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SKEPTICISM AND EXPERTISE: THE SUPREME COURT AND THE EEOC

*Melissa Hart**

In the area of federal antidiscrimination law, the U.S. Supreme Court often prefers to “chart its own course” rather than to defer to Equal Employment Opportunity Commission (“EEOC” or “Commission”) regulations and guidance interpreting these laws. As Justice John Paul Stevens has recognized, the course the Court takes in these instances sadly reflects a “crabbed vision” of antidiscrimination laws.¹

To some extent, the Court’s lack of deference to the EEOC is part of a broader picture: The Court has established a bifurcated structure of administrative deference that leaves much of the kind of interpretation that the EEOC most often engages in with the “power to persuade” but not the “power to control.”² But an examination of decisions interpreting Title VII of the Civil Rights Act (“Title VII”), the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act (“ADA”), reveals that even within this framework the EEOC receives remarkably little respect from the Court. What explains this lack of respect? Some have suggested that more careful work on the part of the EEOC would lead to greater deference from the Court.³ Others have suggested that the particularly political nature of the subject matter dealt with by the Commission leads to a judicial reluctance to cede any authority in this area.⁴ This Essay explores two further possibilities: first, that members of the Supreme Court do not view the EEOC as a repository of valuable expert knowledge on the subject of discrimination, and second, that some members of the Court are suspicious of the agency’s agenda.

* Associate Professor of Law, University of Colorado School of Law. Law Clerk for Justice John Paul Stevens, October Term 1996. I am grateful to participants in the conference on the Jurisprudence of Justice Stevens and at a University of Colorado workshop and to Rachel Arnow-Richman, Emily Calhoun, Nestor Davidson, Clare Huntington, Martin Katz, Nantiya Ruan, Catherine Smith, Mark Squillace, Kevin Traskos, Phil Weiser, and Rebecca Hanner White for their helpful comments. Thanks to Michael Wall and Celene Sheppard for excellent research assistance.

1. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 513 (1999) (Stevens, J. dissenting).

2. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

3. See, e.g., Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second-Class Agency?*, 60 Ohio St. L.J. 1533, 1574 (1999).

4. See, e.g., Rebecca Hanner White, *Deference and Disability Discrimination*, 99 Mich. L. Rev. 532, 571 (2000) (“In the sensitive area of race or sex discrimination, the Supreme Court may be unwilling to defer to an agency interpretation with which it disagrees.”).

This Essay begins in Part I by examining the Court's approach to deference in the context of EEOC interpretation of the statutes that agency enforces. This inquiry reveals that the Court has consistently refused to define what level of deference the agency's regulations are owed, preferring to retain a broad and undefined discretion to accept or reject agency analysis. Further, when the Court does apply a settled deference standard, it more often than not finds the EEOC's interpretation unpersuasive. Part II argues that the Court is making a mistake by refusing to respect the EEOC's interpretation of the statutes it has been charged with enforcing, and I offer some possible explanations for the Court's insistence on retaining broad discretion in this area. Some of the Court's attitude may stem from its perception of where expertise in discrimination does and does not reside. To some extent, the Court may assume that discrimination is not a topic susceptible to the development of expertise, and therefore that the reasons for deferring to administrative agencies do not particularly apply in employment discrimination cases. Further, the Court may perceive itself as having a certain expertise in defining and recognizing discrimination as a consequence of its role in interpreting the Equal Protection Clause of the Fourteenth Amendment, and it may therefore be unwilling to relinquish control of this area. The Court's reluctance to defer to EEOC interpretations may also reflect a broader skepticism about the scope of the problem of discrimination and the appropriateness of empowering a federal agency to define the problem and its possible solutions.

This Essay concludes that Justice Stevens's opinions—both for the Court and in dissent—present a more appealing vision of the EEOC's role in developing federal employment discrimination law than do the Court's other opinions. On the one hand, Justice Stevens is a central architect and supporter of the Court's framework for deference to agency interpretation, including the view that much EEOC interpretation is entitled to lesser deference than other kinds of agency action. On the other hand, he has frequently dissented from the Court's opinions rejecting EEOC interpretations. His adherence to a formal system that accords greater deference to agency regulations with the force of law than to those that lack binding authority is tempered by respect for the EEOC's expertise. In contrast to the Court's cramped vision, Justice Stevens's respect for the EEOC leads to interpretations of the federal antidiscrimination statutes that give these laws the full remedial scope Congress intended.

I. THE SUPREME COURT'S RELUCTANCE TO DEFER TO THE EEOC

In a number of relatively recent opinions, the Court has articulated a basic structure for evaluating the deference due an agency's regulations and interpretations under the statute it is responsible for implementing.⁵ This

5. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000). The Court's approach to administrative deference has been the topic of numerous articles, and I will not seek here to explore all of the intricacies and

framework is intended to apply to judicial review of the legal interpretation undertaken by all of the federal agencies, regardless of the subject matter within their particular jurisdiction. It draws distinctions based on the agency's legal authority to issue the interpretation and on the form that the interpretation takes. Despite this formal content neutrality, however, the Court's attitude towards the EEOC's interpretation of Title VII, the ADA, and the ADEA reveals that substantive context matters quite a lot. When considering the question of deference in the specific context of federal antidiscrimination law, the Court tends either to avoid the question of what deference is due, or to refuse deference to the EEOC under any standard. Some aspects of the Court's approach can be explained as a content-neutral application of the administrative deference framework it has created. The EEOC's interpretations most often take a form that leads to application of a less deferential standard. But the choice of a particular standard of deference does not explain all of the Court's lack of respect for EEOC interpretation. Indeed, the Court's opinions in this area suggest that the particular standard of administrative deference is less important than the way in which that standard is applied.

A. Deference in Theory: A Framework

As Justice Stevens explained in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the Court "[has] long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."⁶ The particular weight to be given to the agency's interpretation, however, will vary depending upon a number of factors. Specifically, the extent of congressional delegation to the agency, the form the agency's interpretation takes, and the procedural rigor that attends the agency's interpretation, will all affect the extent of judicial deference to the agency's view.

The most deferential review standard, set forth in *Chevron*, requires a court to defer to reasonable agency interpretations of the law when the language of a statute does not clearly answer the question at hand.⁷ Under *Chevron*'s two-step analysis, a court must first determine "whether Congress has directly spoken to the precise question at issue."⁸ If so, then the court must effectuate the legislative command. If, however, the statute is silent or ambiguous on the particular question, the Court should determine whether the agency's position "is based on a permissible

open questions in this field. For excellent discussions of the subject, see 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 (1992); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833 (2001); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002); Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 Fordham L. Rev. 1877 (2006).

6. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

7. *Id.* at 842-43.

8. *Id.* at 842.

construction of the statute.”⁹ If the agency’s position is reasonable, the court must defer to that position, even if it is not the one the court itself might have chosen. Recently, the Court has made clear that *Chevron* deference should be applied only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹⁰ The surest sign that *Chevron* deference is warranted is an explicit congressional authorization to the agency to engage in rulemaking or adjudication, but “some other indication of comparable congressional intent” may be sufficient.¹¹ The majority of cases in which the Supreme Court has applied *Chevron* have involved notice-and-comment rulemaking or formal adjudication. While the Court has suggested that *Chevron* may apply to other kinds of agency action,¹² it remains unclear to what extent the doctrine applies in any other contexts.¹³

The Court still accords some respect to agency interpretations that do not receive *Chevron* deference, “but only to the extent that those interpretations have the ‘power to persuade.’”¹⁴ This less deferential standard rests on the notion that an agency’s views “constitute a body of experience and informed judgment” and that courts should in appropriate cases defer to that expertise.¹⁵ As Justice Robert H. Jackson first explained it in an often-quoted passage in *Skidmore v. Swift & Co.*, “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to

9. *Id.* at 843.

10. *Mead*, 533 U.S. at 226-27.

