

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 98–1109

DONNA E. SHALALA, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., PETITIONERS v. ILLINOIS
COUNCIL ON LONG TERM CARE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[February 29, 2000]

JUSTICE SCALIA, dissenting.

I join the opinion of JUSTICE THOMAS except for Part III, and think it necessary to add a few words in explanation of that vote: I am doubtful whether *Bowen v. Michigan Academy of Family Physicians*, 476 U. S. 667 (1986), was correctly decided, but that case being on the books, and involving as it does a question of statutory interpretation, I believe it requires affirmance here. There is in my view neither any basis for holding that 42 U. S. C. §1395ii has a different meaning with regard to Part A than with regard to Part B, nor (since repeals by implication are disfavored) any basis for holding that the subsequent addition of a judicial-review provision distantly related to §1395ii altered the meaning we had authoritatively pronounced. See *post*, at 7, n. 7 (THOMAS, J., dissenting).

I do not join Part III of JUSTICE THOMAS’s opinion because its reliance upon what it calls the presumption of preenforcement review suggests that *Michigan Academy* was (*a fortiori*) correctly decided. I might have thought, as an original matter, that the categorical language of §1395ii and §405(h) overcame even what JUSTICE THOMAS acknowledges is the *stronger* presumption of *some* judicial review. See *post*, at 14. With regard to the timing of review, I would not even use the word “presumption” (a

term which *Abbott Laboratories v. Gardner*, 387 U. S. 136 (1967), applies only to the preference for judicial review at *some* point, see *id.*, at 140) since that suggests that some unusually clear statement is required by way of negation. In my view, preenforcement review is better described as the background rule, which can be displaced by any reasonable implication (“persuasive reason to believe,” as *Abbott Laboratories* put it, *ibid.*) from the statute.