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## CHEVRON AND SKIDMORE IN THE WORKPLACE: UNHAPPY TOGETHER

James J. Brudney\*

### INTRODUCTION

In its approach to agency deference under *Chevron U.S.A. v. Natural Resources Defense Council*,<sup>1</sup> the U.S. Supreme Court often implicates the relationship between *Chevron* and *Skidmore v. Swift & Co.*<sup>2</sup> When *Chevron* was decided, many judges and legal scholars anticipated that its crisp two-stage test promoting deference to agency statutory construction would occupy the field, jilting *Skidmore* and her older multifactor standard favoring a softer form of deference.<sup>3</sup> Other scholars at the time saw a continuing role for *Skidmore*.<sup>4</sup> And since *United States v. Mead Corp.*,<sup>5</sup> the Court's members apart from Justice Scalia regard it as only right that when reviewing an agency's statutory interpretation, *Chevron* and *Skidmore*

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1. 467 U.S. 837 (1984).

2. 323 U.S. 134 (1944).

3. See, e.g., *Equal Emp't Opportunity Comm. v. Arabian Am. Oil Co.*, 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring in part and concurring in the judgment); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513, 521 (predicting broad application of *Chevron* and receding role for *Skidmore*-type factors); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 297, 307–08 (1986) (D.C. Circuit judge describing *Chevron* as having cast serious doubt on the multifactor sliding scale approach to judicial deference established under *Skidmore*, and expressing approval for the new judicial philosophy); Thomas O. Sargentich, *The Scope of Judicial Review of Issues of Law: Chevron Revisited*, 6 ADMIN. L.J. 277 (1992) (never mentioning *Skidmore*); E. Donald Elliott & Peter H. Schuck, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1024 (describing *Chevron* as sweeping aside all other tests for determining deference to agency constructions).

4. See, e.g., Clark Bye, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 266 (1988); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. 187, 208–09 (1992); see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) (questioning the thesis that *Chevron* has supplanted earlier deference regimes).

5. 533 U.S. 218 (2001).

should be thought about together—if not “day and night,”<sup>6</sup> then at least on a regular basis.

This Article examines developments since *Chevron* in the Court’s application of agency deference to its workplace law decisions.<sup>7</sup> The Article relies on a dataset of 730 decisions compiled for the 1969 through 2012 Terms, including 300 cases that predate *Chevron*. Its empirical analysis focuses primarily on the Court’s review of decisions by the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), and the Department of Labor (DOL). These three agencies have long been responsible for implementing statutes that occupy the major portion of the Court’s workplace law docket. Moreover, each agency operated under some form of judicial deference regime well before 1984.

The results of this empirical review are surprising in several respects. During the early *Chevron* era, conventional wisdom was that the decision would or should result in agency deference becoming a more influential factor in the judicial interpretation of statutory meaning.<sup>8</sup> Based on thirty years of Supreme Court decisions in the workplace law area, however, this has not happened. The Court’s reliance on agency deference in comparison to other interpretive resources is no greater since 1984 than it was before *Chevron*.<sup>9</sup>

With respect to the major agencies implementing workplace statutes, the Court’s pre-*Chevron* approach to the NLRB arguably anticipated the broad deference accorded to interpretive judgments under *Chevron*.<sup>10</sup> Conversely, the Court’s treatment of the EEOC prior to *Chevron* featured the more searching review conventionally associated with *Skidmore*.<sup>11</sup> This distinction has persisted since 1984.<sup>12</sup> Despite these primary associations—

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6. See THE TURTLES, HAPPY TOGETHER (White Whale 1967) (“Imagine me and you, I do: I think about you day and night. It’s only right to think about the girl you love and hold her tight, so happy together.”).

7. For an overview of the symposium, see Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475 (2014). A number of other contributions to this symposium focus extensively on the interaction between *Chevron*, *Mead*, and *Skidmore* more generally. See Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 741–43 (2014); Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 528–30 (2014); Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753, 756–58 (2014); Peter L. Strauss, *In Search of Skidmore*, 83 FORDHAM L. REV. 789, 792–93 (2014).

8. See generally *supra* note 3 and accompanying text.

9. See *infra* Part I.A.

10. See, e.g., *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500–01 (1978); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 261–62 (1975); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 235–36 (1963); see also *infra* Part I.B (discussing deference to three main workplace law agencies).

11. See, e.g., *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 69–71 (1982); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140–45 (1976); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93–95 (1973). The Court’s treatment of DOL interpretations prior to *Chevron* was more mixed: some agency judgments received broad deference while others warranted more searching review. See *infra* Part I.B.

12. See *infra* Part I.B.

the EEOC with *Skidmore* and the NLRB with *Chevron*—the Court’s *pro-agency* outcomes since 1984 have increased modestly for the EEOC (52 percent versus 43 percent before *Chevron*) and decreased sharply for the NLRB (52 percent versus 74 percent before *Chevron*).<sup>13</sup> These findings are in tension with the hypothesis that *Chevron* is linked to a heightened respect for agency interpretive judgments.

A final dimension of the *Chevron-Skidmore* relationship explored here involves the extent to which agency deference minimizes the role of ideological preferences in judicial review. The conventional wisdom was that *Chevron*’s call for heightened deference could lead both liberal and conservative wings of the Court to act in a more politically neutral fashion than had been perceived under *Skidmore*. The Court’s workplace law cases are an appropriate subset from which to examine this issue, given the fundamentally pro-employee nature of federal labor and employment statutes.<sup>14</sup> It turns out that in contrast to the fifteen years prior to *Chevron*, agency win rates in the *Chevron* era are higher when the agency position favors employers than when the agency supports employees.<sup>15</sup> While this result doubtless reflects in part the increasingly conservative composition of the Court since 1986, it raises questions about the predictions that *Chevron* would usher in an era of more ideologically neutral judicial deference.

Two post-*Chevron* decisions reviewing agency interpretations of the term “supervisor” illustrate the extent to which discussion of formal deference regimes may obscure more than enlighten. In *NLRB v. Health Care & Retirement Corp. of America*,<sup>16</sup> the Board over twenty-five years had narrowly construed the National Labor Relations Act<sup>17</sup> (NLRA) exemption for “supervisors” in the health care setting so as to exclude from the scope of employee protection only nurses whose direction of other employees involved hiring, discipline, and similar personnel responsibilities, not the direction of those employees in the exercise of professional patient-care judgments.<sup>18</sup> The Court by a five-to-four vote rejected the agency’s construction and in doing so expanded considerably the Act’s exemption for supervisors.<sup>19</sup> In *Vance v. Ball State University*,<sup>20</sup> the EEOC over fourteen years had construed “supervisor” broadly in its Guidance covering harassment by supervisors as “agents” of the employer, to include

13. For more detailed discussion, see *infra* Part I.B.

14. Congress’s broad legislative goals in this field have been to promote employee rights and protections. In addition, the basic dichotomy between employer and employee/union positions makes it relatively straightforward to identify and code Supreme Court results. Thus, it is easier to assess whether agency deference is associated with liberal (or conservative) outcomes in workplace law than for other subject areas that feature multiple disparate constituencies, such as securities law or communications law. See James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 257–58 (2005).

15. See *infra* Part I.C.

16. 511 U.S. 571 (1994).

17. 29 U.S.C. §§ 151–169 (2012).

18. *Health Care*, 511 U.S. at 574.

19. *Id.* at 584.

20. 133 S. Ct. 2434 (2013).

employees who help direct the daily work activities of other employees even if they have no authority to make personnel decisions.<sup>21</sup> The Court, again by a five-to-four vote, rejected the agency construction and in doing so excluded from the scope of employer liability the same group of employees that the Justices had deemed to be supervisors under the NLRA.

The majority in *Health Care* never refers to *Chevron* at all, while the dissent relies heavily on agency deference and invokes *Chevron*-type analysis throughout. The majority in *Vance* dismisses *Skidmore* deference in a footnote, while the dissent emphasizes the persuasiveness of a *Skidmore* approach. The Court's opaque treatment of its two principal deference-defining decisions is not unusual in the field of workplace law.<sup>22</sup> And although a pair of individual cases cannot be deemed adequately representative of the entire dataset, the Court's unwillingness to defer to an agency construction of inconclusive statutory text is also far from unusual where, as in these two decisions, the agency construction favors employees.<sup>23</sup>

Part I of this Article examines the Court's workplace law decisions from an empirical standpoint, focusing on its review of interpretive judgments by the NLRB, the EEOC, and the DOL. Certain key findings reflect the minimal or counter-suggestive impact of *Chevron*. Part II analyzes two decisions, *Health Care* and *Vance*, from a doctrinal standpoint. This part criticizes the Court's refusal to defer under either a *Chevron* or *Skidmore* framework given the agencies' well-settled treatment of the "supervisor" concept, a concept that is central both to the NLRA definition of a covered "employee" and to employer responsibility and liability under antidiscrimination law. Part III offers several possible explanations for outcomes such as *Health Care*, *Vance*, and the broader results presented in Part I. One explanation is *ideological*: any distinction between *Chevron* and *Skidmore* deference may be vitiated by the reality that the Justices' policy preferences trump administrative law principles. A second explanation is *methodological*: the impact of *Chevron* may be overstated because the Court has become so textually fixated that it focuses heavily on a searching Step One review, and *Skidmore* factors are often part of that review process. A final explanation is *institutional*: the Court's varied practical experience with deference for the NLRB and the EEOC may reflect the distinct nature of ongoing relations between those agencies and Congress.

#### I. EMPIRICAL FINDINGS: NO NEW ERA OF DEFERENCE UNDER *CHEVRON*

The dataset of Supreme Court decisions consists of more than 730 workplace law cases decided over forty-four Terms: all seventeen Terms of

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21. *Id.* at 2449–50.

22. *See infra* note 27 and accompanying text (indicating that only one-third of opinions relying on agency deference invoke *Chevron* or *Skidmore*).

