy a lawful authority of the Government of the United States.").

136. Printz v. United States, 521 U.S. 898, 913 (1997).

137. *See* cases cited *supra* note 120. R

138. No. 06-CV-0111-J (D. Wyo. May 7, 2007).

139. *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654–55 (1995).

140. *See id.*; Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

state's general police powers.[141] So, when applying deference to state action in situations of federal passive use, the judiciary should not allow state action that might in any way conflict with the full operation of federal law. However, much like gauging good faith, divining the difference between obstruction and advancement of federal law is not an easy task and must be carefully undertaken by the judiciary.

C. The Three Steps of Passive Use Deference

The substance of Passive Use Deference, as an extension of *Chevron* deference, operates through a two-step method.[142] However, the two steps can be applied by a court only to federal statutes in which some passive federal use exists. While *Chevron* deference also requires, as a threshold matter, that the facts exist to apply its test, this is not an explicit step in the analysis.[143] Passive Use Deference makes this implicit step explicit, as the concept of passive use is a novelty in comparison to agency interpretation and is a necessary prerequisite to the application of the two substantive steps. Thus the first step inquires whether the statute at issue utilizes a passive use scheme. Passive use exists if the federal statute's substance relies on purely state action that is not directly influenced by the federal government. If there is passive use, the first step is satisfied and the inquiry moves onto step two. The second step inquires whether Congress spoke to the issue.[144] If Congress expressed either that the state action controlled or that it definitely did not, then its intention would be carried out by the court.[145] If Congress has not spoken to the issue, then the court moves onto step three. In step three, the court must determine whether the state action is in conflict with the purpose or express language of the federal statute in question. If the state action is not contrary to the intent or text of the federal statute, passive use deference should be given by the court.

141. *Compare N.Y. State Conference*, 514 U.S. at 654–55 (explaining the presumption that Congress does not lightly preempt state law), *with* Lopez v. Gonzales, 127 S. Ct. 625, 632–33 (2006) (finding that even though it could be textually argued that state law should apply in a circumstance of federal incorporation of state law, Congress's actions and policy contradicted each other).

142. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

143. *See id.*

144. *See id.* (describing this as the first step of what is now called the *Chevron* test).

145. *See id.* (stating that the clearly expressed intent of Congress is controlling).

D. Resolution of Conflicts with Other Institutional Bodies

The application of Passive Use Deference to state action leads to possible conflicts with two other government institutions: the judiciary and federal agencies. As has been discussed previously, the judiciary is generally the arbiter of the meaning of federal statutes but has ample reason to defer to states in these passive use schemes. But federal administrative agencies may also come in conflict with the states, as is well illustrated by *Wyoming v. United States*. As seen in the GCA, Congress may employ the use of federal administrative agencies in many of the same statutes in which they have employed passive use of state action.[146] While the judiciary may be willing to give deference to the states, deference to federal agencies is well established,[147] and a decision must be made whether the state or a federal agency prevails when they are in conflict.

First, the question can be easily disposed of if one institution receives deference under its respective test and the other does not. For example, it would be undeniable that the BATF's position on "expungement" would be deemed controlling if it were entitled to *Chevron* deference and Wyoming's statute were ruled to conflict with the GCA, thus disqualifying it from Passive Use Deference. The same would hold true if Wyoming were to receive deference and the BATF were not. A true conflict occurs when both institutions qualify for their relevant deference. There is little precedent to apply in this situation, as the GCA is an example of rare congressional schemes that give two different institutions a substantive hand in a single statute.

One analogous but equally rare scheme occurs when Congress gives multiple federal actors power under a single statute. The most pertinent example is found in the operation of the Occupational Safety and Health Act of 1970 ("OSHA").[148] Under OSHA, the Secretary was given power to promulgate regulations and the Review Commission was given the power to adjudicate claims.[149] In *Martin v. Occupational Safety & Health Review Commission*, the Court was confronted with conflicting interpretations of OSHA regulations from the Secretary and the Review Commission.[150] The Court

146. *See* 18 U.S.C. §§ 921–930 (2000).

147. *See also* United States v. Mead Corp., 533 U.S. 218, 234–35 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000). *See generally Chevron*, 467 U.S. 837.

148. 29 U.S.C. §§ 651–6 78 (2000).

149. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152–53 (1991).

