1993

Administrative Law and Labor Law: The Supreme Court's 1991-92 Docket

Marshall J. Breger
The Catholic University of America, Columbus School of Law

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MARSHALL J. BREGER*

MR. ROSS: Thank you, Judge Wald. Our next speaker is the Solicitor of the Department of Labor, Marshall Breger. Marshall, as many of you know, served as the distinguished Chairman of the Administrative Conference of the United States for a number of years.

MR. BREGER: Thank you very much. It is really a delight to be here and not to be in Chairman Ross's shoes at this time.

Judge Wald has captured all the administrative law movies of the year. Thus, I am just going to have to be a bit of a deconstructionist, and I will title my talk "Husbands and Wives." I will leave it to those assembled to figure out, or perhaps freely associate, the overarching meaning of this talk—let alone its relation to Woody Allen.

More seriously, it is a pleasure to be here, before so many of my friends and former colleagues, to give you my thoughts as Solicitor of Labor on last year's Supreme Court term in administrative law. Of course, when I served as the moderator of the panel last year, I had the luxury of being impartial and objective. Now that I supervise some six-hundred aggressive government attorneys, I have developed more of a litigator's perspective on such matters. You will forgive me if I examine some recent administrative law developments in the Supreme Court focusing on the labor law area. I think I can offer more insight into those administrative law cases that affect the Department of Labor.

Let me start off by noting that traditional employment cases did not play a prominent role in last year's Supreme Court docket. There was only one NLRB ruling,[1] one case addressing Section 301 of the Labor Management Relations Act (LMRA),[2] and one case, involving Title

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* Marshall J. Breger is a Senior Fellow at the Heritage Foundation in Washington, D.C. He has served as the Solicitor of Labor in the Bush Administration, and previously served as Special Assistant to President Ronald Reagan from 1983 to 1985. Mr. Breger was also the Chairman of the Administrative Conference of the United States from 1985 until 1991.

1. *See* Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992) (holding that employers have right to exclude non-employee union organizers when reasonable alternative means of access exist).

2. *See* Woodell v. International Bd. of Elec. Workers, Local 71, 112 S. Ct. 494

VII,[3] that was in reality a ruling under the Internal Revenue Code.[4] On the other hand, the Court decided seven cases that either directly involved Labor Department programs or the Labor Department.[5] I think this demonstrates a trend in which much of the action under the National Labor Relations Act (NLRA) and Title VII is settled in the lower courts. An increasing proportion of Supreme Court labor cases is comprised of matters arising under ERISA,[6] OSHA,[7] LHWCA,[8] and other Labor Department programs. Most of these cases have clear administra-

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(1991) (holding that subject matter jurisdiction under section 301 of Labor Management Relations Act (LMRA) extends to suits on union constitutions brought by individual union member, and that member has right to jury trial under Labor Management Reporting and Disclosure Act (LMRDA) on damages claim for lost wages).

In this case, a union member alleged that because of his opposition to proposed union actions, the local violated Title I of the LMRDA by discriminating against him in job referrals. *Id.*

3. Title VII of the Civil Rights Act 1964, 42 U.S.C. §§ 2000a-2000h-6 (1988).

4. *See* United States v. Burke, 112 S. Ct. 1867 (1992) (holding that back pay awards in Title VII settlements are not excludable from gross income).

5. *See* Southwest Marine, Inc. v. Gizoni, 112 S. Ct. 487 (1991) (holding that maritime worker whose occupation is defined in Longshore and Harbor Workers Compensation Act (LHWCA) may also have seaman status under Jones Act); King v. St. Vincent's Hospital, 112 S. Ct. 570 (1991) (holding that under Veteran's Reemployment Rights Act (VRRA), rights to civilian reemployment are not limited by length of military service); General Motors Corp. v. Romein, 112 S. Ct. 1105 (1992) (holding that statute requiring employer that had withheld worker's compensation benefits and reliance on earlier statute to repay benefits does not violate Contract or Due Process Clauses of Constitution); Nationwide Mut. Ins. Co. v. Darden, 112 S. Ct. 1344 (1992) (holding that under Employment Retirement Income Security Act of 1974 (ERISA), it is correct to use traditional agency law criteria in defining "employee"); Patterson v. Shumate, 112 S. Ct. 2242 (1992) (holding that under Bankruptcy Code and ERISA, anti-alienation provision in qualified pension plan is restriction on transfer, and enforceable under non-bankruptcy law); Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374 (1992) (holding that state regulation of occupational safety and health issues not approved by Secretary of Labor, and for which federal standard is in effect, conflicts with purposes and objectives of Occupational Safety and Health Act (OSHA)); Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589 (1992) (holding that, under LHWCA, worker who has settled with third party, and whose employer is not statutorily obligated to provide compensation, forfeits all future benefits from employer). These constituted 6.4% (seven out of 110) of the cases decided by the Court last term.

6. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988).

7. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988).

8. Longshore and Harbor Workers' Compensation Act of 1927, *as amended*, 33 U.S.C. §§ 901-950 (1988).

tive law implications.

As all of you know, the most important administrative law development in the last several years has been the Court's implementation of the method of statutory construction set out in *Chevron v. Natural Resources Defense Council Inc.*[9] Under this now familiar formulation, when a court reviews an agency's construction of a statute, it first asks if Congress has spoken to the question at issue. It thus gives primary effect to the plain statutory language and places secondary reliance on the legislative history and statutory structure. If Congress has not spoken to the issue, or has done so ambiguously, a court cannot impose its own construction on a statute. It must uphold the agency's interpretation if that interpretation is based on a permissible reading of the applicable statute.

Again, to repeat black letter learning, *Chevron* imposes a two-step analysis. First, the court must attempt to discern Congress's intent, using traditional tools of statutory construction. If that is not possible, the court must look to the agency's reasonable construction of the statute. I will spend most of my allotted time discussing recent applications of these principles.

The notion of judicial deference to agency interpretations of their statutory and regulatory regime is rooted in a proper respect for the legislative delegation of policymaking responsibilities. It recognizes that the agency designated by Congress to administer a statutory regime on a day-to-day basis should have substantial discretion in the discharge of its duties.

Those of you who were here last year will recall a very stimulating discussion on *Chevron* led by Professor Sargentich. One case that was not discussed, however, was *Martin v. Occupational Safety & Health Review Commission.*[10] This was understandable, because, curiously,

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9. 467 U.S. 837 (1984).

10. 111 S. Ct. 1171 (1991). In this case, the Secretary of Labor issued a citation to CF & I Steel Corporation, having found that CF & I had equipped some of its employees with loose-fitting respirators that exposed them to impermissible coke-oven emissions levels. The Secretary also assessed a monetary penalty against CF & I for violating a regulation promulgated by the Secretary, requiring an employer to institute a respiratory protection program. The Occupational Safety and Health Review Commission (Commission) vacated the citation, ruling that the facts did not establish a violation of that regulation, which was the sole asserted basis for liability. The cited regulation expressly requires only that an employer train employees in the proper use of respirators, whereas another regulation—unmentioned in this action—expressly states the employer's obligation to ensure a proper fit. *Id.*

Chevron was not mentioned in the decision. Nonetheless, it was certainly a *Chevron* case. From the Department of Labor's perspective, this case is a very important decision on judicial deference, and therefore, I would like to address it before proceeding to this term's cases.

Although we will also refer to the case as "CF&I," which was the name of the employer involved, the case name in the Supreme Court accurately portrays it as one of those rare legal battles between two federal agencies: the Occupational Safety and Health Administration (OSHA), acting as the Secretary of Labor's delegate under the Occupational Safety and Health Act (OSH Act),[11] and the independent Occupational Health and Safety Review Commission (Commission). Indeed, the Commission considered the case so important that it took the unusual step of hiring an outside law firm to present its views in an *amicus* brief to the Supreme Court.

The issue before the Court was "whether a reviewing court should defer to the Secretary or to the Commission when these actors furnish reasonable but conflicting interpretations of an ambiguous regulation under the OSH Act."[12] We, of course, argued strenuously in favor of deference to OSHA. A unanimous Court, in one of Justice Marshall's last opinions, agreed, thus resolving in the Labor Department's favor a troublesome split in the circuits.

