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Hundred-Years War: The Ongoing Battle between Courts and Agencies over the Right to Interpret Federal Law, The

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The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law

Nancy M. Modesitt¹

Since the Supreme Court's 1984 Chevron decision, the primary responsibility for interpreting federal statutes has increasingly resided with federal agencies in the first instance rather than with the federal courts. In 2005, the Court reinforced this approach by deciding National Telecommunications Ass'n v. Brand X Internet Services, which legitimized the agency practice of interpreting federal statutes in a manner contrary to the federal courts' established interpretation, so long as the agency interpretation is entitled to deference under the well-established Chevron standard. In essence, agencies are free to disregard federal court precedent in these circumstances. This Article analyzes the question left unanswered by Brand X – specifically, whether agencies can also ignore federal court interpretations of federal statutes when the agency's interpretation is not entitled to Chevron deference – and argues, based on consideration of constitutional theory and practical repercussions, that agencies may only do so in extremely limited circumstances where there is substantial justification. This Article reviews the Equal Employment Opportunity Commission's policy of ignoring federal precedent in order to illustrate the damage caused by an unjustified policy.

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I. INTRODUCTION

For much of the last century, there has been an ongoing battle between federal courts and agencies over the right to interpret federal statutes.² At times, courts have deferred to agencies' interpretations. At other times, courts have demanded that agencies follow court interpretations. In some instances, this has resulted in the development of two distinct bodies of law interpreting federal statutes: one created by federal courts and another by federal agencies.

For example, imagine Susan Smith, a woman subjected to sexual harassment while working for the federal government who suffers severe emotional distress as a result of the sexual harassment. She is entitled to damages for her emotional distress, but the damages award is determined by comparing her symptoms to the symptoms of other employees in other employment discrimination cases and is limited by the amounts awarded in those earlier cases – not on the merits of Susan's own claim.³ However, if Susan were to work for a private employer in Virginia, her emotional distress damages would not be limited to an award comparable to those in earlier cases; instead, the amount would be determined by the factfinder with very little limitation.⁴ The reason for the difference is that a federal agency has announced one method of calculating emotional distress damages, using other cases as a benchmark for awards, while the Fourth Circuit has taken a completely different approach of evaluating each case on its merits.⁵ This is despite the fact that the right to emotional distress damages is the same for public and private employees.⁶

2. See, e.g., JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 123 (1938); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1681 (1975); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985). For a history of the rise of the regulatory state, see Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

3. See *Torres v. Chertoff*, E.E.O.C. Dec. 0120064872, 2008 WL 2168134 (May 12, 2008).

4. See *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 180 (4th Cir. 2001).

5. Compare *Torres*, 2008 WL 2168134, at *4 (noting that “the Commission strives to make damage awards for emotional harm consistent with awards in similar cases” in evaluating emotional distress damages awarded), with *Fox*, 247 F.3d at 180 (noting that emotional distress awards are “subjective” in nature and require the evaluation of the demeanor of the witnesses, a role that the jury (trier of fact) is best equipped to provide).

6. The statutory provision authorizing compensatory damages in this situation states that “[i]n an action brought by a complaining party under section 706 [employment discrimination by private employers] or 717 [employment discrimination by the federal government] against a respondent who engaged in unlawful intentional discrimination . . . , the complaining party may recover compensatory . . . damages” 42 U.S.C. § 1981a(a)(1) (2006).

The development of these different bodies of law, with different legal rules, is an exemplar of the results of this ongoing war between federal courts and federal agencies over which entity has the primary authority to interpret federal statutes. Fairly recently, the U.S. Supreme Court granted a significant victory in this war to agencies. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,⁷ the Court held that, where an agency's interpretation of law is entitled to deference under the well-established *Chevron*⁸ standard,⁹ a federal court of appeals' interpretation is not entitled to trump the agency's interpretation based on stare decisis.¹⁰ Rather, the agency interpretation is entitled to court deference so long as it meets the standards established in *Chevron*.¹¹

However, for the thousands of agency actions and interpretations of law not entitled to *Chevron* deference,¹² it has yet to be determined which governmental body – federal court of appeals or agency – is the final arbiter of federal law. At least one federal agency, the Equal Employment Opportunity Commission (EEOC), has taken the position that it need not even consider federal court of appeals precedent, much less defer to it.¹³ This Article posits that a wholesale refusal to defer to federal court of appeals precedent, exemplified in the EEOC policy, is improper where the agency is not entitled to *Chevron* deference. Instead, an agency should provide a significant and sub-

7. 545 U.S. 967 (2005).

8. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

9. Under *Chevron*, where a statute is ambiguous and an agency determines its meaning, such interpretation is entitled to deference by the courts unless it is arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 844.

10. 545 U.S. at 982-83.

11. *Id.* at 983-84.

12. This is not an exaggeration. While there are thousands of agency rules, regulations, interpretive guidances, and other legal decisions issued annually, the Supreme Court's decisions have limited *Chevron* deference to agency action undertaken in a more formal manner and where the agency has been delegated the authority to speak with the force of law, see *United States v. Mead Corp.*, 533 U.S. 218 (2001), and numerous decisions have refused to grant *Chevron* deference to agency action in recent years. See Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 772-73 (2007) (arguing that the trend has been away from granting *Chevron* deference); Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito, Chevron, Auer, and Cheney in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1 (2007) (positing that this trend is reversing).

13. See EEOC ADMINISTRATIVE JUDGES' HANDBOOK, ch. 2, § III (2002), available at <http://eoc.gov/federal/ajhandbook.html#official> [hereinafter EEOC HANDBOOK] (articulating that administrative judges must use Commission precedent rather than federal court precedent); *Montemorra v. Snow*, No. 01A41536, 2005 WL 1936122, at *3 n.4 (E.E.O.C. Admin. Ct. Aug. 2, 2005) (noting that the EEOC considers court of appeals decisions to be nonbinding).

stantial justification for each decision not to defer to decisions issued by the federal courts of appeal.

Part II explains the historical development of agency nonacquiescence, which is the term used to describe an agency's decision not to follow federal court of appeals decisions¹⁴ and concludes with a discussion of the *Brand X* decision. Part III proposes a rubric for analyzing agency nonacquiescence where *Chevron* deference is not owed. Part IV analyzes the Equal Employment Opportunity Commission nonacquiescence policy, using this proposed rubric to illustrate some of the significant problems created by an agency's nonacquiescence policy. This Article concludes that the EEOC's policy is inappropriate for a variety of reasons, including reasons based on an empirical review of EEOC decisions made pursuant to the policy.

II. THE HISTORY AND TYPES OF NONACQUIESCENCE

Nonacquiescence is the refusal of agencies to follow federal court of appeals decisions interpreting federal law. Nonacquiescence is one aspect of the broader issue of the appropriate relationship between the federal judiciary and agencies, specifically, which branch of the government is or should be the primary interpreter of federal statutes. In order to understand the more specific nonacquiescence issue, a brief summary of the battle between courts and agencies over the general right to interpret federal statutes is necessary.

A. The Struggle to Define the General Standard for Court Review of Agency Interpretations of Federal Statutes

In a perfect world, the relationship between judiciary and agency would be established by the Constitution. Unfortunately, while the Constitution provides details on the relationship among the federal judiciary, Congress, and the President, it does not directly address the relationship between the federal judiciary and federal agencies. While generally residing within the purview of the Executive Branch, agencies also have roots in Congress, which legislatively creates their mandates and can control the scope of their power and authority. In addition, many agencies have a quasi-judicial role, deciding disputes that might otherwise be heard by the federal courts. As a result, agencies, the so-called "fourth branch" of the government, occupy a constitutionally uncertain position with respect to the other branches of government.¹⁵

14. See Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L. J. 679, 681 (1989).

15. Peter Strauss's article, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575-80 (1984), provides an excellent overview of the uncertain position that agencies occupy in the federal constitutional structure.

Scholars have long noted the tension between courts and agencies as to who has the ultimate authority to determine what the law is: courts, according to the oft-repeated language in *Marbury v. Madison* that it is for the courts to “say what the law is,” or agencies, according to a “counter-*Marbury*” principle.¹⁶ The pedigree of the former position can be traced back even beyond *Marbury* itself to the Federalist Papers, which noted that “[t]he interpretation of the laws is the proper and peculiar province of the courts.”¹⁷

Agencies’ unclear relationship with the judiciary was not an issue before the New Deal because of the manner in which agencies operated and the posture in which cases came before the courts.¹⁸ Agencies did not take actions to interpret statutes in a manner that would lead to legal challenges being brought directly against the Executive Branch; this left the judiciary with the exclusive role of interpreter of federal statutes.¹⁹ In addition, the relatively small scale of administrative action before the New Deal and the concomitant rise of the regulatory state made the issue far less pressing a century ago than it is today.

As the modern regulatory state developed, the question of the appropriate relationship between judiciary and agency, with its newly developed powers, became acute, and the need for answers grew. One potential articulation of the agency-judiciary relationship surfaced in the Administrative Procedure Act (APA), enacted in 1946. One of the APA’s provisions appeared to place all authority for interpreting federal law with the judiciary, stating that “[a] reviewing court shall decide all relevant questions of law, and interpret constitutional and statutory provisions”²⁰ This language suggested that the judiciary should occupy the premier position with respect to interpreting the law.

However, this language did not affect the Supreme Court’s analysis of the agency-judiciary relationship. Instead, the Court began its own decades-long search for defining principles and rules to determine the appropriate agency-judiciary relationship. Other scholars have detailed much of this history;²¹ for the purposes of this Article, a few examples of the Supreme

16. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074-75 (1990) (coining the term “counter-*Marbury*”) [hereinafter, Sunstein [Chevron]]; Richard W. Murphy, *A “New” Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 2-4 (2004) (discussing the subsequent development of “counter-*Marbury*” principles by the U.S. Supreme Court).

17. See THE FEDERALIST NO. 78 (Alexander Hamilton).

18. See Sunstein [Chevron], *supra* note 16, at 2078-79.

19. *Id.*

20. 5 U.S.C. § 706 (2006).

21. See, e.g., Rabin, *supra* note 2 (discussing, in part, the Supreme Court’s vacillating approach to the judicial-agency relationships, focusing on decisions involving both constitutional and statutory interpretation).

Court's decisions in this area provide a sufficient sense of the confusion permeating the issue.

One early approach, the *Skidmore* standard, was to deny giving administrative interpretations of law mandatory authority but to give the administrative interpretation some persuasive authority.²² In *Skidmore*, the Court interpreted the provisions of the Fair Labor Standards Act (FLSA) in order to determine whether time employees spent on call was working time for which compensation was required.²³ The district court concluded as a matter of law that on-call time was not working time.²⁴ The Supreme Court reversed, holding that such a conclusion was inappropriate.²⁵ A primary support for its conclusion was the district court's failure to consider the guidance provided by the congressionally created Office of the Administrator.²⁶ The Administrator had issued interpretations of the FLSA and concluded that a per se approach to on-call time was inappropriate; instead, each case should be evaluated on its facts in order to determine whether the time should be treated as working time.²⁷ In discussing the appropriate weight to give to the Administrator's guidance, the Court stated that it should be determined by considering "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."²⁸

Interpreting the FLSA in another case decided the same year as *Skidmore*, the Court in *Addison v. Holly Hill Fruit Products*²⁹ took a different approach. In a case involving the Administrator's interpretation of the term "area of production" under the FLSA, the Court engaged in a lengthy discussion of the scope of the congressional grant of authority to the Administrator and ultimately determined that the Administrator's definition was improper.³⁰ The standard used to gauge the legality of the Administrator's decision was not that found in *Skidmore*.³¹ Instead, the Court engaged in its own interpretation of the statute and determined that the Administrator's definition was inconsistent with the text and purpose of the statute.³²

A little over a decade later, the Supreme Court was faced with a challenge to the new definition of "area of production" promulgated by the Administrator under the FLSA in *Mitchell v. Budd*.³³ The specific issue was

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

23. See generally *id.*

24. *Id.* at 136.

25. *Id.* at 140.

26. *Id.*

27. *Id.* at 139-40.

28. *Id.* at 140.

29. 322 U.S. 607 (1944).

30. *Id.* at 615-16.

