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The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation

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We live in an age of statutes.[1] Statutes, however, by chance, by necessity, or by design, are often little more than a general statement of national policies or goals.[2] Nowhere is this more true than in the area of employment and labor relations. The National Labor Relations Act[3] ("NLRA") and the Occupational Safety and Health Act,[4] for example, outline only with broad brush strokes our national policies toward unionization and worker health and safety.[5] It is the National Labor Relations Board ("NLRB") and the Occupa-

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1. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982). In the dozen years since Calabresi's book was published, law by legislation has increased. In the employment area alone, major federal legislation governing the workplace has been enacted. *See, e.g.*, Family and Medical Leave Act, 29 U.S.C.A. §§ 2601, 2611–2619, 2631–2636, 2651–2654 (West Supp. 1994) (granting employees unpaid leave from work for statutorily specified reasons); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (Supp. V 1993) (establishing comprehensive statutory scheme for nondiscriminatory employment of qualified individuals with disabilities).

2. *See* Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 726–28 (1994) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993)); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 472–73 (1985).

Congress has broad power to delegate legislative authority so long as sufficient "standards" are present to guide the delegatee. *E.g.*, J.W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928). Since 1935, no delegation has been held unconstitutional. 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6 (3d ed. 1994); *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 415, 433 (1935). The breadth of this delegation power has led some to call for a revitalized nondelegation doctrine. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 687–88 (1980) (Rehnquist, J., concurring).

3. 29 U.S.C. §§ 151–166 (1988).

4. *Id.* §§ 651–678 (1988 & Supp. V 1993).

5. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151–57 (1991); *Donovan*, 452 U.S. at 508–12; Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500–01 (1978); NLRB v. Hearst Publications, 322 U.S. 111, 132–35 (1944).

tional Safety and Health Administration ("OSHA") that flesh out these statutes, thereby making the policy choices Congress sidestepped when passing each agency's enabling act.[6] The authority of agencies like the NLRB and OSHA to make these policy choices is recognized by courts, academics, and practitioners.[7]

Over the last thirty years, Congress has outlawed employment discrimination on the basis of race, color, sex, religion, national origin,[8] age,[9] and disability.[10] But beneath the surface of these basic prohibitions lie a host of complex, and congressionally unresolved, issues. For example, in enacting the Civil Rights Act of 1991,[11] which amends Title VII of the Civil Rights Act of 1964 in many important respects, Congress was often purposefully ambiguous, essentially choosing not to decide certain polarizing issues in order to pass a bill the President would sign.[12] The recently enact-

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6. *See* cases cited *supra* note 5.

7. *See* cases cited *supra* note 5; *see also* Lee Modjeska, *The Supreme Court and the Diversification of National Labor Policy*, 12 U.C. DAVIS L. REV. 37, 38–47 (1979) (noting courts' and practitioners' respect for NLRB and recognition of its authority to make labor policy); Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 67–74 (discussing why NLRB is entitled to judicial deference).

8. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993).

9. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (1988 & Supp. V 1993).

10. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (Supp. V 1993).

11. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

12. *See* Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1496 (1994). Section 105 of the 1991 Civil Rights Act, for example, provides that an employment practice causing a disparate impact is unlawful unless the employer can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. V 1993). This language replaced the phrasing of the employer's burden in the proposed 1990 Civil Rights Act, which obligated employers to demonstrate that the practice was "required by business necessity," i.e., "essential to effective job performance." S. 2041, 101st Cong., 2d Sess. 3, 4 (1990). This phrasing led to President Bush's veto of the 1990 Civil Rights Act as a "quota bill." S. DOC. NO. 35, 101st Cong., 2d Sess. 1–3 (1990) (veto message of President George Bush). That Congress recognized its phrasing of the employer's burden in the 1991 Act was fraught with ambiguity is demonstrated by the statute's unprecedented provision limiting the legislative history that could be relied upon in construing or applying section 105. Civil Rights Act of 1991 § 105(k)(3)(b), 105 Stat. at 1074–75, *reprinted in* 42 U.S.C. § 1981 note (Supp. V 1993).

The many additional ambiguities of the 1991 Act already have been noted by commentators, increasing the importance of the deference question. *See* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 924–25, 928 (1993); Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights*

ed Americans with Disabilities Act ("ADA") also contains a number of ambiguous terms whose ultimate meaning will determine the scope of our national commitment to eradicating discrimination against the disabled.[13]

Congress created the Equal Employment Opportunity Commission ("EEOC") to administer these statutes. The EEOC is the sole arm of the federal government with an exclusive focus on eradicating job discrimination.[14]

That ambiguities exist in the statutes administered by the EEOC is incontrovertible.[15] Those ambiguities essentially constitute a delegation of lawmaking authority in the employment discrimination area;[16] policy choices left unanswered by Congress ultimately must be answered by some other branch of government.[17] But to whom has this delegation been made?

Act of 1991, 46 RUTGERS L. REV. 1, 238 (1993); Jennifer M. Follette, Comment, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 667 (1993).

13. *See* 42 U.S.C. §§ 12101–12213 (Supp. V 1993). The ADA's ambiguities have been widely noted. *E.g.*, Thomas H. Barnard, *The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229, 239–40 (1990).

14. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), *reprinted in* 5 U.S.C. app. at 1366 (1988), *and in* 92 Stat. 3781 (1978) [hereinafter Reorganization Plan] (consolidating enforcement authority for federal employment discrimination statutes in EEOC).

15. *See, e.g.*, Krent, *supra* note 2, at 729 (noting that Congress, in enacting Title VII, "did not answer many of the critical policy questions arising under the anti-discrimination law").

16. Interpreting statutes frequently involves making policy. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 864–66 (1984); *see* Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 280–81 (1988); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2087–88 (1990) [hereinafter Sunstein, *Law and Administration*]. For further discussion of this point, see *infra* note 178 and accompanying text.

There is considerable disagreement over whether a statutory gap or ambiguity is itself a sufficient basis for finding a delegation to an agency of law-interpreting authority. *See infra* notes 185–88 and accompanying text. However, there is general agreement that if no delegation to an agency has occurred, then the courts are free to supply the statutory meaning. *See* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 643, 664–67 (1991); Krent, *supra* note 2, at 729–30; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421–22 (1989) [hereinafter Sunstein, *Interpreting Statutes*].

17. *See* Sunstein, *Interpreting Statutes*, *supra* note 16, at 422. Limitations on congressional power to delegate lawmaking powers are supplied by the essentially moribund nondelegation doctrine. *See supra* note 2 (discussing decreased application of nondelegation doctrine); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26–27 (1983) (discussing judicial and agency roles in interpreting statutes).

The Supreme Court has recognized that agency interpretations of silent or ambiguous statutes are controlling on the courts *if* Congress has delegated law-interpreting power to the agency.[18] Importantly, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[19] the Court held such delegations need not be express but could be implied from the statutory scheme.[20]

In this post-*Chevron* era, in which the judiciary often defers to agency interpretations of statutes, one would suppose it is the EEOC to whom Congress, expressly or impliedly, confided the authority to interpret the laws administered by that agency. Yet the Supreme Court has not confirmed this supposition. Instead, despite strong disagreement from within the Court,[21] the majority has suggested a lesser role for the EEOC on questions of statutory interpretation than is enjoyed by most independent agencies,[22] in turn reserving for the judiciary a greater lawmaking role in the employment discrimination area.[23] Consequently, the lower courts are

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18. *E.g.*, Batterton v. Francis, 432 U.S. 416, 424–26 (1977).

19. 467 U.S. 837 (1984).

20. *Id.* at 865–66. For a discussion of *Chevron*'s review standard as a product of congressional delegation of law-interpreting power, see *infra* notes 178–86 and accompanying text.

21. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259–60 (1991) ("*ARAMCO*") (Scalia, J., concurring in judgment) (arguing that EEOC is entitled to deference generally accorded other administrative agencies).

22. *Id.* at 257; General Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976). For a discussion of the Supreme Court's approach to the EEOC's statutory interpretations, see *infra* part II. *See also* Eskridge, *supra* note 16, at 641–42 (discussing Supreme Court's pivotal role in interpretation of civil rights statutes).

As Professor Eskridge notes: "The Court has tended to ignore that precept [deference] when agencies charged with enforcing civil rights laws try to help victims of discrimination . . . ." *Id.* at 682. Justice Marshall has voiced similar concerns wondering "why, when important civil rights laws are at issue, the Court fails to adhere with consistency to its so often espoused policy of deferring to expert agency judgment on ambiguous statutory questions." Ohio Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158, 193 (1989) (Marshall, J., dissenting); *see also* Modjeska, *supra* note 7, at 37–38, 65, 76 (observing that Supreme Court gives more deference to NLRB than to EEOC).

23. Indeed, that the courts, not the EEOC, will take the lead in resolving open policy questions under employment discrimination statutes is the unexplored assumption now commonly made by academics in the field. *See, e.g.*, Belton, *supra* note 12, at 931, 936 (asserting that Congress left courts to resolve open issues raised by 1991 Civil Rights Act); Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 62 (1991) ("The most recent example of a statute in which Congress delegated to the courts the task of developing the law in the civil rights field is the Americans with Disabilities Act . . . ."); Sunstein, *Interpreting Statutes*, *supra* note 16, at 422 (stating judges must fill in gaps left by Congress). With one exception, none of the leading employment discrimination textbooks even cites *Chevron* or explores the EEOC's role in statutory interpretation. That one exception is MICHAEL J. ZIMMER ET. AL., CASES AND MATERIALS ON EMPLOYMENT

split on what degree of deference the judiciary should afford the EEOC.[24]

DISCRIMINATION 361, 743–44 n.** (3d ed. 1994), which briefly notes the uncertainty surrounding the deference due the EEOC's interpretations of the statutes it administers.

In prior writings, while I have outlined in detail why the NLRB's interpretations are due strong deference from the courts, Rebecca Hanner White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723, 728, 737–40 (1992) [hereinafter White, *Stare Decisis Exception*], Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639, 651–60 (1991), I have been hesitant about whether the EEOC is similarly deserving of deference, instead reserving the issue. *See* Rebecca Hanner White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 79 (1993). Resolution of the issue is explored herein.

24. *Compare* Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993) (stating courts may consider but are not bound by EEOC guidelines), *cert. denied*, 114 S. Ct. 2726 (1994) *and* Colgan v. Fisher Scientific Co., 935 F.2d 1407, 1421 n.11 (3d Cir.) (stating no need to defer to EEOC, although court "appreciated" having agency's view), *cert. denied*, 112 S. Ct. 379 (1991) *and* Russell v. Micro-dyne Corp., 830 F. Supp. 305, 308 (E.D. Va. 1993) (noting that limited deference due EEOC's guidelines) *with* Rowe v. Sullivan, 967 F.2d 186, 192–94 (5th Cir. 1992) (asserting that EEOC's views deserve deference) *and* Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir.) (granting deference to EEOC interpretation of Civil Rights Act of 1991), *cert. denied*, 113 S. Ct. 86 (1992). For a law review article noting the uncertainty in lower courts and advocating a "modified deferential model," see John S. Moot, Comment, *An Analysis of Judicial Deference to EEOC Interpretative Guidelines*, 1 ADMIN. L.J. 213, 214 (1987).

The question of the level of deference due the EEOC's statutory interpretations was raised in the petition for certiorari in *Garcia*. Petition for Writ of Certiorari at 17–19, Garcia v. Spun Steak Co. (No. 93-1222). The Supreme Court invited the Solicitor General's views on whether certiorari should be granted, Garcia v. Spun Steak Co., 114 S. Ct. 1292, 1292 (1994), and the Solicitor General recommended that the Court take the case. Brief for the United States as Amicus Curiae at 16, Garcia v. Spun Steak Co. (No. 93-1222). Nonetheless, over the dissents of Justices Blackmun and O'Connor, the Court denied certiorari. Garcia v. Spun Steak Co., 114 S. Ct. 2726, 2726 (1994). The question of deference to the EEOC's statutory interpretations undoubtedly will be presented to the Court again in future cases.

Commentators, too, are divided on the level of deference due the EEOC. *Compare* Alfred W. Blumrosen, *The Binding Effect of Affirmative Action Guidelines*, 1 LAB. LAW. 261, 263, 271 (1985) [hereinafter Blumrosen, *Affirmative Action Guidelines*] (suggesting that EEOC's guidelines have force of law) *and* Alfred W. Blumrosen, *Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 903, 910–11, 917 (1993) [hereinafter Blumrosen, *Society in Transition*] (same) *and* Follette, *supra* note 12, at 667 ("If the courts do not defer to reasonable guidelines created by the EEOC, they frustrate the primary purpose for the Commission's existence.") *with* Moot, *supra*, at 214 (proposing that courts defer to EEOC guidelines only if consistent and reasonable) *and* Jamie A. Yavelberg, Comment, *The Revival of* Skidmore v. Swift*: Judicial Deference to Agency Interpretations After* EEOC v. ARAMCO, 42 DUKE L.J. 166, 190–91 (1992) (stating that because EEOC is not provided with rulemaking power, courts need not accord EEOC rulings deference under *Chevron*). These positions, however, have been asserted without sustained analysis of the *Chevron* doctrine's applicability to the EEOC, in light of the

Why might the Court be reluctant to find a congressional delegation of interpretive authority to the EEOC? Historically, the EEOC has been viewed as "toothless,"[25] a "poor, enfeebled thing"[26] as compared to other agencies.[27] When first created, the EEOC had no real enforcement authority.[28] While its enforcement power has since been increased somewhat,[29] it still lacks the cease-and-desist powers afforded other agencies, such as the NLRB. As a result, employment discrimination laws continue to be enforced primarily through private litigation, rather than through the EEOC.[30]

Moreover, Title VII of the Civil Rights Act of 1964, which established the EEOC, expressly delegated to the agency only the power to issue *procedural* rules.[31] The Supreme Court consequently has interpreted Title VII as denying the EEOC the power to engage in *substantive* legislative rulemaking, and this lack of rulemaking

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agency's powers and the applicable statutory regime.

25. HUGH D. GRAHAM, THE CIVIL RIGHTS ERA 157–59, 235–36 (1990).

26. MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966); *see* Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 261; GRAHAM, *supra* note 25, at 236. The EEOC was plagued by poor management during its early years. GRAHAM, *supra* note 25, at 179–236; *see* Reorganization Plan, *supra* note 14, at 1367. The EEOC's image as inept and ineffective, gained from its poor start, may have continued to haunt the agency in later years, long after such problems had been corrected. *See* Modjeska, *supra* note 7, at 76–77.

27. The agency to which the EEOC most frequently has been compared is the NLRB. The NLRB has the power to engage in legislative rulemaking and, importantly, to issue cease-and-desist orders upon finding that unlawful conduct has occurred. 29 U.S.C. §§ 156, 160 (1988). Originally modeled after the NLRB, the EEOC was "considerably defanged" during the political compromises that resulted in enactment of Title VII in 1964. GRAHAM, *supra* note 25, at 129–57; Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 64–68 (1964).

As described by Professor Robert Belton, "[t]he prevailing attitude toward Title VII, as finally enacted, was that the civil rights movement had suffered a defeat—prompted by the political reality of compromise, Congress had deprived the primary federal enforcement agency, the Equal Employment Opportunity Commission, of cease and desist power, the centerpiece for effective enforcement." Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 907 (1978).

28. Berg, *supra* note 27, at 65–67; Follette, *supra* note 12, at 659; *see infra* notes 64–69 and accompanying text (describing EEOC's powers under Title VII as originally enacted).

29. Congress granted the EEOC the power to bring enforcement suits in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 706(f)(1), 86 Stat. 103, 105 (codified as amended at 42 U.S.C. § 2000e-5(f)(1) (1988)). For a discussion of this Act, see *infra* part I.B.

30. *See* Belton, *supra* note 12, at 924; John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 995, 1000 (1991).

31. Civil Rights Act of 1964 § 713, 42 U.S.C. § 2000e-12(a) (1988).

power has figured prominently in the Court's discussion of the EEOC's interpretive authority.[32] Importantly, however, both the Age Discrimination in Employment Act ("ADEA") and the ADA vest the EEOC with full power to issue legislative rules.[33]

This Article explores whether a delegation to the EEOC of law-interpreting authority may be found under Title VII, the ADEA, or the ADA, despite the agency's lack of full enforcement authority under these statutes. If the EEOC possesses such authority, it, not the courts, will decide many of the difficult issues left unresolved by Congress under the 1991 Civil Rights Act, the ADA, and other statutes administered by the agency.[34]

I easily conclude the EEOC has been delegated law-interpreting power under both the ADEA and the ADA. The authority to issue legislative rules, in the context of these statutory schemes, carries with it the authority to interpret the law in a manner binding on the reviewing courts.

Resolving this issue under Title VII is more difficult. It calls for consideration not only of Title VII and its legislative history, but of whether *Chevron*'s rationale can be extended to an agency lacking legislative rulemaking authority under its enabling act.[35]

I conclude the courts should find an implied delegation to the

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32. General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976); *see* Eskridge, *supra* note 16, at 682; Moot, *supra* note 24, at 214, 227; Yavelberg, *supra* note 24, at 190–91. *But see* Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 267–69 (asserting that EEOC has authority to issue substantive regulations).

33. 29 U.S.C. § 628 (1988) (ADEA); 42 U.S.C. § 12116 (Supp. V 1993) (ADA).

34. A number of commentators have called for Congress to amend the employment discrimination laws to expressly delegate lawmaking authority to the EEOC. *See, e.g.*, Leroy D. Clark, *Insuring Equal Opportunity in Employment Through Law*, *in* RETHINKING EMPLOYMENT POLICY 189 (D. Lee Bawden & Felicity Skidmore eds., 1989) (calling for Congress to "explicitly obligate the courts to receive EEOC interpretations as definitive and binding"); Eskridge, *supra* note 16, at 682 (arguing Congress should give EEOC "formal rulemaking authority"); Modjeska, *supra* note 7, at 74 (calling for Congress to grant "EEOC primary administrative authority and enforcement power"). This Article posits that interpretive authority already has been implicitly delegated to the agency.

35. Most commentators assert that the lack of such authority makes the *Chevron* review standard inapplicable to the EEOC's statutory interpretations. DAVIS & PIERCE, *supra* note 2, at 119–22, 235–36; Sunstein, *Law and Administration*, *supra* note 16, at 2093; *see* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 36–40 (1990); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 394–95; Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. 187, 193 (1992); Yavelberg, *supra* note 24, at 179–82. *But see* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 593–95 (1985) (arguing courts should grant deference to EEOC guidelines even though EEOC lacks specific rulemaking authority).