The Court had interesting things to say, both about the split-agency model, of which the OSH Act provides perhaps the foremost example, and about the policies underlying the deference principle. It said that within constitutional limits, Congress is free to separate the rulemaking and enforcement functions from the adjudicative function, and to assign them as it sees fit to separate independent agencies. The Court inferred from the structure and history of the OSH Act, however, that Congress did not intend for these functions to overlap.[13] Further, it held that the interpretive function is a necessary adjunct of the rulemaking function. Hence, the interpretive function resides entirely with OSHA and not with the Commission, whose powers are purely adjudicative.[14]

It necessarily follows that the courts owe deference to OSHA's interpretations of its own regulations, and not to the Commission's, when the competing interpretations are both reasonable. Such deference, the Court said, was appropriate from a policy or institutional competence stand-

11. 29 U.S.C. §§ 651-678 (1988).
12. *Martin*, 111 S. Ct. at 1175.
13. *Id.* at 1176.
14. *Id.* at 1176-77.

point because of certain "readily identifiable structural advantages over the Commission" that OSHA possesses.[15] Not only is it the author of the regulation being interpreted, but as the enforcer of the Act, OSHA "comes into contact with a much greater number of regulatory problems than does the Commission," which sees only contested cases.[16]

Judicial deference is rooted in the concept that the administrative agency assigned lawmaking power by Congress has greater "historical familiarity and policymaking expertise"[17] than the reviewing court. This principle was also the deciding factor in concluding that Congress intended OSHA, not the Commission, to have the authoritative power to issue interpretations. Therefore, even under the split-agency model, vesting the Commission, and ultimately the courts, with the power to review first for consistency with the statute and then for reasonableness, is a sufficient bulwark against bias or overzealous agency interpretation of its own regulations.

In a somewhat muddled part of the decision, the Court held that OSHA is owed deference even when, indeed perhaps particularly when, its interpretations are embodied in an enforcement citation.[18] It went so far as to say that the Secretary's litigating position before the Commission, far from being a *post hoc* rationalization, "is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard."[19] Needless to say, we at the Solicitor's office appreciate the level of deference that the Court chose to give to our briefs. Nonetheless, in this somewhat academic context, one can only wonder if the Court fully appreciated the implications of giving *Chevron* deference to the advocacy positions staked out by a government agency defending its actions in regulatory or enforcement litigation.

Remarkably, the Court then suggested that less formal means of interpreting regulations, which the Court singled out to include interpretive rules and enforcement guidelines, might be entitled to *a lesser degree of deference*.[20] Leaving aside the question of how an interpretive rule is any less "formal" than an interpretation rendered as part of an enforcement action, this raises in my mind the significant issue of how much deference is owed to an agency interpretation as opposed to a legislative

15. *Id.* at 1176.
16. *Id.* at 1177.
17. *Martin*, 111 S. Ct. at 1177.
18. *Id.* at 1178.
19. *Id.* at 1179.
20. *Id.* at 1179.

rule. On this point, the Court was less than clear. In our briefs we argued that post-*Chevron*, an interpretation is entitled to the same deference as a legislative rule.

The Court, however, brushed past this argument *without*, I repeat, *without*, even citing *Chevron* as authority for any part of the decision. But there were at least mixed signals, however enigmatic. On the one hand, the Court pointed out that "[t]he Secretary's interpretation of an ambiguous regulation is subject to the same standard of substantive review as any other exercise of delegated lawmaking power."[21] It also pointed out, echoing *Chevron*, that the Commission, like a court, is "authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness."[22]

On the other hand, the Court emphasized that the reviewing court should defer to the Secretary only if the Secretary's interpretation is reasonable, thus leaving the Commission and the courts somewhat free to believe that the determination of reasonableness is theirs to make under an arguably less deferential pre-*Chevron* standard. And the Court cited the earlier *Batterton v. Francis*[23] and *Skidmore v. Swift & Co.*[24] decisions for the proposition that less formal forms of interpretation are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers" although "these informal interpretations are still entitled to some weight on judicial review."[25]

For my part, I am coming to believe that if anything, it makes more common sense to give a higher degree of deference to an agency's interpretation of its rules than to almost any other kind of agency utterance. After all, the agency is commenting on its own understanding of

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21. *Id.* at 1180 (citing 5 U.S.C. § 7026(2)(A) (1988)).

22. *Martin*, 111 S. Ct. at 1178.

23. 432 U.S. 416 (1977). In *Batterton*, plaintiffs challenged a Department of Health, Education, and Welfare regulation that excluded from the definition of "unemployment" those fathers who were unemployed because of participation in a labor dispute, or because of conduct that would cause disqualification from unemployment compensation under the relevant state unemployment scheme. The Court held that the regulation did not exceed the Secretary's authority. *Id.* at 425-26.

24. 323 U.S. 134, 140 (1944). In *Skidmore*, plaintiffs sought recovery under the Fair Labor Standards Act of overtime pay of which they had been deprived. Their work time at issue was spent in general fire hall duties and in maintenance of fire equipment, and was not considered overtime. The Court considered the Wage and Hour Administrator's opinion as to whether such activities constituted work time, but overruled him and held that these activities should be compensated as overtime. *Id.*

25. *Martin*, 111 S. Ct. at 1179.

its own regulations. Presumably, the agency is more likely than anyone else to know what it meant to say. In fairness, however, changes in administrations, with resultant changes in both personnel and ideology, somewhat mitigate the force of this point.