23. *See infra* Part I.C (indicating that Court win rate for workplace agencies is higher when agency interpretation is pro-employer than pro-employee).

the Burger Court, all nineteen Terms of the Rehnquist Court, and the first eight Terms of the Roberts Court. The Court decided *Chevron* one-third of the way through this period but because the Court docket was heaviest during the Burger years, two-fifths of the total number of cases were decided before *Chevron*. Cases are included in the dataset insofar as the dispute before the Court affects employees or employers in their status as employment-related actors.<sup>24</sup> The decisions almost always feature employees and/or unions in connection with employers, but they occasionally involve the tax consequences or immigration effects of an employment-based event.

In their comprehensive study of the Court's post-*Chevron* approaches to deference, William Eskridge and Lauren Baer concluded that the Court's deference regimes since 1984 have been more of a continuum than a dichotomy.<sup>25</sup> They also found that, despite the attendant volume of judicial and scholarly dialogue, *Chevron* or *Skidmore* were applied in only 15 percent of more than 1000 decisions in which an agency interpretation was at issue.<sup>26</sup> Although this proportion is higher in my dataset, two-thirds of the workplace law decisions in which the majority or the dissent relied on agency deference do not refer either to *Chevron* or *Skidmore*.<sup>27</sup> That said, other workplace law decisions often characterize deference standards in terms that are comparable to the expansive approach adopted in *Chevron* or the narrower standard set forth in *Skidmore*.

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24. The criteria used to construct and maintain this workplace law dataset are fully described in James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 15–29 (2005) and more briefly in James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1248–49 (2009).

25. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098 (2008).

26. *Id.* at 1089–90, 1098–99.

27. Of seventy-two decisions since 1984 in which the Court invoked agency deference to help justify the result, 28 percent (twenty of seventy-two) identify *Chevron*, *Skidmore*, or both. Of the thirty-seven principal dissenting opinions that expressly rely on agency deference, 43 percent (sixteen of thirty-seven) refer to one or both of these leading decisions. It is worth noting that Eskridge and Baer adopted a broader standard to construct a universe of agency deference cases than is used for this dataset. An agency interpretation is “at issue” in my workplace law dataset if the Court’s majority opinion or principal dissent discussed a publicly available agency interpretation as part of its *ratio decidendi*. That universe includes the two reliance categories identified above plus any additional cases where the majority considers and declines to rely on deference to agency judgments. Eskridge and Baer’s dataset encompasses those cases of explicit reliance or rejection by the Justices, but also includes: (a) all cases in which the United States filed a brief interpreting the statute, and (b) all cases in which a brief in the case revealed a publicly available agency interpretation on point. *See* Eskridge & Baer, *supra* note 25, at 1090 n.33; *see also id.* at 1112 n.108 (explaining that in 314 of their 1014 cases, the agency interpretation of the statute was presented only in the Solicitor General’s amicus brief).

A. *Agency Deference in Relation to Other Interpretive Resources:  
Surprisingly Stable*

The field of workplace law is heavily populated by aging statutes. Most major laws are forty years old (Employee Security Income Retirement Act), fifty years old (Title VII), sixty-five years old (Labor Management Relations Act), even seventy-five or eighty years old (Fair Labor Standards Act, National Labor Relations Act). Although some of these laws have been amended since the late 1970s, there have been relatively few modifications in the past two decades.<sup>28</sup>

One might reasonably infer that when a workplace statute has been in place for several decades, the Supreme Court will have addressed most first-order controversies about the meaning of key statutory provisions that protect, permit, or prohibit specific employee or employer conduct.<sup>29</sup> Accordingly, for second and third generation controversies, the Court might look less often to original legislative intent or purpose—arguably reflected in what the enacting Congress communicated through legislative history—and more often to intervening levels of authority, especially the Court’s own precedent and also agency interpretations developed during the implementation process.

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28. Congress’s rate of enacting statutes has declined in general since the arrival of Republican control in the House starting in 1995. See *Historical Statistics About Legislation in the U.S. Congress*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/statistics> (last visited Oct. 19, 2014) (showing a sharp decline from an average of 667 enacted statutes in the period 1975 through 1994 (94th through 103d Congress), to an average of 397 enacted statutes from 1995 through 2014 (104th through 113th Congress)). The pace for workplace statutes is slower than for many other fields, such as securities law, telecommunications law, or consumer protection law. For example, in the last twenty years, Congress has enacted two workplace statutes (2008 American with Disabilities Act (ADA) Amendments and 2009 Lily Ledbetter Act), compared with its enactment of eleven securities law statutes, twelve telecommunications statutes, and six consumer protection statutes. See CONGRESS.GOV, <https://beta.congress.gov/advanced-search> (full advanced search strategy on file with Fordham Law Review).

29. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (each addressing meaning of “discrimination” under Title VII); *NLRB v. Katz*, 369 U.S. 736 (1962) and *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) (each addressing meaning of “bargain in good faith” under NLRA); *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (each addressing meaning of “employees” and “employment” under FLSA).

<b>Table 1: Reliance on Interpretive Resources 1969–2013</b>			
<b>Resource</b>	<b>Percentage of 350 Burger Court Cases</b>	<b>Percentage of 299 Rehnquist Court Cases</b>	<b>Percentage of 82 Roberts Court Cases</b>
Textual Meaning	49.1	62.5	65.9
Dictionary	1.4	6.0	14.6
Language Canons	12.0	24.4	28.0
Legislative History	46.6	28.1	20.7
Legislative Purpose	86.9	72.9	54.9
Legislative Inaction	5.7	6.0	4.9
Sup. Court Precedent	80.3	86.0	96.3
Common Law Precedent	9.4	15.4	20.7
Substantive Canons	8.3	15.4	19.5
<b>Agency Deference</b>	<b>17.1</b>	<b>17.4</b>	<b>15.9</b>

The data reported in Table 1 are consistent with this hypothesis in certain respects. They disclose a marked decline in Supreme Court reliance on both legislative history and legislative purpose, as well as a notable increase in reliance on Supreme Court precedent. There is, however, no change in the level of reliance on agency deference from the Burger Court through the Rehnquist Court and the first eight Terms of the Roberts Court. Instead, there has been a continuous and substantial increase in the Court's reliance on more judicially grounded assets: canons, dictionaries, and common law precedent as well as previously noted Supreme Court precedent.

The stability of the Court's approach to agency deference in relation to other interpretive resources is surprising given early predictions accompanying the *Chevron* standard<sup>30</sup> and also the maturity of workplace statutes. One might have anticipated that because Congress revisits most of these laws only infrequently, and the NLRB, EEOC, and DOL have become primary sources of politically accountable authority for statutory implementation, the Court would be more willing to defer to agency interpretations of aging statutory texts. On the other hand, perhaps the Court's apparent lack of interest in deferring more often to agency rules or guidance is related to its strikingly increased reliance on textual assets like the dictionary and language canons. Those interpretive resources suggest that the Court is more inclined toward *de novo* style review of agency

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30. See generally Scalia, *supra* note 3; Sargentich, *supra* note 3.



interpretations—whether framed as stage one *Chevron* analysis<sup>31</sup> or simply as a close reading of the contested text.

*B. Deference to Key Workplace Law Agencies: Unexpected Changes*

Three federal agencies are responsible for implementing the major federal workplace statutes. The NLRB administers and litigates issues related to a single labor relations statute. The EEOC is responsible for providing guidance and litigation assistance on three major civil rights statutes.<sup>32</sup> The DOL oversees implementation of a wide range of labor standards statutes.<sup>33</sup> From 1984 to 2013, two-thirds of the Court's workplace law decisions implicating agency deference involved these three agencies.<sup>34</sup>

As noted earlier, the Supreme Court prior to *Chevron* had articulated a generous approach to deference for NLRB adjudications.<sup>35</sup> With respect to questions of fact, the Court in 1951 construed the NLRA's "substantial evidence on the record considered as a whole"<sup>36</sup> standard to include a recognition that the Board is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge [labor-management relations], whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."<sup>37</sup>

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31. See Scalia, *supra* note 3, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for [Step Two] *Chevron* deference exists.")

32. Title VII of 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (2012); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

33. These statutes include the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2012); Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461 (2012); Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651–678 (2012); Mine Safety and Health Act (MSHA), 30 U.S.C. §§ 801–965 (2012); Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §§ 901–950 (2012); Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101–2109 (2012); and Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601–2654 (2012).

34. Of the 119 decisions in which the majority expressly relied on or rejected agency deference during this period, DOL was the relevant agency in thirty cases, EEOC in twenty-seven, and NLRB in twenty-one. The remaining decisions involved thirteen different agencies, only one of which (IRS) was involved in as many as four decisions.

35. See *supra* note 10 and accompanying text.

36. 29 U.S.C. § 160(f). Congress added the "substantial evidence" standard in 1947 to modify the original Wagner Act standard that Board findings "if supported by evidence, shall be conclusive." The change parallels Congress's enactment of the "substantial evidence" standard as part of the 1946 Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (2012).

37. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Given the passage of time and the range of factual settings presented by individual cases, the courts of appeals have not applied this standard in a uniform way. Still, the *Universal Camera* standard has supported an ongoing appellate court commitment to substantial deference on Board factual findings, including but not limited to findings that turn on credibility determinations. See, e.g., *NLRB v. Horizons Hotel Corp.*, 49 F.3d 795, 799 (1st Cir. 1995); *J. Huizinga Cartage*

With respect to questions of law, the Court in 1978 made clear that the Board is entitled to special deference when interpreting provisions of the NLRA. In *Beth Israel Hospital v. NLRB*,<sup>38</sup> the Court emphasized the limited nature of judicial review on such questions:

It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. [Therefore the Board] necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions. . . . The function of striking th[e] balance [between conflicting legitimate interests] to effectuate national labor policy is [a] . . . responsibility, which the Congress committed primarily to the [NLRB] . . . . The judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality.<sup>39</sup>

This approach to agency deference on matters of statutory interpretation is consonant with, and arguably anticipates, the second stage of *Chevron* review announced six Terms later.