EEOC of authority to interpret Title VII. While the lack of legislative rulemaking or adjudicative authority is powerful evidence that no delegation was intended, that evidence is outweighed by other factors, including the EEOC's mandatory role in the charge-resolution process, its expertise, congressional dissatisfaction with judicial interpretations of Title VII, and the confiding of interpretive authority to the EEOC under the ADEA and ADA.[36]

This Article begins by tracing the evolution of the EEOC and its administrative and enforcement responsibilities. It also will review how the Supreme Court has treated the question of deference to the EEOC in cases decided before and after *Chevron*.

Next, this Article explores *Chevron*, in which the Court articulated a deferential review standard for agency interpretations of the statutes they administer. It contrasts *Chevron* review with the review standard articulated in *Skidmore v. Swift & Co.*,[37] in which the Court found that an agency's interpretive bulletins or rulings are not controlling on the courts.[38] This Article then discusses when *Chevron*, as opposed to *Skidmore*, deference properly applies to an agency's statutory interpretations.

Finally, this Article explores how the *Chevron* and *Skidmore* review standards, properly understood, apply to the EEOC in the context of the various statutes it administers. This Article concludes by finding a sufficient basis for implying a delegation of law-interpreting authority to the EEOC not only under the ADA and ADEA, but under Title VII as well.

I. THE POWERS AND DUTIES OF THE EEOC

A. The Agency's Beginnings

The EEOC was created by Congress in Title VII of the Civil Rights Act of 1964.[39] That statute prohibits an employer from discriminating on the basis of race, color, sex, religion, and national origin in its employment decisions.[40] A major source of disagree-

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36. *See infra* part IV.B (arguing courts should grant deference to EEOC interpretations).

37. 323 U.S. 134 (1944).

38. *Id.* at 139–40.

39. Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258 (current version at 42 U.S.C. § 2000e-4 (1988)).

40. The Civil Rights Act of 1964 provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

ment during passage of the Act was the level of power to be conferred upon the EEOC.

As originally proposed, the EEOC was modeled after the NLRB.[41] The NLRB, which has full rulemaking powers,[42] also has the exclusive power to adjudicate de novo claims of violations of the NLRA.[43] The Board hears charges of unfair labor practices[44] and has the power to issue cease-and-desist orders upon finding a violation.[45] The NLRB's orders are then subject to judicial review by the appropriate United States court of appeals, with the NLRB's factual determinations conclusive if they are supported by "substantial evidence on the record considered as a whole."[46]

Debate over Title VII centered on whether the EEOC should have enforcement authority similar to the NLRB's,[47] with Republicans vocal in their opposition to creating "another NLRB."[48] Importantly, the focal point of their attack was the NLRB's "cease-and-desist" power.[49] There was considerable resistance to creating a civil rights enforcement agency that could not only investigate and prosecute but also determine employer liability.[50] As a result, the House removed the EEOC's cease-and-desist authority from the bill[51] but retained the EEOC's power to prosecute violations by bringing suit.[52] Ultimately, that enforcement power also was re-

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(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1988).

41. *See supra* note 27 and accompanying text.

42. 29 U.S.C. § 156 (1988).

43. *Id.* § 160(a).

44. *Id.* § 160(k).

45. *Id.* § 160(c).

46. *Id.* § 160(f).

47. *See* Belton, *supra* note 27, at 917; Berg, *supra* note 27, at 64–66; Govan, *supra* note 12, at 7–8.

48. *See* GRAHAM, *supra* note 25, at 129–47.

49. *See id.*

50. H.R. REP. NO. 570, 88th Cong., 1st Sess. 15–17, 19–20 (1963) (noting opposition to enforcement provisions of H.R. 405). As Graham reports, House Republicans insisted the EEOC "must be *denied* the quasi-judicial power to hold hearings and issue cease-and-desist orders." GRAHAM, *supra* note 25, at 130. *See also* Berg, *supra* note 27, at 65 (outlining legislative history of Title VII); Laurie M. Stegman, Note, *An Administrative Battle of the Forms: The EEOC's Intake Questionnaire and Charge of Discrimination*, 91 MICH. L. REV. 124, 131–32 (1992) (discussing judicial enforcement compromise of Title VII).

51. Cease-and-desist authority was removed through a compromise bill backed by the Kennedy administration. GRAHAM, *supra* note 25, at 133–34; *see also* Berg, *supra* note 27, at 65 (stating cease-and-desist authority removed to gain support).

52. *Compare* H.R. 7152, 88th Cong., 1st Sess. § 707(b) (1963) (providing cease-

moved.[53]

While considerable debate and compromise surrounded the EEOC's adjudicatory and prosecutorial roles, there was virtually no focus on its rulemaking powers. This should not be surprising considering that the model to which the EEOC was being compared was the NLRB. Throughout its existence, the NLRB has exercised its broad policymaking powers through adjudication rather than substantive rulemaking, using particular cases to develop and announce the policies it will follow in enforcing the NLRA.[54] Consequently, "cease-and-desist" authority, not rulemaking, was the subject of vigorous congressional debate over the EEOC.

However, as originally introduced, the House bill provided the EEOC with authority "to issue, amend, or rescind suitable regulations" in accordance with the Administrative Procedure Act.[55] On February 8, 1964, two days before the bill was passed by the House, Representative Emmanuel Celler offered an amendment that inserted "procedural" after the word "suitable."[56] The amendment, one of eighteen passed by the House that day,[57] was adopted by voice vote without debate.[58] It remained unchanged by the Dirksen-Mansfield compromise bill that eventually was passed as Title VII and signed into law.[59] No debate on restricting the EEOC to the issuance of

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and-desist authority) *with* H.R. REP. NO. 914, 88th Cong., 1st Sess. 29 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2404–05, *and in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2029 (1968) [hereinafter EEOC, LEGISLATIVE HISTORY] (outlining enforcement authority in draft of proposed Title VII).

53. 110 CONG. REC. 12,704, 12,721–22 (1964), *reprinted in* EEOC, LEGISLATIVE HISTORY, *supra* note 52, at 3003–04. Prosecutorial authority was removed by the Dirksen-Mansfield compromise bill. *Id.*; *see also* Berg, *supra* note 27, at 66–67 (outlining changes in Senate's proposed Title VII).

54. *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 762–66 (1969) (plurality opinion) (noting that NLRB adjudications serve as "vehicles for the formulation of policy"). The NLRB's refusal to use rulemaking procedures has been the object of considerable criticism. Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 27–28 (1987). The newly appointed chair of the NLRB, William B. Gould, has promised the Board will use rulemaking more frequently in the future. *Gould Outlines His Agenda for Change as NLRB Chairman*, [1994 Current Developments] Daily Lab. Rep. (BNA) 53 (Mar. 21, 1994), *available in* Westlaw, BNA-DLR Database, 1994 DLR 53 d4.

55. H.R. 7152, 88th Cong., 1st Sess. § 714(a) (1963).

56. 110 CONG. REC. 2575 (1964).

57. EEOC, LEGISLATIVE HISTORY, *supra* note 52, at 10. The more celebrated of the amendments passed that day was the one adding "sex" to Title VII's prohibited bases of discrimination. 110 CONG. REC. 2577–84 (1964).

58. 110 CONG. REC. 2575 (1964).

59. *Id.* at 12,811–17. The bill finally enacted as Title VII was the Dirksen-Mansfield substitute, an amended version of House Bill 7152, which was the product of extensive debate in the Senate by supporters of the bill and consultation with the Justice Department. EEOC, LEGISLATIVE HISTORY, *supra* note 52, at 10–11, 3001–03.

procedural, as opposed to substantive, legislative rules ever occurred.[60]

Created by the Civil Rights Act of 1964, the EEOC "was a strange hybrid creature."[61] It was responsible for processing all charges of discrimination under Title VII, and filing a charge with the EEOC was a jurisdictional prerequisite for suit.[62] Moreover, the EEOC had authority to investigate charges, to determine whether there was probable cause to believe Title VII had been violated, and to conciliate the claims.[63] Furthermore, employers were given immunity for actions taken in "good faith . . . reliance on any written interpretation or opinion of the Commission."[64] But the EEOC lacked the authority to issue cease-and-desist orders or to file suit. Rather, a charging party, after receiving a right-to-sue letter from the EEOC, was entitled to bring an enforcement action, which would be heard de novo by a trial court.[65] Additionally, the Attorney General, not the EEOC, had authority to bring actions alleging an employer's pattern and practice of violating the Act.[66]

As an agency that could depend only on voluntary compliance, the EEOC proved ineffective in resolving individual complaints.[67] However, the EEOC seized the opportunity to issue "guidelines"

Senator Everett Dirksen inserted an annotated copy of the House bill showing the changes made by Senate substitute amendment no. 656 into the *Congressional Record*. 110 CONG. REC. 12,811–17 (1964).

60. *See* 110 CONG. REC. 2575 (1964).

61. GRAHAM, *supra* note 25, at 157; *see also* Berg, *supra* note 27, at 81 (noting EEOC's "somewhat anomalous" structure).

62. Civil Rights Act of 1964 § 706, 78 Stat. at 259–61 (current version at 42 U.S.C. § 2000e-5 (1988 & Supp. V 1993)).

63. *Id.*

64. *Id.* § 713(b), 78 Stat. at 265 (current version at 42 U.S.C. § 2000e-12(b) (1988)). This provision was borrowed from the Portal to Portal Act, 29 U.S.C. §§ 258–259 (1988). *See* Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 269.

65. *See* Civil Rights Act of 1964 § 706(a), (e), 78 Stat. at 259–60 (current version at 42 U.S.C. § 2000e-5(f) (1988)). This private enforcement model

> represented a rather basic change in the philosophy of the title and implied an appraisal of discrimination in employment as a private rather than a public wrong, a wrong, to be sure, which entitles the damaged party to judicial relief, but not one so injurious to the community as to justify the intervention of the public law enforcement authorities.

Berg, *supra* note 27, at 67; *see* GRAHAM, *supra* note 25, at 189.

66. Civil Rights Act of 1964 § 707, 78 Stat. at 261–62 (current version at 42 U.S.C. § 2000e-6 (1988)). This switch in enforcement authority from the EEOC to the Attorney General was a product of Senator Dirksen's compromise bill. 110 CONG. REC. 12,721–22 (1964).

67. *See* Belton, *supra* note 27, at 924 (describing EEOC as "ineffective because it had power to conciliate, but no power to compel"). For example, of the 15,000 complaints received in fiscal year 1968, only 513 were conciliated. GRAHAM, *supra* note 25, at 422. The agency, moreover, had a backlog of 30,000 complaints. *Id.*

interpreting Title VII, taking positions on such issues as employment testing, bona fide occupational qualifications, and affirmative action.[68] Courts frequently relied on these guidelines in resolving litigation between private parties.[69]

In 1966, a task force led by Attorney General Nicholas Katzenbach focused on how best to strengthen the EEOC's enforcement role and, as part of that process, considered whether Title VII should be amended to give the agency substantive rulemaking powers.[70] Historian Hugh Graham asserts the task force's proposal was not pursued after Justice Department lawyers found

> early indications that despite the EEOC's statutory confinement to voluntary and conciliatory efforts, the federal courts were likely to defer to its presumed substantive authority much as they had with the FTC and the other established regulatory agencies. Such judicial deference would seem to empower the EEOC, retrospectively, to make substantive rulings even in the absence of the normal statutory provisions.[71]

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68. Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 262; *see, e.g.*, 29 C.F.R. pts. 1604–1608 (1994) (documenting EEOC's guidelines for Title VII). As Professor Belton observed: "The EEOC made some significant contributions to the enforcement effort during the Act's first decade. Perhaps its major contribution has been the publication of guidelines and interpretations of the substantive provisions of Title VII." Belton, *supra* note 27, at 921. This important role was predicted in 1964 by Richard K. Berg of the Justice Department's Office of Legal Counsel, who believed "the Commission's role as an interpreter of Title VII may prove a significant one." Berg, *supra* note 27, at 81. Mr. Berg asserted, however, that such interpretations would not have the force of law, because the EEOC lacked authority to issue substantive regulations. *Id.* at 81–82 n.36.

69. *See, e.g.*, Watson v. Limbach Co., 333 F. Supp. 754, 757 (S.D. Ohio 1971) (granting some deference to EEOC regulations allowing EEOC to retain jurisdiction after deferring charges to state authorities for initial consideration); Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454, 462 (D.N.J. 1971) (upholding EEOC guidelines barring differences in retirement plans based on sex), *remanded on other grounds*, 477 F.2d 90, 96 (3d Cir. 1973); Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314, 319 (E.D. La. 1970) (giving great deference to EEOC guidelines requiring "validated" employment tests under Title VII); International Chem. Workers Union v. Planters Mfg. Co., 259 F. Supp. 365, 366–67 (N.D. Miss. 1966) (deferring to EEOC interpretation of "aggrieved person").

70. GRAHAM, *supra* note 25, at 257, 266. This proposal, says Graham,

> revealed just how murky the role of the EEOC was, even in the fine collective legal minds of the Justice Department. As a kind of bastard compromise between a quasi-judicial regulatory commission, an administrative agency, and an educational and conciliation bureau, the EEOC was essentially *sui generis*. Thus it was proposed that Title VII might be amended to give the EEOC the power to issue substantive as distinguished from merely procedural rules.

Id. at 266.

71. *Id.*

Ultimately, the Johnson administration chose to push only for cease-and-desist authority for the EEOC, with no amendments offered on the agency's rulemaking powers.[72]

The Justice Department's view of the EEOC's interpretive authority was seemingly confirmed by the Supreme Court in its second Title VII case, *Griggs v. Duke Power Co.*[73] There, the general question before the Court was whether Title VII's prohibitions against discrimination embraced only a "disparate treatment" model or whether the statute also prohibited practices having a "disparate impact" on a protected group.[74] The specific issue in *Griggs* was whether requiring intelligence tests and a high school diploma, which bore no relationship to the job but adversely impacted black workers, violated Title VII or instead were sheltered by section 703(h) of the 1964 Act.[75] The Court noted the EEOC had issued guidelines interpreting section 703(h) to permit only "job-related" tests.[76] The Court then deferred to the EEOC's interpretation: "The administrative interpretation of the Act by the enforcing agency is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."[77]

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72. *Id.* at 266–67; *see* BUREAU OF NAT'L AFFAIRS, INC., THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 26–27 (1973).

73. 401 U.S. 424 (1971).

74. *Id.* at 429. As the Court explained in International Bd. of Teamsters v. United States, 431 U.S. 324 (1977):

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

Id. at 335–36 n.15 (citations omitted).

75. *Griggs*, 401 U.S. at 429. Section 703(h) provides that "it shall not be an unlawful employment practice . . . for an employer to give and to act upon the results of any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1988).

76. *Griggs*, 401 U.S. at 433 n.9 (citations omitted).

77. *Id.* at 433–34.

B. The 1972 Amendments

It was against this backdrop that the Equal Employment Opportunity Act of 1972[78] was enacted. The debates over the 1972 Act focused on the level of enforcement authority the EEOC should possess.[79] There was general agreement that greater enforcement authority was needed; at issue was whether to give the EEOC cease-and-desist authority comparable to the NLRB's.[80]

Several times since Title VII's enactment, legislation had been introduced to give the EEOC cease-and-desist authority.[81] During the Nixon administration, internal debates within the Attorney General's office were waged over whether the administration should continue to push, as the Johnson administration had, for such authority.[82] William Rehnquist, then head of the Office of Legal Counsel, offered his input on whether to push for the cease-and-desist authority.[83] According to historian Graham, Rehnquist believed "Title VII was such a specialized field of law that its administration would be more just and efficient if handled by an agency with expertise, rather than 'having the law made piecemeal by hundreds of district judges.'"[84] Nonetheless, Rehnquist opposed giving the EEOC cease-and-desist authority because he perceived agencies as "'inferior to courts as finders of fact. They lack objectivity and tend to favor one or another of the groups whose interests are protected by their statute.'"[85] Rehnquist concluded this "'would be par-

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78. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 U.S.C. and 42 U.S.C.).

79. *See, e.g.*, BUREAU OF NAT'L AFFAIRS, INC., *supra* note 72, at 2327–67 (reprinting congressional debates over enforcement provisions of EEOA of 1972). As described by the Bureau of National Affairs, "[t]he most fundamental changes made by the 1972 amendments relate to enforcement." *Id.* at 2.

80. *See, e.g.*, H.R. REP. NO. 238, 92d Cong., 1st Sess. 58 (1971) ("Providing the EEOC with authority to cease and desist . . . would transform this agency into a quasi-judicial body very similar to the [NLRB]."), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2168, *and in* BUREAU OF NAT'L AFFAIRS, INC., *supra* note 72, at 212; GRAHAM, *supra* note 25, at 439 ("The second session of the 92nd Congress, when it convened in January 1972, shared a bipartisan consensus that the equal employment principles of 1964 were sound but the enforcement mechanism was not.").

81. BUREAU OF NAT'L AFFAIRS, INC., *supra* note 72, at 28.

82. GRAHAM, *supra* note 25, at 420–31.

83. *Id.* at 424. Graham described Nixon's request to Attorney General Mitchell for a proposal on EEOC enforcement as "trigger[ing] a policy debate between assistant attorneys general [Jerris] Leonard and [William] Rehnquist over basic ends and means in civil rights policy." *Id.* at 421.

84. *Id.* at 424 (quoting advisory opinion from Rehnquist to Deputy Attorney General Kleindienst).

85. *Id.* at 425 (quoting advisory opinion from Rehnquist to Deputy Attorney

ticularly true of the EEOC,'" which he viewed as claimant-oriented.[86]

In 1972, Congress finally amended Title VII to strengthen the EEOC's enforcement authority but again denied the agency cease-and-desist powers. In both the House and Senate, bills sent to the floor by the Labor Committees gave the EEOC cease-and-desist power with enforcement by the federal courts of appeals.[87] Both Houses, however, amended the bills on the floor to replace cease-and-desist authority with prosecutorial authority, a position supported by the Nixon administration.[88]

Like Rehnquist, congressional Republicans were concerned with conferring fact-finding responsibilities on the EEOC.[89] The agency had "attained an image as an advocate for civil rights,"[90] and thus there was reluctance to make a "mission" agency the finder of facts.[91] The opposition to increasing the EEOC's enforcement authority centered on the fear that an over-zealous agency would be acting as investigator, prosecutor, and judge. Moreover, Title VII claims were perceived as calling for little policy balancing and much fact-finding, at which judges were believed more adept.[92]

General Kleindienst).

86. *Id.* (quoting advisory opinion from Rehnquist to Deputy Attorney General Kleindienst). Leonard, in contrast, favored conferring cease-and-desist authority on the EEOC. *Id.* at 421–25.