31. *Id.*

32. *Id.* at 613-16.

33. 350 U.S. 473 (1956).

whether employees who were working in an agricultural processing plant were working within an “area of production” sufficiently close to the location where the agricultural product was grown such that they were exempt from the FLSA’s provisions.³⁴ The court of appeals held that the regulation created by the Administrator, which defined the term, was invalid.³⁵ The Supreme Court reversed.³⁶ But, instead of referring to the *Skidmore* standard or discussing in detail whether the new definition comported with the Court’s interpretation of the statute (the approach taken in *Holly Hill*), the Court simply noted that the Administrator had created a “reasoned definition” of the term.³⁷

These three cases, all involving the same statute and all taking different approaches to the analysis of agency interpretations of law, illustrate the uncertainty the courts had as to the appropriate relationship between agency and judiciary. The Supreme Court did not try to explain its reasons for taking different approaches or even acknowledge that different approaches were being used. And the approaches taken in the above cases were not the only ones the federal courts used as the modern regulatory state was established and expanded. At times, the Supreme Court has referred to giving agency interpretations of federal statutes “great deference,”³⁸ while on other occasions the Court has appeared to limit this authority by noting that, while deference was due, “courts are the final authorities on issues of statutory construction.”³⁹ Lower federal courts also sometimes scrutinized agency actions closely, perhaps as a result of the perception of unchecked authority of administrative agencies.⁴⁰ Inconsistency appeared to be the order of the day.

Then, in 1984, it appeared that the Supreme Court would finally provide clarity on the issue when it decided *Chevron v. National Resources Defense Council*.⁴¹ In *Chevron*, the Court was faced with a challenge to the Environmental Protection Agency’s (EPA) interpretation of the statutory term “stationary source.”⁴² The EPA had defined the term to provide that all the emitting sources, such as smokestacks, within one facility were a single source (the “bubble” rule), and the Court upheld the definition.⁴³ In so doing, the

34. *Id.* at 476-77.

35. *Id.* at 477.

36. *Id.* at 482.

37. *Id.* at 480. For a thorough discussion of the Supreme Court’s use of a reasonableness standard, see Sunstein [Chevron], *supra* note 16, at 2081-82.

38. See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965).

39. Fed. Election Comm’n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981).

40. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1679-81 (discussing the development of greater scrutiny of agency action in the decades following the passage of the APA).

41. 467 U.S. 837 (1984).

42. *Id.* at 840.

43. *Id.* at 840, 866.

Court articulated a new approach that established parameters for the agency-judiciary relationship. While still stating that “the judiciary is the final authority on issues of statutory construction,”⁴⁴ the Court went on to hold that (1) where a statute is ambiguous, it is for the agency to determine its meaning in the first instance, and (2) such interpretation must receive deference by the courts unless it is “arbitrary, capricious, or manifestly contrary to the statute.”⁴⁵

In the years following *Chevron*, it became clear that the case was the touchstone of analysis for agency interpretations of law.⁴⁶ One of the more significant questions that arose after it was decided was how to determine whether *Chevron* applies; that is, under what circumstances should the two-part standard be used?⁴⁷ Did the *Chevron* approach apply to all situations where courts were reviewing agency interpretations of federal statutes? When it became clear that it did not always apply, the question was then what standard applied in the absence of *Chevron*. Over time, the Supreme Court provided guidance on these questions, and, while the law remains uncertain,⁴⁸ it appears that the analysis proceeds as follows.

The degree of deference the federal courts give to interpretations of law by agencies depends on agency power and the context of the agency’s interpretation. Agencies charged by Congress with authority to speak with the force of law, most commonly by engaging in rulemaking, are entitled to greater deference in their interpretations of that law than agencies without rulemaking authority.⁴⁹ Where Congress grants an agency the authority to create rules with the force of law, courts defer to agency interpretations of statutes for which the agency enjoys such authority if the statute is ambiguous, as long as the interpretation is reasonable, using the approach outlined

44. *Id.* at 843 n.9.

45. *Id.* at 844.

46. Two indications of the importance of *Chevron* are the number of times it has been cited by the courts and the number of scholarly articles written about it. As for the former, Cass Sunstein noted in 2006 that *Chevron* had been cited many thousand times by the courts, while, in 2008, Michael Pappas noted that several thousand law review articles had also cited it. See Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 n.1 (2006) [hereinafter Sunstein [Step Zero]]; Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 978 n.5 (2008).

47. See Sunstein [Step Zero], *supra* note 46, at 191 (noting that the “most important” question as to *Chevron* has been determining when the framework applies at all); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001) (coining the term “Chevron Step Zero” to capture this inquiry).

48. See Sunstein [Step Zero], *supra* note 46, at 191 (discussing the ongoing confusion over determining when *Chevron* applies).

49. See *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

in *Chevron*.⁵⁰ If Congress has not granted an agency rulemaking authority, at most the courts treat the agency's position as merely persuasive, not controlling, under the standard announced in *Skidmore v. Swift & Co.*⁵¹ Under this approach, the agency's interpretation is entitled to some consideration by the courts.⁵² How much weight to give to the interpretation depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁵³

In addition to the congressional grant of rulemaking authority to the agency, the degree of deference a court grants to an agency interpretation of law also depends on the manner in which the agency reached its decision. Decisions made in a formal notice and comment rulemaking are more likely to be analyzed under the *Chevron* deference standard than decisions made in more informal contexts such as policy statements.⁵⁴ The rationale for this is that a more formal decision-making process "foster[s] the fairness and deliberation that should underlie a pronouncement of such force."⁵⁵

B. *The Slow Realization of the Nonacquiescence Problem*

While *Chevron* and its progeny provided some answers to the general relationship between agencies and courts and whether courts should defer to agency interpretations of federal statutes in some contexts, they did not address the question of what to do when federal courts of appeals interpreted a federal statute and reached an interpretation at odds with an interpretation of a federal agency. Would the federal agency be bound by this interpretation in the future? This is the nonacquiescence question.

To clarify the analysis of the propriety of agency nonacquiescence, scholars have identified several different categories of nonacquiescence: (1) intercircuit nonacquiescence, where an agency refuses to defer to one circuit court of appeals' interpretation of law, but the refusal occurs in a case that would ultimately be heard in a different circuit; (2) intracircuit nonacquiescence, where an agency refuses to defer to a court of appeals' interpretation of law, and the case is one that will ultimately be heard in that circuit; and (3) venue choice nonacquiescence, where an agency refuses to defer to a court of

50. 467 U.S. 837, 844 (1984).

51. 323 U.S. 134 (1944).

52. *Id.*

53. *Id.* at 140.

54. *See Mead*, 533 U.S. 218, 232-34 (2001) (discussing the importance of the process by which an agency reaches its interpretation); Robert M. Levin, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 38-39 (2002).

55. *Mead*, 533 U.S. at 230. In exceptional cases, the importance of the legal question presented within the statutory scheme may also play a role in determining whether *Chevron* deference applies. *See, e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

appeals' interpretation of law, but the case may ultimately be brought in a different circuit due to flexibility of venue provisions.⁵⁶ Of these, the only type of nonacquiescence that poses vexing problems is intracircuit nonacquiescence, which is what the term "nonacquiescence" refers to in this Article.⁵⁷

While scholars debated the questions of the general relationship between agency and court both before and after *Chevron*, very little attention was paid to the narrower question of nonacquiescence. It was not until a much-publicized situation in the 1980s that the problem surfaced openly. There, the Social Security Administration (SSA) was taken to task by courts and scholars for its open refusal to follow lower federal court interpretations of the Social Security Act.⁵⁸ A flurry of scholarly and practitioner analysis of nonacquiescence occurred during this time.⁵⁹ However, no resolution of the issue was reached. Scholars failed to agree on the appropriate manner of resolving the issue.⁶⁰ Congress considered a legislative remedy in the SSA context but also failed to take a stance, apparently conceding the floor to the courts.⁶¹ In

56. See Estreicher & Revesz, *supra* note 14, at 687 (identifying these categories of nonacquiescence). A fourth type of nonacquiescence has been suggested by Ross E. Davies in his article, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 81 (2003), but such nonacquiescence arises only in a very limited context that is not relevant to this Article.

57. See *Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1091 (1992) (noting the potential constitutional problems posed by intracircuit nonacquiescence); Estreicher & Revesz, *supra* note 14, at 718-25; Carolyn Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 29 SOC. SECURITY REPORTING SERVICE 627 (May 1990); Robert J. Axelrod, *The Politics of Nonacquiescence: The Legacy of Steiberger v. Sullivan*, 60 BROOKLYN L. REV. 765, 770 nn.28-29 (1994).

58. See, e.g., *Steiberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985); Kubitschek, *supra* note 57; Axelrod, *supra* note 57.

59. See, e.g., Estreicher & Revesz, *supra* note 14; Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Samuel Figler, *Executive Agency Nonacquiescence to Judicial Opinions*, 61 GEO. WASH. L. REV. 1664, 1668 (1993); Kubitschek, *supra* note 57; Steve Y. Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430 (1991); Axelrod, *supra* note 57.

60. See generally Estreicher & Revesz, *supra* note 14, at 683-84, 735 (suggesting that intercircuit nonacquiescence is always acceptable, while intracircuit nonacquiescence is frequently justified); Diller & Morawetz, *supra* note 59 (condemning intracircuit nonacquiescence); Rebecca Hanner White, *Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board*, 69 N.C. L. REV. 639 (1991) (arguing that nonacquiescence is justified as to the NLRB).

61. The House and Senate had slightly different approaches to banning nonacquiescence, and, in the process of crafting a legislative compromise on other issues, the nonacquiescence language was dropped from the bills. See Dan T. Coenen, *The*

various different contexts, the federal courts also failed to expressly forbid agencies to engage in the practice;⁶² however, in both the SSA context and elsewhere, the lower federal courts began condemning some types of nonacquiescence.⁶³

After the Social Security situation subsided, the Supreme Court took up its first case that, at least indirectly, appeared to provide some guidance on the nonacquiescence issue. In *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*,⁶⁴ the Court grappled with a situation where earlier Supreme Court interpretations of the Interstate Commerce Act conflicted with the current Interstate Commerce Commission's (ICC) interpretation of the Act. In other words, the ICC was refusing to defer to the Supreme Court's existing precedent. Faced with this conflict, the Court stated that, "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."⁶⁵

The Supreme Court reaffirmed this approach two years later in *Lechmere, Inc. v. NLRB*.⁶⁶ There, the National Labor Relations Board (NLRB) had interpreted section 7 of the National Labor Relations Act to allow union organizers to distribute union literature on company property despite the company's policy prohibiting solicitation on the premises if, based on a multi-factor balancing test, the union could establish its need to do so.⁶⁷ This conflicted with the Court's decisions holding that a prerequisite for allowing non-employee union organizers to trespass on company property was that there was no reasonable access to employees off of company property and that the balancing test only applied after this prerequisite was established.⁶⁸ Citing *Maislin*, the Court noted that, if it had already determined the Act's clear meaning, an inconsistent interpretation by the NLRB would be fore-

Constitutional Case Against Intracircuit Nonacquiescence, 75 MINN. L. REV. 1339, 1377-81 (discussing congressional inaction in the SSA nonacquiescence debate).

62. See, e.g., Axelrod, *supra* note 57, at 766-68 (explaining how the Second Circuit appeared to initially forbid the Social Security Administration's nonacquiescence policy but later backed away from that approach); Koh, *supra* note 59, at 447-49 (outlining the federal courts' conflicting statements about nonacquiescence by the Immigration & Naturalization Service, ranging from acceptance to condemnation).

63. See, e.g., Lopez v. Heckler, 713 F.2d 1432, 1438 (9th Cir. 1983); Keasler v. United States, 766 F.2d 1227, 1233 (8th Cir. 1985). As the D.C. Circuit noted in *Johnson v. U.S. Railroad Retirement Board*, 969 F.2d 1082, 1091 (D.C. Cir. 1992), "[i]ntracircuit nonacquiescence has been condemned by almost every circuit court of appeals that has confronted it." (citations omitted).

64. 497 U.S. 116 (1990).

65. *Id.* at 131.

66. 502 U.S. 527 (1992).

