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# October Term: 1999: The Supreme Court's Last Term of the Twentieth Century, Increasing Deference to Administrative Agencies

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# October Term, 1999: The Supreme Court's Last Term of the Twentieth Century, Increasing Deference to Administrative Agencies

By Professor Allen E. Shoenberger<sup>1</sup>

The dominant theme last term in the United States Supreme Court's administrative law decisions was increased deference to the agencies. Those decisions run from esoteric, the right of an agency to have the first crack at constitutional challenges to agency regulations,<sup>2</sup> and the ability of an agency to adopt different requirements for unrepresented claimants from those applicable to attorney represented claimants,<sup>3</sup> to the concrete, taking a \$400,000 judgment away from a railroad crossing widow,<sup>4</sup> or government confiscation of the value of range fixtures, such as pipelines, from ranchers and their creditors.<sup>5</sup> Many of the decisions were 5-4, evidencing the close division of the Court.<sup>6</sup> Hidden by the technical nature of some of the decisions is the growing activism of the Court; judicial activism that rivals the Warren Court. How much further the pendulum will swing in favor of unrestrained governmental power is a serious question prompted by the decisions discussed herein.

## INITIAL AGENCY DECISIONS ON CONSTITUTIONAL ISSUES

In *Shalala v. Illinois Council on Long Term Care, Inc.*,<sup>7</sup> the Court held that jurisdiction to contest Medicare regulations was barred from the courts, at least in the initial instance.<sup>8</sup> In the first instance, a contest

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1. Professor of Law, Loyola University Chicago, and former editor of the Journal of the National Association of Administrative Law Judges.

2. *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449 (2000).

3. *Sims v. Apfel*, 530 U.S. 103 (2000).

4. *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (1999).

5. *City of Chicago v. Morales*, 527 U.S. 41 (1999).

6. *Morales*, 527 U.S. at 41; *Shanklin*, 529 U.S. at 344; *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1 (1999); *Nurse Servs.*, 525 U.S. at 449.

7. 529 U.S. 1 (2000).

8. *Id.* at 10.

is limited to agency appeal proceedings, even for constitutional claims.<sup>9</sup> The Court's holding gave an expansive reading to a preclusion of review provision in the Medicare statute.<sup>10</sup> The statute declares that "[n]o findings of fact or decision of the [Secretary of Health and Human Services] shall be reviewed by any person, tribunal, or governmental agency except as herein provided."<sup>11</sup> This provision covers medical claims, such as payment claims for doctor's visit.<sup>12</sup> The Court read the statutory language broadly, so as to cover all contests, including constitutional contests, while holding that § 405(h) makes exclusive the judicial review method set forth in § 405(g).<sup>13</sup>

The nursing homes in *Shalala* wished to raise claims in federal court regarding new regulations imposing sanctions or remedies for deviations from standards imposed by Medicare and Medicaid.<sup>14</sup> No enforcement of the new regulations had taken place, so this was a pre-enforcement challenge.<sup>15</sup>

After inspectors find a nursing home in violation of substantive standards, deficiencies are divided "into three categories of seriousness depending upon [the] deficiency's severity, its prevalence at the home, its relation with other deficiencies and the home's compliance history."<sup>16</sup> Immediate concern for the health and safety of the residents requires the Secretary to either terminate the home's provider agreement or appoint new management.<sup>17</sup> Lesser deficiencies may involve the application of a civil penalty, transfers of residents, denial of all or part payment, state monitoring, and other measures.<sup>18</sup> When a nursing home is in substantial compliance, no more than the "potential for [causing] minimal harm, the Secretary will impose no sanction or remedy at all."<sup>19</sup>

The challengers raised constitutional issues claiming vagueness of terms such as "substantial compliance" and "minimal harm," as well as claiming violations of various statutory requirements which mandate en-

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9. *Id.*

10. *Id.* at 8.

11. 42 U.S.C. § 405(h) (1998).

12. *Shalala*, 529 U.S. at 10.

13. *Id.* at 14-15.

14. *Id.* at 7.

15. *Id.* at 1.

16. *Id.* at 6.

17. *Id.*

18. *Id.* at 6-7.

19. *Id.* at 7.

enforcement consistency, due process violations of the procedures themselves, and failure to promulgate the manual and other agency publications consistent with notice and comment rulemaking requirements.<sup>20</sup>

The practical problem the new regulations presented to nursing homes was that following the issuance of a notice of deficiency, the rules require a nursing home to present a corrective plan, or risk sanctions, including fines and termination from the program.<sup>21</sup> The Secretary posts nursing home deficiencies on the Internet based on a record of past violations.<sup>22</sup> Additionally, simple compliance harms the nursing homes. By complying, the legitimacy of the deficiency finding remains untested and increased sanctions are possible in later prosecutions.<sup>23</sup>

The Secretary responded that nursing homes are rarely terminated, stating that from 1995 to 1996, only 25 out of 13,000 nursing homes were terminated.<sup>24</sup> She also contended that penalties imposed in later enforcement actions, based on findings that are unreviewable, are no more severe.<sup>25</sup> Nursing homes that feel they are in compliance can test the lawfulness of the Secretary's actions "simply by refusing to submit a plan and incurring a minor penalty."<sup>26</sup> Minor penalties are the norm.<sup>27</sup>

Instead of permitting nursing homes to raise either constitutional or statutory issues in court, the Supreme Court required them to channel their disputes through the internal agency review system.<sup>28</sup> The stated reason for the requirement of proceeding through the agency was "provid[ing] the agency the opportunity to reconsider its policies, interpretations, and regulations in light of those challenges."<sup>29</sup> Moreover, if time is an issue, the agency may waive procedural steps and a court may determine them waived in other situations.<sup>30</sup> In essence, the fact that the

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20. *Id.*

21. *Id.* at 21.

22. *Id.* at 21-22 (noting the Secretary pointed out that nursing homes are entitled to post a reply on the Internet).