87. Both bills, H.R. 1746, 92d Cong., 1st Sess. § 706(h) (1971) and S. 2515, 92d Cong., 1st Sess. § 4(h) (1971), are reprinted in STAFF OF SENATE SUBCOMM. ON LABOR OF COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 7–8, 164–65 (Comm. Print 1972) [hereinafter LABOR COMMITTEE PRINT]. *See* BUREAU OF NAT'L AFFAIRS, INC., *supra* note 72, at 28.

88. The amendments to and debates of the House bill, 117 CONG. REC. 20,622 (1971) (introducing Erlenborn substitute bill, H.R. 9247) and 117 CONG. REC. 32,088–114 (1971) (debating and adopting Erlenborn Amendment to H.R. 1746), are reprinted in LABOR COMMITTEE PRINT, *supra* note 87, at 141–47, 251–314. The amendments to and debates of the Senate bill, 118 CONG. REC. 3808–13 (1972) (introducing Dominick Amendment to S. 2515 and House substitute) and 118 CONG. REC. 3959–79 (1972) (adopting Dominick Amendment), are reprinted in LABOR COMMITTEE PRINT, *supra* note 87, at 1557.

Rehnquist's view on the proper enforcement model had prevailed in the White House. The bills supported by the administration in both the 91st and 92d Congress called for prosecutorial, but no cease-and-desist, authority. H.R. 9247, 92d Cong., 1st Sess. § 3(e) (1971); S. 2806, 91st Cong., 1st Sess. (1969); *see* GRAHAM, *supra* note 25, at 426–31, 434–43.

89. H.R. REP. NO. 238, *supra* note 80, at 59, *reprinted in* 1972 U.S.C.C.A.N. 2168, *and in* LABOR COMMITTEE PRINT, *supra* note 87, at 118–19.

90. *Id.*

91. *Id.*; *see also* GRAHAM, *supra* note 25, at 434–43 (discussing congressional debate over EEOC enforcement power).

92. GRAHAM, *supra* note 25, at 434–43. As one House report noted:

The administration's view prevailed. The EEOC was given prosecutorial authority; if conciliation efforts failed, the EEOC could file suit against private employers, greatly strengthening its enforcement role.[93] Moreover, the Attorney General's authority to bring "pattern and practice" suits was transferred to the EEOC.[94] But the EEOC still was denied cease-and-desist authority. If the parties cannot conciliate the charge, the charging party or the EEOC must file suit and a de novo trial will be held in state or federal court.[95]

While much debate centered on the EEOC's role in the adjudicative process, once again there was no discussion of the EEOC's interpretive or rulemaking authority. The decision in *Griggs* may have convinced Congress that the Court viewed the EEOC as already having such authority.[96] In any event, the subject never arose.

C. Reorganization Plan No. 1

In 1978, Reorganization Plan No. 1 took effect.[97] The Reorga-

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> The problem Title VII seeks to correct is not one susceptible to the kind of policy balancing that is usual in the administration of law regulating utilities or other situations involving competing interests. Racial discrimination does not occupy the status of an "interest" under our system of law. It is a grave injustice which should be eliminated [as quickly as possible].

H.R. REP. NO. 238, *supra* note 80, at 62, *reprinted in* 1972 U.S.C.C.A.N. 2171, *and in* LABOR COMMITTEE PRINT, *supra* note 87, at 61, 122.

Of course, interpretation and application of Title VII *does* call for resolving policy questions, balancing "employee rights and employer prerogatives." Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

93. 42 U.S.C. § 2000e-5(f)(1) (1988); *see* Follette, *supra* note 12, at 659.

94. 42 U.S.C. § 2000e-6(e) (1988). The Attorney General, however, not the EEOC, was granted the authority to bring suit against state and local governments and to represent the EEOC in any proceedings before the Supreme Court. *Id.* §§ 2000e-4(b)(2) to 5(f)(1).

Furthermore, proposals to transfer enforcement of Executive Order 11,246, which mandates affirmative action by government contractors, from the Department of Labor to the EEOC did not pass Congress. 118 CONG. REC. 1385–86 (1972), *reprinted in* BUREAU OF NAT'L AFFAIRS, INC., *supra* note 72, at 401–03.

95. 42 U.S.C. § 2000e-5(f) (1988).

96. *See* GRAHAM, *supra* note 25, at 389; *see also* Moot, *supra* note 24, at 224–25 (discussing effect of Court's deference to EEOC regulations).

Of course, one should not overly rely on Congress's failure to respond to *Griggs*, considering the general difficulties involved in interpreting Congress's failure to act. *See generally* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 *passim* (1988) (discussing different judicial models for interpreting legislative inaction). Nonetheless, this legislative inaction is interesting, particularly given the congressional focus throughout 1972 on the EEOC's powers.

97. Reorganization Plan, *supra* note 14. The Reorganization Plan was proposed by President Carter and was approved by Congress. *Id.*

nization Plan's purpose was to consolidate federal enforcement of job discrimination laws and to make "the EEOC the principal Federal agency in equal employment enforcement."[98] Prior to the Reorganization Plan, federal enforcement efforts had been divided between the EEOC and the Department of Labor, with the latter responsible for enforcing the Age Discrimination in Employment Act ("ADEA").[99] The Reorganization Plan transferred ADEA enforcement authority to the EEOC, "granting to a single agency broad authority and responsibility for Federal fair employment policy and enforcement."[100] In choosing the EEOC as the primary enforcement agency, the President and Congress focused on the EEOC's pivotal role in developing federal employment discrimination policy.[101]

The ADEA's substantive prohibitions already were modeled

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98. H.R. REP. NO. 1069, 95th Cong., 2d Sess. 9 (1978).

99. 29 U.S.C. §§ 621–633a (1988). The ADEA prohibits discrimination in employment against workers age 40 and above. *Id.* § 631(a)–(b).

100. S. REP. NO. 750, 95th Cong., 2d Sess. 6–7 (1978). The Reorganization Plan also abolished the Equal Employment Opportunity Coordinating Council and transferred its responsibilities to the EEOC. Reorganization Plan, *supra* note 14. Additionally, it transferred Equal Pay Act enforcement authority from the Labor Department to the EEOC, and transferred the authority to review claims of employment discrimination by federal workers from the Civil Service Commission to the EEOC. *See id.*

101. As stated by President Carter in his message to Congress:

> Its experience and broad scope make the EEOC suitable for the role of principal Federal agency in fair employment enforcement. Located in the Executive Branch and responsible to the President, the EEOC has developed considerable expertise in the field of employment discrimination since Congress created it by the Civil Rights Act of 1964. The Commission has played a pioneer role in defining both employment discrimination and its appropriate remedies.
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> . . . .
>
> . . . [T]his plan places the Commission at the center of equal employment opportunity enforcement.

Reorganization Plan, *supra* note 14, at 1367–68.

The Senate Committee recommending the Reorganization Plan favorably echoed this view:

> There is both logic and force in the President's arguments in favor of assigning to the EEOC the role as principal Federal agency in fair employment enforcement. . . . By granting to a single agency broad authority and responsibility for Federal fair employment policy and enforcement, the plan represents a major advance toward the achievement of a coherent, unified and workable equal employment program.

S. REP. NO. 750, *supra* note 100, at 6–7.

The House Committee similarly recognized the EEOC's role as a policymaker, viewing abolition of the Equal Employment Opportunity Coordinating Council as a move that "will enhance and strengthen the EEOC's role as a focal point in development of equal employment opportunity policy." H.R. REP. NO. 1069, *supra* note 98, at 9.

after Title VII,[102] and with the transfer, the EEOC's enforcement responsibilities under the ADEA became virtually identical to its responsibilities under Title VII.[103] However, there remained one difference in the EEOC's rulemaking powers under the two statutes. Under the ADEA, the Secretary of Labor had possessed the power to issue "such rules and regulations as he may consider necessary or appropriate for carrying out this Act."[104] The Reorganization Plan transferred that authority to the EEOC.[105] The EEOC, however, did not have this power under Title VII. Noting the difference, Representative Robert F. Drinan pointed out the EEOC had the authority to issue only procedural regulations under Title VII and advocated that it "should have the authority to issue substantive regulations under the acts within its jurisdiction."[106]

D. The Americans with Disabilities Act

A dozen years passed without any significant change in the EEOC's powers or responsibilities. But in 1990, Congress enacted the Americans with Disabilities Act ("ADA").[107] Title I prohibits discrimination in employment against qualified individuals with a disability and gives enforcement authority to the EEOC.[108] The enforcement scheme and remedies are identical to those under Title VII—charges must be filed with the EEOC, which may investigate, attempt to conciliate the charges, and prosecute violations.[109] After receiving a right-to-sue notice from the EEOC, persons discriminated against may bring a private action in state or federal court to obtain a trial de novo.[110]

The ADA further provides, however, that "the [EEOC] shall

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102. Lorillard v. Pons, 434 U.S. 575, 584 (1978) ("[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII.").

103. *Compare* 29 U.S.C. § 626 (1988 & Supp. V 1993) (ADEA enforcement provision) *with* 42 U.S.C. § 2000e-5 (1988 & Supp. V 1993) (Title VII enforcement provision).

104. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, 605 (current version at 29 U.S.C. § 628 (1988)).

105. 29 U.S.C. § 628 (1988), *amended by* Reorganization Plan, *supra* note 14.

106. H.R. REP. NO. 1069, *supra* note 98, at 24.

107. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101–12213 (Supp. V 1993)). The employment provisions of the ADA are located at 42 U.S.C. §§ 12101–12102, 12111–12117, 12201–12213 (Supp. V 1993).

108. *Id.* §§ 12116–12117.

109. *Id.* § 12117. Indeed, the ADA provides "[t]he powers, remedies, and procedures set forth in [Title VII] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of [this Act], or regulations promulgated" by the EEOC under this Act. *Id.* § 12117(a).

110. *Id.*

issue regulations in an accessible format to carry out this [Act]."[111] A Senate committee report made clear that such regulations were to have "the force and effect of law."[112] The regulations were to be issued one year before the ADA's effective date in order to give employers and employees adequate time to understand the law.[113] Accordingly, the EEOC, following notice and comment procedures, promulgated regulations interpreting the Act, along with guidelines explaining how the EEOC would resolve the issues presented.[114]

E. The 1991 Civil Rights Act

In response to a series of Supreme Court decisions narrowly interpreting Title VII,[115] Congress amended that statute by enacting the 1991 Civil Rights Act.[116] The amendments, while clarifying some matters, created ambiguities of their own.[117] For example, the most divisive debate over the amendments centered on what a defendant must demonstrate to avoid a disparate impact claim.[118] A purposefully ambiguous compromise was

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111. *Id.* § 12116.

112. S. REP. NO. 116, 101st Cong., 1st Sess. 43 (1989); *see* 42 U.S.C. § 12117 (Supp. V 1993).

113. *See* 42 U.S.C. § 12111 note (Effective Date of Act 24 months after July 26, 1990); *id.* § 12116 (Supp. V 1993) (requiring EEOC regulations within one year of July 26, 1990).

114. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. §§ 1630.1–.16 (1994).

115. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071, *reprinted in* 42 U.S.C. § 1981 note (Supp. V 1993) (stating Act's purpose is "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"); *see also* Rivers v. Roadway Express Inc., 114 S. Ct. 1510, 1515–16 (1994) (noting 1991 Act was passed in response to several Supreme Court opinions); Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1489–90 (1994) (same).

116. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.). The 1991 Act amends §§ 701, 703, and 705 of Title VII and enacts § 1981(a) to provide jury trials and compensatory and punitive damages to victims of intentional discrimination under Title VII and the ADA. 105 Stat. at 1071–81 (codified at 42 U.S.C. §§ 1981(a), 2000e, 2000e-2, 2000e-4 (Supp. V 1993)).

117. *See, e.g.*, Belton, *supra* note 12, at 928 (noting that statute "raises a host of unresolved issues"); Govan, *supra* note 12, at 238 ("Congress purposely chose not to resolve or clarify some policy issues and did not realize its use of language on other issues created latent ambiguities."); Michele A. Estrine, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035, 2054–56 (1992) (finding "nothing in the legislative history or the statutory language" with which to interpret vague section); Follette, *supra* note 12, at 667 (noting numerous unanswered questions raised by 1991 Act).

118. *See* 137 CONG. REC. H3944–45 (daily ed. June 5, 1991) (statement of Rep. Stenholm); *id.* H9534–37 (daily ed. Nov. 7, 1991) (statements of Rep. Ford & Sen.

reached—Congress chose to enact language it knew was susceptible to varying interpretations.[119] Other ambiguities on equally controversial issues still pervade the Act.[120]

These ambiguities, as Congress necessarily recognized, essentially shifted the responsibility for making employment discrimination policy from Congress to either the judiciary or the EEOC.[121] This delegation of policymaking authority allowed Congress to avoid accountability for the policy choices that ultimately will be made under the statute.[122] Through delegation, "[m]embers of Congress can distance themselves from overprotective or underprotective rulings by the courts or agencies because citizens will not be able to trace certain policy decisions as readily to Congress when the policy is significantly shaped outside of Congress."[123]

While it is clear Congress chose to distance itself from the controversial policy choices presented by the Civil Rights Act of 1991, it is unclear to whom Congress shifted those policymaking responsibilities. The law on this question was unsettled at the time the Act was passed, and it remains so today.

Senbrenner); *id.* H9543–47 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde); *id.* S15,463–67 (daily ed. Oct. 30, 1991) (statements of Sens. Dodd, Harlan & Kassebaum); *see also* Belton, *supra* note 12, at 931–36 (discussing interpretive difficulties posed by section 105 of Act).

119. *See supra* note 12 and accompanying text (discussing Congress's intent to leave 1991 Act ambiguous); *see also* Belton, *supra* note 12, at 935–36 (arguing 1991 Act left room for judicial interpretation); Govan, *supra* note 12, at 238 (similar).

120. For a list of major interpretive issues posed by the Civil Rights Act of 1991, see Govan, *supra* note 12, at 238–41. *See also* Belton, *supra* note 12, at 925 (noting that "host of unresolved issues" are raised by 1991 Act).

121. Govan, *supra* note 12, at 238. "Congress purposely chose not to resolve or clarify some policy issues and did not realize its use of language on other issues created latent ambiguities. Many interpretive issues are to be resolved in the courts." *Id.*

As Professor Belton similarly notes, the Civil Rights Act of 1991 was a compromise resulting from

> a lack of consensus on our national commitment to the meaning of equality under civil rights statutes. . . . As a result, the 1991 Act contains numerous ambiguities and unresolved issues that have important consequences for determining the future contours of the unfinished civil rights agenda for economic justice in the workplace.

Belton, *supra* note 12, at 924–25.

Professor Krent recognizes that "Congress delegates when it passes a statute without making clear the underlying rules of private conduct—which employment practices constitute discrimination, or which business practices constitute unreasonable restraints on trade. The reach of Title VII involves not remedial discretion, but the scope of permissible private conduct." Krent, *supra* note 2, at 729 n.80.

122. Krent, *supra* note 2, at 730.

123. *Id.*

II. THE SUPREME COURT'S APPROACH TO STATUTORY INTERPRETATION BY THE EEOC

For a few years following the 1972 amendments to Title VII, the Supreme Court continued to adhere to its *Griggs* position that the EEOC's interpretive guidelines under Title VII were entitled to "great deference" from the courts.[124] However, in 1975 the Court, while paying "'great deference'" to the EEOC's guidelines, pointed out for the first time that those guidelines were not "administrative 'regulations' promulgated pursuant to formal procedures established by Congress."[125]

Subsequently, the Court changed its approach to the guidelines. In *General Electric Co. v. Gilbert*,[126] the issue was whether Title VII's prohibition against sex discrimination encompassed discrimination on the basis of pregnancy.[127] The EEOC had issued interpretive guidelines asserting that it did.[128] The Court not only disagreed but went on to disparage the force of the guidelines.[129] According to the Court, since the agency had not been given the authority to issue substantive legislative rules, its guidelines were merely interpretive rules entitled to "less weight" from the reviewing court.[130]

The *Gilbert* Court based its "less weight" standard[131] on the 1944 case of *Skidmore v. Swift & Co.*[132] In *Skidmore*, the Court considered what weight should be afforded to the "rulings, interpretations and opinions" of the Fair Labor Standard Act's Wage-Hour Administrator, who lacked power to issue substantive regulations

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124. McDonald v. Santa Fe Trail Trans., 427 U.S. 273, 279 (1976) (citing Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971)); Espinoza v. Farah Mfg., 414 U.S. 86, 94 (1973) (same). For a discussion of the Supreme Court's treatment of deference to EEOC interpretations, see Moot, *supra* note 24, at 222–31.

125. Albemarle Paper Co. v Moody, 422 U.S. 405, 431 (1975) (quoting *Griggs*, 401 U.S. at 433–34). Chief Justice Burger noted the EEOC's Guidelines on Employee Selection Procedures were not interpretations of the statute and were not regulations passed under the scrutiny of the APA. *Id.* at 452 (Burger, C.J., concurring & dissenting). Thus, these guidelines deserved less deference from the courts. *Id.* (Burger, C.J., concurring & dissenting). In his concurring opinion, Justice Blackmun also pointed out that the regulations in question were not subject to public comment. *Id.* at 449 (Blackmun, J., concurring).

126. 429 U.S. 125 (1976).

127. *Id.* at 127–28.

128. 29 C.F.R. § 1604.10(b) (1975).

129. *Gilbert*, 429 U.S. at 141–45.

130. *Id.* at 141.

131. *Id.* at 141–42.

132. 323 U.S. 134 (1944).

under the Act.[133] The *Skidmore* Court held that such rulings were at most entitled to persuasive weight, with persuasiveness depending upon the "thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all [other] factors which give [them] power to persuade, if lacking power to control."[134] Applying the *Skidmore* approach, the Court found the guidelines considered in *Gilbert* unpersuasive because they were not promulgated contemporaneously with Title VII's enactment and because they reflected a shift in the agency's position on the question of discrimination based on pregnancy.[135]

The Court continued to follow *Gilbert* for a number of years, stating that while the EEOC's Title VII guidelines did not have the force of law, they were entitled to whatever persuasive weight a court deemed appropriate.[136] In *EEOC v. Commercial Office Products Co.*,[137] however, the Court examined an EEOC procedural regulation interpreting the Act.[138] There, the Court deferred to the agency's interpretation.[139] The different results in *Gilbert* and *Commercial Office Products* could be explained by the fact that the Court had decided the "revolutionary" case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[140] in the interim.

In *Chevron*, the Court broke new ground by announcing a review standard that called for increased judicial deference to agency

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133. *Id.* at 140.