67. *Id.* at 536.

68. *Id.* at 538 (citing *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205 (1978)); *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972).

closed.⁶⁹ The Court went on to hold that the NLRB's interpretation was impermissible because it was indeed inconsistent with the Court's previous interpretation of the Act.⁷⁰

Just a few years later, in *Neal v. United States*,⁷¹ the Court again faced a conflict between an agency's interpretation of the law and its own precedent and once again determined that its own interpretation took precedence over that of the agency.⁷² In *Neal*, the question was whether the Supreme Court's decision in *Chapman v. United States*⁷³ required use of the actual weight of blotter paper to determine the quantity of LSD for sentencing criminal defendants even though the Sentencing Commission had determined that a presumptive rather than actual weight of the blotting paper should be used.⁷⁴ Holding that *Chapman* would preclude reliance on the Sentencing Commission's approach, the Court focused heavily on the importance of stare decisis, noting that, while the Sentencing Commission was free to change its policy, the Court lacked such "latitude."⁷⁵

In *Neal*, the Court sidestepped the question of whether *Chevron* applied and suggested that Supreme Court precedent always trumps agency interpretations, regardless of whether deference should be shown to the agency's interpretation.⁷⁶ In *Lechmere*, the Court reached its decision to trump agency interpretation with Court precedent despite suggesting that *Chevron* deference might apply.⁷⁷ Taking the cases together, it seemed that stare decisis provided an exception to the general *Chevron* deference approach. The open question was how far this exception could be pressed – would it apply when the agency interpretation conflicted with a lower federal court opinion?

Despite Supreme Court precedent that could be read as foreclosing nonacquiescence even when *Chevron* deference was due, many federal agencies maintained their position that they need not, and would not, follow federal courts of appeals decisions interpreting statutes the agencies are charged with administering.⁷⁸ Some agencies adopted a policy of open nonacquiescence,

69. *Id.* at 536-37.

70. *Id.* at 538.

71. 516 U.S. 284 (1996).

72. *Id.* at 285-86 (rejecting the U.S. Sentencing Commission's method of calculating quantity of LSD for purposes of sentencing drug offenses in favor of method articulated by the Court in *Chapman v. United States*, 500 U.S. 453 (1991)).

73. 500 U.S. 453 (1991).

74. 516 U.S. at 287-88.

75. *Id.* at 295.

76. *Id.*

77. *Lechmere*, 502 U.S. at 536.

78. See *Keasler v. United States*, 766 F.2d 1227, 1233 (8th Cir. 1985) (IRS); Koh, *supra* note 59 (discussing the INS); Ekwutozia U. Nwabuzor, Comment, *The Cry of the Colossus: Discipio v. Ashcroft, Nonacquiescence and Judicial Deference in Immigration Law*, 50 How. L.J. 575 (2007) (same); Kevin Haskins, Note, *A "Delicate Balance": How Agency Nonacquiescence and the EPA's Water Transfer Rule*

but others acted in a more covert fashion.⁷⁹ In the face of this, the federal courts of appeals appeared to align generally in one direction – against agency nonacquiescence.⁸⁰

Then, in 2005, the Supreme Court finally took up the issue of nonacquiescence as to federal courts of appeals decisions when it decided *Brand X*. In that case, the Court held that a federal court of appeals' interpretation of a federal statute was not binding on an agency in all circumstances; sometimes, the agency was free to reach an interpretation contrary to that of an earlier federal court of appeals decision.⁸¹ In *Brand X*, the Federal Communications Commission (FCC) had issued a declaratory ruling that internet cable providers were not telecommunication service providers under the Communications Act (as amended in 1996).⁸² This conflicted with an earlier Ninth Circuit decision holding that cable providers were telecommunication service providers.⁸³ When the Ninth Circuit was called upon to resolve the conflict between the FCC interpretation and its own, it held that it was bound by *stare decisis* to abide by its past decision.⁸⁴

When the case reached the Supreme Court, the Court held that the Ninth Circuit's approach was incorrect.⁸⁵ Rather, the Court determined that (1) the FCC's interpretation of the Communications Act was entitled to *Chevron* deference and, (2) because it was entitled to *Chevron* deference, *stare decisis* must yield to the agency's authority to interpret the law.⁸⁶ The FCC was therefore entitled to reach an interpretation of the law contrary to that of the

Dilute the Clean Water Act After Catskill Mountains Chapter of Trout Unlimited, Inc. v. City Of New York, 60 ME. L. REV. 173 (2008) (EPA); Peter J. Rooney, Comment, *Nonacquiescence by the Securities and Exchange Commission: Its Relevance to the Nonacquiescence Debate*, 140 U. PA. L. REV. 1111 (1992); White, *supra* note 60 (discussing the NLRB).

79. Compare *Lopez v. Heckler*, 713 F.2d 1432, 1438 (9th Cir. 1983) (openly acknowledging approach), with *Koh*, *supra* note 59, at 436 (discussing INS official policy that it does not have a policy of nonacquiescence and noting commonality of this approach). One might expect that such policies would be published in the Federal Register, but a search of that publication fails to reveal nonacquiescence policies that do in fact exist. For example, the Department of the Interior's Board of Land Appeals engages in nonacquiescence, but this can only be determined by searching through the Board's adjudicatory decisions. See *In re Amoco Prod. Co.*, 144 IBLA 135 (I.B.L.A. 1998) (noting that the Department of the Interior's Board of Land Appeals occasionally refuses to defer to federal circuit court of appeals decisions). As noted below, the EEOC's nonacquiescence policy is equally difficult to locate. See *infra* Part IV.A.

80. See sources cited *supra* note 62.

81. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

82. *Id.* at 975-78 (discussing the FCC rulemaking process and outcome).

83. *Id.* at 979-80.

84. *Id.*

85. *Id.* at 982.

86. *Id.* at 984-86.

Ninth Circuit, and the federal courts, including the Ninth Circuit, must defer to the agency's interpretation, even over the court's own precedent.⁸⁷

And how did the Court explain *Neal*, *Maislin*, and *Lechmere*? In its decision, the Court explicitly distinguished *Neal* and implicitly distinguished *Maislin* and *Lechmere*, based on the fact that, in each of those cases, the prior Court decision that the agency did not follow was an interpretation of an unambiguous statute.⁸⁸ Because the statute was unambiguous, the agency's construction of it was not entitled to *Chevron* deference; thus, the Court's prior construction trumped that of the agency pursuant to *stare decisis*.⁸⁹ In a scathing dissent, Justice Scalia argued that this interpretation of *Neal*, *Maislin*, and *Lechmere* amounted to revisionist history and that the Court's decision in *Brand X* created a significant shifting of power, possibly in violation of the Constitution, from the judiciary to agencies.⁹⁰

III. THE THEORETICAL AND PHILOSOPHICAL DEBATE OVER NONACQUIESCENCE IN THE ABSENCE OF *CHEVRON* DEFERENCE AND A PROPOSED RUBRIC

A. *The Theoretical and Philosophical Assessment of Nonacquiescence*

While the Court in *Brand X* faced a situation where *Chevron* deference was appropriate and thus did not decide the approach to be used when deference is not appropriate, it did indicate in dictum that federal court precedent would be binding on the agency nevertheless. Specifically, the Court noted that, in some situations, "the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable)."⁹¹

While this is a forceful statement, given the number of times the Supreme Court has changed its approach to determining whether courts should defer to agencies and the ongoing uncertainty as to the scope of Supreme Court decisions involving deference to agency interpretations of law,⁹² rely-

87. *Id.*

88. *Id.* at 984.

89. *Id.*

90. *Id.* at 1016-18.

91. *See id.* at 983.

92. *See* Murphy, *supra* note 16, at 4 (discussing the ongoing confusion as to the relationship between courts and agencies and the contribution of inconsistent decisions by the U.S. Supreme Court to this confusion). For example, some scholars, and the Ninth Circuit as well, had read *Neal* to mean that nonacquiescence was improper because it violated *stare decisis* principles. *See* *Brand X Internet Servs. v. F.C.C.*, 345 F.3d 1120, 1131-32 (9th Cir. 2003) (determining that *Neal* applied to federal courts of appeals decisions as well as Supreme Court decisions); John F. Manning, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit*, 72 GEO. WASH. L. REV. 893, 942 n.234 (2004). The reading of *Neal*, *Maislin*, and *Lechmere* that resulted in *Brand X* was seen by Justice Scalia as being revisionist (and

ing on a single nonbinding statement as authority would be foolhardy. What then should be the proper analysis of an agency's continuing nonacquiescence after *Brand X* where *Chevron* deference does not apply? In order to answer this question, the underlying philosophical, theoretical, and practical justifications for agency nonacquiescence must be examined in the specific circumstances where *Chevron* deference is not due. This analysis is critical to determine whether the justifications continue to provide support for nonacquiescence in this context.

Agency nonacquiescence is sometimes justified under the theory that, since Congress delegates to agencies the power to create administrative rules with the force of law, agencies' interpretations of law are imbued with congressional authority.⁹³ Thus, in many contexts agency interpretations of law are entitled to deference by the courts.⁹⁴ In the nonacquiescence debate, agencies reason that, since agency interpretations of law are sometimes entitled to deference by the courts, it is entirely appropriate for agencies to refuse to follow federal court interpretations of law, as this would infringe on the agency's authority to interpret the law and issue regulations entitled to court deference.⁹⁵ From a court's perspective, the deference owed to agencies is pitted against the constitutional authority of the courts to "determine what the law is" under *Marbury v. Madison* and, in cases where the courts have already spoken, the doctrine of *stare decisis*.⁹⁶

Where no *Chevron* deference is due, an agency's nonacquiescence is suspect because the underlying justifications for *Chevron* apply with far less force, if any at all. There are two primary theoretical justifications developed in *Chevron* and by scholars to support the determination that deference to an agency is appropriate: legislatively delegated authority and separation of

surprising). See *Brand X*, 545 U.S. at 1016-17 (Scalia, J., dissenting) (calling the results of *Brand X* "bizarre").

93. This concept derives from the Supreme Court's own enunciation of the source of its deference to agencies. See *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). For a discussion of the general concept, see Merrill & Hickman, *supra* note 47, at 870-72.

94. See Merrill & Hickman, *supra* note 47.

95. See Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1301-03 (2002) (arguing that requiring agencies to adhere to court precedent "frustrates the very policy justifications for the administrative state"); Estreicher & Revesz, *supra* note 14, at 720-21 (noting that, for any particular agency nonacquiescence decision, the analysis of whether it is appropriate under administrative law principles must be made on a case-by-case basis); Diller & Morawetz, *supra* note 59, at 818-21 (discussing nonacquiescence under *Chevron*).

96. For a discussion of the development of this battle between court deference to agency interpretations of law and the mandate of *stare decisis*, see Kathryn A. Watts, *Adapting to Administrative Law's Erie Doctrine*, 101 NW. U. L. REV. 997 (2007); see also Bamberger, *supra* note 95, at 1283-89.

powers.⁹⁷ Legislative delegation of authority focuses on the authority granted to the agency from Congress to administer the law.⁹⁸ The idea is simple: where Congress authorized an agency to speak with the force of law, courts should respect this delegation of authority and not supplant the agency's interpretations.⁹⁹ Thus, agencies enjoy an authority superior to that of the courts, justifying court deference to the agency and, along with that, agency nonacquiescence.

Separation of powers theories focus on the appropriate role of agencies versus courts within our tripartite system of government. Since the Executive Branch, in which agencies nominally lie, is entrusted with making policy choices to administer legislation, courts should defer to the politically accountable Executive Branch's policy decisions.¹⁰⁰ Separation of powers advocates focus on the Court's statement that,

[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency

97. Merrill & Hickman's article, *Chevron's Domain*, also articulates a third potential doctrinal basis for deference: that *Chevron* represents a common law interpretive doctrine. However, the authors dismiss this possibility. See Merrill & Hickman, *supra* note 47, at 868-70. More recently, Evan Criddle argues that there are, in reality, five core factors that together justify *Chevron*, including congressional delegation and separation of powers, which he denotes as political responsiveness and accountability. See Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1275 (2008). Several of the other factors Criddle notes overlap with the practical, not philosophical, justifications for deference that are discussed below.