23. *Id.*

24. *Id.* at 22.

25. *Id.*

26. *Id.*

27. *Id.* The court stated that the Nursing Homes gave "no convincing reason to doubt the Secretary's description of the agency's general practice." *Id.* How that can be done when the challenge is to new rules tainted with vagueness to the point of unconstitutionality is unclear.

28. *Id.* at 23-24.

29. *Id.* at 24.

30. *Id.*

Council itself was unable to exercise these internal procedures provided by the agency was irrelevant.<sup>31</sup> Its members could.

*Bowen v. Michigan Academy of Family Physicians*<sup>32</sup> held that internal processes for challenges to Medicare reimbursement rules need not be exhausted.<sup>33</sup> These rules provided for higher reimbursement rates for board certified family physicians for services identical to those provided by non-board certified physicians.<sup>34</sup> Justice Stevens writing for the Court construed the interrelationship of sections 405(h) of the Social Security Act<sup>35</sup> and 1395ii of the Medicare Act<sup>36</sup> (which incorporated § 405(h) by reference) as precluding judicial review of “millions of what [Congress] characterized as ‘trivial’ claims.”<sup>37</sup> The Court stated, “[t]he legislative history of both the statute establishing the Medicare program and the 1972 amendments thereto provides specific evidence of Congress’s intent to foreclose review only of ‘amount determinations’ – *i.e.*, those ‘quite minor matters,’ remitted finally and exclusively to adjudication by private insurance carriers in a ‘fair hearing.’”<sup>38</sup>

However, in *Shalala*, the majority distinguished *Bowen* as implicating the possibility that no judicial review was available at all, rather than judicial review after channeling the dispute through agency hearing process.<sup>39</sup> In *Bowen*, the private insurance providers were given exclusive power to determine benefit disputes, but no clear statutory method existed for reviewing challenges to the regulations under which these benefit determinations were to be made.<sup>40</sup> In *Shalala*, although the matter was not completely clear, the majority found that the Secretary’s reading of the relevant review statutes permitted judicial review after agency determinations.<sup>41</sup> Thus, judicial review was possible after both nursing home termination decisions, but also for more minor determinations and sanctions.<sup>42</sup>

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31. *Id.*

32. 476 U.S. 667 (1998).

33. *Id.* at 667.

34. *Id.* at 679 n.8.

35. 42 U.S.C. § 405(h) (1998).

36. 42 U.S.C. § 1395ii (1998).

37. *Bowen*, 476 U.S. at 678.

38. *Id.* at 680 (citation omitted).

39. *Shalala*, 529 U.S. at 9-10.

40. *Bowen*, 476 U.S. at 677-78.

41. *Shalala*, 529 U.S. at 19-21.

42. *Id.* Justice Scalia’s dissent indicated doubt with whether *Bowen* is correctly decided

Justice Thomas, in dissent, asserted that the issue is not just the presumption that there is judicial review, but also the presumption that pre-enforcement judicial review is implicated.<sup>43</sup> That presumption goes back to *Abbott Laboratories v. Gardner*.<sup>44</sup> Accordingly, Justice Thomas viewed the Court's precedent, *Weinberger v. Salfi*<sup>45</sup> and *Abbot Laboratories*, as consistent with a firm presumption in favor of pre-enforcement review; a presumption only overcome when a very minimal burden is placed upon petitioners.<sup>46</sup> Thomas wrote, "[d]elayed review . . . may mean no review at all.<sup>47</sup> For when the costs of presenting a claim via the delayed review route exceeds the costs of simply complying with the regulation, the regulated entity will buckle under and comply, even when the regulation is plainly invalid."<sup>48</sup> To jeopardize the continued existence of a nursing home to the "grace" of the Secretary "provides little comfort to a nursing facility pondering [the internal agency] route to judicial review."<sup>49</sup> Other potential penalties include daily civil penalties and more intangible detriments such as disclosure of detrimental information to the public, including posting in the nursing home and on the Internet, which is likely to result in substantial reputational harm.<sup>50</sup>

Justice Thomas disagreed with imposing a more burdensome hardship test on ordinary ripeness doctrine for aggrieved persons who seek to bring a pre-enforcement challenge to the Secretary's regulations under the Medicare Act.<sup>51</sup>

#### STATE TORT LAW PRE-EMPTION BY FEDERAL REGULATION:

The application of a new presumption against pre-enforcement review was one example of the Supreme Court's increased deference to administrative agencies. In an effort to apply the new presumption against pre-enforcement review, courts issued several startling opinions relating to the pre-emption of state tort law.

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in the first case. *Id.* at 31 (Scalia, J., dissenting).

43. *Id.* at 42 (Thomas, J., dissenting).

44. 387 U.S. 136 (1967).

45. 422 U.S. 749 (1975).

46. *Shalala*, 529 U.S. at 50-52 (Thomas, J., dissenting).

47. *Id.* at 33 (Thomas, J., dissenting).

48. *Id.* at 42-44 (Thomas, J., dissenting).

49. *Id.* at 48 (Thomas, J., dissenting).

50. *Id.* at 48-49 (Thomas, J., dissenting).

51. *Id.* at 50-51 (Thomas, J., dissenting).

In *Silkwood v. Kerr-McGee Corp.*,<sup>52</sup> the Court in 1984 refused to find pre-emption of state tort law punitive damage remedies by the federal safety-licensing scheme for nuclear facilities.<sup>53</sup> In sharp contrast, in two separate cases last term, the Supreme Court found that the Department of Transportation regulation pre-empted state tort law remedies.<sup>54</sup> It is now unclear if *Silkwood* remains valid law.