134. *Id.*

135. *Gilbert*, 429 U.S. at 142–43. Justice Brennan dissented, arguing that "[a]s a matter of law and policy, this is a paradigm example of the type of complex economic and social inquiry that Congress wisely left to resolution by the EEOC pursuant to its Title VII mandate." *Id.* at 155 (Brennan, J., dissenting).

136. Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 69–70 n.6 (1986); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 518 (1986); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); Nashville Gas Co. v. Satty, 434 U.S. 136, 142–43 n.4 (1977); TWA Inc. v. Hardison, 432 U.S. 63, 76 n.11 (1977). *But see* P. Jefferson Ballew, Comment, *Courts, Psychologists, and the EEOC's Uniform Guidelines: An Analysis of Recent Trends Affecting Testing as a Means of Employee Selection*, 36 EMORY L.J. 203, 214–15 (1987) (asserting *Gilbert* dissent and concurrences "reflect the attitudes of a majority of the Court and indicate that *Gilbert* did not resolve the issue of the proper weight to be accorded EEOC Title VII regulations not founded in statutory authority"); Moot, *supra* note 24, at 222–31 (tracing Supreme Court's deference to EEOC guidelines and noting lack of any consistent standard or model).

137. 486 U.S. 107 (1988).

138. *Id.* at 109–10 (determining whether state's waiver of its exclusive 60-day period for processing charges of discrimination "terminates" state agency's proceedings).

139. *Id.* at 114–15.

140. 467 U.S. 837 (1984).

statutory interpretations.[141] Under *Chevron*, a reviewing court must first ask whether "Congress has directly spoken to the precise question at issue."[142] At this step, the court independently construes the statute to determine whether Congress has directly spoken.[143] If it has, the court then gives effect to the statutory meaning.[144] Because Congress itself has resolved the issue, no delegation to the agency or to the courts has occurred.[145] But if the court finds that Congress has not directly spoken, it moves to the second step of the *Chevron* inquiry.[146] At this step, the reviewing court must accept the agency's reading of a silent or ambiguous statute as long as the agency's reading "is based on a permissible construction of the statute."[147]

Although the Court in *Commercial Office Products* did not cite *Chevron*, it was apparent that the Court applied the *Chevron* two-step formula.[148] First, the Court found the statutory language to be susceptible to more than one meaning.[149] Then, although acknowledging that the EEOC's interpretation of the statute may not be the most "natural" one, the Court deferred to that interpreta-

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141. *Id.* at 842–43.

142. *Id.* at 842. The Court further stated: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43.

143. *See id.; see also* The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520–21 (discussing threshold "ambiguity" prong of *Chevron* analysis).

The extent to which the reviewing court may use legislative history in construing the statute is an issue on which the Justices vigorously disagree. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650–56 (1990); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 833 (1991). According to Justice Scalia, legislative history is irrelevant when statutory language is clear. *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (asserting examination of legislative history went well beyond what was necessary); United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (stating that language of legislative document was dispositive without examination of legislative history); United States v. Taylor, 487 U.S. 326, 344 (1988) (Scalia, J., concurring) (same); INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (stating where statutory language is clear, court should not consider legislative history).

144. *Chevron*, 467 U.S. at 842–43.

145. *See id.*

146. *Id.* at 843.

147. *Id.* ("[T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.").

148. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) ("*ARAMCO*") (Scalia, J., concurring) (noting *Commercial Office Products'* language was "quite familiar from our cases following *Chevron*").

149. *Commercial Office Products*, 486 U.S. at 115.

tion.[150] "[I]t is axiomatic," said the Court, "that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."[151]

The following year, in *Public Employees Retirement System v. Betts*,[152] the Court confronted an EEOC regulation promulgated under the ADEA.[153] The EEOC argued that its regulation, originally adopted by the Department of Labor and then repromulgated by the EEOC, was entitled to deference under *Chevron*.[154] The Court disagreed, finding the agency's reading inconsistent with "the plain language" of the statute.[155] Importantly, the Court did not dispute *Chevron*'s applicability. Rather, it found the agency's reading to be unreasonable.[156]

Two years later, however, in *EEOC v. Arabian American Oil Co.*[157] (*"ARAMCO"*), the Court refused to defer to the EEOC's construction of Title VII that allowed extraterritorial application of the statute.[158] Although admitting the statute was ambiguous, the Court did not follow the *Chevron* approach, as it had in *Commercial Office Products*.[159] Instead, the Court, relying on *Gilbert*, stated the EEOC's interpretation was entitled only to whatever persuasive weight it was due under *Skidmore*.[160] The Court concluded that the EEOC's interpretation was of limited persuasive value because

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150. *Id.*

151. *Id.*

152. 492 U.S. 158 (1989).

153. *Id.* at 161–62. The EEOC's regulations defined the word "subterfuge" in the ADEA to mean that age-based distinctions in fringe benefit plans were lawful (and thus not a subterfuge) only if the distinctions were cost-justified. 29 C.F.R. § 1625.10(d) (1994).

154. *Betts*, 492 U.S. at 171.

155. *Id.* "[O]f course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Id.*

156. *Id.* Justices Marshall and Brennan dissented, arguing first that Congress had spoken to the issue by conditioning an exemption on business justifications, and second that if Congress had not spoken, the Court under *Chevron* should defer to the agency. *Id.* at 189–92 (Marshall, J., dissenting).

157. 499 U.S. 244 (1991).

158. *Id.* at 248–51, 258.

159. *Id.* at 250–51, 257–58. The Court found that interpretations for and against extraterritorial interpretation were both plausible. *Id.* at 250. However, the Court relied on a longstanding canon of statutory construction that absent language to the contrary, statutes will "apply only within the territorial jurisdiction of the United States." *Id.* at 248.

160. *Id.* at 257.

it was not issued contemporaneously with the statute's enactment and because it reflected a change in the agency's position on extra-territorial application.[161]

Unlike the EEOC interpretation before the Court in *Gilbert*, however, the interpretation at issue in *ARAMCO* was not expressed in an "interpretive guideline." Instead, it was reflected in a series of less formal documents, including a policy statement, a letter from the EEOC's General Counsel, a 1985 decision by the EEOC, and testimony by the EEOC's Chairman.[162]

Justice Scalia took issue with the *ARAMCO* majority's failure to apply the *Chevron* analysis to the EEOC's interpretation.[163] Justice Scalia argued that *Chevron* was the proper review standard for EEOC interpretations, citing *Commercial Office Products*.[164] The fact that the majority neither mentioned nor overruled *Commercial Office Products* left "the state of the law regarding deference to the EEOC" unsettled.[165] Moreover, Justice Scalia stated that "[i]n an era when our treatment of agency positions is governed by *Chevron*, the 'legislative rules vs other action' dichotomy of *Gilbert* is an anachronism . . . ."[166]

Justice Scalia's concern over the unsettled state of the law is well-founded. The circuit courts are divided over the degree of deference due the EEOC's statutory interpretations.[167] None of the circuits has explored the issue in detail. Some simply defer to the agency, citing *Chevron*, while others, relying on *Gilbert* and *ARAMCO*, refuse to find the agency's interpretations controlling.[168]

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161. *Id.*

162. *Id.* at 256–57.

163. *Id.* at 259–60 (Scalia, J., concurring).

164. *Id.* (Scalia, J., concurring). Justice Scalia, nonetheless, would have rejected the EEOC's interpretation as unreasonable in light of the presumption against extraterritorial application of statutes. *Id.* at 260 (Scalia, J., concurring).

Justices Marshall, Blackmun, and Stevens would have found the EEOC's interpretations reasonable and thus the interpretation would have been entitled to deference based on *Commercial Office Products*. *Id.* at 276 (Marshall, J., dissenting).

165. *Id.* at 260 (Scalia, J., concurring).

166. *Id.* (Scalia, J., concurring). *Gilbert*, said Justice Scalia,

> was decided in an era when we were disposed to give deference (as opposed to "persuasive force") only to so-called "legislative regulations." The reasoning of [*Gilbert*] was not that the EEOC (singled out from other agencies) was not entitled to deference, but that the EEOC's *guidelines*, like the guidelines of all agencies without explicit rulemaking power, could not be considered legislative rules and therefore could not be accorded deference.

Id. at 259–60 (Scalia, J., concurring) (citation omitted).

167. *See* cases cited *supra* note 24.

168. *See* cases cited *supra* note 24.

Proper resolution of this issue requires an analysis of *Chevron*'s reasoning, as applied to that "strange, hybrid" agency, the EEOC. That analysis is supplied below.

III. DEFERENCE TO AGENCY INTERPRETATION OF STATUTES: THE *Chevron* PRESUMPTION

Judicial deference to agency interpretation of statutes is nothing new. The Supreme Court has long paid attention to an agency's view of the statutes it administers.[169] Deference, however, comes in a variety of forms.[170] At one extreme, as in *Skidmore*, *Gilbert*, and *ARAMCO*, the reviewing court treats the agency's views much as it would those of any informed expert or litigant.[171] At the other extreme, as in *Chevron* and *Commercial Office Products*, deference means a reviewing court will accept a reasonable agency interpretation with which it disagrees.[172]

The latter approach, described as "meaningful deference" by Professor Henry Monaghan, involves "administrative displacement of judicial judgment."[173] *Chevron* has become one of the most important administrative law cases in recent years because it announced a review standard that requires "meaningful deference" on a broad basis.[174] The question, accordingly, is not whether courts

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169. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130–31 (1944) (accepting agency interpretation of NLRA, rather than lower court's interpretation).

170. Diver, *supra* note 35, at 565–67. As Professor Clark Byse asserts, "[t]he question is not whether the agency's interpretation shall be 'considered' or 'taken into account.' The precise problem is the extent to which the agency's interpretation shall affect or control the court's interpretation." Clark Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 ADMIN. L. REV. 183, 191 (1981); *see also* DAVIS & PIERCE, *supra* note 2, at 242 (discussing two forms of judicial deference); Anthony, *supra* note 35, at 3 n.4 (same); Moot, *supra* note 24, at 215–16 (contrasting independent judgment model with deferential model).

171. Diver, *supra* note 35, at 565 ("Deference in this sense is no more than 'courteous regard.' The argument's *pedigree* adds nothing to the persuasive force inherent in its reasoning."); *see also* DAVIS & PIERCE, *supra* note 2, at 242 ("*Skidmore* deference is based solely on common sense."); Anthony, *supra* note 35, at 13 (noting that agency has substantial input but interpretative authority belongs with Court).

172. Anthony, *supra* note 35, at 40. Professor Anthony provides the following analysis of the practical and conceptual differences between the two extremes:

> As a matter of practical judicial psychology, it may often make little operational difference whether an interpretation is reviewed independently but given *Skidmore* consideration or is reviewed for reasonableness under *Chevron* Step 2. But the conceptual difference is large. An interpretation subject to the limited review of *Chevron*'s Step 2 binds the court—and therefore is law—unless it can be found unreasonable. The agency thus makes law.

Id.; *see also* DAVIS & PIERCE, *supra* note 2, at 242 (pointing out that *Chevron* involves binding deference); Yavelberg, *supra* note 24, at 186–87 (same).

173. Monaghan, *supra* note 17, at 5.

174. *See, e.g.*, Herz, *supra* note 35, at 203 (calling *Chevron* a "revolutionary

will pay attention to the EEOC's statutory interpretations, but whether, in the face of statutory ambiguity, the EEOC's views will be controlling on a reviewing court.

In mandating deference to agency readings of statutes, the *Chevron* Court recognized the policy choices inherent in statutory interpretation and concluded that those choices are better made by politically accountable agencies than by politically unaccountable courts.[175] While the Court previously had recognized that courts should defer to agency statutory interpretations when faced with an *express* delegation of interpretive authority,[176] the Court in *Chevron* recognized an *implied* delegation of interpretive authority.[177]

It is now widely recognized that *Chevron* is premised on an implied delegation theory—courts defer to agency constructions of silent or ambiguous statutes because "Congress has told them to do so."[178] But it is also recognized that implied delegation is often a

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case"); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971 (1992) (stating that *Chevron* marks "a significant transformation"); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) (calling *Chevron* significant because it "narrowed the ambit of judicial review of complex regulatory issues"); Sunstein, *Law and Administration*, *supra* note 16, at 2075 (describing *Chevron* as "a pillar in administrative law for years to come"); *cf.* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456–57 (1989) (describing *Chevron* deference standard as "more extreme than earlier articulations").

175. *Chevron*, 467 U.S. at 866; *see also* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991) (noting *Chevron* illustrates that "resolution of ambiguity in a statutory text is often more a question of policy than of law"); Merrill, *supra* note 174, at 978 (pointing out that *Chevron* "broke new ground by invoking democratic theory as a basis for requiring deference to executive interpretations").

Numerous commentators have focused upon *Chevron*'s frank acknowledgement of the policymaking involved in statutory interpretation. *See, e.g.*, Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron's *Step Two*, 2 ADMIN. L.J. 255, 257 (1988) (explaining argument in support of agency's policymaking authority); Herz, *supra* note 35, at 188 (noting Congress's delegation of policymaking authority to agencies); Kmiec, *supra* note 16, at 280–81 (recognizing that power to interpret is power to make policy); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305–07 (1988) (same); Sunstein, *Law and Administration*, *supra* note 16, at 2086–89 (describing *Chevron* as "frank recognition" that policy decisions are better left to administrators).

176. Batterton v. Francis, 432 U.S. 416, 425 (1977).

177. *Chevron*, 467 U.S. at 865–66. For a discussion of *Chevron*'s implied delegation approach, see Kmiec, *supra* note 16, at 277–79; Merrill, *supra* note 174, at 979; Starr, *supra* note 174, at 310.

178. Sunstein, *Law and Administration*, *supra* note 16, at 2084. The Court has confirmed this view. Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). For a discussion of the delegation theory and *Chevron*, see Anthony, *supra* note 35, at 4–5; Herz, *supra* note 35, at 194–96, 199; Merrill, *supra* note 174,

fiction.[179] In fact, Congress may have never thought about the precise issue or whether to delegate its resolution to the agency.[180]

Does *Chevron*, then, establish a blanket test to be applied whenever a reviewing court confronts an agency's interpretation of its enabling act? Some commentators, including Justice Scalia, believe that it does.[181] This view asserts that *Chevron* replaces a statute-by-statute search for delegation of interpretive authority with a blanket rule—whenever statutory ambiguity or silence exists in a statute administered by an agency, *Chevron*'s two-step review standard is triggered.[182]

Others correctly read *Chevron* more narrowly to mean that a delegation of interpretive authority to a particular agency must be found before *Chevron*'s review standard will apply.[183] Thus, *Chev-*

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at 987–88; Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 357–67; Scalia, *supra* note 143, at 516–18; Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A., Inc. v. NRDC, 87 COLUM. L. REV. 986, 993–95 (1987).

As Professor Monaghan explained the year before *Chevron* was decided:

> In this context, the court is not abdicating its constitutional duty to "say what the law is" by deferring to agency interpretations of law: it is simply applying the law as "made" by the authorized law-making entity. Indeed, it would be violating legislative supremacy by failing to defer to the interpretation of an agency to the extent that the agency had been delegated law-making authority.

Monaghan, *supra* note 17, at 27–28.

179. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Herz, *supra* note 35, at 194–96; Scalia, *supra* note 143, at 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild goose chase anyway."). *Chevron* thus operates as "a fictional, presumed intent." *Id.*

180. As the Court stated in *Chevron*:

> Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

181. Scalia, *supra* note 143, at 516. *But cf.* Farina, *supra* note 174, at 455–56, 467–71 (criticizing *Chevron* on separation-of-powers grounds).

182. Scalia, *supra* note 143, at 516. "*Chevron*, however, if it is to be believed, replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant." *Id.* But Justice Scalia recognizes that *Chevron* operates only as a *presumption* of deference to the agency which may be overcome by factors that outweigh deference in a particular case. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460–63 (1991) (requiring that Congress make plain statement of intent to intervene in state's governmental functions).

183. *See* Anthony, *supra* note 35, at 33–34; Breyer, *supra* note 179, at 373–74;

ron becomes a three-step formula. Under this three-step approach, if the court finds initially that Congress did not address the precise issue, the court then must determine whether Congress delegated interpretive authority to the agency.[184] If a delegation occurred, the court then determines whether the agency's construction is permissible and therefore binding on the court.[185]

This three-step approach requires the reviewing court to determine whether Congress delegated—either expressly or impliedly—interpretive authority, either in the context of a statute or a particular interpretive issue. However, as Professor Robert Anthony has noted, determining when a delegation of interpretive authority has implicitly been made "may be the most vexing of the many uncertainties left by *Chevron*."[186] This task is particularly daunting when considering the EEOC, an agency lacking substantive rulemaking powers under Title VII, but playing a critical role in the administration of federal employment discrimination statutes.

A. Interpretive vs. Legislative Rules: The Delegation Issue

As set forth earlier, the Court in *Gilbert* and *ARAMCO* gave limited deference to the EEOC because the agency lacked authority to issue substantive legislative rules.[187] But to what extent is the *Chevron* review standard premised on an agency's authority to issue legislative, as opposed to interpretive, rules?

Theoretically speaking, it is easy to distinguish an interpretive rule from a legislative one.[188] An interpretive rule is the agency's pronouncement of what it thinks a statute means.[189] When issuing interpretive rules, the agency need not follow[190] the Administrative Procedure Act's ("APA") notice and comment procedures.[191] Legislative rules, in contrast, create new rights or duties, have the force of law, and may be issued only by an agency that has been

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Sunstein, *Law and Administration*, *supra* note 16, at 2093–104; Braun, *supra* note 178, at 995–96.

184. *See* Condo v. Sysco Corp., 1 F.3d 599, 603–04 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1051 (1994); Anthony, *supra* note 35, at 23–26; Braun, *supra* note 178, at 999 n.100.

185. *See* sources cited *supra* notes 183–84.

186. Anthony, *supra* note 35, at 31–32.

187. *See supra* part II.

188. *See* Asimow, *supra* note 35, at 383.

189. *Id.*; *see* DAVIS & PIERCE, *supra* note 2, at 234–35; Herz, *supra* note 35, at 191–92; Saunders, *supra* note 178, at 346; Yavelberg, *supra* note 24, at 168–69.

190. *See* DAVIS & PIERCE, *supra* note 2, at 234; Asimow, *supra* note 35, at 381–82; Herz, *supra* note 35, at 192; Saunders, *supra* note 178, at 348 n.17; Yavelberg, *supra* note 24, at 168.