98. See Sunstein [Chevron], *supra* note 16, at 2083-87 ("[a]ny principles of deference to administrators must of course depend on congressional instructions, at least as a general rule"); Merrill & Hickman, *supra* note 47, at 870-72 (discussing this as a theory of presumed congressional intent).

99. See Sunstein [Chevron], *supra* note 16, at 2087 (noting that "if Congress has delegated basic implementing authority to the agency, the Chevron approach might reflect a belief, attributable to Congress in the absence of a clear contrary legislative statement, in the comparative advantages of the agency in making those choices"); Merrill & Hickman, *supra* note 47, at 871-72 (noting also the fiction of congressional intent inherent to such a theory).

100. See *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). Numerous scholars have focused their analysis of *Chevron* on this separation of powers principle. See, e.g., Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L. J. 2225, 2232-33 (1997); Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429 (2006) (using separation of powers principles to argue that independent agencies should be entitled to less deference than executive agencies).

charged with the administration of the statute in light of everyday realities.¹⁰¹

Because of this political accountability, courts should defer to agency interpretations of law.¹⁰²

The theory of legislatively delegated authority to an agency cannot, on its own, justify an agency's nonacquiescence when that agency is not entitled to *Chevron* deference. The Supreme Court's preliminary inquiry in *Brand X* as to the scope of the congressional delegation of authority to the agency illustrates its critical nature.¹⁰³ A determination that *Chevron* deference is not owed is, by definition, a determination that Congress has not given the agency the authority to speak with the force of law as to the interpretation at issue, and, thus, the agency's interpretations of law are not made pursuant to an explicit delegation of power by Congress.¹⁰⁴ Yet, in many instances where rulemaking authority has not been delegated by Congress, the agency still has some degree of delegated authority, such as the authority to enforce the statute. As is seen even where *Chevron* deference is not due, there is still some recognition that the agency's interpretation matters because of the agency's congressional mandate – the interpretation simply is not controlling and, thus, does not present a sufficient justification on its own for an agency to engage in nonacquiescence.¹⁰⁵

The separation of powers theory, entrusting policy decisions inherent in the interpretation of law to the politically accountable branch of government, may provide some additional support for agency nonacquiescence even where *Chevron* deference is not owed to the agency interpretation. Interpretations of law by agencies are policy driven regardless of whether Congress has delegated law-making authority to the agency. However, this justification is overreaching on its own: all agency action would be entitled to deference under this theory, which is inconsistent with *Chevron* and its progeny. Thus, this theory can at most provide some support for agency nonacquiescence in the absence of *Chevron* deference; it does not provide a definitive answer.

101. *Chevron*, 467 U.S. at 865-66.

102. *See id.*; *see also* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (discussing and critiquing this theory).

103. *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005).

104. *See* Sunstein [*Chevron*], *supra* note 16, at 2093 (noting that a "legislative grant of rulemaking power implicitly carries with it the grant of authority to interpret ambiguities in the law that the agency is entrusted with administering").

105. For example, under the *Skidmore* standard, courts cannot ignore the agency's interpretation but must give it some consideration. *See Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1156 (2008) (noting that agency interpretations under this standard are entitled to some respect).

Moreover, related separation of powers principles undercut the idea that agency nonacquiescence is appropriate where no *Chevron* deference is owed. Part of our concept of separation of powers is that each separate branch of government acts as a check on the other branches of government, preventing an excessive accrual of power in any one branch.¹⁰⁶ Agency assumption of the power to speak with authority equal to that of the federal courts of appeals moves power from the judiciary to the agency, and such a shift should not be presumed appropriate in all circumstances. Furthermore, giving agencies legislative power as well as primary judicial power of interpretation has the potential for an unchecked accrual of authority by the agency. A second separation of powers concern is also potentially present: usurpation of the judicial role to “say what the law is.”¹⁰⁷ While these concerns exist whenever courts defer to agency interpretations of law, the concerns are subordinated to the expressed (or, at times, implied) congressional delegation of law-making authority to the agency. Lacking such a delegation of authority, these concerns should be taken into consideration and suggest that agency nonacquiescence requires significant justification.

B. *Justifying Agency Nonacquiescence: A Cost-Benefit Rubric*

Because of the lack of legislatively delegated authority to speak with the force of law and the potentially improper infringement by an agency on the authority of the federal courts of appeal, a blanket rule allowing agency nonacquiescence where no *Chevron* deference is due is unjustifiable. However, a per se ban on agency nonacquiescence seems equally inappropriate. Requiring agencies to adhere to federal court of appeals’ interpretations of federal

106. Some would not consider this an aspect to separation of powers but rather its own independent concept. See, e.g., Strauss, *supra* note 15, at 577-78 (describing separation of powers as solely referring to the principle that each branch of government only exercises the power that is at the core of its operations, while describing checks and balances as referring to maintaining).

107. See *id.* However, one theory is that separation of powers concerns are minimal where *Chevron* deference is due because of the significant congressional authority over the lower federal courts. See Estreicher & Revesz, *supra* note 14, at 729-31. Congress has the power to remove and restrict the jurisdiction of the lower federal courts, thereby preventing them from reviewing agency decisions. *Id.* Because of this, where Congress has delegated legislative authority to an agency, this grant of authority to the agency can be read as implicitly limiting the authority of the lower federal courts over that agency, justifying its nonacquiescence. *Id.* Congress has the ability to prevent the lower and intermediate federal courts from exercising jurisdiction over a matter, and this indicates that Congress can give an agency authority to act in the same manner as and with the power equivalent to that of the lower federal courts. *Id.* Therefore, agencies refusing to acquiesce in federal court of appeals interpretations of the law are merely exercising this congressional grant of power. *Id.* There is ample criticism of this position, however. See, e.g., Diller & Morawetz, *supra* note 59, at 823-24; Coenen, *supra* note 61, at 1373-81.

statutes at all times is inconsistent with the political realities facing agencies.¹⁰⁸ Binding the entire agency with a single federal court of appeals decision has the potential to disrupt significantly the operations of the agency.¹⁰⁹ Furthermore, circumstances change over time, and the prospect of a lower federal court decision binding an agency into perpetuity, or at least until congressional action is taken to legislatively overrule the court interpretation, suggests that some flexibility on the part of agencies to engage in nonacquiescence is required.¹¹⁰ Judges are not infallible, and, where there is substantial need and justification, agencies should have recourse to nonacquiescence.¹¹¹

The question, then, is under what circumstances agency nonacquiescence is justified, bearing in mind that this inquiry is limited to situations where *Chevron* deference is inappropriate. Justifications for agency nonacquiescence typically include (1) creating national uniformity in the interpretation of the law; (2) promoting percolation; (3) producing better interpretations of law due to agency expertise; and (4) administrative efficiency. For the reasons that follow, these general justifications are insufficient to support agency nonacquiescence where no *Chevron* deference is due; more is needed.

As to uniformity, deferring to agency interpretation of law as a means of promoting national uniformity is an oft-cited rationale not only for nonacquiescence but also as a general benefit of *Chevron* deference and the regulatory state.¹¹² While promoting national uniformity is a laudable goal, it is far from clear that agency nonacquiescence where no *Chevron* deference is due will lead to national uniformity. While the agency may have a uniform approach nationwide, there is no guarantee that the courts will adopt the same

108. For example, changes in circumstances may require a new approach by the agency. Requiring agencies to follow a single lower federal court decision in perpetuity would have the potential to ossify the law. See *United States v. Mead*, 533 U.S. 218, 247-48 (2001) (Scalia, J., dissenting) (noting the undesirability of ossification).

109. See *Pierce*, *supra* note 100, at 2236 (discussing the difficulties of agencies constructing coherent programs if required to defer to federal court of appeals decisions).

110. Indeed, in *Chevron* the Supreme Court recognized the need for agencies to be authorized to change course over time. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984). See *Murphy*, *supra* note 16, at 16 (noting the expectation that agencies will revise their interpretations of the law over time).

111. See *Coenen*, *supra* note 61, at 1387.

112. See *Estreicher & Revesz*, *supra* note 14, at 747-48; Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118-29 (1987); *Merrill & Hickman*, *supra* note 47, at 860-61 (noting benefits of uniformity); *Bamberger*, *supra* note 95, at 1305 (asserting that greater deference to agencies results in greater uniformity because federal courts all defer to the agency interpretation rather than producing circuit splits where federal courts disagree over the appropriate interpretation of the law).

approach as the agency. In the absence of *Chevron* deference, courts cannot be compelled to defer to the agency's approach; they would need to do so voluntarily, and uniformly, to achieve a single nationwide interpretation of the law. The idea that all the federal courts will defer when they are not required to do so is highly suspect.¹¹³ Indeed, as discussed below in the EEOC context, courts may not even be aware of federal agency interpretations of law that might be at odds with their own interpretations. Thus, even if many federal courts would defer if they were aware of an agency's interpretation, there could still be different interpretations of the law reached by lower federal courts and the agency, precluding national uniformity. Given the reality that agencies are aware of court action, but not necessarily vice-versa, and that courts can compel agency action, but not vice-versa, national uniformity in the absence of *Chevron* deference can only be achieved if agencies acquiesce and thereby defer to federal court decisions.¹¹⁴

The second potential benefit of an agency's nonacquiescence, percolation, requires some explanation. In this context, percolation refers to the process in which different interpretations of the law are explored by different entities before one uniform interpretation is reached – ideas are “percolating” among the entities.¹¹⁵ In the federal courts, percolation occurs as different circuits reach different conclusions about an issue. Because many courts will have the opportunity to address the issue, the full implications of various interpretations of the law will be fully developed. Eventually, so the theory goes, either all the circuits will ultimately agree on the best approach, having seen different options, or the Supreme Court will step in and mandate the best approach if the circuits do not agree. As to agencies, the idea is that the agency acts as an equal player with authority equivalent to the lower federal courts in the percolation process.¹¹⁶

There are two flaws with this argument. First, where no *Chevron* deference is due, it would be anomalous to treat an agency as having the authority equivalent to that of a federal court of appeals. If Congress wanted the agency to have authority equivalent to the federal courts of appeals to promote percolation, it would have done so by giving the agency sufficient au-

113. See Pierce, *supra* note 100, 2234-35 (noting that the problem of inconsistent court-agency interpretations of law was greater before the *Chevron* deference standard was articulated).

114. Even if agencies were to do this, there is still the possibility of multiple approaches being taken in the lower federal courts until the federal circuits agree on the proper interpretation of the law.

115. See Estreicher & Revesz, *supra* note 14, at 729 (noting benefits of percolation).

116. Estreicher and Revesz discuss percolation benefits but do not explicitly articulate this idea. See *id.* at 729-30. See also White, *supra* note 60, at 662 (discussing percolation benefits supporting NLRB nonacquiescence).

thority to speak with the force of law.¹¹⁷ Having failed to do so, in order to justify an agency's nonacquiescence, there would need to be a significant reason to include the agency as a part of the federal court percolation process on par with the federal courts of appeals.

Simply adding one more body, that of the agency, to those who may decide the issue is not a sufficiently compelling rationale. First, it is quite possible that the agency's position will be presented to the federal courts even if it is required to acquiesce, making it a part of the percolation process without raising troubling constitutional concerns.¹¹⁸ In addition, while more is sometimes better, the marginal difference between twelve decision-making entities and thirteen seems slight, unless there is something significant about the additional decision-making entity.¹¹⁹

It is quite possible that an agency will have a different view of the proper interpretation of a law than the courts due to its different role in the government. As the Supreme Court has repeatedly noted, agencies may have special expertise and information unavailable to a court, which could result in a better understanding of an issue.¹²⁰ Here, the goal of percolation, reaching a better ultimate decision, is promoted not so much by adding one more decision-making body but by the special expertise of the agency, which is also an independent argument (the third listed above) in support of agency nonacquiescence.