The Court's pre-*Chevron* stance on deference to EEOC interpretations of Title VII<sup>40</sup> was more constrained than its position toward the NLRB. As explained by the Court, Congress in Title VII did not confer upon the EEOC authority to promulgate substantive rules.<sup>41</sup> Accordingly, agency guidelines construing statutory meaning or legislative intent were not entitled to the same weight as rules that Congress had declared to carry the force of law. Instead, EEOC interpretations were best characterized as informal agency views, entitled to *Skidmore*-level deference.<sup>42</sup>

The Court's pre-*Chevron* approach to DOL interpretations was something of a hybrid. Most statutes give the DOL considerable interpretive scope through grants of authority to issue regulations,<sup>43</sup> and the

Co. v. NLRB, 941 F.2d 616, 619, 620–21 (7th Cir. 1991); Pergament United Sales, Inc. v. NLRB, 920 F.2d 130, 138 (2d Cir. 1990).

38. 437 U.S. 483 (1978).

39. *Id.* at 500–01 (citing to *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 235–36 (1963) and *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)). The Court's reference to Board "rules" encompasses standards adopted through adjudication. As of 1978, the Board had never engaged in notice-and-comment rulemaking, and the Court several years before *Beth Israel* held that the Board may announce new doctrinal standards through adjudication as well as rulemaking. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

40. Title VII of 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (2012).

41. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). The *Gilbert* Court noted that § 713(a) gives the EEOC "authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter," but it concluded that this section does not confer authority to interpret substantive statutory meaning. *Gilbert*, 429 U.S. at 141 n.20.

42. *Gilbert*, 429 U.S. at 141–43. *See EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977); *Trans World Airlines v. Hardison*, 432 U.S. 63, 76 n.11 (1977). *But cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971) (observing that "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference," citing earlier non-Title VII decisions).

43. *See, e.g.*, 29 U.S.C. § 655(b) (2012) (authorizing promulgation of occupational safety or health standards); *id.* §§ 1029, 1135 (authorizing promulgation of regulations related to employee retirement plans); *id.* § 438 (authorizing promulgation of regulations related to union reporting and disclosure requirements).

Court at times deferred to agency judgments undertaken pursuant to that congressional authority.<sup>44</sup> On the other hand, the DOL also interprets its authorizing laws by using less formal mechanisms such as guidelines, individual case determinations, or advisory opinions, and these interpretations on occasion received less deferential judicial review prior to 1984.<sup>45</sup>

The varying pre-*Chevron* approaches to deference for these three major workplace law agencies have essentially been carried forward under *Chevron*. Based on Step Zero analysis, agency legal positions qualify for *Chevron* deference if adopted pursuant to rule of law authority that has been delegated to the agency by Congress.<sup>46</sup> Although Congress has conferred that force of law authority for NLRB interpretations adopted through rulemaking, it has not done so in formal terms for agency interpretations promulgated through adjudication.<sup>47</sup> Yet the Court has expressly invoked *Chevron* when reviewing NLRB adjudications on a number of occasions,<sup>48</sup> and in general its level of deference to Board interpretations reflects a *Chevron* framework rather than a *Skidmore* approach.<sup>49</sup> The Court has frequently invoked *Chevron* when explaining the deference it is prepared to accord to an NLRB adjudication. The Court's deference discussion has featured *Chevron* when it has affirmed Board adjudications under a Step Two review<sup>50</sup> and also when it has rejected Board adjudicatory positions based on a more rigorous Step One-type analysis.<sup>51</sup> Moreover, when

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44. See, e.g., *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11–13 (1980) (deferring to Secretary's interpretation under Occupational Safety and Health Act); *Local 3489, United Steelworkers of Am. v. Usery*, 429 U.S. 305, 313 (1977) (deferring to Secretary's interpretation under Labor Management Reporting and Disclosure Act).

45. See *Potomac Elec. Power Co. v. Dir., Office of Workers' Comp. Programs*, 449 U.S. 268, 273–80 (1980) (relying on text and legislative history, and refusing to defer to series of caselaw determinations by Benefits Review Board).

46. *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001). See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872 (2001).

47. See Merrill & Hickman, *supra* note 46, at 892.

48. See, e.g., *NLRB v. Ky. River Cmty. Care Inc.*, 532 U.S. 706, 713–14 (2001); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398–99, 408–09 (1996); *ABF Freight Sys. v. NLRB*, 510 U.S. 317, 324 (1994).

49. See *NLRB v. United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 123–24 (1987) (reviewing validity of promulgated regulation under *Chevron* Step Two, and equating this test to traditional deference accorded to Board regarding agency interpretations that are "rational and consistent with the [Act]"); Jonathan D. Hacker, Note, *Are Trojan Horse Union Organizers "Employees"?: A New Look at Deference to the NLRB's Interpretation of NLRA Section 2(3)*, 93 MICH. L. REV. 772, 775–76, 788–89 (1995) (equating *Chevron* deference with traditional Board deference—broader than *Skidmore*).

50. See *Ky. River Cmty. Care Inc.*, 532 U.S. at 713; *Holly Farms Corp.*, 517 U.S. at 398–99, 408–409; *ABF Freight Sys.*, 510 U.S. at 324.

51. See *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 148–49 (2002) (declining to defer because of conflict between Board legal position and policies of another federal law that Board lacks authority to enforce or administer); *id.* at 161 (Breyer, J., dissenting) (arguing that Board's interpretation is reasonable hence warrants deference under *Chevron* Step Two); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (rejecting agency position as based on "erroneous legal foundations" with respect to scope and meaning of § 7 (citation omitted)); *id.* at 545 (White, J., dissenting) (arguing that Board's interpretations warrant deference under *Chevron* Step Two).

relying on *Chevron* to support a Board regulation, the Court has made clear that the *Chevron* Step Two standard—whether the interpretation is based on a permissible construction of the text—is equivalent to the Court’s pre-*Chevron* deference when reviewing Board adjudicatory interpretations of the Act.<sup>52</sup>

Congress has given the EEOC rule of law authority for the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) but not for Title VII, which has been the primary implementation focus for the Court when reviewing agency interpretations.<sup>53</sup> As a result, the Court has at times applied *Chevron* when reviewing EEOC interpretive judgments outside of Title VII.<sup>54</sup> More often, however, the Justices have invoked a *Skidmore* framework when reviewing EEOC determinations.<sup>55</sup> Indeed, since 1984, the Court has never relied on *Chevron* when reviewing EEOC interpretations of Title VII text. The majority has opined on a number of occasions that agency interpretations of Title VII are entitled only to *Skidmore* deference,<sup>56</sup> and its refusal to invoke *Chevron* occasionally has been criticized in a separate opinion.<sup>57</sup> While the

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52. See *United Food & Commercial Workers Union Local 23*, 484 U.S. at 123–24 (citing to *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495, 497 (1979); and *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978)). Overall, the Court has expressly relied on *Chevron* in majority or dissent in seven of twenty-one post-*Chevron* decisions reviewing NLRB: five majority and two dissent. The Justices have not invoked *Skidmore* at all when reviewing NLRB decisions.

53. Compare 29 U.S.C. § 628 (2012) (conferring rulemaking authority under Age Discrimination in Employment Act), and 42 U.S.C. § 12116 (2012) (conferring rulemaking authority under Americans with Disabilities Act), with 42 U.S.C. § 2000e-4(g) (reciting EEOC powers under Title VII which do not include rule of law authority). Supreme Court decisions involving the EEOC primarily address Title VII as opposed to the ADEA or ADA: this is true for 93 percent of decisions prior to 1984 and 48 percent since 1984.

54. See, e.g., *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2003) (applying *Chevron* framework to agency interpretation of ADEA); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 84 (2002) (applying *Chevron* framework to agency interpretation of ADA).

55. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256–57 (1991) (applying *Skidmore* framework to agency interpretation of Title VII); *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013) (same); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (same); *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 150 (2008) (applying *Skidmore* framework to agency interpretation of ADEA). Overall, the Court has expressly relied on *Skidmore* in majority or dissent in nine of twenty-seven post-*Chevron* decisions reviewing the EEOC: four majority and five dissent. The Court has relied on *Chevron* when reviewing three EEOC decisions—two construing the ADEA and one under the ADA.

56. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); *Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 517–18 (1986); *Arabian Am. Oil*, 499 U.S. at 256–57; *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.11 (2007) (declining to extend *Chevron* deference); see also *Kasten v. Saint-Gobin Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (according *Skidmore* deference to EEOC guidelines under Equal Pay Act); *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S. 440, 448–49 (2003) (according *Skidmore* deference to EEOC guidelines under the ADA).

57. See *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 125 (1988) (O’Connor, J., concurring in part and concurring in the judgment); *Arabian Am. Oil*, 499 U.S. at 259–60 (Scalia, J., concurring in part and concurring in the judgment); see also *Gen. Dynamics v. Cline*, 540 U.S. 581, 605–06 (2004) (Thomas, J., dissenting) (concluding there is no need to

Court has invoked *Chevron* when considering the scope of deference to EEOC interpretations of the ADEA and ADA, it has not been entirely consistent on this score.<sup>58</sup> In any event, the Agency's Title VII interpretations have been the primary focus of EEOC decisions reviewed by the Court since *Chevron*.<sup>59</sup>

The Court's post-*Chevron* approach to the DOL continues to reflect a hybrid approach. The Justices often apply the *Chevron* test, especially for statutes where the agency's interpretation is conveyed through some form of regulation.<sup>60</sup> But there are also a certain number of *Skidmore*-type analyses, usually when the DOL interpretation is not as formal, such as an advisory opinion, a party or amicus brief, or an interpretive bulletin, rather than a regulation.<sup>61</sup>

Against this backdrop, one might expect that the Court's willingness to defer to the NLRB and DOL would increase given its professed commitment to applying a *Chevron*-type analysis. By contrast the Court's record on deference to the EEOC might be expected to remain basically unchanged in light of its continuation of a *Skidmore*-type approach.