150. *Id* at 152–53.

held that since the Secretary promulgates the OSHA regulations, the Secretary is in a better position to reconstruct the purpose of the regulations than the Commission, which operates only in an adjudicatory manner.[151] The principle found here is that deference is given to the actor actually involved in the substantive creation of the particular area of the statute at issue. In applying this principle to Passive Use Deference, agency-state conflict should be resolved by determining which actor creates the substance of the particular area of the statute in question.[152] This test relies on the same principle which created Passive Use Deference: when Congress expressly relies on an actor to create the substance of a federal law, the judiciary should defer to that actor in times of statutory ambiguity.

Congress may revise any statute invoking a scheme of passive use at any time,[153] but while the statutes still operate, they should not be disrupted by the judiciary or administrative agencies to which the substance of the statutes have not been entrusted. These institutions could not interfere with the effect of state action when Congress expressly requires it to occur.[154] The same sphere of protection against intrusion should exist where Congress's intent is to allow state action to have effect, even where the statute's language is ambiguous, as long as the state action does not obstruct the federal law or its policy. The judiciary is currently entitled to interpret the meaning of a statute or, if appropriate, defer to an agency's interpretation. This choice leaves the states—the creators of the law in question and the choice of Congress to fill out the federal law—out of the decision entirely. Passive Use Deference, therefore, brings a new balance to the judiciary's interpretation that is otherwise missing.

151. *Id.*

152. Supremacy arguments, contemplating a federal agency trumping a state actor, are unproblematic in these circumstances. By the nature of passive use, it is Congress that is giving state action the force of federal law. *See supra* notes 127–30 and accompanying text. R

153. *See* United States v. Sharpnack, 355 U.S. 286, 294 (1958).

154. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) (explaining that the judiciary will implement the express intent of Congress).

V.
APPLICATION OF PASSIVE USE DEFERENCE

A. Passive Use Deference Step I—Does the Statute Employ Passive Use?

This section focuses on *Wyoming v. United States*,[155] described in Section I, in order to clarify Passive Use Deference. The first step of Passive Use Deference, federal passive use, is clearly in place in *Wyoming v. United States*. Congress expressly intended to allow state criminal laws to affect the federal firearm rights of an individual. The GCA makes illegal the sale of firearms to, or possession of firearms by, persons who have been convicted by any court of, among other crimes, either a crime punishable by a term exceeding one year or misdemeanor domestic abuse.[156] In both of these cases, the crimes are defined by the jurisdiction in which they occur, making the individual states' articulation of crimes (alongside federal and tribal definitions) determinative of an individual's gun rights.[157] For example, if Wyoming's legislature determined that petty theft warranted three years' imprisonment, those convicted of petty theft in Wyoming would be stripped of their gun rights, whereas if the state had determined that six months were the proper sentence, gun rights would be unaffected.

The inclusion of a savings clause within each of the previously mentioned conviction clauses is even more indicative of Congress's intention to have states play a significant role in the statute. Individuals are no longer "convicted" under the statue if their convictions are expunged, set aside, pardoned, or their civil rights are otherwise restored.[158] This gives states the power to exempt anyone they wish from the federal statute at any time so long as they are willing to alter the state conviction in some way.[159] There is heavy reliance on state action to propagate the substance of federal law,

155. No. 06-CV-0111-J (D. Wyo. May 7, 2007).

156. 18 U.S.C. § 922(d), (g) (2000).

157. *See id.* § 921(a)(20).

158. *Id.*

159. *See* H.R. REP NO. 99-495, at 20 (1986) (explaining that state expungement before the 1986 amendment did not relieve the federal firearm disabilities of those convicted, but the amendments now have the federal government look to "law of the jurisdiction where the conviction occurred" to determine if they have been expunged); 137 CONG. REC. S3191, 3220 (daily ed. Mar. 13, 1991) (entering a section-by-section analysis of the Comprehensive Violent Crime Control Act of 1991, proposing an amendment to the GCA, which ultimately failed, to rid the statute of the lack of uniformity found in state expungement regimes); 132 CONG. REC. S14,943 (daily ed. Oct. 3, 1986) (statement of Sen. Durenberger) (explaining that the 1986 amendments creating the expungement exceptions make state law controlling).

and the express intent of Congress to allow for leeway in the underlying action of states shows that Passive Use Deference is appropriate for application when there is ambiguity in the statute. The question to be answered in the following two steps is whether a court should defer to Wyoming's legislation that would define expungement outside of the technical definition argued for by BATF.