Sufficient special expertise to justify nonacquiescence should not, however, be presumed. Agencies all have expertise in the subject matter over which they administer. Presuming that all agencies are entitled to ignore lower federal court precedent based on their general expertise is inconsistent with the concept of a specific delegation of authority needed to require lower federal courts to defer to the agency pursuant to *Chevron*. Instead, agencies should be required to prove that they have some specific knowledge or understanding of an issue that is unavailable to a court in order to justify the agency's nonacquiescence where no *Chevron* deference is due. The more complex the regulatory or statutory scheme, the more likely it is that an agency, rather than a court, will appropriately interpret the statute, being better equipped to understand the policy implications and balance the repercussions of a particular interpretation of law over competing ones.¹²¹

117. This is the natural outgrowth of the "legislatively mandated" deference doctrine articulated by Merrill & Hickman. See Merrill & Hickman, *supra* note 47, at 870-73.

118. This would occur when the agency issues its interpretation before the federal courts have an opportunity to speak on the issue.

119. The numbers twelve and thirteen refer to federal circuit courts of appeals.

120. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 845 (1984); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

121. See *Chevron*, 467 U.S. at 844 (noting the agency's superior ability to balance "conflicting policies"); Merrill & Hickman, *supra* note 47, at 861-62 (discussing the need for deference when an agency administers a complex statutory scheme); Mur-

A fourth justification for an agency's nonacquiescence policy is administrative efficiency, that is, the practical need to have a single approach to interpretations of the law at the agency.¹²² Without the nonacquiescence policy, there is the potential for the agency to be subjected to different interpretations of law if the different federal circuits lack a common interpretation. Also, an agency could be required to become familiar with the different cases in every circuit interpreting the law and follow those different interpretations, leading to a lack of uniformity within the agency. Of these two problems, the lack of uniformity within the agency is the more troubling prospect, as the agency may be in the position of having to maintain several different approaches to one situation at the same time. These problems, at a minimum, would make the agency less efficient because it has to research, understand, and apply more than one interpretation of the law at any given time. Yet, where Congress has not delegated authority to the agency sufficient to entitle its interpretations of law to *Chevron* deference, it should be presumed that Congress was aware that the agency would be subject to such situations. Thus, there must be some pressing need beyond the typical agency desire for uniformity and administrative efficiency to justify the agency's nonacquiescence.

The above considerations focus primarily on the structural justifications of agency nonacquiescence. In addition, there should be a substantive justification for the agency's decision to engage in nonacquiescence; that is, the substance of the agency's interpretation should also be assessed to determine whether nonacquiescence is justifiable. An appropriate and familiar framework already exists to conduct this analysis. Where *Chevron* deference is not appropriate, the Supreme Court has sometimes analyzed an agency's interpretation of law according to the standard announced in *Skidmore v. Swift & Co.*¹²³ The *Skidmore* framework is appropriate in this context because it is the standard likely to be used if, ultimately, the Supreme Court is called upon to resolve the continuing dispute between agency and lower federal court interpretations of law. Under this approach, the agency's interpretation is entitled to some consideration by the courts.¹²⁴ If the agency's interpretation would not survive court review under the *Skidmore* standard, then it would be

phy, *supra* note 16, at 24 (arguing that the greater the agency's expertise, the stronger its claim is for deference from the courts); Bamberger, *supra* note 95, at 1305 (opining that the need for deference is greatest with a complex statutory scheme).

122. See Estreicher & Revesz, *supra* note 14, at 743-44; Coenen, *supra* note 61, at 1414; Diller & Morawetz, *supra* note 59, at 813-14.

123. 323 U.S. 134 (1944). Katherine Watts also recommends use of the *Skidmore* framework in a somewhat similar context and advocates reading *Skidmore* in a manner such that the courts are compelled to give some consideration to the agency's interpretation of the statute. See Watts, *supra* note 96, at 1041-47.

124. See *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1156 (2008) (noting that agency interpretations under this standard are entitled to some respect).

futile to engage in nonacquiescence, as the interpretation would ultimately be doomed to failure.

In addition to an agency being required to specifically justify its need to engage in nonacquiescence by identifying the benefits it will achieve and the substantive appropriateness of its interpretation, these benefits must outweigh the costs of the nonacquiescence in order to justify it. Where *Chevron* deference is required, the costs of agency nonacquiescence can be presumed to have been expected by Congress. Without *Chevron* deference, this presumption is inappropriate, and a cost-benefit analysis must justify the nonacquiescence.

The costs of nonacquiescence may fall on the parties subject to agency regulation, the agency, and third parties. There may also be negative repercussions for the administrative system. A common type of cost to be considered is the cost of potential inconsistency of result in any specific case caused by the agency's nonacquiescence. For example, when the SSA engaged in nonacquiescence in the 1980s, the result was that individuals were subjected to two different interpretations of law: one at the agency level, where the SSA used its interpretation, and a second in the lower federal courts, which had their own interpretations of the law. Litigants could only obtain the benefit of the federal court interpretation if they persevered and appealed the agency decision. This imposed costs on both litigants and the courts.

In addition to the potential problem of this inconsistency of result as to any one party, and the concomitant cost to the litigant to obtain a federal court review, consideration should be given to the burdens or costs imposed on third parties. Agency action can affect non-litigants, as rules imposed by agencies are noted and may be followed by those who may be subject to the agency's interpretation in the future, such as in an enforcement action.

Looking beyond the costs and benefits to the agency, parties, and those who follow the agency's rule because they may be subject to the agency's jurisdiction in the future, consideration should also be given to the context in which the agency's interpretation is made.¹²⁵ For example, in situations involving either agency capture or the repeat player phenomenon – that is, situations where an agency is unduly influenced by those it regulates and those with whom it has many interactions – the agency's nonacquiescence is inappropriate, as the agency's interpretation of law may reflect bias.¹²⁶ In addi-

125. Focusing on the context of an agency's action is consistent with the Supreme Court's jurisprudence in this area. In *Mead*, the Court noted that, in addition to the congressional grant of authority to the agency, the degree of deference a court grants to an agency's interpretation of law also depends on the manner in which the agency reached its decision. *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001). Decisions made in a formal notice and comment rulemaking process are generally given greater deference than decisions made in more informal contexts, such as policy statements. *Id.*

126. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 448-50 (1987) [hereinafter Sunstein {Constitutionalism}]; Richard B. Ste-

tion, the inability to police an agency effectively may suggest that the agency should defer to court interpretations rather than engaging in nonacquiescence.¹²⁷

In sum, there are a few potentially viable justifications for an agency's nonacquiescence, such as a significant agency expertise advantage over the federal courts, a pressing need for administrative efficiency promoted by the nonacquiescence, and a substantively appropriate justification. However, simply because there are potential theoretical justifications does not mean that all agency nonacquiescence is appropriate. Costs must also be considered, including the problems of inconsistent results, the effect on non-litigants, and whether problems such as agency capture are present. Thus, agency nonacquiescence should be evaluated in each individual situation to determine whether it is appropriate. One of the reasons for this careful and close evaluation is shown in the following section – where an analysis of the EEOC's nonacquiescence policy using the above framework reveals that it is fundamentally flawed and results in significant negative real-world consequences.

IV. PERILOUS NONACQUIESCENCE: THE EEOC EXAMPLE

A. *The EEOC Nonacquiescence Policy*

In order to analyze the EEOC's specific nonacquiescence policy discussed here, an understanding of the EEOC's role in handling claims of discrimination by federal employees is first needed.

In Title VII of the Civil Rights Act of 1964, Congress charged the EEOC with administering and enforcing federal anti-discrimination in employment statutes.¹²⁸ Enforcement powers under Title VII and other federal anti-discrimination statutes are vested in the EEOC, a purportedly independent agency.¹²⁹ While the EEOC tends to be primarily recognized for its role in overseeing the implementation of Title VII of the Civil Rights Act of 1964 and other federal anti-discrimination statutes¹³⁰ as to employees in the private

wart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 663 (1985); Sunstein [Chevron], *supra* note 16, at 2082. For a discussion of the manner in which agencies may become biased toward those they regulate, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713-16 (1975).

127. Sunstein [Constitutionalism], *supra* note 126, at 450; *see also* Strauss, *supra* note 15, at 579 (noting the need to ensure control over agencies).

128. 42 U.S.C. § 2000e-5(a) (2006).

129. *Id.* While the EEOC is technically an independent agency, even independent agencies are subject to significant control by the Executive. *See* Strauss, *supra* note 15, at 648-50.

130. These laws include the Americans with Disabilities Act, 42 U.S.C. § 12101 (2006), the Rehabilitation Act, 29 U.S.C. § 701 (2006), and the Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (2006). This Article focuses on Title VII be-

sector, it also administers these statutes as to employees of the federal government.¹³¹

Originally, Title VII applied to private sector employees working for employers of a specific size; it did not apply to federal employees.¹³² However, in 1972, Title VII was amended to include coverage of federal employees.¹³³ The substance of the anti-discrimination provisions is identical as to federal and non-federal employees; yet the procedural mechanism for handling claims does differ. The Equal Employment Opportunity Act of 1972 empowered the EEOC to enforce the Act “through appropriate remedies” and to “issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities”¹³⁴ Under the Act, the heads of agencies are required to comply with the EEOC’s “rules, regulations, orders, and instructions.”¹³⁵

The EEOC’s regulations promulgated pursuant to the Act establish detailed procedures for handling discrimination complaints by federal employees.¹³⁶ There is a complex administrative process for handling the employee’s complaint, which requires the employing federal agency to investigate. The employee is then offered the option of an administrative hearing conducted by an EEOC administrative judge.¹³⁷ The employing agency may adopt the decision of the administrative judge or issue its own.¹³⁸ If it does not adopt the administrative judge’s decision, it must also appeal the decision to the EEOC.¹³⁹ Appeals are decided by the EEOC’s Office of Federal Oper-

cause the majority of complaints arise out of that statute; however, the principles articulated herein are applicable to most of these other sources of protection, as there is little substantive difference in the role of the EEOC in interpreting and administering those laws. However, there is authority for the proposition that the EEOC does have a greater role, and is entitled to more deference, with regard to the ADA than with other anti-discrimination laws. See Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1534 (1999) (discussing the different grants of authority to the EEOC).

131. 42 U.S.C. § 2000e-16 (2006).

132. See Civil Rights Act of 1964, tit. VII, § 701(b), 42 U.S.C. § 2000e (2006).

133. See Equal Opportunity Act of 1972, § 11, 42 U.S.C. § 2000e-16 (2006). Other changes were also made at this time, including increasing the EEOC’s enforcement powers by allowing it to bring suit in federal court on behalf of employees. See *id.* § 3.

134. *Id.* §11.

135. *Id.*

136. See 29 C.F.R. §§ 1614.101-.707 (2008).

137. This “administrative judge” is *not* an administrative law judge but merely a lawyer employed by the EEOC. In my own experience, I have encountered EEOC administrative judges who were hired without having ever been counsel on a case, having been hired either directly from a clerkship or from law school.

138. 29 C.F.R. § 1614.110(a) (2008).

139. *Id.* §§ 1614.101-.707.

ations (OFO).¹⁴⁰ The Office of Federal Operations reviews an agency's final decision de novo, while an administrative judge's factual findings are reviewed based on substantial evidence.¹⁴¹ The final OFO decision is mandatory and binding on the agency;¹⁴² the agency cannot appeal the final OFO decision.¹⁴³

While the agency is bound by the final OFO decision, employees are not. Employees may bring claims in the federal district courts if aggrieved by the final decision on their complaint or if sufficient time has passed and no final decision has been issued.¹⁴⁴ These cases may be presented as a claim for enforcement of the final decision or for the case to be tried de novo.¹⁴⁵

In these federal employee cases, the EEOC has implemented a policy of nonacquiescence. Specifically, the EEOC has stated that, in deciding federal sector cases, the EEOC's policy and precedent controls over federal court precedent, except Supreme Court decisions. The EEOC's policy is most clearly articulated in its Administrative Judges' Handbook ("Handbook"). There, the EEOC instructs its Administrative Judges that they

must follow [Equal Employment Opportunity] Commission policy and precedent in adjudicating their cases. When there is a conflict between the Commission's position and that of the Circuit Court in the jurisdiction where the Administrative Judge sits, an Administrative Judge must follow Commission policy but may acknowledge that the Circuit Court has reached a different conclusion.¹⁴⁶

In addition, OFO has asserted that the EEOC's nonacquiescence policy applies at the administrative appellate level. In *Montemorra v. Snow*,¹⁴⁷ OFO

140. *Id.* § 1614.404(a).