Yet as Table 2 indicates, the results differ markedly from those expectations. When invoking agency deference as a probative resource, the Court is *less likely* to support agency interpretations since *Chevron* than it was in the prior fifteen years—even though the earlier period is thought to be characterized by more rigorous judicial review of agency interpretive

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decide if *Chevron* applies to ADEA regulation because the EEOC is correct under Step One and surely reasonable under Step Two).

58. Compare, e.g., *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 84 (2002) (applying *Chevron* deference to an EEOC regulation interpreting ADA text), and *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 170–71 (1989) (applying *Chevron* Step One to reject deference under ADEA), and *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring in part and concurring in the judgment) (applying *Chevron* deference to an EEOC regulation interpreting ADEA although majority does not rely on or mention *Chevron*), with *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (according *Skidmore* deference to consistent EEOC interpretations of ADEA provision), and *Clackemas*, 538 U.S. at 448–51 (according *Skidmore* deference to EEOC interpretation of ADA provision). Some of the tensions involving the ADEA and the ADA may be explained by reference to the Step Zero rule of law distinction under *Mead*, but not all of them. See, e.g., *Smith*, 544 U.S. 228.

59. Of twenty-seven post-*Chevron* decisions in which the Court reviewed an EEOC interpretation and expressly invoked agency deference, thirteen involved Title VII, seven involved the ADA, and seven involved the ADEA. Of fourteen pre-*Chevron* decisions in which the Court examined agency deference to EEOC interpretations, all but one involved Title VII.

60. See, e.g., *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 173–74 (2007) (FLSA); *Pauley v. BethEnergy Mines Inc.*, 501 U.S. 680, 696–700 (1991) (Black Lung Act); *Massachusetts v. Morash*, 490 U.S. 107, 116–17 (1989) (ERISA); see also *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113–17 (1988) (Black Lung Act; agency interpretation rejected at *Chevron* Step One).

61. See, e.g., *Kasten*, 131 S. Ct. at 1335–36 (2011) (amicus brief interpreting FLSA text); *Yates v. Hendon*, 541 U.S. 1, 17–18 (2004) (advisory opinion construing ERISA provision); *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (party brief interpreting LHWCA); see also *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (denying *Skidmore* deference to agency opinion letter construing FLSA); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 106–09 (1993) (denying *Skidmore* and *Chevron* deference to agency interpretive bulletin interpreting ERISA).

positions. The Court’s record of relying on deference to the EEOC increased slightly in the post-*Chevron* period. This difference is modest, however, and is consistent with the Court reviewing a higher proportion of EEOC interpretations involving the ADEA and ADA, statutes in which Congress conferred rule of law interpretive authority on the agency.<sup>62</sup>

**Table 2: Deference to Three Primary Workplace Law Agencies**

	Pre- <i>Chevron</i>		Post- <i>Chevron</i>	
	Agency Support	Agency Rejection	Agency Support	Agency Rejection
<b>EEOC</b>	<b>43%</b> (6/14)	<b>57%</b> (8/14)	<b>52%</b> (14/27)	<b>48%</b> (13/27)
<b>NLRB</b>	<b>74%</b> (29/39)	<b>26%</b> (10/39)	<b>52%</b> (11/21)	<b>48%</b> (10/21)
<b>DOL</b>	<b>83%</b> (5/6)	<b>17%</b> (1/6)	<b>67%</b> (20/30)	<b>33%</b> (10/30)
<b>Overall</b>	<b>68%</b> (40/59)	<b>32%</b> (19/59)	<b>58%</b> (45/78)	<b>42%</b> (33/78)

Of greater interest is the Court’s declining record of support for interpretations rendered by the NLRB and DOL—the two agencies associated with *Chevron*-level deference. The Court has been clear that NLRB adjudications and rules receive *Chevron*-style review, and yet the Court has been notably more willing to reject deference to the Board’s interpretive judgments since *Chevron*. With respect to the DOL, the pre-*Chevron* numbers are small but the Court since *Chevron* has often declined to follow DOL interpretations. In doing so, the Court has invoked *Chevron* Step One analysis on some occasions and *Skidmore* lack of persuasive power on others.<sup>63</sup> Still, the Court’s rejection of agency interpretations by the DOL and NLRB has most often cited to neither *Chevron* nor *Skidmore* but rather to the basic inadequacy of the agency’s legal position.<sup>64</sup>

62. See *supra* note 53 (providing data on Court’s review of decisions involving EEOC); *supra* note 58 (citing opinions applying *Chevron* deference under ADA and ADEA). Still, there are not many such cases, and occasionally the EEOC is rejected under *Chevron*. See *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989) (rejecting agency interpretation of ADEA at Step One).

63. For *Chevron* Step One rejections, see, for example, *Pittston Coal Group*, 488 U.S. at 113–17; *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 86–96 (2002). For *Skidmore* rejections, see, for example, *Christensen*, 529 U.S. at 587; *John Hancock*, 510 U.S. at 106–09.

64. For NLRB interpretations not deferred to, see, for example, *New Process Steel L.P. v. NLRB*, 130 S. Ct. 2635 (2010); *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994); *Comm’n Workers of Am. v. Beck*, 487 U.S. 735 (1988). For DOL interpretations rejected, see, for example, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012); *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

A possible factor contributing to a post-*Chevron* decline in the Court's willingness to defer is an increase in dissonance between the political orientation of agencies and the Court since 1984. The Court's membership has grown steadily more conservative starting in 1969.<sup>65</sup> But while the presidency was occupied primarily by Republicans from 1969 to 1984, it has been more evenly divided between Democrats and Republicans since 1984.<sup>66</sup> One way to examine the possible influence of Supreme Court partisanship in the *Chevron* era is to consider agency win rates before the Court when an agency favors employees versus when it supports employers.

*C. Agency Deference and the Court's Ideological Preferences:  
Favoring Employers*

In the wake of *Chevron*, some scholars anticipated that the new form of deference based on respect for politically accountable agencies would likely diminish the result-oriented nature of judicial review applied to agency interpretations.<sup>67</sup> Recently, however, empirical work suggests that in the *Chevron* era, conservative Justices are more likely to validate conservative agency interpretations than liberal ones, and liberal Justices are similarly likely to agree with liberal agency interpretations more often than conservative ones.<sup>68</sup> In addition, Margaret Lemos in her study of Supreme Court and agency interpretations of Title VII reported that the EEOC is notably more liberal (i.e., pro-employee) than the Supreme Court when both institutions address the same Title VII issues: EEOC interpretations have been liberal more than 90 percent of the time while Court positions have been liberal in 64 percent of the cases.<sup>69</sup> My own previous work on the NLRB and the Court is broadly consistent with Lemos's findings. The

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65. From 1969 to 1984, all six new appointments to the Court were made by Republican presidents. Since 1984, five of the nine new appointments have been made by Republican presidents. Moreover, both Republican and Democrat appointees are viewed as more conservative than predecessors of the same partisan persuasion. See Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FIVETHIRTYEIGHT (Mar. 29, 2012, 8:06 PM), <http://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/>. See generally Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1300–04 (2005).

66. From 1969 to 1984, Republican Presidents occupied the White House for twelve of sixteen years. Since 1984, Republicans have been President for sixteen years (1985 to 1992 and 2001 to 2008) and Democrats for fourteen years (1993 to 2000 and 2009 to 2014). Assuming the Court's docket through June 2013 would likely include agency rulings only through June 2011, that is still a ratio of sixteen to eleven.

67. See generally Scalia, *supra* note 3; Starr, *supra* note 3; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

68. See Connor N. Raso & William N. Eskridge, Jr., *Chevron As A Canon, Not A Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1786–89 (2010); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 831–47 (2006); Eskridge & Baer, *supra* note 25, at 1155.

69. See Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 389–90 (2010).

Board's determinations that employers violated employee rights (a liberal agency determination) under the core statutory provision prohibiting employer coercion or discrimination have been sustained 57 percent of the time since 1970.<sup>70</sup> This agency success record is substantially lower than the 83 percent affirmance rate the NLRB enjoyed for violations under the same core provision from 1940 through 1969.<sup>71</sup>

Although the politicized valence accompanying Supreme Court review of agency rulings is not a huge surprise, an account based only on judicial ideology is likely to omit relevant institutional considerations. The divergence between the Supreme Court and the EEOC or NLRB on disputes concerning employer liability is doubtless due in part to the Court becoming increasingly conservative since 1970. At the same time, the divergence also may be attributable to a degree of mission conflict between the Court and these workplace agencies. The EEOC and NLRB tend to interpret their authorizing statutes, whether consciously or not, with a goal of "giv[ing] energy and effectiveness to the legislative programs for which they are responsible."<sup>72</sup> By contrast, the Supreme Court must interpret these same statutory provisions in the context of a larger legal landscape, including the need to accommodate new and possibly impinging statutory provisions or constitutional law developments.<sup>73</sup>

Of course, workplace agencies are not monolithic when construing provisions of their authorizing statute. Agency interpretations support employer legal positions a certain amount of the time even if they more often construe the statute as favoring employees. This pattern invites an examination of whether the Court's deference to the three key agencies is higher when agency interpretation favors employers as opposed to employees. Table 3 reports results.

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70. See James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1574 n.43 (1996) (reporting that Board determinations of employer liability under § 8(a) of the NLRA were upheld by the Supreme Court in twenty-one of thirty-six cases between 1970 and 1994). Since 1994, six additional Board determinations of § 8(a) employer liability have been reviewed by the Supreme Court: three affirmed and three reversed. Thus the Court has affirmed twenty-four of forty-two Board pro-employee determinations (57 percent) under the core NLRA provision since the start of the Burger era.

71. See *id.* at 1574 n.43 (reporting that Board determinations of employer liability under § 8(a) were affirmed by the Court in fifty of sixty cases between 1940 and 1969).

72. Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 891 (2007).

73. See generally James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 1023–30 (1996). For a more recent example of this accommodation process, see *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 146–52 (2002) (limiting NLRB remedies in light of subsequently enacted immigration laws). For additional discussion, see *infra* Part III.



Table 3: Supreme Court Win Rates for Pro-Employee Versus Pro-Employer Agency Determinations				
	Pre-Chevron Agency Ruling		Post-Chevron Agency Ruling	
	For Employee	For Employer	For Employee	For Employer
<b>EEOC</b>	<b>50%</b> (6/12)	<b>0%</b> (0/2)	<b>48%</b> (10/21)	<b>67%</b> (4/6)
<b>NLRB</b>	<b>71%</b> (20/28)	<b>82%</b> (9/11)	<b>56%</b> (10/18)	<b>67%</b> (2/3)
<b>DOL</b>	<b>80%</b> (4/5)	<b>100%</b> (1/1)	<b>57%</b> (8/14)	<b>75%</b> (12/16)
<b>Overall</b>	<b>67%</b> (30/45)	<b>71%</b> (10/14)	<b>53%</b> (28/53)	<b>72%</b> (18/25)

Although the number of observations is quite small in several agency categories, the overall direction is fairly clear. Considering the three agencies together over the fifteen Terms before *Chevron*, the Court is similarly inclined to affirm agency rulings favoring employees and rulings supporting employers. By contrast, the Court evidences a distinctly greater inclination toward deference for pro-employer agency rulings in the post-*Chevron* era. For the entire period of forty-four Terms, the Court is somewhat more likely to affirm pro-employer agency determinations than pro-employee ones.<sup>74</sup>

The Court's increasingly conservative ideological orientation starting in 1969 helps to explain its growing preference for pro-employer agency determinations. But it is worth noting the Court's essentially identical affirmance rate for pro-employer and pro-employee agency outcomes during the pre-*Chevron* era, a period when federal agencies were uniformly part of Republican administrations. Further, agency rulings that have reached the Court since *Chevron*—during a bipartisan presidential period—are more conservative (pro-employer) than in the pre-*Chevron* years,<sup>75</sup> and the agencies' pro-employer shift between the two periods is comparable to the Court's movement in the same direction.<sup>76</sup> These findings suggest that

74. Between 1969 and 2013 the Court affirmed fifty-eight of ninety-eight pro-employee agency rulings (59 percent) and twenty-eight of thirty-nine pro-employer agency rulings (72 percent).

75. The three primary workplace agencies together favored employers in fifteen of fifty-nine pre-*Chevron* cases (25 percent) and twenty-six of seventy-eight post-*Chevron* cases (33 percent).

76. The Court's pro-employer results in cases implicating agency deference rose from twenty-four of fifty-nine pre-*Chevron* cases (41 percent) to forty-three of seventy-eight post-*Chevron* cases (55 percent). This pro-employer direction is based on cases in which the Court exercised its discretionary jurisdiction to grant certiorari and issue decisions. The Court's trend does not necessarily indicate whether these three agencies have become more pro-employer in the overall volume of their rulings.

factors besides ideological orientation are contributing to the Court's pro-employer tilt during the *Chevron* era.

## II. THE COURT'S RELUCTANCE TO DEFER: TWO DOCTRINAL EXAMPLES

The empirical results presented in Part I indicate that in the workplace law area, *Chevron* has not led the Court to accord agency deference more weight; or to defer more often to agencies deserving of *Chevron* rather than *Skidmore* deference; or to defer to agencies on a more ideologically neutral basis. Assuming, therefore, that *Chevron* has not ushered in a new era of robust deference at the Supreme Court level, how should one approach the Court's deference decisions in doctrinal terms?

Given constraints of space, this part does not attempt a comprehensive response. Instead, it reviews two decisions in which the Court declined to defer—once to the NLRB and once to the EEOC. The two decisions are linked in that they each address agency interpretations of the word “supervisor” under their respective authorizing statutes. The NLRB interpretation of a statutory definition was developed in an effort to identify the scope of protected coverage for employees under the NLRA. The EEOC interpretation of a term derived from statutory text was formulated to establish the scope of liability for employers under Title VII. The Court had the opportunity to invoke *Chevron* deference under the NLRA and *Skidmore* deference under Title VII but declined to do so in each instance. While no pair of decisions can adequately illustrate the trends identified in Part I, these two cases reflect certain key aspects of the Court's direction, and they invite further inquiry on a larger scale.

### A. Invoking Plain Language to Reject Chevron-Type Deference

In *Health Care*, the Court had to decide how broadly to construe the NLRA's exemption for supervisors. The Board had determined that four licensed practical nurses at a nursing home, who were responsible for monitoring and directing the work of aides on evenings and weekends, were focused “on the well-being of the residents rather than of the employer.”<sup>77</sup> The agency went on to hold that these four nurses were covered employees, not excluded “supervisors,” based on its settled interpretation of that statutory term.<sup>78</sup>

The Act's definition of “supervisor” encompasses individuals who have authority, “*in the interest of the employer*,” to hire, discipline, discharge, or “*responsibly to direct*” other employees.<sup>79</sup> The Board had long construed this definition, and its key quoted components, to cover the interest of the employer in terms of personnel relations but not professional performance. Thus, nurses were deemed to be supervisors if, “*in addition to performing their professional duties and responsibilities, they also possessed the*

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77. See *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 574–75 (1994).

78. *Id.* at 574.

79. See 29 U.S.C. § 152(11) (2012) (emphasis added).

authority to make effective recommendations which affected the job status and pay of” health care employees working with them.<sup>80</sup> But nurses’ direction of other, less-skilled employees regarding the work to be done for patients was “solely a product of their highly developed professional skills and do[es] not, without more, constitute an exercise of supervisory authority in the interest of their Employer.”<sup>81</sup>

The Board’s approach relied heavily on the fact that the 1947 Congress, while adding an exclusion from coverage for supervisors, had simultaneously added protection for a class of employees called “professionals.”<sup>82</sup> Professional employees routinely give direction to other less-skilled workers whose performance is required if the professional is to carry out her assignments.<sup>83</sup> Were professionals to be acting “in the interest of the employer” simply because they have authority to tell other employees what tasks to perform, this respondeat superior-type approach would effectively eliminate the vast majority of professionals from the Act’s coverage.

Apart from relying on the text and structure of the 1947 amendments, the Board invoked more recent 1974 legislative history accompanying an extension of the NLRA to cover additional health care establishments. The 1974 House and Senate committee reports emphasized the narrow meaning of “supervisor” in relation to health care professionals. The reports specifically observed that the committees had declined requests to amend the definition of “supervisor” to exclude various health care professionals because of the Board’s established adjudicatory position. Both reports emphasized that

the Board has carefully avoided applying the definition of “supervisor” to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional’s treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.<sup>84</sup>

The reports concluded that the Board should continue to follow this interpretive approach.<sup>85</sup> The Supreme Court in an earlier case, *NLRB v. Yeshiva University*,<sup>86</sup> had relied on this same 1974 legislative history,

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80. *Doctors’ Hosp. of Modesto, Inc.*, 183 N.L.R.B. 950, 951–52 (1970), *enforced*, 489 F.2d 772 (9th Cir. 1973).

81. *Id.* at 951.

82. See 29 U.S.C. § 152(12) (defining “professional employee”).

83. See *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).

84. S. REP. NO. 93-766, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3946, 3951; H.R. REP. NO. 93-1051, at 7 (1974).

85. S. REP. NO. 93-766, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3946, 3951; H.R. REP. NO. 93-1051, at 7 (1974). The phrase “responsibly to direct,” was added as an amendment to the definition of “supervisor” on the Senate floor during the 1947 debates. The floor exchange also makes clear that its author intended the phrase to cover responsible direction reflecting managerial authority, as distinct from minor supervision stemming from an employee’s greater skill or experience. See 93 CONG. REC. 4677–78 (1947) (statement of Sen. Flanders).

86. 444 U.S. 672 (1980).

invoking Congress's "express approv[al]" of the Board test that distinguished between supervisors and health care professionals.<sup>87</sup>

To be sure, plausible arguments are available to counter the Board's interpretation. The phrase "in the interest of the employer" can be construed to apply to an employee's responsible direction of others beyond the exercise of hiring, firing, or disciplinary authority. And the Court's *Yeshiva* decision, which dealt with the status of tenured faculty under the NLRA, also includes discussion that minimizes the professional-supervisor tension by equating the professional interests of university faculty with the university's governance interests as an employer.<sup>88</sup>

The existence of reasonable arguments on each side should in principle lead to a *Chevron* Step Two analysis. Whatever the merits of the competing analyses summarized above, it is a considerable stretch to contend that the terms "responsibly to direct" and "in the interest of the employer" as applied to health care professionals reflect "the unambiguously expressed intent of Congress," or reveal that "Congress has directly spoken to the precise question at issue."<sup>89</sup> It is far more reasonable to conclude that "the statute is silent or ambiguous with respect to th[is] specific issue," in which case the agency's construction should be deferred to if rational and "based on a permissible construction of the statute."<sup>90</sup>

The Court, however, held that the Board's well-settled interpretation of the definition of "supervisor" was at odds with the plain language of the Act.<sup>91</sup> Writing for a five-to-four majority, Justice Kennedy never mentioned *Chevron*, but his Step One-type analysis concluded that the ordinary meaning of the phrase "in the interest of the employer" encompassed all acts by an employee "within the scope of employment or on the authorized business of the employer."<sup>92</sup> Justice Kennedy acknowledged that this reading, broadly excluding supervisors, created tension with the Act's *inclusion* of professionals as employees, but he dismissed the Board's effort to resolve that tension as a distortion of the plain statutory language.<sup>93</sup>

Justice Ginsburg, in dissent, adopted a Step Two-type approach, also without adverting to *Chevron* deference. She observed that Congress had effectively delegated to the Board in the first instance the task of separating excluded "supervisors" from included "professionals."<sup>94</sup> She further noted that the Board's approach to this interpretive issue focused on the purposes of the NLRA exception for supervisors, as explained in detail in the 1947

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87. *Id.* at 690 n.30.