B. Passive Use Deference Step II—Has Congress Spoken to the Issue?

Next, as with *Chevron* deference, we must determine whether Congress has already spoken to the issue. If so, Congress's intent is controlling.[160] The GCA defines thirty-four terms, but "expunge" and "expungement" are not among them.[161] The original enactment in 1968 had no mention of expungement, and the 1986 amendment that inserted the language had little discussion that clarified the meaning of the expungement provision.[162] The most recent 1996 amendment, adding the domestic abuse restrictions, similarly made no mention of the meaning of "expunge" and copied the language of its savings clause wholesale from the previous expungement provision.[163] A subsequent attempt to amend the GCA shows that Congress did not intend to have a uniform definition apply.[164]

In addition, the BATF's argument that the expungement provision must mean "an act that erases the fact of a conviction"[165] does

160. *Chevron*, 467 U.S. at 842–43 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

161. *See* § 921(a)(1)–(34).

162. *See* 132 CONG. REC. S14,943 (statement of Sen. Durenberger) (containing the single discussion of the expungement provision, warning that it would lead to heavy reliance on state law).

163. *See* Pub. L. 104-208, Div. A, Title I, § 101(f), 110 Stat. 3009–371 (1996).

164. 137 CONG. REC. S3191, 3220 ("Under current law, any conviction for a crime punishable by imprisonment for a term exceeding one year which has been expunged, set aside, or pardoned or with respect to which the convicted person has had civil rights restored is not considered disabling for purposes of firearms possession unless such expunction, setting aside, pardon, or restoration expressly provides otherwise. However, the procedures for pardons, expunctions, set-asides and restorations among the various States are far from uniform. Such proceedings do not erase the legal existence of prior convictions nor remove all State disabilities imposed on felons. Neither do they uniformly involve a considered judgment whether the individual deserves the pardon, expunction, set aside or restoration of civil rights. In fact, in some States civil rights are restored automatically, merely as a result of a person's completion of his sentence, thereby permitting dangerous felons immediately to purchase a firearm upon their release.").

165. Response Brief of Defendants, *supra* note 20, at 17. **R**

not hold up in light of the treatment of the term "expunge" in the federal statute. The expungement provision holds that an individual is still considered convicted under the federal statute if the "pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."[166] By these terms, the GCA considers that there may be a state expungement that still restricts firearm rights. Such an expungement would not, however, erase the fact of the conviction as the BATF would require. Additionally, the BATF's own brief shows a flaw in its compulsory uniformity argument when it cites language that "[t]he word expunge generally means the physical destruction of information."[167] Expunge may "generally" mean obliteration, but that language implies that it is not always required, and the GCA is one of the possible exceptions to the general rule because of its surrounding language.

But, although there is no evidence of a uniform definition, there is similarly no evidence that Congress expressly intended for the states to have carte blanche with the term "expunge." So, in answer to the second question of analysis, there is no evidence of congressional intent, "expunge" is ambiguous, and the judiciary should defer to the state legislature.

C. Passive Use Deference Step III—Is the State Action Repugnant to the Federal Statute?

The final question is whether the particular action at hand obstructs the GCA or its underlying policy. If it is found to operate in such a manner, then a court cannot defer to the state's action even if it has passed the first two steps described above. Wyoming's expungement provision provides an especially hard example of the difficulty in determining the fine line between obstruction and furtherance.

The argument for obstruction of federal law is that Wyoming's statute can effectively nullify the most recent amendment by Congress. Simply by providing an expungement to every person who applies, Wyoming can return firearm rights to every person convicted of misdemeanor domestic abuse.[168] It was Congress's intent in the 1996 amendment to quash the discretion state legislatures

166. § 921(a)(33)(ii).

167. Response Brief of Defendants, *supra* note 20, at 17 (quoting United States v. Johnson, 941 F.2d 1102, 1111 (10th Cir. 1991)). R

168. *See* WYO. STAT. ANN. § 7-13-1501(a) (2007) ("A person who has pleaded guilty or nolo contendere to or been convicted of a misdemeanor or misdemeanors arising out of the same occurrence or related course of events may petition the

and prosecutors had in keeping domestic abuse convictions from triggering federal firearm disabilities through defining or prosecuting the offense as a misdemeanor and pushing the sentence below one year.[169] In addition, the Wyoming expungement statute applies to all misdemeanors[170] but is logically, if not pointedly, targeted specifically at the domestic abuse provision as it is the only misdemeanor to which federal firearm disabilities apply.[171]

Although the arguments for obstruction are powerful, Wyoming's statute nevertheless does not conflict with the GCA or its underlying policy. The conflict arguments contain three fatal flaws that point to deference to Wyoming's statute: the breadth of the state statute, the case-by-case determination of the expungement, and the effect of the GCA's built-in savings clause.