141. *Id.* § 1614.405.

142. *Id.* § 1614.502.

143. See 42 U.S.C. § 2000e-16(c) (2008); 29 C.F.R. § 1614.407; *Laber v. Harvey*, 438 F.3d 404, 416 (4th Cir. 2006) (noting that the agency has no right to seek judicial review of OFO decisions). There is a process in place for requesting reconsideration of OFO's initial decision. 29 C.F.R. § 1614.405 (2008).

144. See 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407.

145. Initially, it was unclear whether the federal courts would review the administrative procedure findings or would hear the case de novo. Compare *Abrams v. Johnson*, 534 F.2d 1226 (6th Cir. 1976) (entitled to de novo trial), with *Haire v. Calloway*, 526 F.2d 246 (8th Cir. 1975) (not entitled to de novo trial). In *Chandler v. Roubush*, 425 U.S. 840, 844-46 (1976), the Supreme Court resolved the conflict by holding that federal employees were entitled to a de novo trial in the federal courts. See 29 C.F.R. § 1614.503(g) (2008).

146. EEOC HANDBOOK, *supra* note 13.

147. *Montemorra v. Snow*, E.E.O.C. Doc. No. 01A41536, 2005 WL 1936122, at *3 n.4 (Aug. 2, 2005).

noted, “We remind the agency that the Commission finds circuit court decisions as merely persuasive and non-binding.”¹⁴⁸ Despite the statement of the policy in the Handbook and in *Montemorra*, the EEOC provides no rationale for its nonacquiescence policy.¹⁴⁹ And, while the language used in *Montemorra* suggests that OFO might use federal court of appeals decisions in adjudicating appeals, this does not appear to be the case. For example, in *Montemorra*, instead of discussing or citing to federal courts of appeals decisions interpreting Title VII, OFO cited to a treatise.¹⁵⁰ Similarly, in addressing the standard to be applied in determining whether an allegation of harassment states a claim under Title VII, OFO’s seminal case on the topic discussed Supreme Court cases on the issue and then discussed OFO decisions; no lower federal court decisions were mentioned.¹⁵¹

B. The Framework Applied to the EEOC’s Policy

1. The EEOC’s Interpretations of Title VII Are Not Entitled to *Chevron* Deference

As noted above, the preliminary inquiry in examining an agency’s nonacquiescence is whether the agency’s interpretation of federal law is entitled to *Chevron* deference. In the EEOC’s situation, the EEOC is asserting its entitlement to not acquiesce in any of its interpretations of the federal anti-discrimination statutes; thus, the preliminary inquiry is whether the EEOC is generally entitled to *Chevron* deference when it issues interpretations of the federal anti-discrimination statutes.

Under the relevant standards of agency deference, even the EEOC’s interpretations of Title VII created using formal procedures are entitled to, at most, *Skidmore* deference, not *Chevron* deference. This is due to the lack of congressional authorization for the EEOC to engage in substantive rulemak-

148. *Id.*

149. The EEOC also failed to provide me with any documents explaining its non-acquiescence policy when I requested any documents (pursuant to the Freedom of Information Act) explaining or providing a rationale for its policy.

150. *Montemorra*, 2005 WL 1936122, at *3 (citing Ernest C. Hadley, A GUIDE TO FEDERAL SECTOR EQUAL OPPORTUNITY LAW AND PRACTICE (2004)). In the same case, deciding a different legal question as to when retaliation may be inferred, OFO relied on its own precedent rather than any federal court decisions. *Id.* The Commission framed its reliance on its own precedent as follows: “[o]ur case law holds that this nexus may be shown by evidence that the adverse treatment followed by the protected activity within such a period of time and in such a manner that a reprisal motive is inferred.” *Id.* (citations omitted).

151. *See Cobb v. Rubin*, EEOC Doc. No. 05970077, 1997 WL 123295, at *7-*11 (Mar. 13, 1997).

ing.¹⁵² No Supreme Court decision has ever granted *Chevron* deference to an EEOC pronouncement on the substance of Title VII.¹⁵³ Instead, the Supreme Court has independently examined issues on which the EEOC has opined and reached its own conclusions without relying upon the EEOC's position.¹⁵⁴ The Court has indicated that the reason for this lack of deference is that Congress did not "give[]" rulemaking authority to interpret the *substantive* provisions of Title VII,"¹⁵⁵ which would entitle the EEOC's interpretations to *Chevron* deference.¹⁵⁶

152. While the EEOC does not enjoy the authority to create rules substantively interpreting Title VII with the force of law, *see, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), under the ADEA and ADA, Congress did grant the EEOC some such authority. *See* 29 U.S.C. § 628 (2006) (ADEA); 42 U.S.C. § 12116 (2006) (ADA). However, the scope of this authority is uncertain, being at least somewhat limited. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228 (2005) (concluding that disparate impact claim is available under ADEA without relying upon EEOC interpretation of ADEA); Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999) (EEOC not granted rulemaking authority as to definition of "disability" under the ADA). *But see* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51 (1995) (arguing that the EEOC was granted rulemaking authority as to Title VII, the ADEA, and the ADA).

153. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976). Early on in its review of EEOC regulations, the Supreme Court did grant deference to the EEOC's position, but this approach ceased decades ago. *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) ("The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting s 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.") (citations omitted), *with* Arabian Am. Oil Co., 499 U.S. at 257-58 (noting that, at most, the EEOC's interpretation that Title VII applies to U.S. citizens abroad is entitled to *Skidmore* deference), *and* Smith, 544 U.S. at 239 (independently determining whether a disparate impact claim is available under the ADEA and only noting the EEOC's position without analyzing it or relying upon it).

154. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971) (discussing what constitutes a bona fide occupational qualification without reference to EEOC interpretation); Arabian Am. Oil Co., 499 U.S. at 257-58 (noting but not relying upon EEOC interpretation as to extraterritorial application of Title VII); Smith, 544 U.S. at 239 (independently determining whether a disparate impact claim is available under the ADEA and only noting the EEOC's position without analyzing it or relying upon it).

155. Edelman v. Lynchburg College, 535 U.S. 106, 122 (2002) (O'Connor, J., concurring in judgment) (citing Arabian Am. Oil Co., 499 U.S. at 257); Gen. Elec. Co., 429 U.S. at 141.

156. Edelman, 535 U.S. at 114 (O'Connor, J., concurring in judgment) (citations omitted). The Court has given *Chevron* deference to the EEOC's procedural regulations under the Age Discrimination in Employment Act. *See* Fed. Express Corp. v.

The Supreme Court has shown even less deference to the EEOC when analyzing interpretations of Title VII where the EEOC spoke in its adjudicative capacity rather than in the context of interpretations contained in interpretive guidances or similar documents.¹⁵⁷ In the adjudicative context, it appears that deference is simply not relevant when evaluating the EEOC's adjudicative decisions interpreting Title VII. For example, in *West v. Gibson* the Court addressed the issue of whether the EEOC was entitled to order federal agencies to pay compensatory damages to aggrieved employees under Title VII.¹⁵⁸ The issue arose out of a federal employee's sex discrimination claim that had proceeded through the administrative process within the Department of Veterans Affairs.¹⁵⁹ The Department found against the employee, who appealed to OFO.¹⁶⁰ The Office of Federal Operations reversed the Department's decision.¹⁶¹

When the Department failed to take action as directed by the EEOC, the employee filed suit in federal district court seeking enforcement of the EEOC decision.¹⁶² In that action, the employee sought compensatory damages, which had not been sought in the administrative process.¹⁶³ At that time, OFO had articulated a rule in cases it decided on appeal that it had the authority to order agencies to pay compensatory damages.¹⁶⁴ The Seventh Circuit, in addressing the compensatory damages issue, first determined the appropriate degree of deference to the EEOC's position, determining that some deference was owed.¹⁶⁵

However, on appeal, the Supreme Court analyzed the federal statute at issue without addressing deference to the EEOC and ultimately concluded that the EEOC was entitled to award compensatory damages.¹⁶⁶ Despite finding in favor of the EEOC's position, at no point in its opinion, or in the dis-

Holowecki, 128 S. Ct. 1147 (2008). One might argue that the EEOC's nonacquiescence policy is procedural in nature rather than substantive, as it governs the administrative handling of discrimination claims. However, an agency cannot be entitled to obtain substantive rulemaking powers it was not granted by using a procedural device such as a nonacquiescence policy.

157. *See, e.g.*, *West v. Gibson*, 527 U.S. 212 (1999) (focusing on statutory construction of Title VII rather than discussing the EEOC's decision in the context of a deferral analysis).

158. *Id.* at 214.

159. *Id.* at 216.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (citing *Jackson v. Runyon*, EEOC Doc. No. 01923399, 1993 WL 1509968, at *2 (Nov. 12, 1992)).

165. *Gibson v. Brown*, 137 F.3d 992, 995-96 (7th Cir. 1998), *vacated by West*, 527 U.S. 212.

166. *West*, 527 U.S. at 217-22.

sent to the opinion, did any Justice even mention deference to the EEOC's position as articulated in the OFO decisions.¹⁶⁷ The lack of discussion is made even more surprising by the fact that, leading up to this decision, both the Seventh and Fifth Circuits had explicitly discussed how much deference to give to the EEOC's adjudicative interpretation of Title VII.¹⁶⁸ Both courts appeared to assume that some level of deference to the EEOC's interpretation was appropriate.¹⁶⁹

Against this backdrop, the lack of reference to deference in the Supreme Court's decision might appear to be unusual. But, given the Supreme Court's statements and decisions in other cases indicating that the EEOC's substantive interpretations of Title VII are not entitled to *Chevron* deference, the lack of discussion on deference makes some sense. OFO decisions in federal sector cases are made with less deliberation and less formally than manuals or interpretive guidance statements.¹⁷⁰ Manuals and interpretive guidance statements are less likely to be given deference under *Chevron* than are regulations produced via formal rulemaking. Thus, OFO decisions are fairly far removed from the core types of agency decisions that are entitled to *Chevron* deference by the federal courts.¹⁷¹ Since no *Chevron* deference is due, the inquiry becomes whether the EEOC's nonacquiescence policy is justified according to the considerations established above in Section III.B.

2. The Benefits of the EEOC's Nonacquiescence Policy

a. Special Expertise – Generally

One of the presumed benefits of a nonacquiescence decision is that a superior interpretation of the law is reached by the agency due to the agency's

167. See generally *id.*

168. See *Gibson*, 137 F.3d at 995-96; *Fitzgerald v. U.S. Dep't of Veterans Affairs*, 121 F.3d 203, 207-08 (5th Cir. 1997).

169. *Gibson*, 137 F.3d at 995-96; *Fitzgerald*, 121 F.3d at 207-08.

170. See *supra* Part III.B (noting the high volume of claims handled by OFO and the lack of support and legal analysis contained in the opinions issued by OFO); see also *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001) (discussing high volume of decisions issued and lack of sufficiently senior official input as facts suggesting *Chevron* deference is inappropriate).

171. The EEOC's assertions in the Handbook and *Montemorra* are particularly disturbing when viewed in light of the numerous Supreme Court cases stating that the EEOC is *not* entitled to *Chevron* deference when engaging in substantive interpretations of Title VII. However, it is possible that the EEOC views its interpretations of law in the federal sector cases as somehow entitled to more deference than in the private sector due to its authority to issue orders binding other federal agencies. While Congress did grant the EEOC such authority, it was not accompanied by a grant of authority to issue interpretations on the substantive meaning of Title VII in federal sector cases.

special expertise. However, in the case of the EEOC, this is not a particularly compelling rationale. There are four aspects to this point. First, federal courts have significant experience with employment discrimination claims under Title VII.¹⁷² Employment discrimination cases make up nearly ten percent of the federal district courts' dockets.¹⁷³ This particular issue is not one that federal courts rarely handle. Second, Title VII is not an area where the agency has such significant scientific or technical expertise that the federal courts are unable to adjudicate claims properly.¹⁷⁴ Unlike agencies such as the Environmental Protection Agency,¹⁷⁵ or even the FDA,¹⁷⁶ the EEOC oversees a subject matter that is not generally scientific or technical in nature.¹⁷⁷

Third, the EEOC's record at the Supreme Court suggests that the Court is unlikely to agree with its interpretations of Title VII. Even when the EEOC creates interpretive guidelines and allows for notice and comment on them, the Supreme Court has rarely agreed with the EEOC's interpretation.¹⁷⁸ The Supreme Court's comments on the EEOC's interpretations of the law have included statements that "the Commission is clearly wrong"¹⁷⁹ and that its interpretation is "impermissible."¹⁸⁰ Some scholars have found this lack of respect for the EEOC improper and frustrating, especially when Congress legislatively overrules the Supreme Court and adopts the EEOC's position,¹⁸¹

172. See Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 548 (2003).

173. *Id.*

174. See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORD. L. REV. 1937, 1937 (2006) (opining that the Supreme Court may not believe that anti-discrimination law interpretation requires significant expertise sufficient to defer to the EEOC's interpretations of law); Wern, *supra* note 130, at 1579 (noting the "non technical nature" of anti-discrimination laws as a possible reason for lack of deference to the EEOC).