The *Martin* Court's approach is a more modest exercise of agency discretion than interpreting a statute—that is, interpreting what Congress meant when promulgating a binding legislative rule. And while this approach admittedly may be intuitively reasonable, it does differ from the old school that suggests, in Michael Asimow's words, that "one reason the APA exempted interpretive rules from the pre-adoption requirements was that such rules were thought to be subject to plenary judicial review."[26]

I note also that a few days later in *EEOC v. Arabian American Oil Co.*,[27] involving the extraterritoriality of Title VII, the Court addressed this very point. Chief Justice Rehnquist, for the majority, opined that the lesser deference standard under *Skidmore* and *General Electric Co. v. Gilbert*[28] is still applicable to agency interpretations. But Justice Scalia, with characteristic vigor, strongly disagreed, saying that *Chevron* provides a single standard of deference.[29]

I doubt that we have heard the last of the debate. In the meantime, those of us left to defend agency interpretations of less than pristine reasonableness in the lower courts will ignore then-Judge Scalia's prior post-*Chevron* admonition that "there is deference and there is deference,"[30] and will continue to cite *Chevron* for our purposes.[31]

With one significant exception, the Court continued to give deference to the government's views last term, although I noted no major extensions of the deference doctrine. The Court employed deference to some extent in at least three cases, none of which involved a Labor Depart-

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26. Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 563 (1977).

27. 111 S. Ct. 1127 (1991). The Court held that the Equal Employment Opportunity Commission's (EEOC) interpretation that Title VII applies to discrimination against American citizens abroad should receive a lower deference standard from the courts, in part because this was a recent policy change, was contrary to earlier positions, and lacked support in the statute.

28. 429 U.S. 125 (1976). The Court stated that the EEOC guidelines in question shall be accorded consideration in determining legislative intent, but not as much as would be accorded an agency regulation. *Id.*

29. *Martin*, 111 S. Ct. at 1236 (Scalia, J., concurring).

30. Brock v. Cathedral Bluffs Shale Oil, 796 F.2d 533, 537 (D.C. Cir. 1986).

31. *Cf.* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act I, sc. 3 (arguing that "[t]he Devil can cite Scripture for his purpose.").

ment program. In *INS v. National Center for Immigrants' Rights*,[32] a unanimous Court, although again not citing *Chevron*, deferred to the INS's consistent interpretation of one of its own regulations. This regulation authorized the Attorney General to arrest excludable aliens, and either to hold them or to release them on bond. It also contained a condition forbidding employment pending a deportation determination.[33]

Again, in *Arkansas v. Oklahoma*, the Court unanimously deferred both to EPA's interpretation of the Clean Water Act's permit requirements and to the federal agency's construction of Oklahoma's water quality standards. This case is noteworthy, I think, because it cites *Chevron* as a basis for upholding a federal agency's interpretation, as Judge Wald said, of a state regulation.[34] In that sense, it is reminiscent of *Pauley v. Bethenergy Mines*,[35] decided in 1991, in which the Court, over a vigorous dissent on this point by Justice Scalia, deferred to the Department of Labor's interpretation of Department of Health, Education and Welfare regulations, stating that the Labor Department's interpretation of another agency's regulation should be given deference.[36] Obviously, I liked that decision, too.

Finally, last term in *National R.R. Passenger Corp. v. Boston & Maine Corp.*, a divided Court ruled that the statutory term "required" was ambiguous in context, and thus deferred to the ICC's construction

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32. 112 S. Ct. 551 (1991).

33. Appellants alleged that the Attorney General exceeded his authority in promulgating the regulation. The Supreme Court, per Justice Stevens, held that the regulation allows the Attorney General to impose bond conditions in the case of aliens who lack work authorization. *Id.* at 556. The Court did not address whether aliens authorized to work could be subject to the "no-work" condition. *Id.* at 557. In support of its decision, the Court found the regulation consistent with its stated purpose of protecting against the displacement of workers in the United States. *Id.* at 558. The Court also found that various administrative procedures ensure that aliens detained and bonds issued by INS will receive "individualized determinations." *Id.* at 559.

34. 112 S. Ct. 1059 (1992).