88. *Id.* at 688.

89. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

90. *Id.* at 843.

91. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 578–79 (1994).

92. *Id.* at 578.

93. *Id.* at 581. The majority also discounted any reliance on the legislative history, characterizing the committee report language invoked by the Board as isolated and without authority. *Id.* at 581–82.

94. *See id.* at 585 (Ginsburg, J., dissenting).

legislative history.<sup>95</sup> Finally, she explained how the Board's approach harmonizing Congress's twin policies—including professionals while excluding supervisors—was manifested in a series of decisions covering a wide array of white-collar employees besides health care professionals.<sup>96</sup> Taking these factors into account, Justice Ginsburg concluded that it was difficult to regard the agency's interpretation applied to diverse professional groups over many years as anything less than rational and consistent with the Act.<sup>97</sup> As predicted by the dissent, one result of the Court's decision has been the exclusion of large numbers of professionals from the Act's protections.<sup>98</sup>

### B. *Invoking Plain Language to Reject Skidmore-Type Deference*

In *Vance*, the Court addressed the issue of vicarious employer liability for workplace harassment by a supervisor.<sup>99</sup> The question of who qualifies as a "supervisor" for purposes of the vicarious liability rule involved an interpretation of Supreme Court precedent as well as statutory text. Title VII does not define or use the term "supervisor"; it also does not expressly refer to liability for hostile environment sexual harassment. But the EEOC in its 1980 Guidelines had determined that harassment leading to non-economic injury may qualify as unlawful discrimination under Title VII.<sup>100</sup>

In 1986, the Supreme Court endorsed this determination in *Meritor Savings Bank v. Vinson*.<sup>101</sup> The *Meritor* Court also endorsed the EEOC position that Congress, having defined "employer" to include "any agent of an employer," expected courts to look to agency principles for guidance on when employers may be held liable for such harassment.<sup>102</sup> The majority

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95. *See id.* at 587–88.

96. *Id.* at 590–92 (referring to pharmacists, librarians, social workers, architects, and engineers).

97. *Id.* at 599. Ginsburg went on to insist that the agency's interpretation was *required* by the Act, implying that the Board position could be upheld under *Chevron* Step One as well as Step Two. *Id.* at 598–99.

98. On September 29, 2006, the NLRB issued a trilogy of decisions that sought to refine the Court's analysis in determining supervisory status under the NLRA. The decisions—*In re Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006), *In re Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006), and *In re Beverly Enters.-Minn., Inc.*, 348 N.L.R.B. 727 (2006)—excluded many of the challenged individuals from exercising their union rights. In one study anticipating the potential effects of these cases, employee rights advocates determined that, depending on the NLRB's application of its reasoning, the cases "[c]ould strip 8 million more workers of their right to participate in a union and bargain collectively, adding to the approximately 8.6 million first-line supervisors that the GAO estimates have already been excluded by prior interpretations of the NLRA." ROSS EISENBREY & LAWRENCE MISHEL, ECONOMIC POLICY INSTITUTE, SUPERVISOR IN NAME ONLY: UNION RIGHTS OF EIGHT MILLION WORKERS AT STAKE IN LABOR BOARD RULING (2006), available at <http://www.epi.org/publication/ib225/>. This fear was similar to that expressed by the dissent in *Oakwood Healthcare*, which stated that the majority's decision could "create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees." 348 N.L.R.B. at 700.

99. *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

100. *See* 29 C.F.R. § 1604.11(a)(3) (2013).

101. 477 U.S. 57, 65 (1986).

102. *See id.* at 72.

relied on *Skidmore* deference with respect to both of these conclusions, observing that the EEOC Guidelines constituted an appropriate “body of experience and informed judgment.”<sup>103</sup> Twelve years later, the Court in two separate decisions applied traditional agency law principles to hold that an employer may be liable for hostile environment discrimination caused by a supervisor.<sup>104</sup> Neither decision, however, directly addressed the degree of authority over the victim that a fellow employee must possess in order to be classified as a supervisor.<sup>105</sup>

Following the Court’s decisions in *Ellerth* and *Faragher*, two separate views emerged regarding the meaning of a “supervisor” for purposes of imputing liability for hostile environment harassment. One view followed the reasoning set forth in an EEOC Guidance issued in June 1999, twelve months after the Supreme Court decisions.<sup>106</sup> The EEOC concluded that federal employment discrimination statutes do not define “supervisor,” and principles of agency law—applicable through the statutory definition of “employer”<sup>107</sup>—cannot mechanically determine whether an individual has sufficient authority to qualify as a supervisor for purposes of vicarious liability.<sup>108</sup> The Commission considered both the purposes of Title VII and related antidiscrimination statutes, and the reasoning of the Court’s harassment decisions, to conclude that a supervisor included not only an individual with authority to take tangible personnel actions but also someone with authority to direct an employee’s daily work activities.<sup>109</sup> The EEOC Guidance took close account of the Court’s analyses in *Ellerth* and *Faragher*; the agency then adhered to the Guidance position consistently for fourteen years, and its position or analysis was followed by a number of lower courts.<sup>110</sup>

A second view as to the meaning of “supervisor,” also endorsed by a number of lower courts, limited supervisors to those authorized to take tangible personnel actions. These courts too invoked the analyses from *Ellerth* and *Faragher*, although they did not discuss their reasons for departing from the EEOC Guidance or even refer to the Guidance at all in connection with their analyses.<sup>111</sup>

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103. *Id.* at 65.

104. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

105. The issue was not directly presented in the *Ellerth* and *Faragher* cases. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2447 (2013); *id.* at 2457 (Ginsburg, J., dissenting).

106. EEOC, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, *available at* 1999 WL 33305874 (June 18, 1999).

107. *See supra* note 102 and accompanying text.

108. EEOC, *supra* note 106.

109. *Id.* at \*3–4.

110. *See, e.g., Mack v. Otis Elevator Co.*, 326 F.3d 116, 127 (2d Cir. 2003) (expressly relying on the Guidance); *Whitten v. Fred’s, Inc.*, 601 F.3d 231, 245–47 (4th Cir. 2010) (relying on same analysis as set forth in the Guidance); *Dinkins v. Charoen Pokphand USA*, 133 F. Supp. 2d 1254, 1266 (M.D. Ala. 2001) (same).

111. *See Noviello v. City of Bos.*, 398 F.3d 76, 96 (1st Cir. 2005); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004). The *Noviello* court invoked *Skidmore* deference for a separate issue, relying on an EEOC Compliance Manual

The Supreme Court held that the EEOC's well-settled definitional approach to the term "supervisor" was at odds with the framework created under *Ellerth* and *Faragher*.<sup>112</sup> Writing for a five-to-four majority, Justice Alito insisted there was "no hint in either [decision]" that the Court had contemplated any meaning beyond authority to take tangible employment actions.<sup>113</sup> He quoted from *Ellerth*'s statement distinguishing coworkers from supervisors because they were capable of inflicting psychological harm but not of docking someone's pay or demoting a fellow employee.<sup>114</sup> At the same time, Justice Alito declined to credit the Court's discussion in *Faragher* referring to a coworker with authority to control subordinates' daily work assignments as a supervisor.<sup>115</sup> He went on to reject the EEOC approach as too ambiguous to establish a meaningful limitation on employer liability, "[one of] the objectives of Title VII,"<sup>116</sup> and as presuming a "highly hierarchical management structure" that was "out of touch with the realities of the [modern] workplace."<sup>117</sup>

Agency deference is hardly the equivalent of a blank check, and the EEOC Guidance at issue in *Vance* had interpreted prior Supreme Court decisions (a realm in which the Court has superior authority), as well as a gap in the statutory text. Nonetheless, from the lengthy majority and dissenting opinions (and also the sharp division in the circuits), it is apparent that each side relies heavily on its reading of *Ellerth* and *Faragher*, and on its understanding of the purpose of Title VII. The dissent additionally invokes the interpretive resource of agency deference.

In this regard, it is worth noting that notwithstanding Justice Alito's concerns about its ambiguity, the EEOC Guidance recognizes a number of specific limits on the scope of supervisory authority while directing daily activities.<sup>118</sup> In addition, the Guidance has governed the agency's enforcement judgments consistently since 1999, including in numerous

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interpretation but the court was silent with respect to the EEOC Guidance on vicarious supervisory liability. 398 F.3d at 90. The *Weyers* court also did not address the EEOC Guidance.

112. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443–48 (2013).

113. *Id.* at 2448.

114. *Id.* (quoting *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 762 (1998)).

115. *See id.* at 2458 (Ginsburg, J., dissenting) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998)). Justice Alito concluded that because the employer in *Faragher* had never disputed the supervisory status of its employee who had no hiring or disciplinary authority but rather "was 'responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training,'" this status had not been a relevant consideration in the Court's earlier decision. *Id.* at 2446–47 (majority opinion) (quoting *Faragher*, 524 U.S. at 780).

116. *Id.* at 2449.

117. *Id.* at 2452. This out of touch, hierarchical structure, of course, was precisely what the Court had embraced in *Health Care* as the unambiguous meaning of "responsibly to direct . . . in the interest of the employer" under the NLRA. *See supra* notes 92–93 and accompanying text.