In *Geier v. American Honda Motor Co., Inc.*,<sup>55</sup> the Court found implied pre-emption of state tort law by regulations regarding airbags in cars.<sup>56</sup> As in *Shalala*, four Justices dissented – Stevens, Souter, Thomas and Ginsburg.<sup>57</sup> *Norfolk Southern Railway Co. v. Shanklin*<sup>58</sup> similarly held that regulations regarding railroad crossing safety equipment coupled with federal financing of safety equipment at the site of a railroad crossing accident preempted a widow's tort action against a railroad.<sup>59</sup> Justices Ginsburg and Stevens dissented.<sup>60</sup> In a separate concurrence, Justice Breyer agreed with the dissenting Justices that federal minimum safety standards should not preempt state tort suits, but believed that the particular regulations did preempt.<sup>61</sup>

### *Geier:*

The petitioner's claim in *Geier* was that Honda was negligent in failing to equip a 1987 Honda Accord with airbags.<sup>62</sup> The diversity action in federal district court was dismissed on the grounds that the 1984 regulations<sup>63</sup> gave Honda the option of installing airbags or other passive restraints.<sup>64</sup> The 1984 regulations required gradual phasing in of the

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52. 464 U.S. 238 (1984).

53. *Id.* at 249-56.

54. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000).

55. 529 U.S. 861 (2000).

56. *Id.* at 861.

57. *Id.* at 886 (Stevens, J., dissenting).

58. 529 U.S. 344 (2000).

59. *Id.* at 359.

60. *Id.* at 360 (Ginsburg, J., dissenting).

61. *Id.* at 359-60 (Breyer, J., concurring).

62. *Geier*, 459 U.S. at 865.

63. *Id.* at 877. Elizabeth Dole was the Secretary of the Department of Transportation when the agency enacted the final rule. *Id.*

64. *Id.* at 864-65, 878.

safety systems.<sup>65</sup> Beginning on September 1, 1996, manufacturers were required to equip ten percent of vehicles with passive restraints.<sup>66</sup> The specific Honda vehicle involved in this lawsuit was equipped only with manual shoulder and lap seat belts.<sup>67</sup> The Supreme Court found that although there was no specific statutory pre-emption in the instant case, “ordinary preemption principles” applied and subsequently determined that the regulations did pre-empt.<sup>68</sup>

The dissenting opinion by Justice Stevens states:

The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: it is the product of the Court’s interpretation of the final commentary accompanying an interim administrative regulation and the history of airbag regulation generally. Like many other judge-made rules, its contours are not precisely defined.<sup>69</sup>

Stevens found the majority’s holding particularly startling since the Congressional Act contained a provision that “[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.”<sup>70</sup>

In effect the majority read the savings clause as a nullity, and inferred tort law preclusion even though the face of the regulation itself did not evidence such intent on the part of the Secretary.

### *Shanklin:*

*Shanklin* did not involve an explicit savings clause in the underlying statutory framework, nor did the underlying statutory framework explicitly preempt tort law.<sup>71</sup>

The Federal Railway Safety Act (“FRSA”) was enacted in 1970 “to promote safety in every area of railroad operations and reduce railroad-

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65. *Id.* at 878.

66. *Id.*

67. *Id.* at 865. The seatbelts were buckled at the time of the accident. *Id.*

68. *Id.* at 864-65.

69. *Id.* at 887 (Stevens, J., dissenting).

70. *Id.* at 895 (Stevens, J., dissenting) (citing what is now codified as 49 U.S.C. § 30103(e) (1997)).

71. *Shanklin*, 529 U.S. at 347 (quoting 49 U.S.C. § 20101 (1997)).



related accidents and incidents.”<sup>72</sup> In the Highway Safety Act of 1973, federal funds were made available to finance the Railway-Highway Crossing Program for the “elimination of hazards of railway-highway crossings.”<sup>73</sup> The FRSA provided that:

Laws, regulations and orders related to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force a law, regulation or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the States requirement.<sup>74</sup>

The Secretary of Transportation promulgated several regulations implementing the Crossings Program, including the design of grade crossing improvements.<sup>75</sup> The regulation stated that “[a]dequate warning devices [installed] on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals” if any of several conditions are met.<sup>76</sup> Such conditions include: multiple main tracks; the possibility that one train might obscure another’s movement; high speed trains and moderately high volumes of road traffic; the use of the crossing by substantial number of vehicles such as school buses or trucks carrying hazardous materials; or, “when a diagnostic team recommends them.”<sup>77</sup> If these conditions do not apply, the decision of what devices to install is subject to the approval of the Federal Highway Administration (“FHWA”).<sup>78</sup>

On October 3, 1993, Eddie Shanklin drove his truck across railroad tracks in Gibson County, Tennessee and was struck and killed by a train.<sup>79</sup> The intersection was equipped with advance warning signs and the usual black and white X shaped signs that read “RAILROAD CROSSING.”<sup>80</sup> Several factors were present at the fatal crossing site that would have justified flashing light signals and automatic gates. Indeed, no individual determination was ever made at that site concerning

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72. *Id.* at 348 (quoting 23 U.S.C. § 130(a) (Supp. 2000)).

73. *Id.* at 347-48 (quoting 49 U.S.C. § 20106 (1997)).

74. *Id.* at 348 (quoting 23 C.F.R. § 646.214(b) (Supp. 2000)).

75. *Id.* at 348-49 (quoting 23 C.F.R. § 646.214(b)(3)(i) (2000)).

76. *Id.* at 349 (quoting 23 C.F.R. § 646.214(b)(3)(i) (2000)).

77. *Id.* (quoting 23 C.F.R. § 646.214(b)(3)(ii) (2000)).

78. *Id.* at 350.

79. *Id.*

80. *Id.*

whether upgraded warning devices were appropriate.<sup>81</sup>

The district court rejected an argument that pre-emption precluded an action based upon the inadequacy of the devices at the crossing.<sup>82</sup> The Sixth Circuit affirmed, holding in effect that the railroad had a duty to prove that the devices installed were adequate for the particular crossing. Installation of the existing signs and markers were merely “minimum protection,” not necessarily adequate protection.