11. *Id.* at 227; see also *Chevron*, 467 U.S. at 844 (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

12. See *Mead*, 533 U.S. at 230-31.

13. In his opinion for the Court in *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987), Justice John Paul Stevens suggested a further wrinkle to *Chevron* when he observed that courts need not defer to agency interpretation when the matter at issue is “a pure question of statutory construction.” *Id.* at 446. In such a case, Justice Stevens argued, courts are entirely equipped to conduct the interpretive exercise using their traditional skills of statutory exegesis. Deference to agencies is reserved for circumstances involving a regulatory gap or case-specific application of a statutory term. *Id.* at 448. The precise scope of this limitation is very unclear, and it appears to be a refinement of *Chevron* that has been somewhat ignored both in the courts and among scholars.

14. *Christensen v. Harris County*, 529 U.S. 576, 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

15. *Skidmore*, 323 U.S. at 140; see also Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 Admin. L. Rev. 735, 740 (2002); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 Admin. L. Rev. 501, 505 (2005); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 Wm. & Mary L. Rev. 1105, 1127-28 (noting that the *Skidmore* factors are “designed to assess the relative decisionmaking capacity of the agency vis-à-vis the reviewing court”).

persuade, if lacking power to control.”¹⁶ The Court applies this *Skidmore* standard in reviewing a wide variety of agency interpretations, ranging from opinion letters addressed to specific disputes to more generally applicable policy statements, agency manuals, and enforcement guidelines.¹⁷ Because agencies publish these less formal statements more often than they do statements through notice-and-comment rulemaking or adjudication, the “weaker deference” of *Skidmore* applies significantly more often than the stronger *Chevron* deference.¹⁸ But simply saying that *Skidmore* deference is applicable tells us very little about the level of actual respect an agency’s views will receive. As the Court recently recognized, “[t]he approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.”¹⁹

B. Deference in Practice: The Court’s Treatment of the EEOC

The EEOC was created in 1964 with the enactment of Title VII, and its jurisdiction now extends over all of the federal statutes that prohibit discrimination in employment.²⁰ Among other laws, the agency has primary enforcement authority over Title VII, the ADEA, and Title I of the ADA.²¹ Each of these statutes contains slightly different language about the agency’s authority to fill in gaps left by Congress in these contentious federal laws. In Title VII, the only explicit delegation of rulemaking authority directs the Commission to issue “suitable procedural regulations to carry out the provisions of this subchapter.”²² By contrast, the ADEA does not limit the agency to “procedural regulations,” but broadly authorizes the EEOC to “issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter.”²³ And the explicit terms of the ADA required the EEOC to issue regulations to carry out Title I (the employment provisions) within one year of the date of the statute’s enactment.²⁴

16. *Skidmore*, 323 U.S. at 140; see also *Mead*, 533 U.S. at 234-35.

17. See *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449 n.9 (2003); *Christensen*, 529 U.S. at 587; *Reno v. Koray*, 515 U.S. 50, 61 (1995).

18. See Rossi, *supra* note 15, at 1109-10.

19. *Mead*, 533 U.S. at 228 (citations omitted); see also Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 565 (1985) (stating that *Skidmore* is “nothing more than ‘respectful or courteous regard’”); Rossi, *supra* note 15 at 1109 (“*Skidmore* is commonly understood to be ‘weak deference.’”).

20. See Laws Enforced by the EEOC, www.eeoc.gov/policy/laws.html (last visited Feb. 20, 2006).

21. See Age Discrimination in Employment Act of 1964, 29 U.S.C. § 628 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-12 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. § 12116 (2000).

22. 42 U.S.C. § 2000e-12. Title VII does not require the Equal Employment Opportunity Commission (“EEOC”) EEOC to use notice-and-comment procedures in issuing its regulations. See *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 n.7 (2002).

23. 29 U.S.C. § 628.

24. See 42 U.S.C. § 12116.

The EEOC exercises this delegated authority in some instances to promulgate regulations through notice-and-comment rulemaking.²⁵ However, in addition to regulations promulgated through these relatively formal processes, the EEOC issues a dizzying array of arguably less formal documents including enforcement guidance,²⁶ interpretive guidance,²⁷ policy guidance,²⁸ policy statements, technical assistance manuals,²⁹ and compliance manuals.³⁰ Because the agency does so much of its interpretation of federal antidiscrimination law through these less formal mechanisms, it is unsurprising that the Court reviews the EEOC's interpretations under *Skidmore* more often than under *Chevron*.³¹ But an examination of the Court's approach towards the EEOC interpretation shows a more complicated picture—one that cannot be explained only by reference to the dictates of the Court's formal deference framework.

Much of the time, whether it agrees with the agency or not, the Court has simply declined to decide what standard of deference it should apply to an EEOC interpretation, even when the interpretation at issue is made pursuant to the agency's explicitly delegated authority. For example, in *Edelman v. Lynchburg College*,³² the Court considered the validity of an EEOC regulation that seemed quite clearly to be the type of "procedural regulation" Congress explicitly authorized the agency to enact under Title VII.³³ The regulation provided that if a charge of discrimination is timely filed with the EEOC but it is not verified by oath and affirmation, the charge can be amended later with the required verification, and the verification will relate back to the time of initially filing.³⁴ Justice David Souter, writing for the majority, explained that

deference under [*Chevron*] does not necessarily require an agency's exercise of express notice-and-comment rulemaking power. But there is

25. See, e.g., Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630 (1991).

26. See, e.g., EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited Feb. 20, 2006).

27. See, e.g., 29 C.F.R. § 1630.

28. See, e.g., Equal Employment Opportunity Comm'n, Policy Guidance on Executive Order 13145: To Prohibit Discrimination in Federal Employment Based on Genetic Information (2000), available at <http://www.eeoc.gov/policy/docs/guidance-genetic.html#1>.

29. See, e.g., U.S. Equal Employment Opportunity Comm'n, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act (1992).

30. See, e.g., EEOC Compliance Manual, Section 2: Threshold Issues, <http://www.eeoc.gov/policy/docs/threshold.html> (last visited Feb. 20, 2006); Compliance Manual, Section 902 Definition of the Term Disability, <http://www.eeoc.gov/policy/docs/902cm.html> (last visited Feb. 20, 2006).

31. See, e.g., Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 Utah L. Rev. 51, 102-07 (discussing the role that "format" plays and should play in the binding (or nonbinding) nature of EEOC interpretation).

32. 535 U.S. 106 (2002).

33. *Id.* at 113-14.

34. *Id.* at 113 & n.2.

no need to resolve any question of deference here. We find the EEOC rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch. Because we so clearly agree with the EEOC, there is no occasion to defer and no point in asking what kind of deference, or how much.³⁵

The Court also avoided the deference question in a recent case involving the EEOC's regulations under the ADEA. In *General Dynamics Land Systems, Inc. v. Cline*, the Court considered whether the statute permits suits by individuals over forty (and thus within the law's protected class) when they involve claims that older workers are treated better than younger workers.³⁶ The EEOC's regulations provided that these reverse age discrimination claims were permissible under the Act.³⁷ In rejecting the regulations, the Court declared that "today, we neither defer nor settle on any degree of deference because the Commission is clearly wrong."³⁸

In decisions under the ADA, the Court has repeatedly declined to resolve whether it will defer to what might be the EEOC's most important regulatory pronouncement—the definition of disability under the Act. The ADA's structure complicates the question of the proper degree of deference for these regulations. The ADA's definition of disability is contained in a section that precedes any of the Act's substantive Titles.³⁹ For each of the Titles, Congress authorized different agencies to promulgate regulations implementing the law, but no one agency is specifically and unambiguously tasked with interpreting the section of the statute containing the disability definition.⁴⁰ However, some of the most central provisions of Title I, which prohibits discrimination in employment, include definitions that themselves require definition of the term "disability."⁴¹ Indeed, the precise meaning of "disability" is integral to application of the Act's employment provisions since only an individual with a disability, as defined by the ADA, can claim protection under the statute.⁴² Given the centrality of this term to the Act's employment provisions, it seems entirely reasonable that Congress intended the agency charged with implementing these provisions—the EEOC—to

35. *Id.* at 114 (citations omitted). Concurring in the judgment, Justice Sandra Day O'Connor challenged the majority's refusal to address the deference question and noted that the reasoning the Court used suggested that it was applying *Chevron* deference. *See id.* at 121-23.

36. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004).

37. *Id.* at 585.

38. *Id.* at 600; *see also id.* at 603-07 (Thomas, J., dissenting).

39. *See* 42 U.S.C. § 12102 (2000). In addition to its employment-related provisions (contained in Title I), the Americans with Disabilities Act ("ADA") addresses disability discrimination in public services, public accommodations and transportation (Titles II and III).

40. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999).

41. *See, e.g.*, 42 U.S.C. § 12111(8) ("Qualified Individual with a Disability"); 42 U.S.C. § 12111(9) ("Reasonable Accommodation").

42. *See* 42 U.S.C. § 12112(a).

flesh out the meaning of "disability."⁴³ An extraordinary number of ADA cases turn on this threshold definitional question, and the EEOC has issued regulations interpreting and offering detail as to the statutory definition.⁴⁴ These regulations have been central to several of the Court's recent ADA opinions, but in each opinion the Court has "assume[d], without deciding, that such regulations are valid" and declared that it had "no occasion to decide what level of deference, if any, they are due."⁴⁵

The Court has similarly declined to settle on any firm standard of deference in considering the interpretive guidelines the EEOC promulgated in connection with its ADA regulations. In *Sutton v. United Air Lines*, for example, the Court concluded that in determining whether an individual is disabled, a court must consider the individual in his mitigated state (e.g., with eyeglasses, rather than without).⁴⁶ In reaching this conclusion, the Court rejected interpretive guidelines issued by both the EEOC and the Department of Justice. Without addressing the proper level of deference for the interpretive guidance, the Court summarily concluded that the guidelines were so plainly wrong that they would not be accorded deference under any standard.⁴⁷

While the Court has often avoided specifying how much deference EEOC interpretations should receive, in other cases the Court has applied

43. See, e.g., *Sutton*, 527 U.S. at 514-15 (Breyer, J., dissenting) (arguing that Congress did give the EEOC authority to issue regulations defining disability under the statute because of its repeated use of the word disability incorporated into other definitions that clearly are within the scope of the EEOC's authority to promulgate regulations); White, *supra* note 4, at 580-81.

44. See 29 C.F.R. § 1630.2(g)-(j) (2004); see also White, *supra* note 4, at 550 (noting that, in issuing its regulations, interpretive guidance, and technical assistance manual under Title I, the agency focused a significant part of its attention on the definition of disability).

45. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 563 n.10 (1999); see also *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194 (2002) (noting that the persuasive authority of the EEOC regulations was unclear because they interpreted a portion of the ADA over which no agency had interpretive authority, but concluding that because the regulations were reasonable, the Court need not reach any decision about the level of deference they were due); *Sutton*, 527 U.S. at 480 ("Because both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any."); cf. *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 582-83 (1999). In *Olmstead*, the Court stated that

[b]ecause the Department [of Justice] is the agency directed by Congress to issue [ADA] Title II regulations, its views warrant respect. This Court need not inquire whether the degree of deference described in [*Chevron*] is in order; the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Id.; see also *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) ("Every agency to consider the issue under the Rehabilitation Act found statutory coverage for persons with asymptomatic HIV. Responsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under [*Chevron*].").

46. *Sutton*, 527 U.S. at 475. The interpretive guidelines, like the regulations, were subject to notice and comment. See 29 C.F.R. § 1630.2(j).

47. *Sutton*, 527 U.S. at 480 ("Although the parties dispute the persuasive force of these interpretive guidelines, we have no need in this case to decide what deference is due.").

either *Chevron* or *Skidmore* to the agency's regulations and other interpretive statements. Despite the fact that Title VII, the ADA, and the ADEA all explicitly grant some rulemaking authority to the EEOC, the Court has applied *Chevron* deference in only two antidiscrimination cases, one under the ADA and one under the ADEA.⁴⁸ In only one of the two did the Court choose to defer to the agency.⁴⁹

Most cases considering EEOC interpretations have applied the *Skidmore* standard, and the agency's views have, perhaps not surprisingly, often fared poorly in these cases. More interesting, perhaps, is what these cases suggest about the *Skidmore* standard—that its open-ended and malleable list of persuasive factors lends itself to a transparently results-oriented evaluation. In two Title VII cases, the Court devoted considerable discussion to the administrative deference question. In each, the Court applied *Skidmore* and rejected the EEOC's interpretation of the law. Each case garnered a strong dissenting opinion that also applied the same *Skidmore* deference standard but reached a contrary conclusion as to the persuasiveness of the agency's views.

The Court first applied the *Skidmore* standard to an EEOC interpretive guideline in its 1976 decision in *General Electric Co. v. Gilbert*.⁵⁰ In that case, plaintiffs challenged an employer-run disability plan that excluded coverage for pregnancy and childbirth-related work loss.⁵¹ Plaintiffs claimed that this exclusion, given the otherwise expansive nature of the policy, violated Title VII's prohibition on discrimination because of sex. They relied in part on an EEOC interpretive guideline concluding that Title VII's sex discrimination ban required employers to provide coverage for pregnancy-related work loss to the same extent that they covered other

48. See *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002); *Pub. Employee Ret. Sys. v. Betts*, 492 U.S. 158 (1989); cf. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 86-87 (2002) (applying *Chevron* to the Secretary of Labor's regulations under the Family Medical Leave Act and invalidating the regulations).

49. See *Echazabal*, 536 U.S. at 84 (applying *Chevron* and deferring to the EEOC's interpretation of the ADA's "direct threat" provision); *Betts*, 492 U.S. at 170 (applying *Chevron* and declining deference to the agency's interpretation of the Age Discrimination in Employment Act's ("ADEA's") "subterfuge" provision). In a third case, the Court, although never mentioning *Chevron*, appeared to apply that standard and to defer to the EEOC's procedural regulation. See *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 114-15 (1988) ("[I]t is axiomatic 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.").

50. 429 U.S. 125, 145-46 (1976). Interestingly, before 1976 the Court made little mention of the weight that it should accord the agency's determinations, but each time the issue was raised, the Court observed that "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); see also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973). As I discuss in Part II, the new reluctance to defer to the EEOC corresponded with a generally greater skepticism about claims of discrimination.

51. *Gilbert*, 429 U.S. at 129.

temporary disabilities.⁵² The Court rejected that guideline and held that discrimination on the basis of pregnancy was not sex discrimination prohibited by Title VII. Applying *Skidmore*, the Court concluded that the agency's 1972 interpretation lacked the "power to persuade" because it contradicted the position taken in a 1966 opinion letter penned by the EEOC General Counsel.⁵³ Justice William Brennan's dissenting opinion argued forcefully that "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."⁵⁴ Justice Brennan then argued that the majority opinion mischaracterized the history of the EEOC's position on pregnancy discrimination. In fact, the 1972 guideline was the agency's "first formalized, systemic statement on 'employment policies relating to pregnancy and childbirth.'"⁵⁵ While the earlier opinion letter had declined to impose liability on employers, this opinion was not a statement of affirmative policy choice by the agency, but instead reflected "an unwillingness to impose additional, potentially premature costs" on employers during a period of deliberation about the appropriate interpretation.⁵⁶ When the history of the contested regulation is viewed this way, the EEOC's position is not problematically inconsistent as the majority found, but instead "represents a particularly conscientious and reasonable product of EEOC deliberations" of the sort entitled to deference.⁵⁷

The Court applied the *Skidmore* standard in *EEOC v. Arabian American Oil Co. (Aramco)*⁵⁸ and again rejected an EEOC policy statement, this one applying Title VII to U.S. citizens employed overseas.⁵⁹ The deference question in this case was complicated somewhat by the presumption against extraterritorial application of laws, which requires Congress to express clearly its intention to apply the law outside the United States.⁶⁰ The EEOC had reached its interpretation of Title VII in reliance on the statute's extremely broad jurisdictional language, which extended coverage to any employer affecting commerce "between a State and any place outside thereof."⁶¹ The Commission saw further evidence of congressional intent in the "alien exemption" provision, which denied the Act's coverage "with respect to the employment of aliens outside any State."⁶² Because the Act excluded only aliens, the EEOC concluded, it could reasonably be

52. *Id.* at 140.