35. 111 S. Ct. 2524 (1991).

36. *See id.* at 2535 (holding that Department of Labor's determination that interim regulations were not more restrictive than those of Department of Health, Education, and Welfare, was reasonable, and therefore warranted judicial deference). The Court asserted that because the Black Lung Benefits Act provides disability compensation for miners developing pneumoconiosis from coal mine employment, "policy-making" authority should be delegated to the Department of Labor, and judicial deference was warranted, provided that *Chevron*'s reasonableness requirement was satisfied. *Id.* at 2535 (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984)).

of that term to mean "convenient or useful."[37] Commentators have described this decision as reflecting the Court's "extraordinarily deferential approach."[38]

Going from one extreme of deference to another, nobody can claim that the Court was overly deferential to the government in *Lechmere, Inc. v. NLRB*,[39] the most significant and controversial labor case of last term. The Court, led by Justice Thomas, held that employers do not have to allow non-employee union organizers to distribute literature on their private property. Rather, the NLRA protects such union organizers only in rare instances in which employees cannot be reached by other means, such as in an isolated mining camp.[40]

In so holding, the Court rejected the balancing test adopted by the NLRB for such union access cases.[41] In a sweeping repudiation of the NLRB, Justice Thomas stressed that, before addressing any issue of deference, the Court must decide whether the agency's interpretation of the statute is consistent with the Court's prior determinations of the statute's true meaning. Applying this standard, the Court held that the Labor Board's interpretation was inconsistent with the 1956 "black letter" *NLRB v. Babcock & Wilcox Co.*[42] decision, and thus must be set aside.

The Court did not even remand *Lechmere* to provide the Board with an opportunity to explain its rationale. It simply vacated. Justice White wrote a stinging dissent, arguing that *Chevron* deference was due, because the Supreme Court had never ruled, not even in *Babcock*, that the NLRA unambiguously addresses the access rights of non-employees, and because of this, the Board's construction was permissible and entitled to deference.[43] Perhaps surprisingly, Justice Scalia, the champion of deference to administrative agencies, joined the majority.

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37. 112 S. Ct. 1401-02 (1992).

38. William Funk, *Supreme Court News*, 17-4 A.B.A. SEC. ADMIN. L. & REG. PRAC. 5, 6 (SUMMER 1992).

39. 112 S. Ct. 841 (1992).

40. *Id.* at 849.

41. Jean Country, 291 N.L.R.B. 11 (1988). In Jean Country, the NLRB set out a three-part balancing test to determine whether non-employee union organizers should have access to an employer's private property. *Id.* at 14. The components of the test were: (1) the degree of impairment to the employer's property rights, balanced against (2) the employee's right to organize as provided in the National Labor Relations Act, while considering (3) the organizer's reasonably effective alternative means of access. *Id.*

42. 351 U.S. 105 (1956).

43. *Lechmere*, 112 S. Ct. at 852 (White, J., dissenting).

Lechmere probably does not represent a retrenchment in deference law. It is likely only a caution that, just as courts will sometimes go to great lengths to find statutes ambiguous, they can find statutory certainty when you least expect it, even from a convenient reading of prior cases. A more cynical person than myself might be tempted to say that just as there is (or was) "deference and deference," so too "there is *Chevron* and there is *Chevron*."

This brings me to the other group of cases I would like to discuss briefly today—the Court's "plain meaning cases." As I have already noted, none of the deference cases last term were Labor Department cases. Rather, we were successful last term in persuading the Court that our construction of any relevant statutes was consistent with their plain meaning. In other words, we asked the Court to employ the first prong of the *Chevron* test, and just leave it at that.

The increasing use of plain meaning analysis may be the Court's way of avoiding a meaningful exploration of legislative intent and statutory purpose. I will not add my views to the ongoing debate of whether this is a good or bad development overall, except to say that I am glad to see courts looking skeptically at statements of individual congressmen and other often purposely created legislative history.[44]

Let me consider the plain meaning of four labor law cases decided last term. In *King v. St. Vincent's Hospital*,[45] the Court unanimously agreed with the government's view that a provision of the Veterans' Reemployment Rights Act (VRRA)[46] includes no implicit reasonableness limits on the duration of leave that must be granted by employers for military training.[47] As many of you know, the VRRA requires em-

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44. For a recent example, see Bath Iron Works v. Director, Office of Workers' Compensation Programs, 113 S. Ct. 692, 700 (1993) (citing specific comments of individual Senators in using legislative history to decide appropriate statutory interpretation). In this case, the Court decided that hearing loss claims filed by either current workers or retirees must be compensated under compensation system for claimants suffering statutorily scheduled injuries, rather than under compensation system for retirees. *Id.* at 700.