The jury assessed damages of \$615,379, reduced by thirty percent for contributory negligence of her husband to \$430,765.<sup>83</sup> It is obvious the jury assigned predominant responsibility to the railroad for insufficient protection at the crossing.<sup>84</sup>

The Supreme Court reversed, holding that the expenditure of any federal funds on the signs that were actually installed pre-empted state tort actions based upon inadequate warning devices.<sup>85</sup> In justifying its conclusions, Justice O'Connor's majority opinion discussed the Court's previous decision in *CSX Transportation, Inc. v. Easterwood*.<sup>86</sup> In *Easterwood*, the Court said the regulations contained in 23 C.F.R. § 646.214(b)(1) were not preemptive, nor was the statute preemptive.<sup>87</sup> However, with respect to 23 C.F.R. § 646.214(b)(3), the Court reached a different result in *Shanklin*, concluding that when particular warning devices are installed, state tort law is pre-empted.<sup>88</sup> In *Easterwood*, no devices had ever actually been installed, even though federal funds had been obtained, so the Court found no pre-emption.<sup>89</sup>

The dissenting justices in *Shanklin*, Justices Breyer, Ginsburg, and Stevens, believed that *Easterwood* held that federal funding was necessary, not that it was sufficient to justify pre-emption.<sup>90</sup> Justice Ginsburg correctly noted that because federal funds had not been spent in *Easterwood*, the issue remained open for consideration in a later case.<sup>91</sup> The

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81. *Id.* at 351.

82. *Id.*

83. *Id.*

84. *See id.*

85. *Id.* at 359.

86. 507 U.S. 658 (1993).

87. *Id.* at 659.

88. *Shanklin*, 529 U.S. at 353.

89. *Id.*

90. *Id.* at 361 (Ginsburg, J., dissenting).

91. *Id.* (Ginsburg, J., dissenting).

devices installed in the instant case were the result of federal funding for improvements at 196 grade crossings in eleven counties in Tennessee.<sup>92</sup> No state or federal authority ever found or expressed an opinion on whether the actual devices installed were adequate to protect safety at the site in question.<sup>93</sup> The distinction the dissenters believed determinative was precisely the position the United States took as *amicus* in *Easterwood*.<sup>94</sup>

Thus, several Supreme Court decisions held that blanket pre-emption had not occurred through either the relevant legislation or regulations alone, and that something in addition had to take place to produce pre-emption. *Shanklin* holds, in effect, that any federal expenditure for installed devices pre-empts state tort law, regardless of the inadequacy of the particular devices.<sup>95</sup> Pre-emptive effect is conferred to the Tennessee Department of Transportation grant writers, subject only to the potential check of FHWA approval.<sup>96</sup> As no individualized determination ever took place of the particular site, it appears that the Supreme Court has effectively delegated Congress's power to pre-empt state law to state transportation planners, even though nothing in the statute or federal regulations indicates any such intent.

#### *Public Lands Council v. Babbitt*

The Court in *Public Lands Council v. Babbitt*<sup>97</sup> unanimously held that the Department of Interior permissibly adopted federal regulations concerning grazing rights on federal land.<sup>98</sup> In effect, the case validated the Secretary of the Interior's great discretionary power to make determinations about substantial property rights, including the right to extinguish such rights without compensation, and to require that private expenditures inure to the benefit of the United States.<sup>99</sup>

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92. *Id.* at 360 (Ginsburg, J., dissenting).

93. *Id.* (Ginsburg, J., dissenting).

94. *Id.* (Ginsburg, J., dissenting).

95. *Id.* at 353.

96. Grant writers may never have seen the railroad crossing at issue. It is ironic that the only specific fact based determination by any governmental entity regarding the adequacy of the safety measures at the railroad crossing is the now overturned jury verdict. *See id.* at 353-54.

97. 529 U.S. 728 (2000).

98. *Id.* at 731.

99. *Id.* at 728.

The case stemmed from three 1995 regulations<sup>100</sup> that: (1) redefined grazing preferences;<sup>101</sup> (2) opened up the eligibility of persons to receive grazing preferences beyond those “engaged in the livestock business;”<sup>102</sup> and (3) changed the future allocation of ownership of range improvements such as fencing, stock tanks, pipelines, and well drilling on public lands.<sup>103</sup>

After a lengthy discourse on the history of public land management,<sup>104</sup> the Court analyzed the Taylor Grazing Act (“Taylor Act”) signed into law on June 28, 1934.<sup>105</sup> The Court found that the Taylor Act delegated an enormous administrative task to the Interior Department, including the determination of the bounds of the public range, the creation of grazing districts, the determination of the grazing capacity of the districts, and the division of that capacity among applicants.<sup>106</sup> In effect, local grazing decisions were delegated to local district advisory boards made up of local ranchers.<sup>107</sup> Grazing permits were issued in terms of “animal unit months” (“AUMs”).<sup>108</sup> Permits were valid for up to ten years and usually renewed, as suggested by the Taylor Act.<sup>109</sup> “Grazing regulations in effect from 1938 to the present [make] clear that the Department [reserved] the [right] to modify, fail to renew, or cancel” a permit or lease for various reasons.<sup>110</sup> Potential reasons for cancellation include persistent overgrazing and failure to comply with the Range Code.<sup>111</sup> The Department frequently reduced individual permit AUM allocations so that by 1964 only “active AUMs” counted.<sup>112</sup> However,

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100. *Id.* at 738.

101. *Id.* at 740.

102. *Id.* at 745 (quoting the Dep’t of Interior, Fed. Range Code § 3(a) (1942)).

103. *Id.* at 748.

104. *Id.* at 731-32 (citing RICHARD WHITE, “IT’S YOUR MISFORTUNE AND NONE OF MY OWN”: A NEW HISTORY OF THE AMERICAN WEST (1991); WAYNE GARD, FRONTIER JUSTICE (1949); and ERNEST STAPLES OSGOOD, THE DAY OF THE CATTLEMAN (1929)).