First, as to the argument of express conflict, the state statute has broad effect, both on state and federal firearm rights.[172] The GCA is never mentioned, and although it may logically be affected, the state statute applies to *all* misdemeanors and *all* firearm rights.[173] On its face, the state statute is a normal and typical state enactment, having federal effect only through the enactment of Congress. If the statute had expressly applied to only federal firearm rights, conflict might be shown, but absent that effect, it is difficult to show that Wyoming acted in any deference-defeating way.

Second, the state statute does not obstruct federal law or its policy through its case-by-case determinations. The statute begins by employing minimum safeguards that every expungement must meet, including the refusal of expungement if the misdemeanor involved the use of a firearm.[174] A neutral judge weighs many factors in determining expungement, including the petitioner's criminal history, testimony of any victims of the misdemeanor, and any potential that the petitioner "represents a substantial danger to himself, any identifiable victim or society."[175] Many of these factors

convicting court for an expungement of the records of conviction for the purposes of restoring any firearm rights lost . . . .").

169. *See* 142 CONG. REC. 22,956, 22,987-88 (1996) (statement of Sen. Feinstein) (explaining that the amendment was intended to keep firearms out of the hands of domestic abusers no matter how the crime was classified or prosecuted by the states).

170. § 7-13-1501(a).

171. *See* § 922(g)(9).

172. *See* § 7-13-1501(a) (applying "for the purposes of restoring *any* firearm rights lost") (emphasis added).

173. *Id.*

174. *Id* § 7-13-1501(a)(i)–(iii).

175. *Id.* § 7-13-1501(e), (g).

parallel the federal concerns expressed in the floor debate urging passage of the 1996 amendment.[176] The judge determines expungement on a case-by-case basis, subject to appeal by the state's prosecuting attorney, making for a measured inquiry into the delicate issue of returning dangerous rights to a convicted individual. The policy behind the GCA of keeping firearms from dangerous individuals is upheld by the Wyoming statute as it appears that a domestic abuse conviction would be nearly prima facie evidence of potential for dangerous behavior.

Finally, the inclusion of the savings clause and its operation within the GCA show that Congress intended to embrace divergent expungement statutes that took creative approaches. Although the federal statute takes a very strict and inclusive approach to domestic abuse misdemeanors, it nevertheless includes a provision allowing for expungement.[177] To state that partial expungement obstructs federal law when it allows for the return of firearm rights implies that any expungement doing the same would be ipso facto invalid. A complete state expungement, pardon, or restoration of civil rights, contemplated and implemented by Congress, would have the same obstructive effect on the federal law or policy as a partial expungement would: it would return firearm rights to an individual convicted of domestic abuse. Ultimately, Congress showed that it anticipated and intended creative expungement provisions beyond their full and typical counterparts by accepting expungements that would leave firearm disabilities intact.[178]

The individual states play a large part in the operation of the GCA since they are passively used by Congress to provide the statute's general substance.[179] Deference to state action in this particular case is warranted because "expungement" has no uniform or intended meaning by Congress and was not expressly committed to the exclusive discretion of any government actor. Finally, the restriction of deference does not apply, given the express intention of Congress and the broad and unassuming statute passed by Wyoming.

176. *See* 142 CONG. REC. 22,956, 22,988 (1996) (statement of Sen. Feinstein) (listing dangerous behavior and past criminal history, in the context of domestic violence, as chief concerns).

177. *See* 18 U.S.C. § 921(a)(33)(ii) (2000).

178. *Id.* ("A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged . . . unless the . . . expungement . . . expressly provides that the person may not ship, transport, possess, or receive firearms.").

179. *See, e.g.*, *id.* § 922(d), (g).