175. See Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 771 (2008) (discussing scientific expertise as a basis for deferring to EPA decision-making).

176. See James O'Reilly, *Losing Deference in the FDA's Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 940 (2008) (noting the longstanding deference given to the FDA due to the perception of the scientific nature of its work).

177. The exception to this may be with disparate impact cases where a statistical analysis of personnel data is required.

178. See Hart, *supra* note 174, at 1937 (noting that the Supreme Court gives "remarkably little respect" to the EEOC).

179. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

180. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 472 (1999).

181. See Hart, *supra* note 174, at 1950-51 (arguing that, regardless of the standard the Supreme Court uses to evaluate the EEOC's regulations and interpretations of

but the reality remains the same: the Supreme Court tends to disagree with the EEOC's interpretations of Title VII.¹⁸²

The problem of EEOC incorrectness (as perceived by the Supreme Court) is even potentially worse in its adjudication of federal employee claims than when it promulgates regulations and interpretative guidance. In the latter situation, the EEOC has the benefit of time to create its regulation or interpretation, take comments, and reconsider its position in light of input from stakeholders. However, in the adjudicative process with federal employees, the EEOC is under significant time pressure, making analysis fraught with potential for error. In FY 2005, the EEOC decided 7,415 appeals.¹⁸³ Yet the EEOC's budget for FY 2006 indicates only twenty-two full-time equivalent positions allotted to OFO.¹⁸⁴ Even if all these persons were decision-makers, which is not likely since only one department within OFO processes the appeals,¹⁸⁵ it amounts to a staggering 337 appeals per person per year – or approximately 1.5 appeals per day.¹⁸⁶

b. Special Expertise – Empirical Data

Finally, an empirical review of the decisions issued by OFO also undercuts the argument that the EEOC's special expertise should be sufficient justi-

federal anti-discrimination law, the Supreme Court rarely agrees with the EEOC's regulations and interpretations); *see also* The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2006) (legislatively overruling the Supreme Court's interpretation of the after-acquired evidence doctrine).

182. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (holding that EEOC's interpretation of Title VII as applying to American citizens working abroad is inconsistent with the plain language of the statute). The EEOC's interpretations of the procedural aspects of the federal anti-discrimination laws may receive more respect from the Court. *See, e.g.*, Fed. Express Corp. v. Holowecki, 128 S.Ct. 1147, 1154 (2008) (noting that the EEOC's interpretation of the term "charge" is reasonable).

183. EEOC ANNUAL REPORT ON THE FEDERAL WORKFORCE FY 2005, *available at* <http://www.eeoc.gov/federal/fsp2005/index.html>.

184. EEOC 2006 FAIR ACT INVENTORY, II. 52-56, *available at* http://www.eeoc.gov/abouteeoc/plan/commercial_2006.html.

185. This department is the Appellate Review Program. *See* <http://www.eeoc.gov/federal/fsp>.

186. This assumes a total number of working days of 225 per year. This number is based on a non-leap year with 365 days, of which 10 are federal holidays and 104 are weekend days. It also assumes that an employee uses half of all sick days (6.5) and all annual leave days per year and that the employee has 19.5 days of annual leave per year (the average between the most days, 26, and least days, 13, an employee can accrue). *See* http://www.opm.gov/Insure/health/enrollment/new_employees.asp#leave (last visited Jul. 2, 2008) (indicating accrual rates for sick and annual leave); <http://www.opm.gov/oca/worksch/HTML/HOLIDAY.asp#HolidaysforFederalEmployees> (last visited Jul. 2, 2008) (listing federal holidays).

fication for its nonacquiescence policy. If the decisions rendered by OFO indicated a better, more nuanced, or more in-depth analysis of Title VII cases than those of the federal courts, this would support the nonacquiescence policy and suggest that OFO's decisions should be entitled to equal or greater value than those of the federal courts.¹⁸⁷ However, the substance of OFO's decisions does not indicate that the EEOC's special expertise provides any benefit. Indeed, the substance of OFO's decisions suggests that OFO should be relying on federal court cases rather than generating its own body of law. Perhaps due to the incredible volume of cases OFO handles and the relatively small number of OFO attorneys working on these cases, the substance of the decisions is frequently unimpressive and is not better than, and in some respects even compares poorly with, the work product of the federal courts of appeals.

i. Methodology

I reviewed one month of decisions from OFO¹⁸⁸ and categorized the opinions based on the substance of the legal analysis in the decision. An initial review of these opinions revealed a startling number of cases where OFO did not even cite to legal authority for its decision. Upon further review, I was able to develop three basic categories of decisions to suit the different levels of legal analysis in the opinions. While not a perfect fit in all instances, the cases can generally be classified as follows. The first category of cases involves opinions that contain some statement of legal standards regarding Title VII with citation to authority, as well as some discussion of the facts of the case (Category I). These opinions contained the most in-depth legal analysis of the three types of opinions.¹⁸⁹

The second category of cases involves opinions containing no statement of legal standard or citation regarding Title VII but some explanation of the legal standard and citation regarding the procedural context of the case (such as a grant of summary judgment or motion to dismiss) (Category II). A typi-

187. See Pierce, *supra* note 100, at 2240-41 (noting the reputational value of well-reasoned decisions). This would suggest that perhaps the area of law is so complex or complicated that courts should defer to the EEOC's special expertise. However, there appears to be a perception that employment discrimination law is simply not an area of law where the courts feel the need to defer based on agency expertise. See Wern, *supra* note 130, at 1579 (noting that the non-technical nature of the EEOC's subject matter may lead to a lack of deference by judges).

188. To obtain these cases, I used the Westlaw database FLB-EEOC and searched by date for all cases decided in January 2006. This resulted in 361 opinions by OFO.

189. Initially, research assistants reviewed the decisions, but I subsequently read all the cases and reviewed the categorizations myself. Nearly all opinions begin with a reference to the underlying statute, regulations, or both governing the procedural process; those preliminary references were not counted for purposes of these categories.

cal Category II case contains a few paragraphs of facts, followed by a paragraph or two establishing the standard used in the specific procedural posture of the case, then a bare legal conclusion.¹⁹⁰

Third, some opinions contain no citation and no statement of legal standard at all (Category III). These opinions begin with a one-paragraph recitation of the most basic facts of the case, followed by a one or two-sentence legal conclusion such as the following:

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to affirm the agency's final order, because the Administrative Judge's issuance of a decision without a hearing was appropriate and a preponderance of the record evidence does not establish that discrimination occurred.¹⁹¹

After my review of the OFO decisions, I then reviewed the decisions of one federal court of appeals, the Fourth Circuit, made in the same time period, January 2006, to compare them to OFO decisions. I selected the Fourth

190. For example, in *Sadzinski v. Potter*, EEOC Doc. No. 01A53863, 2006 WL 398328 (Jan. 31, 2006), the language used was as follows:

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage, and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255. An issue of fact is 'genuine' if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-323 (1986); *Oliver v. Digital Equipment Corporation*, 846 F.2d 103, 105 (1st Cir. 1988). A fact is 'material' if it has the potential to affect the outcome of a case. If a case can only be resolved by weighing conflicting evidence, summary judgment is not appropriate. In the context of an administrative proceeding, an AJ may properly consider summary judgment only upon a determination that the record has been adequately developed for summary disposition. After a careful review of the record, the Commission finds that the grant of summary judgment was appropriate, as no genuine dispute of material fact exists.

Id. at *1-*2.

191. *Garcia v. Potter*, EEOC Doc. No. 01A50363, 2006 WL 266478 (Jan. 26, 2006).

Circuit as the comparator because it is physically the closest circuit to the location where OFO is located (D.C.), other than the D.C. Circuit. I elected not to use the D.C. Circuit because it is unlike the numerical federal circuits in terms of jurisdiction. I categorized the Fourth Circuit opinions using the same criteria.

ii. Results

The results of this review are set forth in Table 1.

TABLE 1

Overview of Research Results

	Category I (SOME ANALYSIS AND CITATION)	Category II (SOME CITATION BUT NO ANALYSIS)	Category III (NO CITATION OR ANALYSIS)
OFO	240 (66%)	17 (5%)	104 (29%)
FOURTH CIRCUIT	214 (86%)	0 (0%)	36 (14%)

The results are disturbing for several reasons. First, a surprisingly large percentage of the OFO opinions are classified in Category III. Specifically, 29% contained no citation to or discussion of legal authority. Taking Category II and III together, 121 out of 361 cases (34%) lack citation to or discussion of federal anti-discrimination laws.

The remaining cases, Category I cases, do at least cite to some authority for their decisions. However, as indicated in Table 2, a close look at these opinions reveals that some decisions lack actual legal analysis. Instead of substantive legal analysis, the opinions tend to recite well-established legal standards, cite to authority, and then proceed to discuss the factual merits of the appeal without referencing legal authority again. For example, 9% of Category I cases involve the alleged breach of a settlement agreement and contain identical or substantially similar sentences articulating how the EEOC judges determine whether a settlement agreement has been breached. Then, the opinions go on to determine whether there is a breach, without referencing the citations or authority again and without engaging in any comparison between the current case and cited authority.¹⁹² Similarly, 12% of Category I

192. The following is an example of the language used:

EEOC Regulation 29 C.F.R. § 1614.504(a) provides that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at

opinions contain nearly identical paragraphs describing the applicable legal standards for establishing a Title VII claim of disparate treatment.¹⁹³ The

any stage of the complaint process, shall be binding on both parties. The Commission has held that a settlement agreement constitutes a contract between the employee and the agency, to which ordinary rules of contract construction apply. See *Herrington v. Department of Defense*, EEOC Request No. 05960032 (December 9, 1996). The Commission has further held that it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract's construction. See *Egleston v. Department of Veterans Affairs*, EEOC Request No. 05900795 (August 23, 1990). In ascertaining the intent of the parties with regard to the terms of a settlement agreement, the Commission has generally relied on the plain meaning rule. See *Hyon O v. United States Postal Service*, EEOC Request No. 05910787 (December 2, 1991). This rule states that if the writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. See *Montgomery Elevator Co. v. Building Eng'g Servs. Co.*, 730 F.2d 377 (5th Cir. 1984).

Sheppard v. Norton, EEOC Doc. No. 01A46193, 2006 WL 266290, *2-*3 (Jan. 27, 2006).

193. The following is an example of the language used:

A claim of disparate treatment is examined under the three-part analysis first enunciated in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). For complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See *McDonnell Douglas*, 411 U.S. at 802; *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713-714 (1983); *Hernandez v. Department of Transportation*, EEOC Request No. 05900159 (June 28, 1990); *Peterson v. Department of Health and Human Services*, EEOC Request No. 05900467 (June 8, 1990); *Washington v. Department of the Navy*, EEOC Petition No. 03900056 (May 31, 1990).