105. One Senator described the devastating storms of the Dust Bowl as “the most tragic, the most impressive lobbyist, that have ever come to this Capitol.” *Id.* at 733 (citing 79 CONG. REC. 6013 (1935)).

106. *Id.* at 734.

107. *Id.*

108. *Id.* at 735 (stating that an AUM is “the right to obtain the forage needed to sustain one cow (or five sheep) for one month”).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 736. “Active AUMs” are AUMs that are intentionally granted by permit, minus AUMs suspended due to diminished range capacity. *Id.*

each rancher was assured that any capacity-related reduction would take place proportionally among permit holders and that if the range capacity increased, the Department would try to restore grazing privileges proportionally.<sup>113</sup> As a result of such regulations, the ranchers maintained that they possessed expectations in relationship to grazing privileges; these well-founded reliance interests, they argued, not only applied to ranchers but also to credit unions and other lenders.<sup>114</sup>

The Supreme Court strongly deferred to the discretionary authority of the Secretary to implement the underlying policies of the Taylor Act. The Court cited 43 U.S.C. § 315b which stated that the creation of a grazing permit “shall *not* create any right, title, interest or estate in or to the lands.”<sup>115</sup> The rights of the ranchers in such grazing permits were not absolute, and the Secretary of the Interior was “free reasonably to determine just how, and the extent to which, ‘grazing privileges’ shall be safeguarded.”<sup>116</sup> The Secretary is directed to consider not only such purposes as stabilizing the livestock industry, but also preventing injury to the public lands.<sup>117</sup> Redefinition of grazing preferences without specific reference to AUMs, neither violated the Taylor Act, nor implicated anything broader than “ordinary administrative leeway in adoption of regulations.”<sup>118</sup>

However, while the Court recognized the broad discretionary power of the Secretary, other actions by the Secretary regarding the new definitions emphasized “that the new definitions do ‘not cancel preference’ and that any change[s] are] ‘merely a clarification of terminology,’”<sup>119</sup> and the ranchers had failed to demonstrate to the Court a single case in which the recent changes had “jeopardized or might yet jeopardize permit security.”<sup>120</sup> Indeed, it appears that the Court effectively considered the challenge an “on the face” challenge, and finding no clear harm, relegated ranchers to the possibility of “as applied” challenges.<sup>121</sup> Moreover, instead of discussing the reasonableness of the Secretary’s

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113. *Id.*

114. *Id.* at 741.

115. *Id.* at 741 (emphasis in the original).

116. *Id.* at 742.

117. *Id.*

118. *Id.*

119. *Id.* at 743 (quoting Range Management, Definitions, 60 Fed. Reg. 9922 (Feb. 22, 1995)).

120. *Id.* at 744.

121. *Id.* at 751 (O’Connor, J., concurring).

actions through rulemaking,<sup>122</sup> much of the opinion centered on whether any specific provisions in the statute precluded the Secretary from making the regulatory changes at issue.

The Court found that neither the new definitional regulation regarding grazing rights, nor the regulation that omits reference to “engaged in the livestock business,” actually conflicted with statutory language.<sup>123</sup> The Court stated that: “[t]he regulation cannot change the statute, and a regulation promulgated to guide the Secretary’s discretion in exercising his authority under the Taylor Act need not also restate all related statutory language. Ultimately it is *both* the Taylor Act and the regulations promulgated there under that constrain the Secretary’s discretion in issuing permits.”<sup>124</sup>

Additionally, the Court denominated as unfounded the rancher’s fears that the hidden purpose of the new regulations was to end livestock grazing on the public lands.<sup>125</sup> Grazing permits must be used, thus radical environmentalists could not acquire grazing permits and effectively retire them through non-use.<sup>126</sup> Failing to make substantial use for two years is grounds for canceling the permit.<sup>127</sup> Further, explicit permission of the Secretary is necessary to place a permit into “temporary non-use” for financial reasons.<sup>128</sup>

The last challenge was a regulation that required title to all “structural or removable improvements” on federal land to be given to the United States government through a cooperative agreement.<sup>129</sup> Prior to the 1995 amendments, title was shared between the United States and the permit holder “in proportion to the actual amount of the respective contribution to the initial construction.”<sup>130</sup> The regulatory change effectively takes full title to all removable or non-removable structural im-

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122. A concurring opinion authored by Justice O’Connor, with Justice Thomas concurring, makes the point that although petitioners had presented an arbitrary and capricious challenge under the Administrative Procedure Act in the district court, the claim was not raised before the Supreme Court “for whatever reason.” *Id.* at 751-52 (O’Connor, J., concurring).

123. *Id.* at 746-48.

124. *Id.* at 745 (emphasis in the original).

125. *Id.* at 747.

126. *Id.*

127. *Id.* at 748.

128. *Id.*

129. *Id.* 748-49.

130. *Id.* at 749 (quoting 43 C.F.R. § 4120.3-3(b) (1998)).

provements in the future, even if virtually the entire cost of construction was born by the grazing permit holder.<sup>131</sup> The Court found this was not in conflict with the explicit statutory language in 43 U.S.C. § 315c, which required a subsequent permit holder on land with improvements to pay to the prior occupant “the reasonable value of such improvements.”<sup>132</sup> However, the Court accepted the Secretary’s argument that “the power to *authorize* range improvements pursuant to a cooperative agreement – a greater power,” also contained the lesser power to set “terms of title ownership to such improvements.”<sup>133</sup> The Court cited treatises in its decision.<sup>134</sup> If the Secretary denies that any private title exists as a condition of all future cooperative agreements, then no title or interest exists to which the requirement of reasonable compensation in 43 U.S.C. § 315c would apply.<sup>135</sup>

Neither “contracts of adhesion” nor the Court’s opinion suggests that it makes any difference that the landlord at issue is the United States and not a private landlord. In short, the decision in its totality represents substantial deference to the presumptive “reasonable judgment” of the Secretary. A brief concurring opinion, indicates that arbitrariness, while raised below, was not properly before the Court.<sup>136</sup>

#### DEFERENCE MAY REQUIRE A REGULATION LETTER RULINGS AND UNPUBLISHED POLICY ARE INSUFFICIENT:

The Court decided several cases that initially appear to indicate positions of non-deference. Closer examination reveals that even these decisions stand for the proposition that substantial deference is appropriate, but only if the agency acts with greater formality in announcing its posi-

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131. No change was made in the post 1995 regulations to title of structural improvements made pursuant to a range improvement permit. *Id.*

132. *Id.* at 750.