118. *See EEOC, supra* note 106, at \*4 (discussing limits based on job function rather than job title, taking account of temporary authorizations, direction of a limited number of tasks, and the role of relaying other officials' instructions regarding work assignments).

briefs filed in the appellate courts,<sup>119</sup> and the Court has often recognized the relevance of long-term consistency in the *Skidmore* setting.<sup>120</sup> Finally, in relation to the asserted clarity of the *Ellerth* and *Faragher* treatment of supervisor, several Supreme Court decisions between 1998 and 2013 recognized the meaning of “supervisor” under Title VII as extending to employees who direct duties, not simply those with authority to take tangible employment actions.<sup>121</sup>

The juxtaposition of the Court’s analyses in *Vance* and *Health Care* is more than a little ironic, even though they deal with two separate statutes. The Court in *Health Care* insisted that the key terms defining “supervisor” had to be given broad scope to reflect ordinary meaning. What was “ordinary” for purposes of *excluding* employees from NLRA protection encompassed directing someone else’s daily work activities, not merely having authority over their tangible employment status. The Court rejected the NLRB’s longstanding contrary view as incompatible with this ordinary meaning. And yet, the Court concluded that the approach it adopted in *Health Care*, which was separately developed and applied by the EEOC, was unacceptably ambiguous and out of touch with workplace realities in a Title VII setting. When the issue was whether an individual was a “supervisor” for purposes of *including* greater protection for employees who suffered from his conduct, the Court insisted that this individual must have authority over tangible employment status, not simply direct and supervise the daily activities of a fellow employee.

Inconsistent results would perhaps be understandable if in each instance the Court had deferred to an agency determination. That there may be two reasonable interpretations of the term “supervisor” under each statutory scheme would enable the Court to justify supporting the agency position on each occasion. It seems harder to explain inconsistent results based on a rejection of agency judgments, particularly judgments rendered consistently over a long period of time in highly visible and elaborated contexts. One possible explanation is the Court’s growing inclination to favor employers on these matters. Another involves the Court’s burgeoning confidence that it can identify and explain contested statutory terms or concepts as clear and unambiguous, rather than obscure or inconclusive.

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119. See Brief for the United States As Amicus Curiae in Support of Neither Party at 28, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013) (No. 11-556), 2012 WL 3864279 (citing to six briefs filed by EEOC).

120. See, e.g., *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008); *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977).

121. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70–71 (2006) (recognizing that retaliatory reallocation of job duties within the same position was actionable); *Pa. State Police v. Suders*, 542 U.S. 129, 140 (2004) (evaluating constructive discharge claim by supervisors responsible for daily work assignments); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77 (1998) (recognizing supervisory authority by two employees who had de facto control over plaintiff’s conditions of employment); see also *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190–91, 1193 (2011) (applying Uniformed Services Employment and Reemployment Rights Act).



### III. WHY *CHEVRON* DEFERENCE MATTERS SO LITTLE IN THE WORKPLACE

The empirical results and doctrinal analyses presented above are not necessarily unique to the workplace law field. At the same time, these results and analyses call for explanations, which, while specific to workplace law, may shed light on the complex fate of *Chevron* deference in larger terms.

#### A. Ideology

As noted at the end of Part II, one explanation invokes ideological factors. From the mid-1930s through the early 1990s, liberal coalitions in both houses of Congress enacted more than a dozen major employee protection statutes.<sup>122</sup> Many of these laws, regulating and restricting employers' business discretion in the areas of labor-management relations, civil rights, and labor standards, were endorsed by Republican as well as Democratic presidents.<sup>123</sup> The three major agencies responsible for implementation of these statutes have adopted a fairly vigorous pro-employee approach (with occasional pauses or exceptions) through rulemaking, adjudication, and less formal interpretive and guidance efforts.

On the other hand, the Court has grown steadily more conservative since 1970. In terms of its composition, Justices appointed to the Rehnquist Court were more conservative than their Burger Court predecessors, and Justices in the Roberts era tend to be more conservative than those from the Rehnquist era.<sup>124</sup> The increasingly conservative orientation is especially visible in an ideologically charged field like workplace law, as illustrated in voting scores compiled by Supreme Court scholar Harold Spaeth.<sup>125</sup> Given the direction of this ideological orientation, it is not surprising that the Court has become less willing to endorse or defer to pro-employee agency

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122. In addition to the NLRA, the three major civil rights statutes administered by the EEOC, see *supra* note 32, and the seven labor standards statutes administered by the DOL, see *supra* note 33, Congress enacted the Equal Pay Act, the Employee Polygraph Protection Act, and numerous expansions or modifications of many of these statutes.

123. For example, President Nixon signed the Occupational Safety and Health Act and the Mine Safety and Health Act; President Reagan signed the Employee Polygraph Protection Act; and President George H.W. Bush signed the ADA, the Older Workers Benefit Protection Act, and the 1991 Civil Rights Act.

124. See Martin, Quinn & Epstein, *supra* note 65, at 1300–04 (describing the increasing conservatism of the Justices from the Warren to the Rehnquist Court as measured by the partisan orientation of the median Justice); see also Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 955–81 (2008) (describing increasing conservatism in early years of the Roberts Court); RONALD DWORKIN, *THE SUPREME COURT PHALANX: THE COURT'S NEW RIGHT-WING BLOC* 47 (2008); Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.

125. I previously obtained an ideology score exogenous to my dataset using each Justice's votes on a subgroup of civil rights, union-related, government employee, and economic issues in the Spaeth database. For results covering Justices on the Court from the 1969 to 1970 through the 2005 to 2006 terms, see James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 130–31 nn.44–46 (2008). These results do not include any votes from Justices Sotomayor and Kagan, appointed after June 2006.

interpretations arising from the circuit-conflict settings where these interpretations have been contested.

In addition, there is an institutional dimension to the ideology factor. Workplace agencies are for the most part on a mission to promote collective bargaining and to protect employee rights, as one would expect in their role as implementers of the specific statutory directives that created them and give them their powers. By contrast, the Supreme Court as well as lower federal courts must integrate these statutory directives with developments in the larger legal landscape. The NLRA is perhaps the paradigmatic example of a statute unchanged for decades even as the political, economic, and legal conditions that existed in the 1930s and 1940s no longer obtain. The statute emphasizes the central value of establishing and maintaining stable collective bargaining relationships, including addressing the free rider problem through mechanisms to create union financial stability. But the economic culture many decades later prefers free enterprise efficiency and innovation over collective bargaining stability. And the legal culture has become distinctly more individual rights oriented—both in how it promotes a fairer distribution of economic resources<sup>126</sup> and how it recognizes an individual right to refrain from union membership or representation.<sup>127</sup>

In this setting, the Court may be reflecting as well as advancing an altered set of legal norms when it refuses to defer to NLRB rulings anchored in considerations of bargaining stability and related union capacity.<sup>128</sup> In similar, although perhaps less dramatic terms, the Court's reluctance to defer to EEOC interpretations of Title VII and the ADEA may reflect in part the Court's perspective that robust enforcement of statutory antidiscrimination norms must be reconciled with respect for business interests in efficiency and competitiveness. The perceived need for accommodation arguably plays out when the Court construes statutory language to insulate employers from attack on their putatively neutral or settled practices related to compensation, fringe benefits, and noneconomic aspects of the employment relationship.<sup>129</sup>

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126. See generally Brudney, *supra* note 70, at 1568–72 (discussing Congress's enactment of an array of new laws promoting and protecting individual employee rights while forsaking renewed commitments to group action as a means of regulating the workplace).

127. See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *Knox v. Serv. Emps. Int'l Union Local 1000*, 132 S. Ct. 2277 (2012); *Chi. Teachers Union Local 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

128. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998) (rejecting considerations of bargaining stability); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (dismissing arguments in support of union access to employer workplaces); *Comm'n Workers of Am. v. Beck*, 487 U.S. 735 (1988) (declining to recognize claims for union financial security).

129. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (upholding employer position on compensation); *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989) (sustaining employer position on fringe benefits); see also *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (upholding employer position regarding other employment conditions); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (same).

### B. Methodology

The Court may invoke agency deference selectively or strategically, just as it does for certain other interpretive assets. Dictionaries and canons may be more obvious targets for a cherrypicking critique, given that in the Court's hands their use seems unaccompanied by basic objective standards.<sup>130</sup> But as Peter Strauss recently noted, "deference" itself is a highly variable concept, ranging from "obey/accept" to "respectfully consider."<sup>131</sup> When examining agency deference as a source of relevant evidence, *Skidmore* virtues such as subject matter expertise, grasp of legislative intent, and consistent application may each be respectfully considered without being obeyed or accepted. And in *Chevron* terms, the special deference associated with political accountability may be overcome by rigorous Step One textual analysis.

As Table 1 makes clear, the Court has turned increasingly to textually related analyses to justify its outcomes in workplace statutory cases. A heavier reliance on dictionaries, language canons, and ordinary meaning (and a diminished use of legislative history and purpose) results in more decisions being based on assertedly unambiguous statutory text.<sup>132</sup> In the workplace law dataset, the Court's express refusal to defer under *Chevron* invariably involves a Step One analysis.<sup>133</sup> This Step One approach to rejecting deference has been recognized with respect to agencies outside the workplace law setting,<sup>134</sup> and it is a natural corollary of the Court's textualist turn. Because the turn to intensely language-based analysis has

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130. On dictionaries, see James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013); Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994). On canons, see Brudney & Ditslear, *supra* note 24; Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085 (1995); Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561 (1992).

131. Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012).

132. For workplace law examples beyond this Article's agency deference focus, see *Gross v. FBL Financial Services*, 557 U.S. 167 (2009); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

133. See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002); *Lechmere*, 502 U.S. 527; *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990); *Pittston Coal Grp. v. Sebben*, 488 U.S. 105 (1988).

134. See Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1399–1400 (2000) (noting that until 1999—*AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)—the Court had never invalidated an agency interpretation under *Chevron* Step Two). There is even disagreement as to whether this 1999 case was an invalidation under Step Two. See Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL'Y 362, 373–74 (2008) ("To date, an agency's decision has not been invalidated by the Supreme Court under step two of *Chevron* (though several Courts of Appeal have done so)." (citing STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 289–90 (5th ed. 2002))).

been driven primarily though not exclusively by conservative Justices, the link between Step One deference rejection and pro-employer results is understandable if not predictable.