53. *Id.* at 142-43.

54. *Id.* at 155 (Brennan, J., dissenting).

55. *Id.* at 157.

56. *Id.*

57. *Id.* Justice Stevens wrote a separate dissent that did not focus on administrative deference, but in which he approvingly describes Justice Brennan's opinion as "persuasively expos[ing]" "the questions of motive, administrative expertise and policy." *Id.* at 162.

58. 499 U.S. 244 (1991).

59. *Id.* at 256-58.

60. *Id.* at 248.

61. *Id.* at 249-50.

62. *Id.* at 253.

interpreted to apply to United States citizens employed outside any State.⁶³ The Court rejected the EEOC's interpretation of these provisions of the statute. The majority's rationale was based in substantial part on the notion that these statutory provisions were too ambiguous to satisfy what it described as the "clear statement" rule for extraterritorial application of the law. The Court also dismissed the agency's interpretation by characterizing the EEOC's position on the extraterritorial application of Title VII as inconsistent over time and thus suspect under *Skidmore's* standards. To support its view, the Court noted that, although the agency had maintained that the statute applied to citizens employed overseas in a variety of contexts between 1975 and 1989,⁶⁴ a 1971 EEOC regulation discussed the statute's application to "both citizens and noncitizens, domiciled or residing in the United States."⁶⁵ The Court read this earlier regulation as inconsistent with the EEOC's later position, and thus, while the Court "[did] not wholly discount the weight to be given to the 1988 guideline," it concluded that the agency's interpretation was ultimately unpersuasive, particularly in light of the presumption against extraterritorial application.⁶⁶

The dissent (in which Justice Stevens joined) challenged the majority's aggressive application of the presumption against extraterritorial application of laws as well as its characterization of the history of the EEOC's position on the application of Title VII outside of the United States. As to the first issue, the dissent argued that the majority had overstated the strength of the presumption to create a novel "clear statement" rule.⁶⁷ By creating this new requirement, the majority weighted the scales against deference to the EEOC. As to the majority's rejection of the EEOC's interpretation as inconsistent with the agency's later views, the dissent observed that the challenged EEOC regulation was not inconsistent at all. The agency's statement that Title VII applied to "both citizens and noncitizens, domiciled or residing in the United States" was made "to underscore that neither the citizenship nor the residency status of an individual" affects the applicability of Title VII's ban on national origin discrimination.⁶⁸ The statement had absolutely nothing to do with whether Title VII applied extraterritorially or only within the United States and thus revealed no inconsistency in the EEOC's position on extraterritoriality. Applying *Skidmore*, the dissent concluded that the EEOC's position deserved greater respect.⁶⁹

63. *Id.*

64. The EEOC had articulated this view about Title VII's extraterritorial application in a 1975 letter from the agency's general counsel, testimony given in 1983 by the Chairman of the EEOC, a 1985 decision by the Commission, and a 1989 Policy Statement. *Id.* at 256-57.

65. *Id.* at 257.

66. *Id.* at 258.

67. *Id.* at 261-65 (Marshall, J., dissenting).

68. *Id.* at 277.

69. *Id.* at 275-78.

Only twice has the Supreme Court applied *Skidmore* to EEOC statements and agreed with the EEOC's interpretation of an antidiscrimination law.⁷⁰ Notably, Justice Stevens authored the one majority opinion in which the Court seemed truly to accord some considered respect to the agency's view, in *Clackamas Gastroenterology Associates v. Wells*. In *Clackamas*, the Court reaffirmed that an EEOC Compliance Manual is not entitled to strong deference "even though it may constitute a 'body of experience and informed judgment' to which we may resort for guidance."⁷¹ However, applying *Skidmore*, Justice Stevens's opinion found that the agency's view was persuasive, spent considerable time describing that view, and ultimately deferred to that view as a persuasive one, evaluating the district court's findings "under the EEOC's standard that we endorse today."⁷²

Taken together these opinions suggest that the standard of deference may be less important than the way it is applied.⁷³ The contrast between Justice Stevens's approach and that taken by Justice Antonin Scalia in these cases is instructive. Justice Stevens has made it abundantly clear that he endorses a framework for administrative deference in which *Chevron* deference is applied only to a limited range of agency action and the *Skidmore* standard is applied to the majority of administrative interpretations.⁷⁴ But this theoretical model says little about the respect he accords the EEOC in practice. In two recent opinions authored by the Justice, the Court agreed with the EEOC's interpretation.⁷⁵ And in a number of cases, Justice Stevens dissented when the Court rejected the EEOC's views and criticized the Court's decision to chart its own policy course in the face of a persuasive administrative interpretation of the law.⁷⁶ By contrast, Justice Scalia has long taken the position that the *Skidmore* standard is an "anachronism" that was replaced by *Chevron*, and that all agency action

70. See *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003); *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 65 (1986). In another recent case, the Court agreed with the EEOC's position without mentioning any particular deference standard. See *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005). In *Smith*, the Court concluded that disparate impact claims are cognizable under the ADEA. Justice Stevens's opinion for the Court included a detailed analysis of the statutory text and purpose and then very briefly "note[d] that . . . the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, [has] consistently interpreted the ADEA to authorize relief on a disparate-impact theory." *Id.* at 1544; see also *id.* at 1546 (Scalia, J., concurring in part and concurring in the judgment) (noting that the majority opinion reflects "independent determination of the disparate-impact question" rather than deference to the EEOC).

71. *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449 n.9 (2003) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

72. *Id.* at 448-51.

73. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts*, 7 Yale J. on Reg. 1, 40 (1990); Rossi, *supra* note 15, at 1125-29 (discussing the Court's three different ways of applying *Skidmore* in the *Christensen* decision).

74. See, e.g., *Clackamas*, 538 U.S. at 449; *Christensen v. Harris County*, 529 U.S. 576, 582 n.2, 594-95 (2000) (Stevens, J., dissenting).

75. See *Smith*, 125 S. Ct. at 1544; *Clackamas*, 538 U.S. at 448-51.

76. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 513 (1999); *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 224, 277 (1991); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 162 (1976); cf. *Christensen*, 529 U.S. at 594-95.

should receive the same deference.⁷⁷ And yet, even applying *Chevron*, he quite regularly finds the EEOC's interpretations "unreasonable."⁷⁸

The disparate approaches taken by members of the Court to deference to the EEOC, even when they purport to apply the same level of deference, confirms that the formal framework for administrative deference leaves considerable discretion to practical application. The *Skidmore* standard—which is most often applicable to EEOC statements about antidiscrimination law—is particularly open-ended. Moreover, the Court retains for itself the broadest possible discretion by simply declining to settle on any standard of deference in a significant number of cases reviewing EEOC regulations and other interpretive statements. In exercising this discretion, the Court has revealed a lack of respect for the EEOC that calls for an explanation.