191. 5 U.S.C. § 552 (1988) (establishing requirements for agency rulemaking).

delegated the power to issue legislative regulations.[192] Legislative rules come in two forms—substantive and procedural.[193] The agency must follow the APA's notice and comment procedures when issuing substantive, but not procedural, legislative rules.[194]

While the two types of rules are theoretically different, as a practical matter it is often difficult to distinguish between interpretive and legislative rules.[195] "[T]here has always been doubt whether one could reliably tell the difference between a rule that interpreted a statute and one that extrapolated from the statute."[196]

This difficulty is compounded by the fact that agencies have the inherent authority to interpret their enabling acts.[197] They necessarily must interpret a statute in order to administer it.[198] But does this inherent interpretive power carry with it an implied delegation of interpretive authority that is binding on courts as well as the public?

The *Skidmore* Court suggested it does not. In *Skidmore*, the Wage-Hour Administrator had no substantive rulemaking powers under the Fair Labor Standards Act but had the power to seek injunctive relief against violators of the law.[199] In order to guide

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192. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 301–03 (1979); DAVIS & PIERCE, *supra* note 2, at 228, 233–36; Herz, *supra* note 35, at 191–92; Saunders, *supra* note 178, at 346–47, 352; Yavelberg, *supra* note 24, at 167–69.

193. Associated Dry Goods Corp. v. EEOC, 720 F.2d 804, 808–09 (4th Cir. 1983). The EEOC, for example, has been delegated authority to issue procedural regulations but not substantive ones under Title VII. It has authority to issue both types of regulations under the ADA and ADEA. *See supra* notes 56–59, 104–06, 109–12 and accompanying text (discussing rulemaking authority delegated to EEOC).

194. 5 U.S.C. § 553 (1988). An agency need only issue the procedural rule and publish it in the *Federal Register*. DAVIS & PIERCE, *supra* note 2, at 248.

Substantive legislative rules, however, must follow either formal or informal rulemaking procedures. *Id.* at 286–87. Informal rulemaking procedures require that the proposed rule be published, that comments from interested persons be considered, and that the rule thereafter be issued stating its basis and purpose. *See* 5 U.S.C. § 553(c) (1988); DAVIS & PIERCE, *supra* note 2, at 287–88. It is this informal rulemaking process that is most frequently used by agencies when promulgating substantive rules. *Id.* at 288.

Congress may also direct the agency to promulgate substantive rules after an evidentiary hearing. 5 U.S.C. §§ 553(c), 556–557 (1988). This process is known as formal rulemaking. DAVIS & PIERCE, *supra* note 2, at 290–98.

195. Asimow, *supra* note 35, at 383–84.

196. Saunders, *supra* note 178, at 347.

197. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944); DAVIS & PIERCE, *supra* note 2, at 234.

198. *See* Morton v. Ruiz, 415 U.S. 199, 231 (1974) (explaining agency administration "requires the formulation of policy and the making of rules"); Saunders, *supra* note 178, at 349–50 (stating that "interpretive rulemaking" is "practical necessity").

199. *Skidmore*, 323 U.S. at 137–39. In many ways, the Administrator's powers

the public, the Administrator had issued bulletins explaining how he would apply the Act.[200] The Court found these bulletins were not "controlling upon the courts by reason of their authority, [but] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[201]

Chevron, in contrast, involved the review of a legislative rule promulgated by the Environmental Protection Agency ("EPA").[202] There, the EPA, through use of its substantive rulemaking procedures, had defined an ambiguous statutory term.[203] After first concluding that Congress itself had expressed no intent on the particular issue, the Court determined that the only question was whether the agency's interpretation was reasonable.[204] In upholding the EPA's definition as a "permissible construction of the statute," the Court stated:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of

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parallelled those of the EEOC. As the EEOC has done under Title VII, the ADEA, and the ADA, the Wage-Hour Administrator in *Skidmore* issued interpretive regulations to explain the meaning of the Fair Labor Standards Act. *Id.* at 138 (citing Wage and Hour Division, Interpretive Bulletin No. 13 (codified at 29 C.F.R. § 776(a) (1994))). The Administrator, through the Secretary of Labor, is charged with administering the Fair Labor Standards Act ("FLSA") and has investigative powers and authority to prosecute violators. *See id.* at 139–40; 29 U.S.C. § 204 (1988) (providing for appointment of Wage and Hour Division Administrator). But unlike Title VII, the FLSA does not require claimants to exhaust administrative remedies prior to bringing suit. *Compare* 29 U.S.C. § 216(b) (1988) (Wage and Hour enforcement provisions) *with* 42 U.S.C. § 2000e-5(b) (1988) (Title VII enforcement provisions). Private enforcement can occur without any proceedings before the agency. 29 U.S.C. § 216(b) (1988).

200. *Skidmore*, 323 U.S. at 138. These bulletins, issued without notice and comment proceedings, set forth examples of when "waiting time" would be compensable under the FLSA. *Id.* The Wage-Hour Administrator had filed an amicus curiae brief suggesting how his test should be applied to the facts at hand. *Id.* at 139.

201. *Id.* at 140.

202. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 840 (1984).

203. At issue was the meaning of the term "stationary source" in the Clean Air Act Amendments of 1977. *Id.* at 839–40. The EPA defined "stationary source" to "allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble.'" *Id.*; 40 C.F.R. §§ 51.18(j)(1)(i)–(ii) (1983) (defining "stationary source").

204. *Chevron*, 467 U.S. at 842–45.

> the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[205]

Thus, *Chevron* recognizes that the key to judicial deference to an agency's statutory interpretations is a delegation of *policymaking* authority.[206] An agency that has been delegated such authority is Congress's ostensible choice for resolving the policy decisions implicated in statutory interpretation.

It is beyond question that an agency that has been delegated legislative rulemaking powers has been delegated policymaking authority.[207] The power to impose new obligations having the force of law is, of course, the power to make law.[208] Because *Chevron* involved the review of a legislative rule, some commentators have argued that *Chevron* only applies to agency pronouncements contained in such formats.[209] But *Chevron* has not been so limited. For example, when an agency with policymaking authority makes a policy choice through adjudication, *Chevron* applies.[210] However, when an agency, with or without legislative rulemaking authority, issues a so-called "interpretive" rule, the question that arises is whether judicial review of that rule is governed by *Skidmore* or

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205. *Id.* at 865–66.

206. Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991); *see* Diver, *supra* note 35, at 552; *see also* Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Prog., 449 U.S. 268, 278 n.18 (1980) (commenting that when entity is not policymaking agency its interpretation is entitled to no special deference).

207. *See* Diver, *supra* note 35, at 593–95; Sunstein, *Law and Administration*, *supra* note 16, at 2093.

208. Diver, *supra* note 35, at 593–95.

209. *See* Yavelberg, *supra* note 24, at 186. As Professor Herz asserts, "*Chevron* does not make agency 'interpretations' of statutes binding on the courts; it does require acceptance of agency lawmaking. *Chevron* is understood best in light of the longstanding, if oversimple, distinction between legislative and interpretive rules." Herz, *supra* note 35, at 190.

210. *See, e.g.*, Martin v. Occupational Health and Safety Review Comm'n, 499 U.S. 144, 153–54 (1991) (stating policymaking through adjudication is appropriate when Congress has delegated power to make law and policy through rulemaking); Kohler v. Moen, Inc., 12 F.3d 632, 634–36 (7th Cir. 1993) (applying *Chevron* when commissioner had exercised adjudicatory power); DAVIS & PIERCE, *supra* note 2, at 120 ("Since Congress gave the NLRB both the power to make policy decisions and the power to adjudicate, it is fair to infer that Congress delegated to the NLRB the power to make binding policy decisions through the process of adjudication."); Anthony, *supra* note 35, at 46 (arguing that "*Chevron* acceptance extends to all interpretations expressed in formats that Congress intended to be used to implement delegated law-making authority"); Bernard Schwartz, *Administrative Law Cases During 1991*, 44 ADMIN. L. REV. 629, 649 (1992) ("[*Chevron*] applies to review of all statutory interpretations by agencies—whether in rules or adjudicatory decisions.").

Chevron.[211]

When Congress explicitly grants an agency rulemaking authority, the interpretive/legislative distinction makes little difference as long as the agency has followed rulemaking procedures in issuing its interpretation.[212] In such a case, the *Chevron* standard applies. Even if the agency's regulation purports to "interpret" the statute, as the EPA did in *Chevron*, and even if Congress has not expressly confided to the agency the authority to define the statutory term, the interpretation is still entitled to *Chevron* review.[213] This is because when an agency possesses legislative rulemaking authority, it is appropriate to *presume* a delegation of interpretive authority has occurred. As the Court recognized in *Chevron*, statutory interpretation frequently presents a policy question, and an agency to whom Congress delegated broad lawmaking powers is the likely candidate for resolving the policy choices implicated in statutory interpretation.[214] *Chevron* replaces a statute-by-statute search for congres-

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211. This question has drawn attention from numerous commentators. *E.g.*, DAVIS & PIERCE, *supra* note 2, at 119–20, 235–43; Asimow, *supra* note 35, at 15; Herz, *supra* note 35, at 193; Saunders, *supra* note 178, at 358–67; Yavelberg, *supra* note 24, at 197.

212. *See* DAVIS & PIERCE, *supra* note 2, at 119–20; Anthony, *supra* note 35, at 46; Breyer, *supra* note 179, at 372; Monaghan, *supra* note 17, at 26–27; Saunders, *supra* note 178, at 352–57.

213. As one commentator noted, *Chevron* has "blurred" the distinction between legislative and interpretive rules by finding that Congress may implicitly delegate interpretative authority. Saunders, *supra* note 178, at 352–53. *But see* Herz, *supra* note 35, at 201 (contending that agency's interpretation of statute should be entitled to *Chevron* deference only if interpretive authority has been *expressly* delegated). Professor Herz reads *Chevron*'s implicit delegation theory as extending only to an agency's authority to use legislative rulemaking to fill in statutory gaps, not to resolve statutory ambiguities. *Id.* at 199–207.

214. See *supra* text accompanying notes 203–10 (discussing *Chevron*'s emphasis on policymaking authority). As Professor Sunstein states:

> If regulatory decisions in the face of ambiguities amount in large part to choices of policy, and if Congress has delegated basic implementing authority to the agency, the *Chevron* approach might reflect a belief, attributable to Congress in the absence of a clear contrary legislative statement, in the comparative advantages of the agency in making those choices.

Sunstein, *Law and Administration*, *supra* note 16, at 2087. Professor Sunstein goes on to add:

> [I]t is plausible to think that the legislative grant of rulemaking power implicitly carries with it the grant of authority to interpret ambiguities in the law that the agency is entrusted with administering. Somewhat more broadly, *Chevron* might be taken to suggest that whenever an agency is entrusted with implementing power—whether to be exercised through rulemaking or adjudication—agency interpretations in the course of exercising that power are entitled to respect so long as they are reasonable.

Id. at 2093 (footnote omitted); *see also* DAVIS & PIERCE, *supra* note 2, at 114 (noting *Chevron*'s criticism of substitution of judicial policy preferences where Congress in-

sional intent with a presumption that Congress has delegated interpretive authority to an agency with legislative rulemaking, i.e., policymaking, authority.[215] That presumption, of course, can be overcome by evidence of a contrary congressional intent regarding either the statute as a whole or a particular interpretive issue.[216]

But when the agency has *not* been delegated the authority to issue legislative rules, any rule the agency promulgates will necessarily be "interpretive."[217] As such, is the courts' review of that rule necessarily governed by *Skidmore*? Numerous courts and commentators have so argued,[218] and the United States Supreme

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tended to delegate policymaking authority to agency); Diver, *supra* note 35, at 552 (concluding that courts should presumptively defer to agency where Congress endowed agency with significant policymaking responsibility); Monaghan, *supra* note 17, at 31 n.185 (noting that substantive rulemaking authority is indicium of legislative intent that agency should supply statutory meaning).

215. Sunstein, *Law and Administration*, *supra* note 16, at 2093; *see* Scalia, *supra* note 143, at 516. For discussion of Justice Scalia's position, see infra note 221 and accompanying text.

216. Sunstein, *Law and Administration*, *supra* note 16, at 2083–86, 2091. For example, if Congress expressly states that the courts are not to defer to the agency's construction, no deference would be found. Also, the Supreme Court sometimes has found the *Chevron* presumption of deference overcome by competing canons of construction that militate against deference. *See, e.g.*, Lechmere, Inc. v. NLRB, 112 S. Ct. 841, 847–49 (1992) (refusing to defer to NLRB construction that was viewed as inconsistent with Court's past interpretations of statute); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574–78 (1988) (rejecting agency interpretation that raised First Amendment concerns); White, *Stare Decisis Exception*, *supra* note 23, at 741–46 (discussing conflict between *Chevron* and stare decisis). For a discussion of *Chevron*'s intersection with other norms of statutory construction, see Sunstein, *Law and Administration*, *supra* note 16, at 2105–19.

217. As set forth above, there is an overlap between legislative and interpretive rules in the sense that a regulation, promulgated through rulemaking procedures by an agency with rulemaking authority, may define an ambiguous statutory term. *See supra* text accompanying notes 212–16. *Chevron* itself presented such a scenario and established that such interpretations were binding on the courts. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843–44, 864–66 (1984).

Legislative rules, however, may go beyond interpreting the statute and impose new rights or duties. *See* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 528–29 (1981). Such an exercise of lawmaking authority depends upon a grant of legislative rulemaking power. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 308 (1979).

218. *See, e.g.*, Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) (following *Skidmore* as to nonlegislative guidelines); DAVIS & PIERCE, *supra* note 2, at 239–40 (explaining *Skidmore*'s application to interpretive rule); Herz, *supra* note 35, at 193 (stating interpretive rules deserve *Skidmore* deference); Sunstein, *Law and Administration*, *supra* note 16, at 2093 (concluding that *Chevron* deference does not apply to agencies without rulemaking power); Yavelberg, *supra* note 24, at 192 (reasoning that EEOC's rulings are interpretive and thus do not qualify for *Chevron* deference); *cf.* Reich v. Local 30, Int'l Bhd. of Teamsters, 6 F.3d 978, 987 n.14 (3d Cir. 1993) (declining to decide whether *Chevron* deference to interpretive rules is appropriate but noting that *Skidmore* has not been overruled).

Court implied as much in *ARAMCO*.[219]

This view is wrong. The proper inquiry is not whether the agency has been delegated legislative rulemaking authority but whether it has been delegated interpretive authority. Congress may have withheld from the agency the broader lawmaking authority that legislative rulemaking often entails—the power to grant new rights and impose new obligations—while nonetheless delegating to the agency the authority to interpret the statute Congress enacted.[220]

But *Chevron*'s presumption of deference does *not* apply when an agency lacks the authority to issue legislative rules. Rather, the question becomes whether the agency, even though Congress has not expressly delegated legislative rulemaking powers to it, nonetheless possesses sufficient policymaking power to support an implied delegation to it of interpretive authority.

In answering this question, Justice Scalia has argued that whenever Congress entrusts an agency with the task of *administering* a statutory scheme, the "inherent" authority, recognized by *Skidmore*, to interpret the statute constitutes an implied delegation of interpretive authority.[221] For this reason, he has called the distinction between legislative and interpretive rules "an anachronism"

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219. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257–58 (1991) ("*ARAMCO*"); *see* Yavelberg, *supra* note 24, at 190–91.

220. As Professor Saunders asserts, Congress may *implicitly* delegate to an agency the authority to issue rules of construction that will have legislative effect. Saunders, *supra* note 178, at 347, 358–59. This implicit delegation may be made even when the agency lacks legislative rulemaking authority. For an illustration of this point with regard to the EEOC, see *infra* part IV.B.

Professor Herz draws a similar distinction to reach an opposite conclusion. Herz, *supra* note 35, at 203. A delegation of legislative rulemaking authority is, he says, only a delegation to fill in the gaps Congress left in the statutory scheme. *Id.* Professor Herz would not extend *Chevron* deference to rules that resolve statutory ambiguities, rules "that are interpretive in the sense of merely delineating what Congress has decided," unless an express delegation of interpretive, as opposed to legislative rulemaking, authority exists. *Id.* He advocates this approach based on a belief that "[t]he political result reflected in the statute more likely will be respected by neutral courts than by accountable, politically appointed agencies." *Id.* at 202–03.

This belief, however, has proved unwarranted as applied to Title VII. The "breach of political faith" by the courts under that statute has been well documented. *See* Eskridge, *supra* note 16, at 684; *infra* text accompanying notes 296–99. More importantly, Professor Herz's reasoning appears inconsistent with *Chevron* itself, in which the Court found an implicit delegation of authority to interpret an ambiguous statutory term. *Chevron*, 467 U.S. at 865.

221. Scalia, *supra* note 143, at 516 (observing that while grant of rulemaking authority makes intent to delegate more likely, *Chevron* established "across-the-board presumption that, in the case of ambiguity, agency discretion is meant"); *see also ARAMCO*, 499 U.S. at 260 (Scalia, J., concurring) (arguing that Court should have assumed EEOC was entitled to deference).

in the post-*Chevron* era.[222]

But Justice Scalia does not explore what degree of agency administration of the statutory scheme is necessary to support an implied delegation of interpretive authority.[223] When the agency lacks power to promulgate legislative rules, the reviewing court should question whether the agency's "administrative authority" supports an implied delegation to issue binding interpretations of its enabling act.[224] The distinction between legislative and interpretive rules may be "anachronistic" when the agency has legislative rulemaking authority, but it is not when the agency lacks such authority.[225]

Justice Scalia, however, is correct in his assumption that an agency's lack of legislative rulemaking power is not dispositive.[226] The question is whether, in the context of the particular statutory scheme, an implied delegation to interpret the law may reasonably be found.[227] In other words, does it "'make[] sense,' in terms of

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222. *ARAMCO*, 499 U.S. at 260–61 (Scalia, J., concurring). For a discussion of Justice Scalia's concurring opinion in *ARAMCO*, see *supra* text accompanying notes 163–66.

223. Nor has the Court. *See* Morton v. Ruiz, 415 U.S. 199, 231 (1974). The *Morton* Court noted that "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* Significantly, the Court did not clarify whether rulemaking powers are necessary to find a power to "administer." *See id.*

224. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990). An agency that lacks the power to issue substantive legislative rules or to engage in binding adjudication lacks the full range of administrative powers possessed by an agency such as the NLRB. It lacks the policymaking "pedigree" that underlies the *Chevron* presumption. *See* Sunstein, *Law and Administration*, *supra* note 16, at 2093–94.