Moreover, the Court's now-prevailing appetite for close textual analysis may have the effect of diminishing the distance between its two principal agency deference standards. When considering the contours of an increasingly popular Step One *Chevron* review, some scholars suggest that the Court should give *Skidmore* deference to an agency's reading of the statute.<sup>135</sup> Agencies often have helped to draft the statutory language, and their expert insights about original meaning seem relevant to a judicial determination as to whether "Congress has directly spoken to the precise question at issue."<sup>136</sup> A consistent and longstanding agency interpretation, on which parties have relied and which the legislature has left undisturbed, also may be probative in assessing whether Congress has unambiguously addressed a contested statutory issue.<sup>137</sup>

Perhaps for these reasons, the Court in an early post-*Chevron* decision incorporated *Skidmore* factors into its Step One analysis,<sup>138</sup> and the Justices on occasion have done so in the workplace law setting.<sup>139</sup> Conversely, the Court's *Skidmore*-based refusals to defer often include reliance on the conclusion that the agency's interpretation is inconsistent with or lacks support from the plain language of the statute.<sup>140</sup> And as the Court has further observed, there is no reason to choose between *Chevron* and *Skidmore* standards when it determines that an agency is either clearly right or clearly wrong as a matter of law.<sup>141</sup> Thus, inasmuch as the Court's focus has shifted toward more extensive review of enacted text<sup>142</sup> in an

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135. See William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 449 (2013); Strauss, *supra* note 131, at 1146.

136. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

137. Eskridge, *supra* note 135, at 449.

138. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (giving agency interpretation diminished weight for inconsistency during Step One rejection of its position).

139. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (referring to both *Chevron* and *Skidmore* as applicable to show agency is wrong as matter of law); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 34–40 (1990) (finding agency interpretation incorrect as a matter of law based on the purpose of the Act as a whole as well as certain language and structure, and because no exact statutory provision supports agency); see also *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 470–71 (2002) (Stevens, J., dissenting) (noting that consistent agency interpretation across different administrations is relevant for *Chevron* purposes).

140. See, e.g., *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999) (rejecting EEOC Guidelines as inconsistent with letter as well as spirit of ADA); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (rejecting EEOC interpretation as lacking support in plain language of statute, as well as not being contemporaneous or consistent with prior interpretations); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (rejecting EEOC Guidelines as inconsistent with plain meaning of statute).

141. See *Gen. Dynamics*, 540 U.S. at 600 (agency clearly wrong); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (agency clearly right).

142. The turn to textualism does not mean that reliance on legislative history or purpose has disappeared. These resources remain relevant both to *Chevron* Step One analysis and when considering *Skidmore* expertise.

increasingly successful hunt for unambiguous meaning, this focus may result in differences between deference standards becoming of lesser importance to its review process.

### C. Institutional Relations

Finally, the counterintuitive patterns of lesser deference for the NLRB under *Chevron* than for the EEOC under *Skidmore* may be in part attributable to the contrast between the Board's prolonged isolation from Congress and the EEOC's continuing integration with the legislative branch. Following longstanding legislative gridlock, engineered by labor and management as powerful interest groups, Congress has failed to update the NLRA since 1959. This remarkable period of congressional inaction has left the NLRB on a political island, lacking the full accountability status envisioned under *Chevron*.<sup>143</sup> Of particular relevance, because all efforts to amend the NLRA in either labor or management directions have failed to garner necessary supermajority support,<sup>144</sup> the accountability inherent in a congressional override for failure to defer is entirely absent. The Court has little to fear by yielding to its conservative inclinations on reasonably contested issues, thereby limiting the NLRA's scope of protections for collective bargaining and related employee rights.

By contrast, Congress regularly revisits and updates the mandates and policy directives governing EEOC operations.<sup>145</sup> Indeed, from 1980 to 2009, Congress often overrode conservative Court decisions in the employment discrimination area, primarily those interpreting Title VII but also decisions construing the ADEA and the ADA.<sup>146</sup> From the standpoint

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143. See generally Brudney, *supra* note 14.

144. Unsuccessful efforts at reform on the union side have foundered in the Senate, due to the failure to secure sixty votes to end a filibuster. See Labor Law Reform Act, S. 2467, 95th Cong. (1978); Workplace Fairness Act, S. 55, 102d Cong. (1992); Employee Free Choice Act, S. 1041, 110th Cong. (2007). Efforts at management-side reform died when proponents lacked the two-thirds support in either chamber to override a veto by President Clinton. See Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Cong. (1996).

145. For examples involving Title VII since 1964, see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; and Lily Ledbetter Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. For examples involving Age Discrimination in Employment Act since 1967, see ADEA Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189; ADEA Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342; and the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978. For examples involving disability law, see Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2012) and the ADA Amendments of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

146. See Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1356-60 (2014) (reporting that antidiscrimination laws are a regular focus of successful congressional override activity, whereas labor law is virtually absent from the dataset of statutory overrides). For notable examples of statutes overriding Supreme Court decisions that construed antidiscrimination laws, see 1976 Pregnancy Discrimination Act, 1978 ADEA Amendments, 1990 Older Workers Benefit Protection Act, 1991 Civil Rights Act, 2008 ADA Amendments, and 2009 Lily Ledbetter Act.

of institutional self-protection, the Court may well feel a need to pay more attention to EEOC interpretations.<sup>147</sup> This attentiveness is based not on the agency's rule of law standing as specified in one statute versus another. Instead, it derives from the agency's connection to the policy preferences of contemporary Congresses. Because the EEOC's political accountability is essentially being renewed in both branches, the Court is more likely to be punished for failing to defer.

That is not to say the Court is unwilling to reject EEOC positions for ideological reasons, or that it will not invoke *Skidmore* to help explain its reluctance to defer in specific cases. Since Congress enacted large-scale overrides of the Court's civil rights statutory interpretations in 1990 and 1991, the Court has declined to defer to the agency in eight of thirteen cases, and its rulings favored employers in six of those eight decisions.<sup>148</sup> Still, Congress has overridden several post-1991 Court decisions favoring employers; two others are so recent it may be too early to know whether Congress will react to them.<sup>149</sup> In the end, the fact that the EEOC has received a higher level of deference since 1984 than it did in the prior fifteen years, notwithstanding the arrival of an ever-more conservative Court, suggests that there may be some residual respect for the combined weight of the politically accountable branches.

#### CONCLUSION

This Article has shown that *Chevron's* role as a deference-triggering norm has not come close to fulfilling initial expectations in the workplace law field. Over three decades, the Court has often relied on pro-employer ideological preferences and a passion for rigorous textual analysis to undermine its embrace of the putatively game-changing *Chevron* standard. Support for NLRB determinations has declined noticeably since *Chevron*, even though the Court remains formally committed to broader deference.

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147. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) ("In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress's actual purpose and require it 'to take the time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error." (footnote omitted)). Congress overrode the result in *Casey* within several months of Stevens' dissenting observation, as part of the 1991 Civil Rights Act. See also Justice Harry A. Blackmun, Conference Notes, EEOC v. Arabian Am. Oil Co. (No. 89-1838) (Jan. 18, 1991) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers: Box 572) (reporting that Justice O'Connor, who voted with the majority to affirm the lower court ruling against extraterritorial application of Title VII, stated "Congress would extend coverage if we [affirm]. Useful to have Congress look at it"). Congress overrode the result in *Arabian American* within several months as well, also as part of the 1991 Civil Rights Act.

148. For decisions in addition to *Vance* in which the Court has favored employers while refusing to defer to the EEOC, see, for example, *University of Texas Southwest Medical Center v. Nassar*, 133 S. Ct. 2517 (2013); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

149. Congress has overridden *Ledbetter* (in 2009 with the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5) and *Sutton* (in 2008 by the ADA Amendments Act, Pub. L. No. 110-325, 122 Stat. 3552). *Vance* and *Nassar* were decided in June 2013.

With respect to DOL interpretations, there is evidence that Step Zero analysis has influenced *Chevron* applicability but there are also ample instances of refusals to defer based on *Chevron* Step One review.

Ironically, the judicial deference record under *Skidmore* has been somewhat more positive since *Chevron* when reviewing agency interpretations of federal antidiscrimination statutes. To be clear, the invocation of *Skidmore* or *Skidmore*-type factors has hardly resulted in robust respect for agency determinations. Further, to the extent that the Justices have been prepared to defer to EEOC judgments, the most persuasive explanation may be that Congress's continuing willingness to override anti-agency pro-employer interpretations acts as a restraint on the current Court's ideological and methodological proclivities.

Workplace law is only one area of federal statutory development, and it is more ideologically polarizing than some others. Still, the findings that *Chevron* has had limited impact are supported by other scholarly work covering a wider range of subject matter.<sup>150</sup> The past need not be prologue with respect to the impact of the *Chevron* approach: the Court's ideological composition may change, and in addition the current cycle of heavy reliance on textual analysis may give way to a more purposive interpretive orientation.<sup>151</sup> For now, though, the levels of agency deference under both *Chevron* and *Skidmore* seem likely to remain quite limited, and well below the aspirations of *Chevron* enthusiasts.

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150. See Eskridge & Baer, *supra* note 25; Miles & Sunstein, *supra* note 68; Raso & Eskridge, *supra* note 68.

151. See, e.g., *NLRB v. Canning*, 134 S. Ct. 2550, 2561 (2014) (“The constitutional text is thus ambiguous. And we believe the Clause’s purpose demands the broader interpretation.”); *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014) (“Considered alone, the language of the Act does not clearly indicate when an entity ‘perform[s]’ (or ‘transmit[s]’) and when it merely supplies equipment that allows others to do so. But when read in light of its purpose, the Act is unmistakable. . . .”). See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65–66 (2004) (Stevens, J., concurring) (“In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’[s] true intent when interpreting its work product. Common sense is often more reliable than rote repetition of canons of statutory construction. It is unfortunate that wooden reliance on those canons has led to unjust results from time to time. Fortunately, today the Court has provided us with a lucid opinion that reflects the sound application of common sense.” (footnote omitted)).