II. SKEPTICISM AND EXPERTISE: POSSIBLE EXPLANATIONS FOR THE SUPREME COURT'S ATTITUDE TOWARDS THE EEOC

The Supreme Court is making a mistake by so often rejecting the EEOC's regulations and other statements interpreting and implementing federal antidiscrimination law. The Court's attitude towards the EEOC seems inconsistent with its articulated standards for administrative deference. Even under *Skidmore*, administrative interpretations should receive great respect if they are enacted with procedural care and reflect the application of expertise to a question on which there is statutory ambiguity.⁷⁹ While a detailed analysis of the EEOC's process for issuing regulations, interpretive guidelines, and other analyses of antidiscrimination requirements is far beyond the scope of this Essay, it is notable that the EEOC's interpretive statements have generally been promulgated after a relatively careful and public process. Indeed, "[s]ince the mid-1970s, the agency has issued its interpretive guidelines only after extensive study, notice and comment, and sometimes public hearings."⁸⁰ The agency's

77. *Aramco*, 499 U.S. at 260 (Scalia, J., concurring in part and concurring in the judgment); see also *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

78. See, e.g., *Aramco*, 499 U.S. at 259 (Scalia, J., concurring in part and concurring in the judgment); *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158 (1989); cf. *Christensen*, 529 U.S. at 589-91 (Scalia, J., concurring in part and concurring in the judgment). But see *Smith*, 125 S. Ct. at 1546-49 (Scalia, J., concurring) (applying *Chevron* and deferring); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 601 (2004) (Scalia, J., dissenting) (same); *Clackamas*, 538 U.S. at 440 (joining the majority without comment, although the opinion applied the *Skidmore* standard to review an EEOC interpretation).

79. See, e.g., *Mead*, 533 U.S. at 228; Krotoszynski, *supra* note 15, at 753-54; Wildermuth, *supra* note 5, at 1909-12. It is entirely possible that no agency receives significant deference in application of *Skidmore*, and that the EEOC is less a special case than simply one among many. That question is beyond the scope of this Essay. To the extent that it is the case, I imagine that the Court's reasons for lack of deference will differ in each particular context. The question remains, then, what explains the lack of deference to this specific agency.

80. White, *supra* note 31, at 98.

regulations and Interpretive Guidance under the ADA, for example, were both the end result of an extended period of public comment and analysis.⁸¹ Moreover, these and other EEOC statements do reflect considered judgment, informed by expert analysis and research, about application of open-ended or unclear statutory commands. They are precisely the type of careful, research-driven interpretation that warrants great respect from the courts.

Congress has provided some evidence that the Court's lack of respect for the EEOC's interpretations of these statutes is in error. On at least three occasions, the Supreme Court's decision to disregard EEOC interpretation of federal antidiscrimination laws has led Congress to reverse the Court's decisions and essentially to enact the EEOC's interpretation directly into law.⁸² The legislative overruling of Supreme Court decisions is subject to a

81. The Commission began with an Advanced Notice of Proposed Rulemaking and it "actively solicited and considered public comment." 56 Fed. Reg. 35,726-01 (July 26, 1991). In response, the agency received 138 comments from different organizations and individuals. The Commission also held sixty-two input meetings in field offices, which were attended by over 2400 representatives from employer groups and disability rights advocates. When the ADA regulations were set forth for public comment, the Commission received almost 700 comments from interested individuals and organizations. The EEOC took these comments into account not only in issuing the final regulations, but also in promulgating its interpretive guidance, contained in the appendix to the regulations, and in the Compliance Manual sections that it issued to provide more detail about particular topics. *Id.*; see also White, *supra* note 4, at 583-84.

82. The first such instance was the enactment of the Pregnancy Discrimination Act ("PDA") in 1978, which was a direct response to the Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Court held that a disability plan that covered employees for a host of conditions, but excluded pregnancy, did not violate Title VII because the statutorily prohibited sex discrimination did not include pregnancy discrimination. In so doing, the Court rejected the EEOC's contrary view. Congress responded quickly, adding language to the statute that conformed the law to the EEOC interpretation rejected by the Court. In passing the PDA, its sponsors were emphatic that the *Gilbert* dissenters had gotten it right. Proponents of the bill emphasized that "the bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC . . ." S. Rep. No. 95-331, at 7-8 (1977), as reprinted in 1978 U.S.C.C.A.N. 4749, 4756. Congress has twice amended the ADEA to accord with an EEOC interpretation rejected by the Court. See Age Discrimination Amendments of 1978, Pub. L. No. 95-256, § 2, 92 Stat. 189 (codified as amended in scattered sections of 29 U.S.C.) (overriding *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977)); Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended at 29 U.S.C. § 623) (overriding *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989)). In both instances, "the conferees specifically disagree[d] with the Supreme Court's holding and reasoning." H.R. Rep. No. 950, at 8 (1978) (Conf. Rep.), as reprinted in 1978 U.S.C.C.A.N. 528, 529. The second time, the bills introduced in both the House and the Senate included specific statutory findings that "as a result of the decision of the Supreme Court in *Betts*, legislative action is necessary to restore the original congressional intent in passing and amending the ADEA." S. 1511, 101st Cong. (1990); H.R. 3200, 101st Cong. (1989). And, finally, in the Civil Rights Act of 1991, Congress legislatively overruled the Supreme Court's decision in *Aramco*, 499 U.S. 244, in which the Court had rejected an EEOC guideline that provided for Title VII coverage to U.S. citizens employed overseas. Within months of that decision, Congress added a provision to the 1991 amendments so that the agency's position on extraterritorial application of the law was explicitly included in the statute's text. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1077 (codified as amended at 42 U.S.C. § 1981).

variety of interpretations and should not be read to mean too much.⁸³ Nevertheless, these three instances in which Congress has expressed its strong and specific disagreement with the Court's rejection of EEOC interpretations of antidiscrimination laws should at least give the Court pause as to the ease with which it disregards the Commission's positions. So why does the Court remain so resistant to accepting this agency's views about the statutes it has been charged with implementing and enforcing?

The key to the Court's reluctance may rest in the subject matter that is the domain of this particular administrative body and in particular in skepticism about the scope of the problem of discrimination and uncertainty about the nature and locus of expertise in defining the problem. I suggest that two different ideas about expertise cloud the Court's approach to EEOC interpretation. First, the Court may believe that the problem of discrimination is less susceptible to expert evaluation and understanding than the complex scientific or economic subjects that occupy other federal agencies, and thus that the reasons for administrative deference are weakened in this area. Second, discrimination is an area in which the Supreme Court may perceive itself as having a particular expertise in light of its Fourteenth Amendment jurisprudence. A further possible explanation for the Court's attitude towards the EEOC may simply be the skepticism of members of the Court about the continuing problem of discrimination and the appropriate scope of legal responses to it.

A. *Discrimination and EEOC Expertise*

The Court's reluctance to defer to the EEOC may stem from a view that discrimination is a subject of common knowledge, not susceptible to expert analysis. The rationale behind judicial deference to administrative interpretation is, at least to some extent, that the agency offers an expert's opinion on the topic. *Skidmore* deference in particular rests on this notion of expertise. If there is no such thing as expertise in identifying or addressing discrimination, then there is little reason for courts to defer to the EEOC's interpretations. To the extent that this view drives the Court's lack of respect for the EEOC, it ignores the legislative desire for an agency with expertise in this field. It also avoids the realities of discrimination as a complex social and economic problem whose causes and solutions in fact do require expert understanding.

The EEOC came into being with the enactment of Title VII in 1964. The agency created in that initial statute was relatively weak. Congress debated whether to give the new administrative body cease-and-desist powers but ultimately concluded that resolution of disputes under the new law should go through the courts.⁸⁴ In its initial form, the agency was not even responsible for bringing claims of discrimination under the law; that

83. See, e.g., *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101 n.7 (1991) (arguing that congressional override does not demonstrate that the Court's decision was wrong).

84. See *White*, *supra* note 31, at 59.

responsibility rested with the Attorney General's office.⁸⁵ In 1972, however, Congress amended Title VII and significantly expanded the powers of the EEOC.⁸⁶ This expanded authority indicates that Congress recognized a need for an administrative agency with acknowledged expertise in the area of discrimination. As was explained in both the House and Senate Committee Reports to the 1972 amendments,

Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, (and) perpetuation of the present effect of pre-act discriminatory practices through various institutional devices In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful.⁸⁷

Moreover, the legislative history of these amendments suggests not only that Congress viewed discrimination as a subject of possible expertise, but that the legislature expected the EEOC to provide that expertise. The Senate Report explained that "[i]t is expected that through the administrative process, the Commission will continue to define and develop the approaches to handling serious problems of discrimination that are involved in the area of employment."⁸⁸

In the ensuing decades, it has become increasingly clear that the legislature amending Title VII in 1972 correctly identified employment discrimination as a complex phenomenon whose identification and resolution requires expertise. Indeed, the causes and effects of, as well as solutions for, discrimination are being studied by scholars and researchers in a number of different disciplines. Social psychologists studying the phenomenon of discrimination have written extensively about the dynamics underlying bias, which are now recognized as significantly more complicated than was understood when Title VII was first enacted.⁸⁹

85. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 707, 78 Stat. 261-62 (codified as amended at 42 U.S.C. § 2000d).

86. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e).

87. S. Rep. No. 92-415, at 5 (1971); see also H.R. Rep. No. 92-238, at 8 (1972).

88. S. Rep. No. 92-415, at 19; see also H.R. Rep. No. 92-238, at 10 (1972), as reprinted in 1972 U.S.C.C.A.N. 2146 ("Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases."); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74-75 n.9 (1977) (noting that Congress, in the 1972 amendments to Title VII, did not specify what kind of "reasonable accommodation" employers would be required to make to employees' religious needs, "preferring to leave that question open for future resolution by the EEOC").

89. See, e.g., John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. Soc. Issues 829, 830 (2001). See generally Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 745-49 (2005)

Organizational psychologists study the dynamics of particular work environments to assess how different structural and cultural norms influence workplace conduct, including the extent and nature of discrimination.⁹⁰ Human resources specialists consult with employers seeking to minimize discriminatory misconduct in their workplaces.⁹¹ And in both academic and popular writings over the years, economists, sociologists, anthropologists, and historians have further contributed to an appreciation of the complex nature of both the sources and the effects of discrimination.

The need for expertise in applying federal law to the problem of workplace discrimination is heightened by the fact that the nature of discrimination in employment is constantly evolving. In the early years of federal prohibitions against discrimination, most of the claims filed with the EEOC were relatively straightforward failure to hire claims, in which the complainant alleged race or sex discrimination.⁹² During the 1980s and 1990s, so-called "glass ceiling" claims were particularly prevalent.⁹³ These claims, which often challenge structural biases and multiple decision points, added a layer of complexity absent from the earlier claims. And new trends are emerging today: more sexual harassment against teenagers working in establishments with high turnover, minimal training, and young managers; an increasing number of claims alleging "accent discrimination"; a growing problem with pregnancy discrimination; and a jump in the number of claims of retaliation.⁹⁴ Added to this panoply of issues under Title VII are the extremely complicated questions that can arise in implementing the requirements of the ADA, which require recourse to experts in medicine, human resources, and even architecture.⁹⁵

(discussing the current social science research on stereotyping and bias); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1186-1211 (1995) (same).

90. See, e.g., Vicki Schultz, *The Sanitized Workplace*, 112 Yale L.J. 2061, 2138 (2003) (discussing studies of sexual dynamics in the workplace).

91. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 463 n.12, 464 n.13 (2001) (describing how organizational and human resource specialists have helped employers study and attempt to alter workplace dynamics).

92. See U.S. Equal Employment Opportunity Comm'n, *Performance & Accountability Report* (2004), available at <http://www.eeoc.gov/abouteeoc/plan/par/2004/>.

93. *Id.*

94. *Id.*

95. As just one example, in its administration of the ADA, the EEOC provides guidance on the kinds of complicated details that the statute could not possibly speak to, and that courts are ill-equipped to assess. For example, the agency has published question and answer documents that provide guidance on epilepsy, diabetes, vision problems, intellectual disabilities, and cancer in the workplace. See e.g., EEOC Questions & Answers About Blindness in the Workplace and the Americans with Disabilities Act (ADA) (2005), <http://www.eeoc.gov/facts/blindness.html>; EEOC Questions & Answers About Cancer in the Workplace and the Americans with Disabilities Act (ADA) (2005), <http://www.eeoc.gov/facts/cancer.html>; EEOC Questions & Answers About Diabetes in the Workplace and the ADA (2003), <http://www.eeoc.gov/facts/diabetes.html>; EEOC Questions & Answers About Epilepsy in the Workplace and the Americans with Disabilities Act

The EEOC is responsible for tracking these trends and issues and understanding how federal law should respond. In order to meet this obligation, the agency conducts research studies, collaborates "with a broad range of stakeholder groups," issues policy guidance designed to facilitate compliance and protect the rights of workers under the law, and promulgates rules and regulations designed to clarify the law and to ensure compliance.⁹⁶ The Commission is the exclusive federal agency responsible for the implementation of federal laws prohibiting workplace discrimination, and in that capacity it serves as a repository for a wealth of information about the discrimination-related trends and concerns in workplaces around the country. In its efforts to bring this collected knowledge to bear on the best interpretation of the gaps and ambiguities in antidiscrimination statutes, the EEOC acts as precisely the kind of expert that *Skidmore* deference in particular seems to anticipate. Thus, to the extent that the Court's relative indifference to the EEOC's interpretation of antidiscrimination law is a product of the belief that an administrative agency cannot develop expertise in this field, the Court should rethink that underlying assumption.

B. *Discrimination and the Supreme Court's Expertise*

Another possible explanation for the Court's reluctance to defer to the EEOC's interpretations of federal laws prohibiting discrimination is that the Court simply does not want to relinquish its own perceived authority and expertise in this context.⁹⁷ A number of explanations might be offered for a sense among members of the Court that they have a special expertise in defining discrimination. Throughout the history of federal antidiscrimination laws, and particularly in the early years after the enactment of Title VII, the federal courts have played a unique role in filling statutory gaps in this area.⁹⁸ Moreover, individual Justices have, in

(ADA) (2004), <http://www.eeoc.gov/facts/epilepsy.html>; EEOC Questions & Answers About Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA) (2004), http://www.eeoc.gov/facts/intellectual_disabilities.html. Each of these question and answer documents covers topics ranging from medical details about the particular condition, to establishing processes to maintain the confidentiality of an employee's medical records to providing workplace accommodations, to recognizing when the particular condition meets the ADA definition of disability. The publications thus blend legal analysis with information gleaned from a host of experts whose collective knowledge is essential to responding appropriately to the legal mandates.

96. EEOC, Performance and Accountability Report FY 2004, Management's Discussion and Analysis (2004), http://www.eeoc.gov/abouteeoc/plan/par/2004/management_discussion.html#introduction.

97. See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 139-40 (1999); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Cal. L. Rev. 613, 664 (1991) ("The Court imposes its own preferences onto civil rights statutes."); White, *supra* note 4, at 570-74.

98. See, e.g., Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 St. Louis U. L.J. 225 (1976).

different ways, played active roles in shaping antidiscrimination law.⁹⁹ A third source of perceived expertise in this area might flow from the Court's work interpreting the Constitution's Fourteenth Amendment. To the extent that this third possibility is in play, it suggests an inappropriate intrusion of certain constitutional constraints into the interpretation of federal law.

In fact, there is some evidence in the Court's opinions interpreting Title VII, the ADA, and the ADEA that the Court relies on the policy judgments that inform its equal protection jurisprudence when interpreting the substantive provisions of federal antidiscrimination laws. Of course, there is some relationship between the Constitution and federal antidiscrimination law. Congress can legislate only pursuant to a specific grant of constitutional authority, and the Constitution thus necessarily poses a limit on what any federal legislation can do.¹⁰⁰ However, when the Court is merely analyzing statutory language and need not confront questions of congressional authority to enact a particular law, there is no reason for constitutional analysis to intrude into the decision.¹⁰¹

The Court's decision in *General Electric Co. v. Gilbert* provides the clearest example of the Court's tendency to impose constitutional analysis upon this area of statutory interpretation.¹⁰² Two years before deciding that case, the Supreme Court had concluded in *Geduldig v. Aiello* that discrimination against pregnant women did not violate the Fourteenth Amendment's Equal Protection Clause as impermissible sex discrimination.¹⁰³ In *Gilbert*, the Court considered whether an employer

99. From 1982 to 1990, Justice Clarence Thomas was the Chairman of the EEOC. See EEOC, <http://www.eeoc.gov/abouteeoc/35th/bios/clarencecthomas.html> (last visited Jan. 22, 2006). Justice Ruth Bader Ginsburg also litigated a number of important sex discrimination cases and served as the Director of the American Civil Liberties Union's Women's Rights Project before becoming a judge. See The Supreme Court Historical Society, <http://www.supremecourthistory.org/myweb/justice/ginsburg.htm> (last visited Jan. 22, 2006).