45. 112 S. Ct. 570 (1991).

46. 38 U.S.C. §§ 2021-2027 (1988). This Act covers the reemployment rights of those persons inducted into the Armed Forces of the United States who were required to leave their employment to perform such duties. *Id.*

47. The Supreme Court in *St. Vincent's Hosp.* held that the petitioner's request for a three-year leave of absence from the hospital to serve as a Command Sergeant Major in the Active Guard/Reserve program was not unreasonable. *St. Vincent's Hosp.*, 112 S. Ct. at 572-73. The Court further stated that section 2024(d) of the VRRA "places no limit on the length of a tour after which [a veteran] may enforce

ployers to grant leave requests for military training and to permit such employees to return to their previous positions with no loss of seniority.

While this holding perhaps was not surprising in light of Operation Desert Storm, it should be noted that most of the circuits that had considered the issue had grafted a reasonableness gloss onto the statutory language.[48] As Justice Souter noted, if he were "free to tinker with the statutory scheme," he could reasonably accord significance to the length of leave in determining the protections of the Act.[49] But the Court held that the relatively straightforward statutory leave language simply did not permit such tinkering, or the use of a reasonableness standard.

In *Nationwide Mutual Insurance v. Darden*,[50] we find a variation on that theme. In that case, the Court unanimously held that ERISA's definition of "employee"[51] incorporates traditional agency law criteria for identifying master-servant relationships. Justice Souter, again writing for the Court, noted that the statutory definition of "employee" did not offer much guidance as to its meaning. But the Court nonetheless rejected the Fourth Circuit's broad test based on its understanding of ERISA's policies and purposes.[52] Instead, as it did earlier in the intellectual property

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his reemployment rights against [his employer]." *Id.* at 575.

48. *See, e.g.* St. Vincent's Hosp. v. King, 901 F.2d 1068, 1072 (11th Cir. 1990) (finding that employee's request for three-year leave for tour with National Guard was unreasonable); Eidukonis v. Southeastern Pa. Transp. Auth., 873 F.2d 688, 694 (3d Cir. 1989) (holding that reasonableness standard was applicable to evaluation of employee's request for military leave); Gulf States Paper Corp. v. Ingram, 811 F.2d 1464, 1468 (11th Cir. 1987) (stating that judicial inquiry into reasonableness of leave request must be limited and extremely deferential, beginning with presumption that such leave is reasonable); Lee v. Pensacola, 634 F.2d 886, 889 (5th Cir. 1981) (finding that National Guard member who continued training after employer denied his application to do so failed reasonableness standard). *Contra* Kolkhorst v. Tilghman, 897 F.2d 1282, 1286 (4th Cir. 1990) (deciding that reservist's leave of absence to participate in training under VRRA was not dependent on reasonableness of request), *cert. denied*, 112 S. Ct. 865 (1992).

49. *St. Vincent's Hosp.*, 112 S. Ct. at 573.

50. 112 S. Ct. 1344 (1992). The Court held that, in determining whether Robert Darden was an employee of Nationwide Mutual Insurance Corporation for the purpose of receiving retirement benefits under ERISA, the traditional agency law criteria of an employee would be applied. *Id.*

51. *See* 29 U.S.C. § 1002(6) (1988) (stating "[t]he term 'employee' means any individual employed by an employer.").

52. The Fourth Circuit created a standard to determine whether an individual who does not fit within the traditional concept of employee status should be considered an employee in the context of ERISA's definition. First, the "employer" or sponsor of the pension plan must have taken some action to create a reasonable expectation on the part of the "employees" that benefits would be afforded to them; and second, the

context,[53] the Court stated that where Congress uses a term that has a "settled meaning under the common law,"[54] such as "employee," the Court will assume that Congress meant to incorporate that established meaning, unless the statute indicates otherwise.[55]

The Court was so committed to the "settled meaning under the common law" approach that it even rejected the government's somewhat broader alternative that would take account of the statute's remedial purposes. In other words, at least in this case, the Court decided that not only does a "plain" statutory meaning trump an agency's permissible but somewhat innovative interpretation, but so too does a "settled" meaning of an admittedly undefined general term.