However, the absence of rulemaking authority is not dispositive. It simply forces close examination of whether Congress nonetheless implicitly delegated interpretive authority to the agency. Professor Saunders points to two factors courts should consider in determining whether statutory ambiguity constitutes an implicit delegation of interpretive authority: (1) the degree to which the ambiguity represents an unresolved policy choice, and (2) the degree to which the ambiguous term needs agency expertise to clarify. Saunders, *supra* note 178, at 360–64.

225. When the agency has legislative rulemaking powers, *Chevron*'s presumption is that interpretive authority has been delegated. Thus, any search for a separate delegation of interpretive authority no longer is necessary in the post-*Chevron* era. When the agency lacks legislative rulemaking authority, however, the question of whether interpretive authority has been delegated must be explored. If no such delegation has occurred, the agency's rules would be entitled only to *Skidmore* deference. *See ARAMCO*, 499 U.S. at 257.

226. In other words, Justice Scalia's *ARAMCO* concurrence is better read as asserting that the EEOC's lack of substantive rulemaking powers did not deprive its interpretations of *Chevron* deference, *not* that the EEOC had substantive rulemaking authority. *See id.* at 259–60 (Scalia, J., concurring).

227. *See* Saunders, *supra* note 178, at 358–60; Braun, *supra* note 178, at 994; *see*

th[e] need for fair and efficient administration of the statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretations."[228] While legislative rulemaking powers are sufficient to support *Chevron*'s presumption of an implied delegation, their absence simply forces the court to examine whether Congress intended the agency, as opposed to the courts, to resolve the policy questions Congress failed to resolve when it enacted the particular statute.

B. Interpretive vs. Legislative Rules: The Format Issue

Once a court determines Congress has delegated an agency interpretive authority, a question arises as to the format in which the agency must issue the interpretation for it to be accorded deference from the court.[229] When an agency issues an interpretation through legislative rules or adjudicative orders, it clearly has exercised interpretive power.[230] But when its interpretation is expressed more informally, through interpretive guidelines, manuals, letters, memoranda, or briefs, the binding nature of the interpretation is uncertain, even when the agency unquestionably possesses

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also Diver, *supra* note 35, at 593–95 (explaining criteria to be considered in determining whether agency's policymaking responsibilities justify deference to its statutory interpretations). Although Professor Diver believes substantive rulemaking and adjudicative authority are the most obvious and important indicia of policymaking powers, he finds that the EEOC's power to issue advisory rulings and the fact that its "guidelines play an important role in the implementation of the Act" are evidence of sufficient policymaking authority to support deference to its statutory interpretations. *Id.* Whether an implied delegation may be found is, of course, a question for the judiciary. *See* Monaghan, *supra* note 17, at 6, 25–26; Starr, *supra* note 174, at 308–09; Braun, *supra* note 178, at 995–96.

228. Breyer, *supra* note 179, at 370. Then-Judge Breyer listed the following factors as helpful in determining whether Congress intended the courts to defer to an agency's interpretations:

(1) Does the question call for special expertise?
(2) Is the question so important as to make it unlikely Congress did not intend to resolve it?
(3) Is the statute "phrased so broadly as to invite agency interpretation?"
(4) To what extent will the answer "clarify, illuminate or stabilize" the law.
(5) Can the agency "be trusted to give a properly balanced answer."

Id. at 370–71; *see also* Sunstein, *Law and Administration*, *supra* note 16, at 2086 (recognizing that when Congress does not expressly delegate interpretive authority, "the court's task is to make the best reconstruction that it can of congressional instructions"). If Congress was unclear, "the choice among the alternatives will call for an assessment of which strategy is the most sensible one to attribute to Congress under the circumstances." *Id.* at 2086.

229. This issue was first explored in detail in Anthony, *supra* note 35, at 6–15, 42–63. *See also* DAVIS & PIERCE, *supra* note 2, at 120 (opining that *Chevron* would not apply to interpretations issued in informal formats).

230. Anthony, *supra* note 35, at 44–48.

policymaking authority.[231]

The key here should be agency intent. If Congress has delegated the agency interpretive authority, the question is whether the agency intended to exercise that authority when it made a particular pronouncement.[232] Agency pronouncements made in informal formats are less likely to reflect an agency's intent to exercise its delegated interpretive authority. But when an agency's "interpretive guidelines" are the product of notice and comment procedures, public hearings, and *Federal Register* publication, they are more likely intended to be an exercise of delegated interpretive authority.[233]

IV. THE EEOC'S STATUTORY INTERPRETATIONS ARE ENTITLED TO MEANINGFUL DEFERENCE FROM THE COURTS

The above understanding of the *Chevron/Skidmore* distinction informs the level of deference due the EEOC's statutory interpretations. The paramount question is whether Congress has delegated interpretive authority to the EEOC. If it has, then the agency's interpretations of ambiguous statutory terms are binding on the reviewing courts, not simply agency views to be considered and dismissed.

Determining whether such a delegation has occurred requires analysis of the EEOC's administrative powers. To what degree did Congress envision the agency as a policymaker? In the context of

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231. City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1594 n.5 (1994) ("In view of our construction [of the statute], we need not consider whether an agency interpretation expressed in a memorandum like the Administrator's in this case is entitled to any less deference under *Chevron* than an interpretation adopted by rule published in the Federal Register, or by adjudication.").

232. Saunders, *supra* note 178, at 373–74; *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328 (1992) (recognizing that agencies must intend for legislative rule to be binding before it will be).

Professor Anthony, however, takes a different approach to the question of format. He says the issue "is *whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used.*" Anthony, *supra* note 35, at 4. He adds that "'implicit' delegation should be inferred only for formats that usually carry the force of law." *Id.* at 39. As a general rule, Professor Anthony would find deference due only to legislative rules and adjudicative orders. *Id.* at 44–52.

The problem with this approach is that it excludes the possibility that Congress may have delegated interpretive authority to an agency while having denied it legislative rulemaking and adjudicating authority.

233. *See* Saunders, *supra* note 178, at 374–82. If an interpretation is the product of delegated authority, it is, says Professor Saunders, essentially a legislative rule and thus should issue only after the APA's notice and comment procedures have been followed. *Id.* at 382. For further discussion of this point, see *infra* part IV.C.

the administrative scheme set up by these statutes, does it "make sense" to find that Congress implicitly delegated interpretive authority to the EEOC? Finally, if deference is due the EEOC, in what formats must those interpretations be expressed?

A. EEOC Interpretations Under the ADA and ADEA

The EEOC has been implicitly conferred interpretive authority under the ADA and ADEA through Congress's express delegation of the power to issue legislative rules.[234] As previously outlined, the conferral of general policymaking authority carries with it the presumption of an implied delegation of interpretive authority.[235] Thus, statutory gaps and ambiguities are to be resolved by the agency, with the courts deferring to the agency's interpretation so long as that interpretation is reasonable.[236]

The fact that Congress has delegated interpretive powers to the EEOC is particularly apparent under the ADA. First, the ADA was enacted in the post-*Chevron* era. After *Chevron*, Congress must (or should) have understood to whom it was delegating the authority to interpret the statute's ambiguous terms[237] such as "reasonable accommodations," "undue hardship," "qualified individual with a disability," and "job-related for the position in question and . . . consistent with business necessity."[238] Second, by directing the agency to have regulations in place within one year after the Act's passage but one year before its effective date, Congress evidenced its intent that the agency flesh out the statute, allowing employers and employees time to understand their rights and duties under the

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234. 42 U.S.C. § 12116 (Supp. V 1993) (ADA); 29 U.S.C. § 628 (1988) (ADEA).

235. *See supra* text accompanying notes 212–16. The EEOC's broad grant of rulemaking authority under the ADA and ADEA supports *Chevron*'s presumption that interpretive authority has been delegated. As Professor Anthony notes, a general conferral of rulemaking authority is a conferral of substantive rulemaking powers. Anthony, *supra* note 35, at 44–45.

236. *See supra* notes 146–47 and accompanying text (discussing agency authority under *Chevron* analysis where statute is silent or ambiguous). Of course, no deference to the agency will occur if the court determines, at *Chevron*'s Step 1, that Congress itself has resolved the issue. *See supra* notes 142–45 and accompanying text.

237. Scalia, *supra* note 143, at 517 ("Congress now knows that the ambiguities it creates . . . will be resolved . . . not by the courts but by a particular agency . . . ."); *see also* Starr, *supra* note 174, at 311 (noting that *Chevron* puts burden on Congress to legislate more precisely).

238. *E.g.*, 42 U.S.C. § 12112(b)(5)–(6) (Supp. V 1993). Each of the terms is susceptible to varying interpretations, as commentators have pointed out. *See generally* Barnard, *supra* note 13, at 239–52; Nancy L. Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 489–90 (1991). It is a statute phrased "so broadly as to invite agency interpretation." Breyer, *supra* note 179, at 371 (discussing statutes generally).

Act.[239] Third, the statute expressly provides a cause of action not only for violations of the statute but also for violations of the regulations promulgated by the EEOC.[240] This provision confirms the agency's broad lawmaking powers under the ADA.[241]

Similarly, the EEOC possesses legislative rulemaking power under the ADEA.[242] Under that statute, the EEOC has been delegated not only the power to issue regulations but also the authority to "establish such reasonable exemptions . . . as [it] may find necessary and proper in the public interest."[243] This expressly delegated power to create exemptions from the ADEA is a significant grant of policymaking authority, consistent with an implicit delegation of interpretive authority.

The *Chevron* presumption of interpretive authority arising from the agency's legislative rulemaking powers is further buttressed by the statutes' enforcement scheme. Under both the ADA and ADEA, the EEOC must process all claims of discrimination before suit may be brought.[244] The Supreme Court has treated this requirement as a jurisdictional prerequisite to suit.[245] The agency also is responsi-

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239. *See* 42 U.S.C. § 12116 (Supp. V 1993); 135 CONG. REC. S10,721 (daily ed. Sept. 7, 1989) (statement of Sen. Durenberger) ("The regulations are due 12 months after the enactment date in order to provide time to educate covered entities about their obligations under the act.").

As a House report states:

> It is the Committee's intent that these regulations will be drafted so as to be a self-contained document. The regulations should not incorporate by reference other laws or regulations. The Commission's regulations will have the force and effect of law. This format will increase the likelihood of voluntary compliance on the part of covered entities and should minimize the need to hire a battery of lawyers to ascertain the obligations created by this legislation.

H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 82 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 364.

240. 42 U.S.C. § 12117(a) (Supp. V 1993).

241. *But see* Greenberger, *supra* note 23, at 62 (assuming without discussion that Congress delegated to courts task of developing law under ADA).

242. 29 U.S.C. § 628 (1988).

243. *Id.*

244. 42 U.S.C. § 12117 (Supp. V 1993) (ADA); 29 U.S.C. § 626(c)(1) (1988) (ADEA).

245. *E.g.*, Mohasco Corp. v. Silver, 447 U.S. 807, 810 (1980); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 753, 755–56 (1979). There is, however, no requirement that administrative proceedings be exhausted. The charging party may request a right-to-sue letter and proceed to court. *See* EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 110–13 (1988). Also, in "deferral" states—states with fair employment agencies and laws deemed acceptable by the EEOC—the charging party also must resort to state administrative procedures. *Id.* at 112. The EEOC often enters into worksharing agreements with agencies in deferral states allowing the state and the EEOC to share charge-handling responsibilities. *Id.*

ble for investigating and resolving claims, and its power to prosecute aids conciliation by giving it leverage with employers.[246] As the agency responsible for administering all claims under both statutes, the EEOC possesses an expertise unmatched by courts.[247]

Absent, however, under both the ADEA and ADA is cease-and-desist authority. The EEOC has no power to issue an enforceable order against any party; only a court may determine liability. The judiciary's role in the enforcement process, therefore, gives it undeniable policymaking power under both statutes.[248]

But Congress's failure to confer cease-and-desist powers on the agency does not overcome *Chevron*'s presumption of a delegation of interpretive authority. There is no inconsistency in giving the courts authority to make liability determinations while sharing with the agency the power to resolve policy questions implicated in interpreting ambiguous statutory terms.[249]

The 1972 debates that resulted in denying the EEOC cease-and-desist authority under Title VII reflected congressional reluc-

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246. An obvious goal of the agency process is to resolve claims without the need for judicial proceedings. EEOC v. Shell Oil Co., 466 U.S. 54, 77–78 (1984) (explaining congressional intent regarding Title VII). Providing the EEOC with authority to seek judicial relief gives teeth to its enforcement efforts during investigation and conciliation. Moreover, the agency's investigative responsibilities include subpoena powers and the power to require employers to issue reports to the Commission. *See* 42 U.S.C. §§ 2000e-8(c), -9 (1988). This enforcement process "grants the EEOC a central role in bringing justice to victims of discrimination." Follette, *supra* note 12, at 659.

247. Agency expertise, in and of itself, is not a basis for deference. *See* Herz, *supra* note 35, at 194; Scalia, *supra* note 143, at 514. But it is a factor to be considered in determining whether it is reasonable to find an implicit delegation of interpretive authority. *See* Breyer, *supra* note 179, at 370–71; Saunders, *supra* note 178, at 362–64. For a discussion of this issue with respect to Title VII, see *infra* notes 288–93 and accompanying text.

248. *See* Diver, *supra* note 35, at 595 ("[T]he fact that Title VII of the Civil Rights Act may be enforced by private action in federal courts implies that courts have substantial policymaking responsibilit[ies].").

Resolution of individual claims often involves resolution of open statutory questions, on which the agency has issued no interpretation. This private enforcement scheme may be contrasted with the one established under the NLRA, which gives the NRLB exclusive power to decide in every case whether or not a violation has occurred. 29 U.S.C. § 160 (1988). A court will not confront a claim under the NLRA without benefit of the agency's views, expressed through rulemaking or adjudication. *Id.* In contrast, a charging party under the ADA, ADEA, or Title VII may bring suit without any agency determination on the merits of the claim. *See supra* note 245 (discussing party's right to proceed to court).

249. *See, e.g.*, Wagner Seed Co. v. Bush, 946 F.2d 918, 920–22 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992). In *Wagner*, the plaintiff argued *Chevron* did not apply to the EPA's statutory interpretations because the Act provided the plaintiff with a trial de novo. *Id.* at 921. The court disagreed, finding Congress may have intended de novo judicial review of the agency's particularized liability finding, while wanting deference for broader questions of statutory interpretation. *Id.* at 922.

tance to make the EEOC the investigator, the prosecutor, and the judge of individual liability.[250] The debates, however, did not reflect a decision to withhold interpretive authority, authority *Griggs* suggested the agency already had been confided.[251] That Congress responded to *Griggs* by increasing the EEOC's enforcement role without suggesting that its interpretive powers be limited can be seen as confirming the EEOC's power to authoritatively interpret the statute.[252] Thus, the carrying forward into the ADA and ADEA of Title VII's enforcement scheme is not inconsistent with a delegation of interpretive authority.

The lack of cease-and-desist authority, however, is significant in one respect. It precludes the EEOC's determination of probable cause, or lack thereof, from binding courts or litigants in individual cases.[253] But the EEOC's broad determination, for example, of what factors should be considered in determining whether a job function is "essential" within the meaning of the ADA,[254] so long as reasonable, is binding on the courts when contained in an appropriate format.[255] This split enforcement scheme gives the agency the authority to resolve the broader policy questions left open under the statute while reserving to the courts the dispensing of individual justice.

B. EEOC Interpretations Under Title VII

Determining whether deference is due the EEOC's interpretations of Title VII is more difficult. Answering this question first requires distinguishing the EEOC's procedural regulations from its substantive interpretations of the statute.

Chevron's presumption of a delegation of interpretive authority

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250. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 474–75 & n.15 (1982); *see also supra* notes 79–95 and accompanying text (discussing legislative history regarding EEOC's authority).

251. *See supra* note 96 and accompanying text (discussing relationship between congressional intent and *Griggs*).

252. *See* Johnson v. Transportation Agency, 480 U.S. 616, 629 n.7 (1987). Legislative inaction alone would perhaps be a suspect basis for finding a delegation. *Johnson*, 480 U.S. at 671–72 (Scalia, J., dissenting); Eskridge, *supra* note 16, at 670. But when attempting to determine whether an implicit delegation of interpretive authority has occurred, it is a factor worth some consideration.

253. *Kremer*, 456 U.S. at 470 n.7.

254. *E.g.*, 29 C.F.R. § 1630.2(n) (1994).

255. Historian Graham points to the EEOC as leading the development of a "wholesale" manner of regulating, having been denied the "retail," case-by-case approach of cease-and-desist orders. GRAHAM, *supra* note 25, at 239–40. As Graham correctly notes, that the agency cannot adjudicate does not deprive it of its "legislative"-type powers. *Id.* at 465–67.

applies to the EEOC's procedural regulations under Title VII, just as it does to regulations issued under the ADEA and ADA. Congress has expressly delegated to the agency the authority to issue procedural regulations.[256] This explains why the Court deferred to the EEOC in *Commercial Office Products*.[257] In that case, because the statutory interpretation was reflected in a procedural regulation, and Congress had delegated authority to issue such regulations, the Court properly presumed a delegation to the EEOC of interpretive authority for procedural questions arising under the Act.[258]

Because the EEOC lacks the power to issue substantive legislative regulations under Title VII,[259] *Chevron*'s presumption of a delegation of interpretive authority to the agency does not apply when the agency is issuing a substantive interpretation of the statute.[260] Instead, the reviewing court must determine whether Congress implicitly delegated interpretive authority to the agency, despite its failure to delegate legislative rulemaking authority.[261]

It is here that one must draw a distinction between legislative and interpretive rules. The EEOC is without power to impose new duties or obligations not found in Title VII.[262] Although Congress denied the EEOC the broader power to legislate, that does not mean Congress denied the EEOC the more narrow power to give meaning to the statute. In a sense, one may find that Congress denied the EEOC the power to fill in statutory gaps while implicitly delegating the power to interpret statutory ambiguities.[263]

In *Griggs*, for example, the Court deferred to an EEOC inter-

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256. *See supra* notes 55–59 and accompanying text.

257. 486 U.S. 107, 126 (1988) (O'Connor, J., concurring); *see supra* text accompanying notes 148–51 (discussing *Commercial Office Products*).

258. *See supra* notes 212–16 and accompanying text (explaining presumption that agency has interpretive power unless rebutted by congressional intent); *see also* Jackson v. Richards Medical Co., 961 F.2d 575, 581 (6th Cir. 1992) (plurality opinion) (applying *Chevron* deference to EEOC's procedural, as opposed to substantive, rules); Anthony, *supra* note 35, at 52–55 (discussing appropriateness of deference to procedural regulations).

259. General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976).

260. *See supra* notes 221–28 and accompanying text (explaining that EEOC's lack of power to promulgate legislative rules is basis for not applying *Chevron*'s presumption of interpretive authority).