133. *Id.* at 749 (citing ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 5:31 (1980); HARRISON A. BRONSON, A TREATISE ON THE LAW OF FIXTURES § 40 (1904); 2 JOHN N. TAYLOR, A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT § 554 (8th ed. 1887)) (emphasis in the original).

134. *Id.* (citing ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 5:31 (1980) (stating that “ownership of tenant improvements is a matter open to negotiation with landlord”); HARRISON A. BRONSON, A TREATISE ON THE LAW OF FIXTURES § 40 (1904); 2 JOHN N. TAYLOR, A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT § 554 (8th ed. 1887)).

135. *Id.* at 749.

136. *Id.* at 751-52 (O’Connor, J., concurring).

tion.

*Christensen:*

One of the few cases in which the Court did not defer to an agency position was *Christensen v. Harris County*.<sup>137</sup> The Court did not defer to the agency position articulated in a letter ruling.<sup>138</sup>

The Court in *Christensen* addressed the issue of whether public employers can compel an employee to use accrued compensatory time.<sup>139</sup> The Fair Labor Standards Act (“FLSA”) originally did not cover states and political subdivisions, but subsequent amendments extended its coverage first in 1966, then in 1974.<sup>140</sup> After the Supreme Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>141</sup> Congress amended the FLSA to permit states and political subdivisions to substitute a system of compensating employees for overtime by compensatory time at a rate of at least one and one-half times their regular hourly wage for every hour of overtime worked.<sup>142</sup> This was an alternative to paying cash for the overtime.<sup>143</sup> However, there was a cap on the amount of compensatory time that could be accrued.<sup>144</sup> After an employee reached that cap, the employer had to cash out additional overtime.<sup>145</sup>

*Christensen* involved the employment of deputy sheriffs in Harris County, Texas.<sup>146</sup> The county became concerned that so much compensatory time was being accumulated that it could not afford to cash out additional overtime.<sup>147</sup> The county wrote the United States Department of Labor Wage and Hour Division asking “whether the sheriff may schedule non-exempt employees to use or take compensatory time.”<sup>148</sup>

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137. 529 U.S. 576 (2000).

138. *Id.* at 587.

139. *Id.* at 576.

140. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, and Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1)-(2), 88 Stat. 55.

141. 469 U.S. 528 (1985).

142. *Christensen*, 529 U.S. at 578-79.

143. *Id.* at 579.

144. *Id.* at 580.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*



The acting administrator replied:

It is our position that a public employer may schedule its nonexempt employees to use their accrued FLSA compensatory time as directed if the prior agreement specifically provides such a provision. . . . Absent such an agreement, it is our position that neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time.<sup>149</sup>

Harris then implemented a policy in which there were maximum numbers of compensatory hours which could be accumulated.<sup>150</sup> When the employee approached that cap number, the employee was asked to take steps to reduce the number.<sup>151</sup> If the employee did not voluntarily act, a supervisor could order the use of compensatory time at specified times.<sup>152</sup> More than one hundred deputy sheriffs sued the county, claiming that the new policy violated 29 U.S.C. § 207(o)(5),<sup>153</sup> which required that an employer reasonably accommodate employee requests to use compensatory time because this requirement was the exclusive means of utilizing compensatory time absent a prior agreement or understanding permitting some other method.<sup>154</sup> The district court agreed, granting summary judgment for the employees, but the court of appeals reversed, holding the FLSA did not speak to the issue and thus did not prohibit the county from using its new policy.<sup>155</sup>

Before the Supreme Court, all parties agreed that nothing in the FLSA expressly prohibited compelling employees to utilize accrued compensatory time. Petitioners and the United States as *amicus*, contended that the FLSA implicitly prohibited such a practice absent an agreement or understanding authorizing compelled use.<sup>156</sup> Both relied upon the canon *expressio unius est exclusio alterius*<sup>157</sup> according to Justice Thomas, the author of the opinion for the Court, though neither expressed the argument in Latin. However, the Court found the objective to be accomplished by the relevant statutory language was a minimal guarantee that

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149. *Id.*

150. *Id.* at 581.

151. *Id.*

152. *Id.*

153. 29 U.S.C. § 207(o)(5) (1995).

154. *Christensen*, 529 U.S. at 581.

155. *Id.*

156. *Id.*

157. The expression meaning “one thing implies the exclusion of another thing.”

some use of compensatory time would be assured to an employee when the employee requests it. Such requests were to be granted subject to the limitation contained in § 207(o)(5), that is, “if the use of the compensatory time does not unduly disrupt the operations of the public agency.”<sup>158</sup>

The remaining argument, and the most contentious part of the decision, concerned the application, *vel non*, of the doctrine in *Skidmore v. Swift & Co.*<sup>159</sup> In *Skidmore*, the administrator of the FLSA issued a letter similar to that in *Christensen*.<sup>160</sup> The *Skidmore* Court addressed the appropriate amount of deference given to the letter by the courts. At that time, the administrator had no rulemaking power regarding the subject of the letter.<sup>161</sup> The Court held that such letters were “entitled to respect,” but only to the extent that those interpretations have the “power to persuade.”<sup>162</sup> Petitioners argued that the deference applied by the Court in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*<sup>163</sup> was more appropriate. Justice Thomas explained that *Chevron*-style deference required a court to “give effect to an agency’s regulation containing a reasonable interpretation of an ambiguous statute.”<sup>164</sup> Justice Thomas wrote that agency interpretations not subject to formal adjudication or notice-and-comment rulemaking, such as the letter in the instant case, do not warrant *Chevron* deference. In *Christensen*, the Court perceived the position of the agency as an attempt to reinterpret an unambiguous regulation under the guise of interpreting it, in order to create a new regulation.<sup>165</sup>

Justice Souter’s concurring opinion states that nothing in the opinion prevents the Secretary of Labor from issuing regulations limiting forced use.<sup>166</sup> Based on that understanding, *Christensen* only stands for the proposition that an administrative agency may not accomplish by letter rulings what it is required to accomplish by notice-and-comment rulemaking.