The most difficult case for me last term, both personally and institutionally, was another plain meaning case, *Estate of Cowart v. Nicklos Drilling Co.*[56] In that case, a divided Court agreed with our argument based on the literal language of the Longshore and Harbor Workers' Compensation Act (Longshore Act) that a claimant forfeits his workers' compensation benefits if he settles a third-party tort claim without obtaining his employer's prior written approval.[57] This is true regardless of whether the employer made benefit payments to the claimant or acknowledged liability at the time of settlement.[58] That puts the claimant at the mercy of the employer, because he has to get approval before receiving a settlement.

In our brief to the Supreme Court, we argued for this result, although we had taken a contrary position in the court of appeals. For this reason, some people—and from the language of the case, I think this in-

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"employees" must have relied on that expectation, by foregoing other significant means of providing for retirement. Darden v. Nationwide Mut. Ins., 796 F.2d 701, 706-07 (1986), *aff'd*, 922 F.2d 203 (4th Cir. 1991), *rev'd*, 112 S. Ct. 1344 (1992).

53. Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). The Court confronted the issue of whether a sculptor's work was a "work made for hire," as defined by the Copyright Act of 1976, 17 U.S.C. § 101 (1988).

54. *Darden*, 112 S. Ct. at 1348 (quoting *Reid*, 490 U.S. at 739).

55. *Id.* at 1349.

56. 112 S. Ct. 2589 (1992). In this case, petitioner, a Nicklos employee, was injured while working on an oil drilling platform owned by Transco. Petitioner, after suing Transco, ultimately settled. Petitioner, however, did not receive a formal written approval from Nicklos before settling with Transco, as required by the clear language of the Longshore Act. *Id.* at 2591.

57. 33 U.S.C. § 933(g) (1988). The Longshore Act requires an employer to compensate an employee engaged in maritime employment for disabilities or death. *Id.* §§ 901-945, 947-950.

58. *Id.* § 933(g)(2).

cludes several Supreme Court Justices[59]—have assumed that the Solicitor General forced us to change our position. That was not the case. We took that position after extensive staff conversations, culminating in a six-hour meeting commencing one Sunday morning.

Like both the Court's majority and dissent, I was, and continue to be, troubled by the outcome. That is because the Court's decision will almost surely result in the denial of benefits to some deserving claimants. But I was convinced under the *Chevron* analysis that the plain meaning of the statutory language compelled this result and required that we change our position. This should provide, for better or worse, some comfort to those who fear that *Chevron* has become unprincipled in the hands of litigators, and result-oriented in the hands of courts.

In response to *Cowart*, the Labor Department is actively developing an amendment to the Longshore Act to correct this statutorily driven inequity. Thus, at least we are trying to follow the "rules of the game" by asking Congress, and not courts, to correct plain meaning that has injurious social outcomes.

The fourth plain-meaning ruling I want to discuss is the *Gade v. National Solid Wastes Management Ass'n*[60] case that Judge Wald referred to earlier. It is primarily a preemption case, and it turned on the proper construction of the OSH Act.[61] The threshold question was whether the OSH Act has any preemptive effect at all on state standards that "supplement," but do not purport to displace, the federal OSHA standards.[62] As it turned out, this question proved troubling for the Court, and is interesting in light of our *Chevron* discussion.

As *amicus*, we argued the Labor Department's longstanding position that the OSH Act explicitly preempts such state standards, unless the state has obtained approval for a state plan in accordance with the OSH Act. We derived that construction from the language and structure of section 18 of the OSH Act,[63] which affirmatively directs states to have federally approved state plans if they wish to continue to regulate issues covered by an OSHA standard.

In our view, the clear negative implication of this language was that states do not retain concurrent jurisdiction to regulate these issues out-

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59. *Cowart*, 112 S. Ct. at 2597-98, 2602 (Blackmun, J., dissenting). Justice Blackmun called the Director's change in position, "the Government's newly discovered interpretation." *Id.* at 2599.

60. 112 S. Ct. 2374 (1992).

61. 29 U.S.C. §§ 651-678 (1988).

62. *Gade*, 112 S. Ct. at 2381-82.

63. 29 U.S.C. § 667(b) (1988).

side of the state-plan process. If you have a state plan, you can regulate; if you do not have a state plan, you cannot regulate. In twenty years, every court that addressed the issue also had concluded, or at least assumed, that the OSH Act was an express preemption statute.[64]

If you look at this case in *Chevron* terms, we were arguing that the threshold preemption question should be decided at *Chevron* step one. If necessary, we certainly should prevail in step two, because our interpretation of the statute expressly preempting the states was, at the very least, permissible. But neither we nor the Court framed the case to fit a *Chevron* analysis. The Court split four-one-four on this fundamental threshold issue.