261. *See supra* notes 224–28 and accompanying text (stating that implied delegation may be determined from statutory scheme).

262. For a discussion of the differences between interpretive and legislative rules, see *supra* part III.A–B.

263. *See supra* note 220 and accompanying text. This is not to say that drawing the line between interpreting a statute and creating new law is easy. It is not. But it is a distinction that must be made when the agency has been delegated one form of authority but not the other.

pretation of section 703(h) of the 1964 Civil Rights Act, which provided that an employment test must be "job-related" in order to be sheltered by that section.[264] But in *Albemarle Paper Co. v. Moody*,[265] the EEOC had promulgated "Uniform Guidelines for Employee Selection Procedures," which set forth in detail what an employer must do to validate job criteria.[266] As Chief Justice Burger pointed out, these guidelines did *not* interpret the statute but related instead to methods of proving job-relatedness.[267] As such, they were more akin to substantive regulations, which the agency lacked authority to issue under Title VII.[268]

But even when the agency has simply interpreted the statute, the reviewing court still must determine whether Title VII delegates interpretive authority to the EEOC.[269] That inquiry must proceed without the benefit of *Chevron's* presumption that a delegation occurred.

Admittedly, Congress's failure to confer either cease-and-desist or substantive legislative rulemaking authority on the EEOC strongly suggests that no delegation of interpretive authority may be found.[270] As set forth above, the absence of cease-and-desist authority is insufficient to overcome *Chevron*'s presumption when substantive rulemaking powers are present, given the broad policymaking power that substantive rulemaking represents.[271] But the absence of cease-and-desist authority is more telling when substantive rulemaking powers are also missing. An enforcement scheme that hinges liability on judicial determinations necessarily confers interpretive authority on the courts, who are called upon to

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264. Griggs v. Duke Power Co., 401 U.S. 424, 424 (1971).

265. 422 U.S. 405 (1975).

266. *Id.* at 430–31; 29 C.F.R. pt. 1607 (1994).

267. *Moody*, 422 U.S. at 452 (Burger, C.J., concurring & dissenting).

268. *But see* Blumrosen, *Society in Transition*, *supra* note 24, at 910 (asserting that EEOC's Uniform Guidelines *are* substantive regulations entitled, under *Chevron*, to deference because other agencies participating in development of guidelines have substantive rulemaking powers). However, this does not answer whether the EEOC's interpretations of Title VII are entitled to *Chevron* deference.

269. *See supra* notes 223–28 and accompanying text (discussing methods for determining when there has been implied delegation of interpretive power).

270. *See* Sunstein, *Law and Administration*, *supra* note 16, at 2093 ("[A]gencies that have been entrusted with the power to prosecute violations but not to make rules lack the pedigree that is a prerequisite for deference."); Yavelberg, *supra* note 24, at 192 ("The EEOC has no rulemaking power, and therefore cannot promulgate legislative rules. It follows that all EEOC rulings are interpretive and thus not eligible for *Chevron* deference.").

271. *See supra* notes 248–55 and accompanying text (explaining that agency's substantive rulemaking powers supports *Chevron* deference even though agency lacks cease-and-desist power).

interpret the statute in resolving individual disputes.[272] Moreover, Congress's refusal to give the EEOC broad policymaking powers through a grant of substantive legislative rulemaking authority could be viewed as an unwillingness to confer *any* policymaking authority on the agency.

But that refusal should not be viewed as dispositive in the context of the EEOC and Title VII's enforcement scheme. Indeed, an examination of the EEOC's lack of substantive rulemaking authority under Title VII demonstrates the strength of the general proposition, made earlier, that deferential review should not be denied based solely on a lack of legislative rulemaking authority.[273]

The EEOC's lack of substantive rulemaking power under Title VII has never been the object of sustained congressional debate. Rather, Congress has devoted enormous attention to the question of whether to confer cease-and-desist authority on the agency; concern has focused on the EEOC's role as adjudicator of individual liability, not on its role as policymaker.[274] Moreover, in 1972, when Congress last revisited the issue of cease-and-desist power on a considered basis, it was fair to assume the Court already had found a delegation of interpretive authority, a conclusion with which Congress did not disagree.[275]

In addition, Congress conferred substantive rulemaking authority on the EEOC under the ADEA and ADA *without debate*, suggesting Congress did not view the distinction as particularly momentous. Granted, the EEOC's policymaking authority under those statutes is greater than under Title VII.[276] But if Congress viewed substantive rulemaking powers as a significant expansion of the EEOC's policymaking authority, one would have expected *some*

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272. *See supra* note 249 and accompanying text (noting that courts necessarily have policymaking power when agency lacks cease-and-desist power).

273. *See supra* notes 223–28 and accompanying text (discussing whether implied delegation exists even though agency lacks authority to promulgate legislative rules); *see also* Condo v. Sysco Corp., 1 F.3d 599, 604–05 (7th Cir. 1993) (concluding that administrative powers conferred on Secretary of Labor support implied delegation of interpretive authority), *cert. denied*, 114 S. Ct. 1051 (1994).

274. *See supra* notes 47–54, 87–88 and accompanying text (discussing legislative history of cease-and-desist powers).

275. *See supra* note 96 and accompanying text (explaining that *Griggs* suggests that EEOC had interpretive authority).

276. *Compare* 29 U.S.C. § 628 (1988) (ADEA) (granting power to issue "such rules and regulations as he may consider necessary or appropriate in carrying out this Act.") *and* 42 U.S.C. § 12116 (Supp. V 1993) (ADA) ("The EEOC shall issue regulations in an accessible format to carry out this Act.") *with* 42 U.S.C. § 2000e-12 (1988) (Title VII) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter.").

debate. What emerged instead was a congressional focus on aligning the enforcement schemes under the three statutes.

Reorganization Plan No. 1 of 1978,[277] moreover, reflects congressional appreciation of the EEOC's policymaking role.[278] Congress premised its decision to consolidate administrative enforcement authority for federal employment discrimination in the EEOC, in part, on the need for a single agency to serve as policymaker in this area. The EEOC's experience in interpreting Title VII and developing standards under that statute were relied upon in transferring enforcement authority, including rulemaking, to the agency under the ADEA.[279]

Moreover, the enforcement powers granted the agency under Title VII make it obvious that statutory interpretation by the agency necessarily must occur. As under the ADA and ADEA, filing a charge of discrimination with the EEOC is a jurisdictional prerequisite for suit under Title VII.[280] By requiring agency investigation and conciliation of charges before a court action could be filed, Congress hoped that administrative resolution would obviate the need for private enforcement actions in the courts.[281] Successful conciliation at the agency level, however, requires some measure of agency interpretive power. If the EEOC's views of what the statute means are without force, the conciliation process becomes perfunctory until the courts resolve the statutory issue. Thus, a denial of interpretive authority appears inconsistent with the EEOC's charge-handling responsibilities.[282]

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277. Reorganization Plan, *supra* note 14.

278. *See supra* notes 100–01 and accompanying text (discussing recognition of EEOC as policymaker).

279. *See supra* notes 98–106 and accompanying text (discussing transfer of ADEA enforcement authority from Department of Labor to EEOC).

280. *See* Mohasco Corp. v. Silver, 447 U.S. 807, 811–12 (1980).

281. EEOC v. Shell Oil Co., 466 U.S. 54, 77–78 (1984); *see also* Follette, *supra* note 12, at 659 (noting administrative enforcement scheme "grants the EEOC a central role in bringing justice to victims of discrimination").

282. The EEOC was given enforcement authority to give teeth to its interpretive rulings. As noted by the Senate Labor Committee during consideration of what would become the Equal Employment Opportunity Act of 1972: "The employer realizes that any attack on its policies by the EEOC presents largely an ineffectual threat. *To comply with the Commission's interpretation of a problem*, and to accord the appropriate relief, is a purely voluntary matter with the respondent with no direct legal sanctions available to EEOC." S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971), *reprinted in* BUREAU OF NAT'L AFFAIRS, INC., *supra* note 72, at 229 (emphasis added).

Although the Senate Labor Committee recommended the EEOC be given cease-and-desist authority, Congress based its ultimate decision to confer prosecutorial authority on the agency on the need to give the EEOC enforcement powers. *See supra* notes 78–80 and accompanying text (discussing need for greater enforcement authority); *see also* Follette, *supra* note 12, at 667 ("If the courts do not defer to

That Congress necessarily envisioned the need for agency interpretation is further supported by the EEOC's prosecutorial role and by the congressional immunity granted defendants who rely on agency interpretations or opinions.[283] While neither of these powers conclusively demonstrates a delegation of interpretive authority, they are consistent with an implied delegation theory.[284]

So, too, are other factors generally regarded as useful in determining whether a delegation of interpretive authority to an agency "makes sense" in terms of the statutory scheme.[285] First, deference to EEOC interpretations furthers uniformity of the law. Such deference enhances uniformity by replacing a piecemeal search by hundreds of judges for an ambiguous statute's meaning with an inquiry into whether the single meaning assigned by the agency is rational.[286] And achieving national uniformity in the interpretation of

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reasonable guidelines created by the EEOC, they frustrate the primary purpose for the Commission's existence . . . . Moreover, deference to the guidelines will encourage parties to settle claims before they reach litigation, thus promoting the EEOC's goal of conciliation."); *cf.* Condo v. Sysco Corp., 1 F.3d 599, 605 (7th Cir. 1993) (holding that *Chevron* applied to Secretary of Labor's interpretations of FLSA even though no substantive rulemaking powers were present), *cert. denied*, 114 S. Ct. 1051 (1994).

283. Civil Rights Act of 1964, Pub. L. No. 88-352, § 713(b), 78 Stat. 241, 265 (current version at 42 U.S.C. § 2000e-12(b) (1988)); *cf.* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 567–68 (1980) (finding that statutory provisions relieving creditors from liability based on good faith compliance with rules, regulations, or interpretations of Federal Reserve Board "signals an unmistakable congressional decision to treat administrative rulemaking and interpretations under the Truth in Lending Act as authoritative"). In *Milhollin*, however, the Federal Reserve Board had substantive rulemaking authority. *Id.* at 566; *see* 15 U.S.C. § 1604 (1988).

284. Some commentators have argued that the good faith reliance defense in section 713(b) of the 1964 Act (current version at 42 U.S.C. § 2000e-12(b)) constitutes a delegation of interpretive authority to the EEOC. Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 270; Follette, *supra* note 12, at 667; Moot, *supra* note 24, at 245. Professor Blumrosen argues that "the thrust of Section 713(b) was to provide authority to make binding interpretations, not merely to create an estoppel against government," and equates this to a grant of substantive rulemaking authority. Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 270.

But this is reading too much into section 713(b). That section confers immunity in the context of individual litigation; it does not state that the agency's interpretation is binding on the court. Indeed, section 713(b) expressly recognizes the court's authority to invalidate the agency's interpretation, authority the judiciary retains under either *Skidmore* or *Chevron*. 42 U.S.C. § 2000e-12(b) (1988).

Nonetheless, section 713(b) acknowledges not only the EEOC's need to interpret the statute but that such interpretations will be relied upon by employers. As such, it *supports* an implied delegation of binding interpretive authority, even if it is not viewed as conclusive.

285. Breyer, *supra* note 179, at 370 (discussing factors courts look to in determining whether agency has been delegated interpretive authority).

286. *See, e.g.*, Byse, *supra* note 175, at 259–60 (arguing that court interpretations can "frustrate uniform, nationwide administration of the regulatory program"); Pierce, *supra* note 175, at 313 (noting that deference to agency interpretations will lead

so important (and frequently ambiguous) a statute as Title VII is a goal one readily may attribute to Congress.[287] That goal supports a finding that Congress intended to delegate interpretive authority to the agency.

Second, the EEOC, as the federal agency devoted to eliminating discrimination in the workplace, possesses expertise in the area unmatched by the courts.[288] Since the mid-1970s, the agency has issued its interpretive guidelines only after extensive study, notice and comment, and sometimes public hearings.[289] For example, the

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judges with different political views to same result); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) (noting that failure to defer would lead to circuit court inconsistency).

287. A *Chevron* review standard gives judges

> less room to infuse their personal political philosophies in the Nation's policy making process . . . [by allowing] judges of widely differing political perspectives to agree in a large number of cases that Congress did or did not resolve a particular policy issue. This agreement should reduce the unfortunate tendency of judges to engage in policy making disguised as interpretation of ambiguous statutory language.

Pierce, *supra* note 175, at 313.

288. Other commentators have so noted. For example:

> [T]he EEOC clearly possesses greater consequential knowledge about practices subject to the Act than do the courts. Moreover, EEOC guidelines avoid the problems of delay and intercircuit variation endemic to judicial enforcement. Under the circumstances, EEOC guidelines play an important role in the implementation of the Act, and courts should thus defer to the Commission's interpretations of the statute.

Diver, *supra* note 35, at 595; *see also* Follette, *supra* note 12, at 667 ("The EEOC has the expertise necessary to more comprehensively address complex questions and determine appropriate remedies in the area of employment discrimination. . . . The EEOC is also better equipped than the courts to evaluate the complex range of issues that impact the employment community." (footnote omitted)); Moot, *supra* note 24, at 247 ("The EEOC's expertise lies in its institutional knowledge of the character of relationships between employees and their supervisors in the workplace. Because courts commonly defer to agency interpretations when the agency possesses specialized expertise, deference to EEOC interpretative guidelines would be entirely consistent with statutory construction doctrine." (footnote omitted)).

That agency expertise should be considered in determining whether an implied delegation of interpretive authority exists is widely recognized. *See, e.g.*, Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 152–53 (1991) (determining that Secretary of Labor, not OSHRC, was due deference in interpretation of regulations promulgated under Occupational Safety and Health Act of 1970). The *Martin* Court relied on the Secretary's expertise, noting that "policymaking expertise" accounts for a presumption that Congress has delegated "interpretive lawmaking power to the agency rather than to the reviewing court." *Id.*; *see also* Breyer, *supra* note 179, at 370–71 (noting agency expertise as factor in determining how much deference to grant agency interpretations); Byse, *supra* note 175, at 258 (same).

289. *See, e.g.*, Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 263 (noting EEOC approach is to comply with APA); Michael J. Underwood, Comment, *The Pregnancy Discrimination Act of 1978 and the EEOC Guidelines: A Return to*

EEOC's proposed (and since withdrawn) guidelines on religious harassment[290] were the subject of hearings before a Senate subcommittee and almost 100,000 public comments.[291] The guidelines followed, moreover, from complaints of discrimination filed with the agency, demonstrating a need for clarification of what forms of workplace conduct do and do not violate Title VII.[292] In contrast, courts issuing statutory interpretations lack the benefit of such expertise or insights.

Third, the Court in *Chevron* viewed agencies' greater political accountability as an important basis for implying a delegation of interpretive authority.[293] Statutory interpretation often involves the making of policy choices, which, the Court recognized, are preferably made by a governmental branch that is politically responsive.[294] The more important the policy question, the more important it is that it be made by a politically accountable body. Title VII's unresolved policy questions go to the heart of our national debate over civil rights.[295] In some respects, the prestige of the courts, as well as their adjudicative responsibilities in the private enforcement model chosen by Congress, make the judiciary a more likely candidate for an implicit congressional delegation to make these policy choices.

"Great Deference"?, 41 U. PITT. L. REV. 735, 744 (1980) (explaining that EEOC guidelines under Pregnancy Discrimination Act exceeded APA standards).

290. 58 Fed. Reg. 51,266–69 (1993) (to have been codified at 20 C.F.R. pt. 1609) (proposed Oct. 1, 1993).

291. *Senate Passes Resolution 94-0 Urging EEOC to Withdraw Religion from Proposed Guidelines*, [1994 Current Developments] Daily Lab. Rep. (BNA) 115 (June 17, 1994), *available in* Westlaw, BNA-DLR Database, 1994 DLR 115 d19. Moreover, the fact that the Senate held hearings over the proposed guidelines reflects a congressional view that the EEOC's interpretive guidelines under Title VII have force and effect.

292. *Id.* The Senate voted to urge the EEOC to withdraw and revise the proposed guideline on religious harassment. *Id.* The guidelines were withdrawn.

293. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

294. *Id.; see supra* note 175 and accompanying text (discussing *Chevron* Court's emphasis on political accountability).

295. *See* Eskridge, *supra* note 16, at 615. According to Professor Eskridge, "[t]he debate over the proposed Civil Rights Act of 1990 dramatizes the centrality of statutes and their interpretation to the nation's civil rights agenda." *Id.* For example, the limits of affirmative action under Title VII presently are uncertain. *See, e.g., In re* Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525, 1529 (11th Cir. 1994) (holding provisions in consent decree requiring city to select employees for promotion based upon race violated Title VII); Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 728 (9th Cir. 1992) (holding that banding of promotion test scores to comply with consent decree did not violate Title VII), *cert. denied*, 113 S. Ct. 1645 (1993); *see also* 29 C.F.R. pt. 1608 (1993) (listing affirmative action guidelines under Title VII).

But one must also take into account the dynamics between the Supreme Court and Congress over Title VII. Prior to the Civil Rights Act of 1991, Congress had amended the statute numerous times to respond to Supreme Court interpretations of the law.[296] In many of those instances, Congress enacted the EEOC's interpretation, which the Court had rejected.[297] Moreover, the 1991 Act itself was a reaction to a series of Supreme Court decisions that Congress viewed as inconsistent with the statute's purposes.[298]

That Congress would pass a statute triggered by dissatisfaction with Court interpretations and at the same time hand interpretive authority back to the Court is questionable, to say the least. In the post-*Chevron* era in which the amendments were enacted, it is reasonable to conclude that Congress intended any ambiguities to be resolved by the expert agency, not by the courts.[299]

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296. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189, 189 (codified as amended in scattered sections of 29 U.S.C.); Pregnancy Discrimination Act, Pub. L. No. 95-555, sec. 1, § 701(k), 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1988)); *see also* Eskridge, *supra* note 16, at 623–29, 636–38 (noting that Congress responded to increasingly conservative Supreme Court interpretations of statutes by amending statute); Greenberger, *supra* note 23, at 38 (discussing Congress's overruling of Supreme Court decisions).