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158. 29 U.S.C. § 207(o)(5) (1995).

159. 323 U.S. 134 (1944).

160. *Id.* at 138.

161. *Id.* at 139.

162. *Id.* at 140.

163. 467 U.S. 837 (1984).

164. *Christensen*, 529 U.S. at 585.

165. *Id.*

166. *Id.* at 589.

Justice Scalia's concurring opinion, asserts that it is time to abandon *Skidmore* deference as an anachronism, dating from times in which the Court refused to accord agency interpretations authoritative effect.<sup>167</sup> This position existed before the Administrative Procedure Act ("APA"), and accounts for the exemption in the APA of "interpretative rules," which are neither authoritative nor subjected to the requirements of notice-and-comment rulemaking.<sup>168</sup> Justice Scalia believes that era ended with the *Chevron* decision, and accordingly, *Chevron* deference should not be limited to the products of notice-and-comment rulemaking, but rather be accorded to any authoritative agency position, including letters, decisions, even a no-action notice published in the Federal Register.<sup>169</sup> However, Justice Scalia joined the Court's decision because he believes the Secretary's position was not a reasonable interpretation of the statute.<sup>170</sup> Justices Stevens, Ginsburg and Breyer dissented, in part because they disagreed with the majority's characterization of Petitioner's argument.<sup>171</sup> According to the dissent, the majority identifies the wrong "thing to be done" under the canon, *expressio unius*.<sup>172</sup> The dissenters believe that the thing to be done is that the employer and employees must reach an agreement.<sup>173</sup> Absent such agreements, as in the instant case, the employer may not unilaterally force its position regarding the use of compensatory time.<sup>174</sup> Justice Stevens said nothing in his dissent about either *Skidmore* or *Chevron* deference.<sup>175</sup>

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167. *Id.*

168. *Id.*

169. *See id.*

170. *Id.* at 591 (Scalia, J., concurring).

171. *Id.* at 593 (Stevens, J., dissenting). According to the majority, petitioners and the United States, relying on the canon, *expressio unius*, contend that the express grant of control to employees to use compensatory time, subject to the undue disruptions of workplace operations limitation, implies that all other methods of spending compensatory time are precluded under the *expressio unius* canon. *Id.* at 582. *Expressio unius est exclusio alterius* is a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. This canon was eluded to in Petitioner's Amicus Curiae Brief when citing, "[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Id.* at 583 (citation omitted); *see also* Amicus Curiae Brief for Petitioner at 270, *Christensen v. Harris County*, 529 U.S. 576 (2000) (No. 98-1167). The majority argues that the "thing to be done" is a minimal guarantee that an employee will be able to make some use of compensatory time when he requests to use it. *Christensen*, 529 U.S. at 583.

172. *Id.* at 593-94 (Stevens, J., dissenting).

173. *Id.* at 594 (Stevens, J., dissenting).

174. *Id.* (Stevens, J., dissenting).

175. However, in a footnote, Justice Stevens agreed with Justice Breyer's opinion of

The separate dissent by Justice Breyer (joined by Justice Ginsburg) disagrees with the thrust of Justice Scalia's suggestion that *Skidmore* deference is an anachronism.<sup>176</sup> Justice Breyer asserts that *Skidmore* stands for the proposition that the courts should "pay particular attention to the views of an expert agency where they represent 'specialized experience.'"<sup>177</sup> Such views, while not controlling, do "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>178</sup> Breyer opined, "*Chevron* made no relevant change. It simply focused upon an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations."<sup>179</sup> Absent such Congressional intent, Justice Breyer believes *Chevron* is inapplicable.<sup>180</sup> Justice Breyer concludes his dissent by agreeing with Justice Stevens' view that whether *Chevron* or *Skidmore* deference is applied in the instant case, petitioners' position and the United States should be sustained.<sup>181</sup>

Ultimately, *Christensen* provides a road map for judicial deference; indeed, it appears that all but Justice Scalia believe that the agency could do what the solicitor asserted the agency already had done.<sup>182</sup> Only Justice Scalia believed that result unreasonable.<sup>183</sup>

*Christensen* thus lines up as another decision supporting deference to agency actions, even though the eventual result was contrary to the agency's particular objective. Indeed, if the Court adopted Justice Scalia's position, greater deference would be appropriate in the future. Policy announced by an administrator in a luncheon speech to an industry trade group potentially would have the force of law. Would an answer to a reporter's question also have the force of law? It is hard to see the limits of deference proposed by Justice Scalia's position.

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*Chevron* deference. *Id.* at 595 n.2 (Stevens, J., dissenting).

176. *Id.* at 596 (Breyer, J., dissenting).

177. *Id.* (Breyer, J., dissenting) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)).

178. *Id.* at 596 (Breyer, J., dissenting) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

179. *Id.* (Breyer, J., dissenting).

180. *Id.* at 596-97 (Breyer, J., dissenting).

181. *Id.* at 597 (Breyer, J., dissenting).

182. *Id.* at 589-91 (Scalia, J., concurring).

183. *Id.* at 591 (Scalia, J., concurring).