Only Justice Kennedy in concurrence agreed completely with our view that section 18 of the OSH Act unambiguously and expressly preempts a related state standard. He noted that this statutory construction was "confirmed" by OSHA's consistent interpretation of the Act.[65] Meanwhile, Justice Souter, in dissent, found the statute to be ambiguous at best, and therefore would have permitted the state to regulate workplace safety as it pleased, so long as its standard did not conflict directly with an OSHA standard.[66]

But it is the plurality opinion of Justice O'Connor, in which Justices Rehnquist, White, and Scalia joined, that I find so interesting. Like the Kennedy concurrence, it also drew upon our analysis, but it did not purport to give any deference to the Secretary's longstanding construction. Rather, construing the statute independently, the plurality stated its agreement with Justice Kennedy that the text of the OSH Act provides the strongest indication that Congress intended preemption in this context. But it disagreed with Justice Kennedy that preemption that relies on the negative implications of the text rises "to the level of express pre-emption."[67] Nevertheless, the plurality agreed "that the implications of the text of the statute evince a congressional intent to pre-empt nonapproved state regulations when a federal standard is in effect,"[68] and held that such regulations are preempted under implied preemption analysis. Thus, the plurality rejected the Labor Department's notion of the statute's plain meaning, while finding in the statute, ostensibly without the added boost of deference, an "implied" meaning that served the

64. *See Gade*, 112 S. Ct. at 2382 n.1 (citing cases supporting position that OSH Act is preemptive statute).

65. *Id.* at 2388-91 (Kennedy, J., concurring).

66. *Id.* at 2391-95 (Souter, J., dissenting).

67. *Id.* at 2386 n.2.

68. *Id.*

same purpose. In other words, it supplied its own reasonable interpretation of the statute, rather than limiting its review to the reasonableness of the agency's interpretation, once it decided that the statutory language did not "plainly" express a preemptive intent. At least, the contested language was not plain enough to satisfy the more stringent, clear, and unmistakable intent test for express preemption.

Thus, *Gade* not only raises fascinating questions about the Court's preemption jurisprudence, surely a topic of interest to administrative lawyers, but also about the way the Court sometimes avoids a *Chevron* analysis when reading statutes that are both ambiguous on their face and the subject of an interpretation by the agency charged with their implementation. Viewed as a *Chevron* case, the plurality's approach is perhaps perplexing. In hindsight, I wonder whether the plurality would have joined Justice Kennedy in adopting our express preemption analysis had we wrapped it up in a *Chevron* package.

But perhaps the *Gade* plurality becomes less perplexing if one thinks of it as illustrating the limits of *Chevron*. It may just be that *Chevron* is not suited to preemption cases where there are presumptions of statutory construction going in the opposite direction. One might then argue that the competing presumptions simply cancel each other out, leaving the Court more or less free to pursue its own interpretation of congressional intent.

Finally, I would like to offer a brief peek into the Court's next term. One of the problems with trying to prophecy about *Chevron* is that you cannot forecast the case that will turn on *Chevron* deference, and the case that will turn on deference without citing *Chevron*. But the Court may well make its next pronouncement on this subject in one of the Labor Department's Longshore Act cases, *Bath Iron Works v. Director, OWCP*.[69] I will not attempt to describe the rather technical issues in that case, but would note that the case involves contrary interpretations by the Labor Secretary and the Benefits Review Board (Board), an independent adjudicatory agency within the Labor Department. As in the *CF&I* case, we are arguing that it is the Secretary (who is charged with administering the Longshore Act), rather than the Board, who is entitled to *Chevron* deference.

As you can see, in my view the relationship between administrative

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69. 113 S. Ct. 692 (1993). As it turned out, a unanimous Court, per Justice Stevens, affirmed on the basis of the Labor Department's construction of the Act under a "plain meaning" analysis, without citing *Chevron* or addressing the "*CF&I*" issue of whether the Secretary or the Board is entitled to deference. *Id.*

law and labor law is significant and is evidenced in much of the Court's work. Indeed, this is not mere theorizing, because how the Court deals with administrative law issues impacts directly on how the Labor Department, at least, does its job.

Thus, the struggle of the Court to understand the role of regulatory agencies in the administrative state continues. But I think the debate over deference and plain meaning must ultimately be considered in the context of the debate over separation of powers. At the end of any discussion, it is important to keep that truth in mind.

Thank you very much.