D. Conflict Between Deference to BATF and to Wyoming

Passive Use Deference should have been applied by the court in *Wyoming v. United States*, but this does not completely resolve the question of the conflict between the agency and the state. The agency's interpretation of "expungement" receives some deference, leaving the court with a choice between two powerful yet mutually exclusive calls for deference.[180] Here, however, the BATF did not prevail on a *Chevron* deference claim. The BATF's interpretation of "expungement" is contained in a policy letter, which has been held not to amount to the type of formal procedure entitled to *Chevron* deference.[181] Although the Court held that the interpretation receives a lesser form of deference,[182] it is not enough to overcome the full deference to the state under Passive Use Deference.

Even if the BATF interpretation were entitled to *Chevron* deference, by passing a regulation on the definition of expungement, the BATF would still fail to overcome the deference to Wyoming. Applying the reasoning discussed above, since the BATF plays no part in the expungement of individuals under the GCA nor does it create the substance of the crimes which are incorporated into the statute, and Congress placed the substance of this section of the statute in the hands of the states, the states' Passive Use Deference trumps any deference otherwise due the BATF.[183]

E. Problems Presented

The vast majority of decisions and commentary on cooperative federalism have focused on ensuring the autonomy of state governments and checking the separation-of-powers concern associated with a federal branch commandeering state resources.[184] These critiques are valuable in evaluating Passive Use Deference, most nota-

180. *See* discussion *supra* Part III.C.

181. *See supra* note 38 and accompanying text. R

182. *Id.*

183. *Cf.* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152–53 (1991) (finding that since the Secretary promulgates the regulations for OSHA, the Secretary is in a better position to reconstruct the purpose of the regulations than the Commission which operates in only an adjudicatory manner).

184. *See, e.g.*, Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting); Printz v. United States, 521 U.S. 898, 935 (1997); New York v. United States, 505 U.S. 144, 162–63 (1992); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 430–31 (1998) ("Our anticommandeering principle only requires that when the federal government does find it attractive to enlist the states directly in its regulatory programs, it does so by offering them the possibility of true cooperation."). *But see* Sarnoff, *supra* note 90, at 214–17 (arguing that cooperative federalism unnecessa- R

bly for their emphasis on government's accountability to its citizens and the potential of tyranny when government structure is modified. However, instead of asking how the federal government is permitted to act, this Note focuses on a related yet somewhat different question: what concerns emerge when a state's power is enhanced through judicial deference?

One of the Court's main concerns when evaluating cooperative federalism regimes is that the government be accountable to its constituents.[185] Much of the judiciary's reluctance to interfere with actions of other divisions of government is based on its belief in the external check of the people inherent in representative institutions.[186] When a new government structure somehow hides the true decision-maker from public judgment, however, the Court is disinclined to let the structure survive.[187] A related concern is the possible alteration of a government entity's power, bringing an increased risk of tyranny toward the citizenry.[188] Although the issue is often considered in the context of federal separation of powers, it is equally significant when evaluating the checks and balances between the federal and state governments.[189]

The Court addressed these concerns in the context of judicial deference to states by affirming the constitutionality of the federal

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rily degrades and distributes federal power, calling for a showing of justification proportional to the degree states are included in federal programs).

185. *See Printz*, 521 U.S. at 929–30 (asserting that forcing States to implement a federal program insulates Congress from "blame for [a program's] burdensomeness and for its defects"); *New York*, 505 U.S. at 168–69 (emphasizing the importance of the ability of the electorate to determine the identity of the true decision-maker so that the appropriate officials are held accountable for the policies and regulations implemented).

186. *See* United States v. Richardson, 418 U.S. 166, 188–89 (1974) (Powell, J., concurring).

187. *See* cases cited *supra* note 184. **R**

188. *See New York*, 505 U.S. at 181 ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

189. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

incorporation of state law in *Sharpnack*.[190] Although incorporation was argued to be an unconstitutional delegation by Congress to the states, the Court determined that there had been no delegation at all; Congress had merely exercised its power to prospectively adopt future state law.[191] Just as the Tenth Amendment is a "truism that all is retained which has not been surrendered,"[192] so it is also true that "Congress retains . . . ample power to revise, alter and revoke the local legislation,"[193] and surrenders nothing to the state actors utilized through passive federal use.

So under passive federal use, state action is completely independent, operating as it would under normal circumstances, and though the federal action is dependent on state action, it remains clearly federal.[194] Accountability is present since citizens are independently affected by both state and federal laws, which both remain fully under the control of the respective governmental division and are easily discernable as such.[195] Similarly, there is no additional risk of power-hoarding on account of the lack of any true shift in power from Congress to the states, as it is Congress that retains the power to nullify the states' influence on federal law if it is contrary to its wishes.[196] And if complete passive federal use through the express intent of Congress does not violate the Court's concerns, then judicial deference to states in ambiguous circumstances, as a logical subset, also passes muster.