*Sims*:

Another decision, *Sims v. Apfel*,<sup>184</sup> similarly indicates that some degree of formal adoption of a policy is necessary before that policy may permissibly be applied.<sup>185</sup> *Sims* concerned whether a social security claimant must present all issues that had been initially presented to the ALJ on appeal to the appeals council.<sup>186</sup> *Sims* requested appeals council review on a single issue, but review was denied.<sup>187</sup> *Sims* then brought suit in federal district court raising several additional issues that had not been presented in the request for Appeals Council review.<sup>188</sup> These issues included whether questions posed by the ALJ to a vocational expert were defective because they failed to include all of claimant's ailments, as well as failure to order a consultative examination with a physician.<sup>189</sup>

The district court rejected all claims on the merits.<sup>190</sup> On appeal, the Fifth Circuit affirmed, but refused to reach these contentions because they had not been presented to the appeals council under the issue preclusion doctrine.<sup>191</sup> The Commissioner of Social Security took the position before the Supreme Court that it had a policy of not invoking issue preclusion if a lawyer does not represent the claimant.<sup>192</sup> However, *Sims* had counsel.<sup>193</sup>

Justice Thomas wrote the decision for the Court, reversing the Fifth Circuit.<sup>194</sup> His opinion emphasized the policy of non-adversarialness in social security hearings.<sup>195</sup> While reasons justifying the normal rule of issue preclusion in judicial proceedings should also apply in most administrative proceedings, exceptions exist.<sup>196</sup> The Court held that when

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184. 530 U.S. 103 (2000).

185. *See id.*

186. *Id.* at 105.

187. *Id.*

188. *Id.*

189. *Id.* at 106.

190. *Id.*

191. *Id.*

192. *Id.* at 114 (O'Connor, J., concurring).

193. *Id.* at 105.

194. *Id.* at 104.

195. *Id.* at 110-11.

196. *Id.* at 109 (citing *Shepard v. NLRB*, 459 U.S. 344, 351 (1983)).

“an administrative proceeding is not adversarial, . . . the reasons for a court to require issue exhaustion are much weaker.”<sup>197</sup> Social security regulations make clear that “the SSA ‘conducts the administrative review process in an informal, non-adversary manner.’”<sup>198</sup> The Court concluded, “[s]ocial security proceedings are inquisitorial rather than adversarial.”<sup>199</sup>

Justice O’Connor’s vote was critical for the 5-4 decision holding issue preclusion inapplicable.<sup>200</sup> In her judgment, different policies depending upon whether a party was represented or not, was an “unwise” idea.<sup>201</sup> However, Justice O’Connor wrote separately because the SSA regulations failed to notify claimants of an issue exhaustion requirement.<sup>202</sup> She did not join the portion of Justice Thomas’s opinion discussing non-adversarialness and the inquisitory nature of SSA proceedings.<sup>203</sup> Lack of notice was sufficient to reverse the decision below.<sup>204</sup>

Justice Breyer authored a dissenting opinion joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.<sup>205</sup> The dissent finds inadequate justification in the non-adversarial nature of the SSA proceedings to justify different issue preclusion rules from the ordinary judicial situation.<sup>206</sup> Moreover, the dissent argues that “[p]etitioner’s lawyer should have known the basic legal principle: namely, that with important exceptions, a claimant must raise his objections in an internal agency appellate proceeding or forgo the opportunity later to raise them in court.”<sup>207</sup> The Fifth Circuit precedent was squarely on point, so the lawyer was on notice.<sup>208</sup>

However, all nine justices appear to agree that if the SSA wished to adopt issue preclusion, it could do so, although notice through a regula-

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197. *Id.* at 110 (citing *Hormel v. Helvering*, 312 U.S. 552, 560 (1941)).

198. *Id.* at 111 (quoting 20 C.F.R. § 404.900(b) (1999)).

199. *Id.* at 110.

200. *Id.* at 112 (O’Connor, J., concurring).

201. *Id.* at 114 (O’Connor, J., concurring).

202. *Id.* at 113 (O’Connor, J., concurring).

203. *Id.* (O’Connor, J., concurring).

204. *See id.* (O’Connor, J., concurring).

205. *Id.* at 114 (Breyer, J., dissenting).

206. *Id.* at 115-16 (Breyer, J., dissenting).

207. *Id.* at 119 (Breyer, J., dissenting).

208. *Id.* (Breyer, J., dissenting) (citing *Paul v. Shalala*, 29 F.3d 208, 210-11 (5th Cir. 1994)).

tion would be required.<sup>209</sup> It is unclear whether Justice O'Connor would deny application of such a regulation if it incorporated the "unwise" policy of one rule for represented claimants, and another rule for unrepresented claimants. None of the justices mentioned the practical reality that many of the attorneys who represent social security claimants have little experience with such cases and are unlikely to be adequately familiar with social security regulations. Indeed, many attorneys handle only one or two social security cases in their entire careers. Of course, for those attorneys who specialize in social security law, a special rule might be appropriate.

#### CONCLUSION:

The full set of administrative law decisions by the Supreme Court in its final Term of the Twentieth Century repeatedly trumpet deference to administrative agency discretion. Whether that discretion is exercised to preclude state tort suits or seize investments in fixtures on federal land, the Court consistently sounds maintains a steady drum beat; a drum beat of deference. One is reminded of a statement from Judge Learned Hand in the context of the legitimacy of judicial review of legislative enactments: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."<sup>210</sup> Is there any reason to believe we are more confident in our selection of agency personnel today, than in Hand's time? While certain Justices appear to require a level of formal consideration in the adoption of agency positions, Justice Scalia would vitiate any limitation of *Chevron* to notice and comment rules. Will agency whim, or press conference reactions replace notice and comment rulemaking in the future? Only the next millennium will tell.

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209. *See id.* at 108, 113, 118.

210. LEARNED HAND, J., THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73 (1958).