100. Title VII, the ADEA, and the ADA were all passed pursuant to Congress's authority under the Commerce Clause and under the Fourteenth Amendment. For each of those Acts, the Court has considered whether it was an appropriate exercise of either source of legislative authority. Fairly early on, the Court concluded that Title VII was validly enacted under both provisions. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976). For both the ADA and the ADEA, the Court concluded that Congress could not have been acting pursuant to its authority to enforce the substantive protections of the Fourteenth Amendment. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (ADEA). This line of cases, however, says nothing about the content of the statutes' substantive prohibitions. Because Congress also relied on its Commerce Clause powers to pass these laws, the limitation on Fourteenth Amendment enforcement authority affects only the applicability of the statutes to government employers.

101. The Court has quite explicitly recognized the opposite point—that Title VII analysis should not intrude into the realm of equal protection. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (stating “[w]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today”).

102. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

103. See *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Court explained that [w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based

violated Title VII by offering employees health benefits that excluded pregnancy-related costs. The majority concluded that a violation of Title VII's prohibition on intentional sex discrimination could not be proved "[a]bsent a showing of gender-based discrimination, as that term is defined in *Geduldig*."¹⁰⁴ In incorporating its constitutional definition of sex discrimination into Title VII, the Court offered no analytical justification and very little explanation for its decision, saying only,

While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former.¹⁰⁵

Justice Stevens dissented in *Gilbert*, starting his opinion with the observation that "[t]he word 'discriminate' does not appear in the Equal Protection Clause."¹⁰⁶ Moreover, as Stevens noted, a plaintiff seeking to prove a constitutional violation bears a heavier burden than a plaintiff claiming a Title VII violation. Thus, "the constitutional holding in [*Geduldig*] does not control the question of statutory interpretation presented by this case."¹⁰⁷

The Court has never since *Gilbert* been so explicit in its incorporation of constitutional concepts into statutory interpretation. However, there is reason to wonder what role equal protection jurisprudence continues to play in the Court's interpretation of antidiscrimination statutes. In particular, the Court's hostility to disability and age discrimination claims under the ADA and the ADEA raises the question whether the policy judgments reflected in equal protection jurisprudence are influencing the Court's statutory decisions.

classification The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.

Id. at 496 n.20.

104. *Gilbert*, 429 U.S. at 137 n.15.

105. *Id.* at 133. In *Gilbert*, the Court asserts that

The concept of "discrimination," of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to "discriminate . . . because of . . . sex," without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant.

Id. at 145.

106. *Id.* at 160 (Stevens, J., dissenting).

107. *Id.* at 160-61 (citations omitted).

Equal protection analysis offers different levels of constitutional protection for different kinds of discrimination. If a classification interferes with the exercise of a fundamental right or disadvantages a suspect class, that classification is reviewed with the highest level, "strict scrutiny."¹⁰⁸ This level of examination has been described as "strict in theory, fatal in fact,"¹⁰⁹ and classifications based on, for example, race, are extremely unlikely to be upheld as constitutional. Classifications that create disadvantages based on gender or immigration status are accorded a middle-level "intermediate scrutiny."¹¹⁰ All other classifications—such as those based on age or disability—are subject to "rational basis review."¹¹¹ When a classification is reviewed under this rational basis standard, it will most likely survive constitutional scrutiny.¹¹² The Equal Protection Clause is thus interpreted and applied with the judgment that some kinds of discrimination are worse than others.

The federal antidiscrimination statutes do not contain these same policy judgments.¹¹³ Certainly the statutes are not identical, but there is nothing in the ADEA or ADA to suggest that Congress believed these forms of discrimination—age and disability—are less significant than the discrimination prohibited by Title VII. Indeed, some have observed that the ADA offers arguably greater protection than Title VII.¹¹⁴

The Court's decisions under the ADA and the ADEA often seem, however, to reflect the basic policy judgment that age and disability discrimination are not as unacceptable as discrimination on the basis of sex or race. Sometimes this judgment is quite explicit. For example, a number of cases interpreting the ADEA are cast in terms that parrot the language used in equal protection age discrimination cases. In explaining why age-based classifications are subject only to rational basis review under the Equal Protection Clause, the Court has asserted more than once that

[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been

108. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).

109. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978).

110. *United States v. Virginia*, 518 U.S. 515, 531 (1996); *City of Cleburne*, 473 U.S. at 440.

111. *City of Cleburne*, 473 U.S. at 441-43.

112. *Id.* at 440; *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

113. Title VII does draw some specific distinctions between race and other forms of discrimination. For example, while an employer can defend against a charge of sex discrimination by arguing that sex is a "bona fide occupational qualification," there is no such defense available to a charge of race discrimination. The statute thus reflects congressional judgment that race discrimination and gender discrimination are different and should be treated differently.

114. See R. Bales, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 Cornell J.L. & Pub. Pol'y 161, 166-67 (1992) (describing why Title VII provides insufficient protection for the disabled); S. Elizabeth Wilborn Malloy, *Something Borrowed, Something Blue: Why Disability Law Claims Are Different*, 33 Conn. L. Rev. 603, 618-26 (2001) (describing the difference between Title I of the ADA and Title VII protections).

discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.¹¹⁵

Justice Sandra Day O'Connor used remarkably similar language last Term, arguing against an interpretation of the ADEA that would permit disparate impact claims. "No one," she asserted, "would argue that older workers have suffered disadvantages as a result of entrenched historical patterns of discrimination, like racial minorities have."¹¹⁶ Justice Stevens's majority opinion in the same case (finding that the statute did permit disparate impact claims) also observed that

age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. . . . Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII.¹¹⁷

Without disputing the truth of these assertions, it is simply worth noting that they demonstrate explicitly the assumptions with which the Justices approach claims of age discrimination.

While the same explicitly parallel language has not been used in disability cases, the Court's ADA decisions reflect a constant effort to cabin a remarkably expansive remedial statute.¹¹⁸ It seems entirely plausible that the Court's discomfort with the ADA's broad potential reach stems in some part from its sense of disability's place in the hierarchy of invidious discrimination. When the EEOC's interpretation would give full breadth to the ADA's remedial reach, the Court's discomfort with the statute's reach may underlie its rejection of the agency's views.

It is, of course, impossible to know how much the Court's equal protection jurisprudence intrudes into its evaluation of the substance of antidiscrimination statutes. I suspect that there is some intrusion, and that, together with other justifications for judicial expertise in the area, the Fourteenth Amendment affects the Court's willingness to give the EEOC any considerable respect.

115. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); *see also* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

116. *See* *Smith v. City of Jackson*, 125 S. Ct. 1536, 1555 (2005) (O'Connor, J., concurring); *see also* *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (stating "age discrimination rarely was based on the sort of animus motivating some other forms of discrimination"); *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983).

117. *Smith*, 125 S. Ct. at 1545.

118. *See, e.g.*, Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 Wm. & Mary L. Rev. 921, 931-36 (2003); Ruby Afram, Note, *New Diagnoses and the ADA: A Case Study of Fibromyalgia and Multiple Chemical Sensitivity*, 4 Yale J. Health Pol'y L. & Ethics 85, 87 (2004).

C. Discrimination and Skepticism

The Court's approach in these cases may be not only a product of the institutional concerns of deference and expertise but also a consequence of substantive judgments about discrimination. At base, the reluctance to defer reflects a more general skepticism about the problem of discrimination and legal efforts to redress it. When the EEOC interprets federal antidiscrimination laws in ways that appear to favor plaintiff-employees over defendant-employers, a majority of the Court may decline deference to the agency because the Justices are troubled by the agency's expansive approach to these statutes. This skepticism is reflected in the historical evolution of the Court's treatment of EEOC interpretations. Moreover, the Court's often-divided opinions in this area parallel the divisions within the legislature that first created the EEOC—suggesting that these debates may have less to do with the relative expertise of different governmental bodies and more to do with core political values.