297. For example, see Pregnancy Discrimination Act § 701(k), 92 Stat. at 2076 (codified as amended at 42 U.S.C. § 2000e(k) (1988)) (enacting EEOC interpretation of Title VII provision rejected in *Gilbert*); 29 C.F.R. § 1604.10(b) (1975) (EEOC interpretation); General Elec. Co. v. Gilbert, 429 U.S. 125, 140–41, 145 (1976) (rejecting EEOC interpretation of Title VII), and Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 101, 104 Stat. 978, 978 (1990) (codified as amended at 29 U.S.C. § 630(*l*) (Supp. V 1993)) (enacting EEOC interpretation of ADEA rejected in *Betts*); 29 C.F.R. § 1625.10(d) (1988) (EEOC interpretation); Ohio Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158, 175 (1989) (rejecting EEOC interpretation of ADEA). *See generally* Clark, *supra* note 34, at 188–89 (noting Congress's overruling of Supreme Court decisions and adoption of EEOC interpretations); Eskridge, *supra* note 16, at 623–29, 636–38 (same).

298. Rivers v. Roadway Express, 114 S. Ct. 1510, 1515 (1994); Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1489 (1994); *see supra* part I.E (discussing 1991 Civil Rights Act).

One could argue, of course, that Congress's failure to expressly mandate judicial deference to the EEOC's interpretations reflects an acquiescence to the Court's decision in EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1990) ("*ARAMCO*"). The EEOC's enforcement powers, however, were not the focus of congressional debates over the 1991 Act. *See supra* part I.E (discussing purpose and effect of 1991 Civil Rights Act). The *ARAMCO* decision, moreover, reflected disagreement within the Court on the level of deference due the agency. *Id.* at 261 (Marshall, J., dissenting). Moreover, two years previously, in EEOC v. Commercial Office Products, 486 U.S. 107, 122 (1988), the Court demonstrated a willingness to defer to the agency. Thus, it is accurate to characterize the question of deference as unsettled when the Civil Rights Act of 1991 was passed. *See ARAMCO*, 499 U.S. at 260 (Scalia, J., concurring).

299. *See* Eskridge, *supra* note 16, at 623–29, 636–38 (discussing congressional

The availability of alternative dispute resolution is an additional, and quite practical, basis for finding an implicit delegation of interpretive authority to the EEOC. For example, the 1991 Civil Rights Act encourages the use of alternative dispute resolution mechanisms under Title VII and the ADA.[300] In *Gilmer v. Interstate/Johnson Lane Corp.*,[301] moreover, the Supreme Court upheld a prospective agreement to arbitrate an ADEA claim.[302] The Civil Rights Act of 1991 and the *Gilmer* decision portend the widespread future use of arbitration to resolve employment discrimination claims.[303]

The increased use of arbitration makes the EEOC's role in statutory interpretation more important. Because arbitration potentially stifles development of the law under Title VII,[304] giving the EEOC's statutory interpretations binding effect would provide arbitrators a needed source of law. Additionally, an award inconsistent with the EEOC's binding interpretations[305] could be interpreted as

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disapproval of Court's interpretations of Civil Rights Act); Greenberger, *supra* note 23, at 38–39 (describing pattern of court interpretations of Title VII as more narrow than that intended by Congress).

Professor Eskridge notes, moreover, the Supreme Court's willingness to impose its own preferences onto employment discrimination statutes and that the Court's "drift to the right" has coincided with Congress's "drift to the left," suggesting that "Congress may be better off with agency-driven policy." Eskridge, *supra* note 16, at 682–83.

Finally, as Professor Saunders points out, an implicit delegation of interpretive authority is more likely when

> the ambiguity present in the statute reflects uncertainty about which of two competing policies is to carry the day. When Congress is motivated by competing policy concerns in enacting a statute, it is more likely implicitly to delegate authority to interpret the statute and thereby balance the policies than when only one policy predominates and the question is simply how the policy underlying the statute applies to the issue at hand.

Saunders, *supra* note 178, at 360 (footnote omitted). Thus, the unresolved policy issues in the Act are indicative of a delegation to the expert agency to balance the competing policy questions presented. As one commentator noted: "Rather than wait until the courts determine what the 1991 amendments mean for the working world, the EEOC should be afforded the flexibility to create uniform guidelines which reflect changing conditions and laws." Follette, *supra* note 12, at 667.

300. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081, *reprinted in* 42 U.S.C. § 1981 note (1988).

301. 500 U.S. 20 (1991).

302. *Id.* at 23.

303. *See* Christine G. Cooper, *Where Are We Going with* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 241–42 (1992); John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-*Gilmer *Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113, 120 (1992).

304. *See* Cooper, *supra* note 303, at 216–19.

305. *See infra* part IV.C (discussing which EEOC interpretations should be given

an award outside the law and thus be set aside by the reviewing court.[306] Congress's presumed endorsement[307] of arbitration as a substitute forum supports a delegation of interpretive authority to the agency.

C. Binding EEOC Interpretations: Format

To say the EEOC has been delegated interpretive authority is not to say that any agency pronouncement, in whatever form, is binding on a reviewing court. As set forth earlier, interpretations expressed in legislative regulations and adjudicatory orders are presumptively entitled to *Chevron* review.[308] Thus, where legislative rulemaking powers are present, and where the EEOC's interpretation is expressed in such a regulation, *Chevron* review applies to the EEOC's interpretation. The Court properly followed this approach in *Commercial Office Products*, in which the Court applied *Chevron*-styled review to an EEOC procedural regulation under Title VII.[309]

The EEOC, however, has no adjudicatory authority under any of the statutes it administers, and, accordingly, it has no capacity to issue a binding interpretation through an adjudicatory order.[310] It does, however, have the inherent authority to interpret its enabling acts[311] and, as set forth above, has been delegated interpretive authority under each statute.[312] When the EEOC issues its interpretation in an informal format, such as an interpretive guideline, opinion letter, commission decision, amicus brief, or policy guidance, is that interpretation entitled to deferential review?

Some courts have found that once a delegation of interpretive

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binding effect).

306. *See* Cooper, *supra* note 303, at 216–17.

307. There are, of course, many unanswered questions as to *Gilmer*'s scope and as to the use of arbitration in employment discrimination claims, questions this Article does not purport to address.

308. *See supra* note 230 and accompanying text.

309. 486 U.S. 107, 125 (1988) (O'Connor, J., concurring); *see supra* notes 148–51 and accompanying text (discussing *Commercial Office Products*).

310. The EEOC's "probable cause" or "no probable cause" determinations are not binding on courts or litigants. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 470 n.7 (1982). Because such determinations usually do not result from evidentiary hearings or rulings by the Commission, any statutory interpretations expressed in such determinations lack the "pedigree" of interpretations deserving of *Chevron* deference. *But see* Wagner Seed Co. v. Bush, 946 F.2d 918, 921 (D.C. Cir. 1991) (finding EPA's interpretation contained in decision letter entitled to deference despite plaintiff's right to trial de novo on liability), *cert. denied*, 112 S. Ct. 1584 (1992).

311. *See* Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

312. *See supra* parts IV.A–B (discussing EEOC's powers under ADA, ADEA, and Title VII).

authority has been found, the format in which the agency announces its interpretation is insignificant.[313] While "the greater the procedural trappings that attend an agency's interpretive moment, the less reason for judicial concern that the interpretation was off-handed or opportunistic," these courts nonetheless will defer to an agency interpretation that is carefully considered.[314] But the more informal the format, the less certain a reviewing court can be that the agency has intended to exercise its delegated authority to interpret the statute. After all, in order for *Chevron* review to apply, there must not only be a delegation to the agency, but a properly evidenced intent by the agency to exercise its delegated authority.[315]

At the same time, a conclusion that the EEOC has been delegated interpretive authority under Title VII necessarily means that deference to interpretations outside the adjudicatory-order/legislative-rule formats must occur. Since the agency can issue neither adjudicatory orders nor substantive legislative rules under the statute, its interpretations cannot be contained in those formats. When, then, should a court defer to the EEOC's substantive interpretations under Title VII?

The EEOC itself has drawn a distinction among its interpretations. Although it issues various opinion letters, files amicus briefs, and publishes policy guidances, it also issues "interpretive guidelines" under the statute.[316] Since the mid-1970s, following the Court's pointed hint in *Albemarle Paper Co. v. Moody*,[317] the EEOC has issued its interpretive guidelines only after following notice and comment procedures and sometimes after public hearings.[318] These guidelines, encompassing such matters as sex discrimination, national-origin discrimination, and reasonable accom-

313. *See, e.g., Wagner Seed*, 946 F.2d at 920–22 (agency letter).

314. *Id.* at 921.

315. Anthony, *supra* note 232, at 355–59; Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 267; Saunders, *supra* note 178, at 374.

316. *See, e.g.*, 29 C.F.R. pt. 1604 (1994) (Guidelines on Discrimination Because of Sex); *id.* pt. 1605 (Guidelines on Discrimination Because of Religion); *id.* pt. 1606 (Guidelines on Discrimination Because of National Origin); *id.* pt. 1608 (Affirmative Action Appropriate Under Title VII of Civil Rights Act of 1964, As Amended); *id.* pt. 1625 (Interpretative Regulations Under the ADEA); *id.* pt. 1630 (Regulations to Implement the Equal Employment Provisions of the ADA); 58 Fed. Reg. 51,266–69 (1993) (to be codified at 29 C.F.R. pt. 1609) (Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability) (proposed Oct. 1, 1993).

317. 422 U.S. 405, 431 (1975) (Blackmun, J., concurring) (noting that EEOC interpretation was due less deference because "[g]uidelines in question have never been subjected to the test of adversary comment").

318. *See* Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 263.

modation to religious beliefs, reflect interpretations issued only after the EEOC followed informal rulemaking procedures. For example, the agency's recent efforts to develop guidelines for religious harassment were in keeping with the informal rulemaking procedures used to promulgate legislative rules.[319]

When the agency issues its interpretation through an interpretive guideline, the benefits of *Chevron* review are realized. The agency's superior expertise, enhanced through the informal rulemaking process, is brought to bear on the meaning of a statutory term.[320] More importantly, the political-accountability goal underlying *Chevron*'s deferential review standard[321] is well-served through the notice and comment process. Public participation, which may include congressional input,[322] demonstrates the benefits of political accountability that gave rise to the implicit delegation. Moreover, when an agency interpretation will bind a reviewing court, it is, as Professor Kevin Saunders convincingly argues, equivalent to a legislative rule and thus should issue only after following legislative rulemaking procedures, including public participation.[323] Finally, the EEOC's use of notice and comment procedures leaves little question that when it issues an interpretive guideline it intends to exercise its authority to interpret the statute.[324] It is the EEOC's Title VII interpretations in this format that are entitled

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319. *See supra* note 291 and accompanying text (noting extensive public comment on religious harassment proposal).

320. "[T]he EEOC can give concentrated study to an issue for a year or two, can draw on multiple sources of expertise, hire consultants, and invite a wide range of public comment, both through hearings and in writing." Clark, *supra* note 34, at 189 (noting that rulemaking is more informed than judicial decisions, and thus, advocating rulemaking powers be granted to EEOC). In fact, the EEOC, through its interpretive guidelines, already follows the format outlined by former EEOC General Counsel Leroy D. Clark.

321. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984).

322. *See supra* note 291 and accompanying text (discussing EEOC's proposed guidelines on religious harassment which generated almost 100,000 public comments, a Senate subcommittee hearing, and a Senate resolution).

323. Saunders, *supra* note 178, at 374–82. This approach would prevent agencies from sidestepping the APA's rulemaking procedures merely by issuing interpretive rules. *Id.*; *see also* Monaghan, *supra* note 17, at 26 n.152 (stating that if interpretive rules are given same deference as rules made under rulemaking authority, then agency should follow APA's notice and comment procedures).

324. Blumrosen, *Affirmative Action Guidelines*, *supra* note 24, at 267–69 (finding guidelines functionally equivalent to substantive rules when notice and comment procedures followed and thus entitled to deference if EEOC exercises its § 713(b) power to grant immunity to employers). *But see* Anthony, *supra* note 35, at 39 (arguing to extend *Chevron* deference only to "formats that usually carry the force of law," such as legislative rules and adjudicative orders).

to *Chevron* review.

The same approach works under the ADEA and ADA. Obviously, when the EEOC issues a legislative regulation interpreting the statute, its interpretation is entitled to *Chevron* review.[325] When the agency issues its interpretation through an interpretive guideline that follows from informal rulemaking procedures, it has similarly expressed an intent to exercise its delegated authority to interpret the statute, and *Chevron* review should apply to these guidelines as well.[326] Indeed, when an agency possesses legislative rulemaking authority and has followed legislative rulemaking procedures, then a distinction between an interpretation expressed in a "regulation" and in an "interpretive guideline" is anachronistic, once the delegation of interpretive authority has been recognized.[327]

But amicus briefs, opinion letters, and policy guidances do not reflect the deliberate exercise of interpretive authority that regulations and guidelines demonstrate.[328] Moreover, to give such documents "legislative effect" would be, as noted earlier, inconsistent with the APA's scheme for legislative rulemaking.[329] Such interpretations are properly entitled to *Skidmore* review.[330]

There are indications the Court is following this approach. In *Ohio Public Employees Retirement System v. Betts*,[331] the Court

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325. *See supra* notes 212–16 and accompanying text (noting that legislative rulemaking is presumptively entitled to deference).

326. For example, the EEOC's regulations under the ADA contain, as an appendix, an "Interpretive Guideline" which was promulgated after notice and comment procedures were followed. 29 C.F.R. pt. 1630 app. (1994).

Moreover, the Court has long recognized that an agency's interpretations of its own regulations are entitled to deference; so that to the extent the guidelines interpret the regulations, they are deserving of deferential review, even though contained in a less formal format. Stinson v. United States, 113 S. Ct. 1913, 1919–20 (1993).

327. *See supra* notes 212–16 and accompanying text (noting that *Chevron*'s acceptance of implicit delegations of interpretive authority to agencies with legislative authority eliminates functional distinction between legislative and interpretive rules).

328. *See* Anthony, *supra* note 232, at 13–14. *But see* Merrill, *supra* note 178, at 987–88 (noting that if Congress has delegated enforcement authority it should not matter what form interpretation takes). Professor Merrill concedes, however, "it is clear that the Court is not about to start deferring to government legal briefs." *Id.* at 988.

329. *See* Saunders, *supra* note 178, at 374–82.

330. Skidmore v. Swift & Co., 323 U.S. 134, 138–40 (1944) (giving limited deference to FLSA administrator's interpretations issued in interpretive bulletin, opinion letters, and amicus brief). *But see* Follette, *supra* note 12, at 667 (arguing that EEOC's Advance Policy Guidance on After-Acquired Evidence is entitled to *Chevron* deference). While I agree the Advance Policy Guidance is entitled to deference from the courts, the *Chevron* review standard should not apply.

331. 492 U.S. 158 (1989).

confronted an interpretive regulation under the ADEA.[332] While the Court refused to defer to the EEOC's interpretation, contending it conflicted with the statute's "plain meaning,"[333] it never questioned the agency's claim to *Chevron* review.[334] But in *Gregory v. Ashcroft*,[335] the Court refused to defer to the EEOC's conclusion that appointed judges were covered by the ADEA, when the agency's position was articulated only in the course of litigation instead of in a deliberative exercise of interpretive authority.[336]

In *ARAMCO*, moreover, the EEOC had issued no interpretive guideline on extraterritorial application of Title VII but had expressed its interpretation through opinion letters, hearing testimony, and probable-cause decisions, none of which went through notice and comment.[337] And in *Gilbert*, the EEOC had issued the interpretive guideline in question without the benefit of notice and comment procedures.[338] In *Skidmore* itself, the interpretation was contained in an interpretive bulletin, informal rulings, and an amicus brief.[339]

In the post-*Chevron* era, the Court has not denied *Chevron* review to an EEOC interpretation expressed through an interpretive guideline or regulation. Nor should it. Congress has delegated interpretive authority to the agency, and when the agency uses

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332. *Id.* at 169–71.

333. *Id.* at 171. Under *Chevron*'s Step 2, the reviewing court will reject an agency's interpretation that is inconsistent with the statute. *Chevron*, 467 U.S. at 842–43.

334. The dissent would have deferred to the EEOC under *Chevron*. *Betts*, 492 U.S. at 192–93 (Marshall, J., dissenting).

335. 501 U.S. 452 (1991).

336. *Id.* at 485 n.3 (White, J., concurring) (noting Court refused to defer to EEOC because its "position is not embodied in any formal issuance from the agency, such as a regulation, guideline, policy statement, or administrative adjudication. Instead, it is merely EEOC's *litigating* position in recent lawsuits. Accordingly, it is entitled to little if any deference."). The dissent would have deferred to the EEOC under *Chevron*. *Id.* at 493–94 (Blackmun, J., dissenting).

Justice White appeared ready to defer to a guideline or policy statement, as well as a regulation or adjudicative order, although the issue was not before the Court. *See id.* at 485 n.3 (White, J., concurring). An interpretive guideline, issued through notice and comment procedures, is much more akin to legislative regulations and adjudicative orders, and thus, it is deserving of deference. A policy statement, which issues without such procedures, is not. *See* Anthony, *supra* note 232, at 1316–17.

337. 499 U.S. 244, 256–57 (1990); *see also supra* notes 158–62 and accompanying text (discussing *ARAMCO*).

338. 429 U.S. 125, 140–41 (1976); Blumrosen, *Society in Transition*, *supra* note 24, at 911 n.40 (noting guidelines in *Gilbert* had not been subject to notice and comment).

339. 323 U.S. 134, 138–40 (1944).

informal rulemaking procedures to develop and announce its interpretation, it is exercising that delegated authority. Less formal interpretations by the agency, however, as the Court has found, are entitled to less deference from the reviewing court.

CONCLUSION

The EEOC, too long an overlooked player in the development of employment discrimination policy, has come of age. The *Chevron* revolution, one that recognizes an implicit delegation of interpretive authority to agencies of the statutes they administer, forces recognition of the EEOC's policymaking role. *Chevron*'s presumption of deference extends to the EEOC under the ADA and ADEA. Furthermore, an examination of the administrative scheme under Title VII demonstrates an implicit delegation of interpretive authority under that statute.

Recognizing that the EEOC has been given the lead in clarifying ambiguous statutes allows the law to develop more quickly and more coherently. It places important policy choices into the hands of a politically accountable actor, rather than those of politically unaccountable courts.

That is for the good. For too long, employment discrimination policy has been viewed as a dialogue between Congress and the courts, with the agency's role all but disregarded.[340] It is time to acknowledge the "poor, enfeebled thing" that was the EEOC is now the governmental unit primarily responsible for giving meaning to our nation's commitment to civil rights on the job.

340. *See, e.g.*, Eskridge, *supra* note 16, at 680–82 (criticizing Court's "breach of political faith" with civil rights community and calling for congressional amendment of employment discrimination statutes to confide interpretive authority to EEOC). As demonstrated herein, such amendments are unnecessary because the agency currently possesses such authority.