VI.
CONCLUSION

The preceding discussion shows how drastic the impact of Passive Use Deference applied to state action may become. Even though a federal agency or court may disagree with a relevant action taken by the state, if it fits within the dominion of Passive Use

190. United States v. Sharpnack, 355 U.S. 286 (1958).

191. *Id.* at 293–94. The distinction between prospective adoption of state law and wholesale delegation to state legislatures is a difficult one, because in either case the state legislatures create the substance of federal law. *Id.* However, the distinction is an important one to the judiciary. *Id.*

192. United States v. Darby, 312 U.S. 100, 124 (1941).

193. *Sharpnack*, 355 U.S. at 296.

194. *See supra* Part III.

195. *See Sharpnack*, 355 U.S. at 293.

196. *See id.* at 294 ("Congress retains power to exclude a particular state law from the assimilative effect of the Act. This procedure is a practical accommodation of the mechanics of the legislative functions of State and Nation in the field of police power where it is especially appropriate to make the federal regulation of local conduct conform to that already established by the State.").

Deference, their internal preferences must give way to state choices. Although both the judiciary and federal agencies have independent ability to interpret federal law,[197] passive federal use is backed by congressional intent, which must be given primary effect.[198] In the process of following congressional intent, therefore, state action should be elevated in importance in a court's decision-making process.

The significant potential impact of Passive Use Deference is also illustrated by its scope of influence. The GCA, for instance, is only one of many statutes that implement policy through federal passive use.[199] Currently, most instances are in areas generally considered the domain of state law such as criminal law.[200] But passive federal use is not restrained to these areas of law, and Passive Use Deference would expand with any future congressional enactments. Also, although beyond the scope of this Note, Passive Use Deference may work with other arguments, many covered by other commentators, to give deference to active federal uses of state actors.[201]

The influence of Passive Use Deference may be halted, however, by a congressional backlash. The preceding discussion has demonstrated that Congress has the ultimate power to constrain what state action will find effect in federal law. One of the possible reasons Congress has given so much power to the states in recent years is that it has more control over them than it does over what have become very powerful federal administrative agencies.[202] So, in the face of ambiguity being solidified through state action, Congress may determine that it would rather control the outcome of

197. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (stating that a court must in some cases provide its own construction of ambiguous statutory language, but only absent an administrative interpretation).

198. *See id.* at 843 n.9 (stating that the court "must reject administrative constructions which are contrary to clear congressional intent").

199. *See, e.g.*, 18 U.S.C. § 13 (2000); 18 U.S.C. § 1961(1)(A) (2000) (defining "racketeering activity" as any act or threat involving specified state law crimes); 18 U.S.C. § 16 (2000) (using the general term "felony" in a definition of a crime of violence, referring to both state and federal crimes).

200. *See supra* note 199. R

201. S*ee* Dorf & Sabel, *supra* note 184, at 430–31 (arguing for an anti-commandeering principle to allow states and the federal government to work more closely); Weiser, *supra* note 105, at 666 (arguing for a reverse-Erie approach, allowing state agencies to implement federal law unless they have a "'valid excuse' for not doing so"). R R

202. *See generally* Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181 (1998) (describing the emerging use of states as the new administrative agency).

the statute itself instead of leaving it to the states. However, the backlash would probably not come in the form of a complete repudiation of passive federal use. Congress has had prolonged experience with passive federal use and express incorporation of state law, and its practical significance would not likely be changed by state law's having federal effect on the margins. Rather, Congress may, as it did in the GCA through the domestic abuse amendment, limit the passive federal use directly within the statute. By expressly stating what it sees as the guidelines within which states may operate, Congress would be able to continue using the breadth of experience and comprehensiveness of state law while directly legislating those principles it sees as requiring uniformity.

Ultimately, under this conception, Passive Use Deference would be initiating its own demise as the more expressly Congress legislated in response, the less often ambiguity would occur. But, the end result would be a more complete and symbiotic scheme of cooperative federalism. Congress would operate under the knowledge that statutes embodying passive federal use would leave substance to the state when Congress legislates expressly and ambiguously, and states would be more circumspect in their enactments, as the enactments would have effects on state citizens on both state and federal levels.