Cases in which the Court has declined deference to the EEOC's position have frequently involved the Court's rejection of a more expansive, employee-friendly reading of the particular statute in favor of a more restrictive reading. In *Gilbert*, the Court limited the reach of Title VII in rejecting the EEOC's view that pregnancy discrimination was sex discrimination.¹¹⁹ In *Aramco*, the Court rejected the EEOC's opinion that Title VII applied to U.S. citizens employed overseas, thus restricting the number of employees protected by the law.¹²⁰ In *Sutton*, the Court rejected the EEOC's regulation requiring that disability be evaluated without regard to mitigating measures—the Court's approach includes a substantially smaller number of people within the reach of the ADA.¹²¹ In another case, the Court adopted an approach to "continuing violations" under Title VII that rendered untimely many claims that the EEOC's standard would have allowed.¹²² By contrast, in the only case in which the Court explicitly applied *Chevron* and deferred to the EEOC's regulations, the agency regulation at issue was a more restrictive view of the disability statute than the one the plaintiff was advocating.¹²³ Of course, this trend does have exceptions,¹²⁴ but far more often the Court invalidates EEOC regulations

119. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976).

120. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244 (1991).

121. *Sutton v. United States*, 527 U.S. 471 (1999).

122. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 & n.6, 111-13 (2002); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) (rejecting the EEOC's interpretive guidance providing that reverse discrimination claims were available under the ADEA); *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158 (1989) (rejecting an EEOC interpretive guideline under the ADEA that gave plaintiffs a cause of action where an employer plan drew distinctions among different age groups without specific economic justification, and finding instead that such plans could only be challenged on a showing of specific invidious intent).

123. *See Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002).

124. *See, e.g., Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

and interpretive statements that support an expansive application of federal antidiscrimination laws.

The historical evolution of the Court's cases discussing deference to the EEOC also suggests a connection between substantive judgments about the problem of discrimination and attitudes about the level of deference due the Commission. Prior to 1976, the Court was extremely deferential to the EEOC, never referring to any specific deference standard, but simply stating that "[t]he administrative interpretation of the Act by the enforcing authority is entitled to great deference."¹²⁵ The Court's deference to the agency in these earlier cases reflected both the Court's and the EEOC's tendency to interpret Title VII broadly to effectuate its remedial purposes.¹²⁶ In the second half of the 1970s, at about the same time that the Court first adopted its less deferential stance towards the EEOC, there were other indications of a growing concern among members of the Court that antidiscrimination laws were being too expansively applied.¹²⁷ Moreover, during this time the membership of the Court began to shift politically to the right, and this shift in membership significantly altered the Court's approach to antidiscrimination laws.¹²⁸ While the EEOC continued to interpret Title VII and other antidiscrimination laws broadly, the Court began to take a more limiting approach. The Court's more cabined interpretation of the law was necessarily accompanied by a diminished deference to the EEOC.

Many of the Court's decisions interpreting these major antidiscrimination statutes and assessing what respect to give the EEOC's interpretations have been sharply divided.¹²⁹ While the majority in these cases generally prefers both to restrict the reach of antidiscrimination laws and to limit deference to the agency, the dissenters would give greater respect to EEOC interpretations and also would generally prefer a more expansive reading of the civil rights laws. This division—which links a substantive vision of antidiscrimination laws to the power accorded the agency charged with enforcing these laws—closely parallels the divisions in Congress over the appropriateness of an empowered EEOC. As originally proposed by the first supporters of the Civil Rights Act, the EEOC would have had significant enforcement authority, which would have "assured that the agency would be able to implement federal policies in the civil rights area

125. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *see also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

126. *See Eskridge, supra* note 97, at 618-23 (describing the cooperative relationship among the Court, Congress, and the executive in the early years of enforcing civil rights laws).

127. For example, in 1977, the Court authored the first of two opinions cautioning against overuse of class action litigation in discrimination cases. *See E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *see also Gen. Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

128. *See, e.g., Eskridge, supra* note 97, at 623-36 (describing this rightward shift).

129. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 245 (1991); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 126 (1976).

directly.”¹³⁰ Opponents of the agency, who were also opponents of the new legislation more generally, argued that the EEOC would be too much an advocate for plaintiff-employees.¹³¹ The substitute bill, altered to win the support of those legislators who were at best on the fence about the proposed civil rights laws, weakened the EEOC considerably.¹³² Thus, both for members of Congress and for members of the Court, a strong EEOC is directly linked to an expansive vision of civil rights laws. Given this link, it seems entirely plausible that the Supreme Court’s lack of deference to the EEOC is motivated in part by political judgments about the problem of discrimination.

CONCLUSION: LESSONS FROM JUSTICE STEVENS

Whatever the reasons, the Court too often disregards the EEOC’s interpretations of the major statutes the agency is responsible for implementing and enforcing. Some scholars have suggested that a solution to this lack of respect lies in altering or applying the formal standards for administrative deference so that the EEOC’s interpretations are accorded *Chevron* deference.¹³³ While applying this meaningful deference standard to the agency’s interpretations might lead the Court to accede to the EEOC’s views more often, I believe that the real problem is less the formal deference standard applied to the agency’s rules and regulations and more the Court’s underlying attitude towards the problem of discrimination and its consequent lack of respect for the EEOC.

Justice Stevens’s approach in this context is instructive. He very clearly endorses the administrative deference structure that has been developed by the Court, and he is also quite explicit in his view that the EEOC’s most common form of interpretation—interpretive guidance—should receive the less deferential *Skidmore* review.¹³⁴ However, in applying that standard, he gives the agency’s interpretations the respect that even this less deferential review standard demands. Thus, in both *Aramco* and *Sutton*, Justice Stevens dissented, concluding that the EEOC’s interpretations of Title VII merited the Court’s respect.¹³⁵ And, authoring the Court’s opinion in its

130. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. Pa. L. Rev. 1417, 1491 (2003).

131. See, e.g., White, *supra* note 31, at 59, 65.

132. *Id.*

133. See, e.g., Eskridge, *supra* note 97, at 681-82 (suggesting that perhaps Congress should amend the civil rights laws to make explicit the agency’s power to engage in substantive rulemaking); White, *supra* note 4, at 574 (arguing that the EEOC’s ADA regulations and guidance are entitled to *Chevron* deference).

134. See, e.g., *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449 n.9 (2003); *Christensen v. Harris County*, 529 U.S. 576, 582 n.2, 594-95 (2000) (Stevens, J., dissenting).

135. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 513 (1999) (Stevens, J., dissenting); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 275-78 (1991) (Marshall, J., dissenting). Dissenting in *Gilbert*, Justice Stevens did not base his views on deference to the EEOC, though he did note approvingly Justice William Brennan’s defense of the EEOC’s

most recent case evaluating an EEOC regulation, Justice Stevens applied the *Skidmore* standard in a manner that again acknowledged the significant respect due the agency's carefully considered interpretation.¹³⁶

Justice Stevens has also recognized that the Court's rejection of EEOC interpretation comes at the expense of the major federal antidiscrimination laws' remedial goals. Dissenting in *Sutton*, Justice Stevens observed that the Court's tendency to "chart its own course—rather than to follow the one that has been well marked by . . . the Executive officials charged with the responsibility of administering the ADA" led to a "crabbed vision of the territory covered by this important statute."¹³⁷ The application of administrative deference standards is just one context in which courts apply purportedly neutral legal principles in ways that actually reflect important substantive judgments. By acknowledging the connection between deference and a particular substantive vision of civil rights legislation, Justice Stevens helps force to light this subtle but significant hobbling of antidiscrimination law.

interpretive authority. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting).

136. See *Clackamas*, 538 U.S. at 448-51.

137. *Sutton*, 527 U.S. at 513.