Abron v. Potter, EEOC Doc. No. 01A55425, 2006 WL 266271 (Jan. 24, 2006).

paragraphs following these legal standards purport to apply the law articulated but fail to cite to it and fail to compare the current case to past precedent. A third common type of Category I case is one that deals with requests for reconsideration. In these cases, the opinions cite to the applicable EEOC regulations then go on to state in a conclusory manner that the standard is not met in the current case.¹⁹⁴

TABLE 2

Common Types of Category I OFO Decisions that Lack Substantive Analysis

Breach of Settlement Agreement	Disparate Treatment Claims	Requests for Reconsideration
22 (9%)	28 (12%)	33 (14%)

In sum, OFO opinions lack sufficient in-depth analysis to justify ignoring federal court of appeals decisions. Indeed, a brief comparison to Fourth Circuit opinions reveals that the OFO opinions reflect a more shallow analysis. The most striking difference between the Fourth Circuit and OFO decisions is that there were only thirty-six Fourth Circuit decisions (or 14%) that could be classified in Category III.¹⁹⁵ The remainder of the decisions were Category I decisions. This indicates that the federal courts, or at least the Fourth Circuit, tend to provide legal support for more decisions than OFO does. Using this metric, it appears that the Fourth Circuit is disposing of cases using more substantive legal analysis than OFO.

In all fairness, however, there are some indications that the depth of analysis shown by OFO and the Fourth Circuit are fairly similar. Within the Category I cases, the Fourth Circuit, like OFO, demonstrated a tendency to

194. The specific language used is typically as follows:

EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. *See* 29 C.F.R. §1614.405(b).

After reconsidering the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(b), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 01A54702 remains the Commission's final decision. There is no further right of administrative appeal on the decision of the Commission on this request.

Turner v. Potter, EEOC Doc. No. 05A60326, 2006 WL 266279 (Jan. 27, 2006).

195. For purposes of this review, I considered both published and nonprecedential decisions.

use identical language and citation, with no or nearly no substantive analysis, to dispose of numerous cases. Specifically, in 56 out of the 214 Category I cases (26%), the court used identical language¹⁹⁶ to address cases where a prisoner collaterally attacked the sentence imposed by the court.¹⁹⁷ There were also numerous cases where the court provided a citation for its decision but followed that citation with no substantive analysis. Instead, it merely provided a few sentences articulating its conclusions.¹⁹⁸ On the other hand, there were a few Fourth Circuit cases where the court conducted significant, in-depth legal analysis far beyond that of any of the OFO cases.¹⁹⁹

196. In a few cases, the court added an additional sentence or two to its opinion, but the citations remained the same.

197. The following is an example of the language used:

The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2000). A certificate of appealability will not issue absent “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court’s assessment of his constitutional claims is debatable and that any dispositive procedural rulings of the district court are also debatable or wrong. See *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Harris has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

United States v. Harris, 164 F. App’x. 406, 406-07 (4th Cir. 2006).

198. The most common situation where the court took this approach was in cases involving immigration appeals such as requests for asylum. See, e.g., *Irwina v. Gonzales*, 161 F. App’x 302, 302 (4th Cir. 2006) (In an immigration case, after citations, the court stated only the following: “Having conducted our review, we conclude that substantial evidence supports the finding that Irwina failed to meet these standards. We accordingly deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.”). Another situation using this type of cursory approach involved claims of improper sentencing. See, e.g., *Boone v. Hickey*, 161 F. App’x 279-80 (4th Cir. 2006) (In review of sentencing conducted under Booker, after citations, the court stated only the following: “Because Boone does not meet the standard set forth in *In re Jones*, 226 F.3d 328, 333-34 (4th Cir. 2000), we affirm the denial of relief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.”).

199. Compare *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 435 F.3d 521 (4th Cir. 2006); *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510 (4th Cir. 2006); *Jean v. Gonzales*, 435 F.3d 475 (4th Cir. 2006), with *Dalesandro v. Potter*, EEOC Doc. No.

One could posit very different conclusions from this information. For example, on its face, it suggests that the Fourth Circuit does conduct more significant, in-depth legal analysis than OFO does on a regular basis. Alternatively, it is possible that the Fourth Circuit had more substantive or complex cases during January 2006 and OFO's docket that month had nothing requiring such detailed analysis. It is also possible that OFO has already addressed with substantive legal analysis nearly every possible significant legal issue posed under federal anti-discrimination laws, and thus it is not regularly presented with new opportunities to conduct significant analysis. Assessing these (and other) possibilities is unfortunately beyond the scope of this Article.²⁰⁰ Regardless of whether it establishes that the Fourth Circuit always or regularly conducts more substantive legal analysis than OFO, at a minimum, it fails to support any contention that OFO's analysis is more in depth or substantive than that of the federal courts – rebutting one rationale for OFO's nonacquiescence policy.

c. Administrative Efficiency

The EEOC has not provided a justification for its nonacquiescence policy.²⁰¹ However, because the EEOC handles cases from across the United States, it is likely that the EEOC would assert a practical need to have a single approach to interpretations of the law at the agency.²⁰²

While it seems easier and simpler for OFO to have one body of law to reference in deciding its cases, by virtue of the policy, OFO is taking on the task of developing and interpreting the law, which would not be required to

01A50250, 2006 WL 266497 (Jan. 30, 2006); *Lewis v. Potter*, EEOC Doc. No. 01A52754, 2006 WL 266262 (Jan. 27, 2006).

200. Ascertaining the veracity of the first possibility would require a significant review over a more extended period of time than one month. As for the second possibility, it is nearly impossible to prove or disprove, as it would require access to all the underlying information in the cases presented to both the Fourth Circuit and OFO, and much of this information is not publicly available. Particularly as to the federal employee claims at OFO, the claimants' privacy rights prevent access to the documents and information available to OFO at the time it reaches its decisions.

201. In order to ascertain whether the EEOC had at some point provided a justification, I conducted research in the Federal Register and located nothing. I subsequently searched the EEOC's website and located the Handbook. I then submitted a Freedom of Information Act request seeking any documents discussing or mentioning the policy. The only document submitted in response to the request was the Handbook. If the EEOC did ever publish a document justifying its policy, it is one that is extraordinarily difficult to find.

202. This is one of the commonly asserted rationales for engaging in nonacquiescence. See *Estreicher & Revesz*, *supra* note 14, at 743-44; *Coenen*, *supra* note 61, at 1414; *Diller & Morawetz*, *supra* note 59, at 813-14.

the same extent as if it were to follow federal court precedent.²⁰³ There is, then, some cost imposed on OFO by its policy that should be weighed against the potential benefits of the policy. In addition, it is unclear to what extent OFO is even using its own law as the basis for its decisions, as many OFO decisions lack any indication of the legal authority for the outcome. This suggests that following federal court precedent might improve the quality of the decisions, as OFO might be forced to explain its decision under the applicable federal precedent.

Another flaw in the argument that the EEOC requires uniformity is that uniformity at the administrative level has to be balanced against the cost of a lack of uniformity within any given case. The use of one approach at the agency may provide efficiency benefits at OFO, but it is at the potential expense of uniformity of result for any one individual's claim. For example, a litigant may find one result at OFO and a different result in federal court. Even if the result at OFO and in federal court would be the same the majority of the time, the official policy of disregarding federal court cases suggests to the litigants that the result may well be different; otherwise, why not use the same law? In addition, because OFO's decisions only create a national standard as to federal employees, other employees are subject to the standards established by the federal courts in the circuit in which they work. Thus, when considering both public and private sector employees, OFO's approach undercuts the goal of national uniformity.

d. Substantive Justification

The final aspect to justifying an agency's nonacquiescence decision is a substantive one: the agency should be producing an interpretation of law that has a good prospect for surviving federal court review. However, the EEOC's nonacquiescence decision is a broad policy. In essence, the EEOC is effectively asserting that all its interpretations of Title VII would be accepted by federal courts reviewing the interpretations under a *Skidmore* standard. This is entirely contrary to the limited role of agency nonacquiescence in the absence of *Chevron* deference envisioned by this Article. Furthermore, it is nearly impossible to assess the substance of all the EEOC interpretations of Title VII because OFO does not identify when it is engaging in nonacquiescence, making it a painstaking process to discern when the OFO interpretations vary from those of the federal courts of appeals.

203. OFO would still be required to develop and interpret the law in the absence of federal court precedent.

3. The Costs of the EEOC's Nonacquiescence Policy Are Significant

In the case of the EEOC's nonacquiescence policy, the unique administrative and court procedures for handling federal sector cases impose significant costs that outweigh any benefits of the policy.

a. Costs of Dual Bodies of Law Interpreting Title VII

The costs resulting from the procedural system established by the EEOC for handling federal employee complaints of discrimination make OFO's nonacquiescence policy untenable. The procedural system precludes a dialogue between the federal courts and OFO regarding different interpretations of Title VII. As a result, two separate bodies of law interpreting Title VII have arisen. This situation differs from those in other administrative law contexts, where courts explicitly review agency decisions and, in that context, have been able to speak to both the proper relationship between the agency and the courts and the substantive legal interpretations by the agency.²⁰⁴ The federal courts are never required to address OFO's interpretations of law and are rarely presented with the opportunity to do so. Indeed, it is unclear whether most federal courts are even aware of the body of law developed by OFO that governs federal employees' claims in the administrative process.

The reason for the lack of dialogue between federal courts and the agency is the administrative process through which complaints of discrimination are handled. As discussed in Part II, Congress delegated to the EEOC the authority to create the administrative process for handling federal employee claims under Title VII. The EEOC's resulting regulations and the Supreme Court's decision in *Chandler v. Roudebush*²⁰⁵ create a system in which OFO's decisions are insulated from any direct review by the courts.

Under these regulations, a federal employee's claim can present itself in federal court in three different procedural postures. First, the employee can opt out of the administrative process if it takes more than 180 days and may then bring suit directly in federal court.²⁰⁶ In this instance, the employee's claim is brought in federal district court and is tried de novo.²⁰⁷ The second

204. See, e.g., *Peters v. Ashcroft*, 383 F.3d 302, 306 n.2 (5th Cir. 2004) (noting that the Board of Immigration Appeals is bound by Fifth Circuit decisions); *Ladha v. I.N.S.*, 215 F.3d 889, 896 (9th Cir. 2000) (same), *overruled on other grounds by* *Abbebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009); *Swentek v. OPM*, 76 M.S.P.R. 605, 615 (Merit Sys. Prot. Bd. 1997) (citations omitted) (noting that the Merit Systems Protection Board is bound by Federal Circuit precedent).

205. 425 U.S. 840 (1976).

206. 29 C.F.R. § 1614.407(b) (2008). The employee may also opt out at the administrative appeal stage, within 180 days of filing the appeal, if no final decision has been issued. *Id.* § 1614.407(d).

207. See *Chandler*, 425 U.S. at 844, 864 (discussing procedural mechanisms for employees to bring suit in federal court and concluding that employees are entitled to

and third situations arise when the employee's claim has been fully decided in the administrative process. In the second option, the employee can bring suit in federal court if the employee is unsatisfied with the EEOC's ultimate decision on the claim.²⁰⁸ This allows the employee to have the federal district court hear his or her claim *de novo*.²⁰⁹ Third, if the EEOC decides in favor of the employee, the employee can seek to enforce the EEOC decision in the federal district courts.²¹⁰ In this situation, the EEOC's determination that the agency discriminated against the employee is binding on the federal court, and the EEOC's decision cannot be reviewed by the court.²¹¹

In the first and second options, the federal court entirely disregards the administrative process.²¹² Thus, the court will not review any interpretation by the EEOC of Title VII.²¹³ In the third situation, the court does take notice of the administrative process. Specifically, the court accepts the EEOC's decision and does not review its merits.²¹⁴ Thus, no matter how the case is brought to federal court, the court will not be called upon to decide whether the EEOC's interpretations of law are correct. As a result, the EEOC's interpretations of law made in the adjudicative process are not directly reviewable, and federal courts only discuss them in exceedingly rare instances.²¹⁵

a *de novo* trial regardless of whether the suit is brought before or after a decision has been reached on the claim).

208. 29 C.F.R. §§ 1614.407(c), 1614.503(g).

209. *Id.*

210. 29 C.F.R. §1614.503(g).

211. *See* *Laber v. Harvey*, 438 F.3d 404, 416-17 (4th Cir. 2006) (noting that employees may either bring an enforcement claim, in which case the court does not review the EEOC's decision, or bring suit *de novo*); *Scott v. Johanns*, 409 F.3d 466, 469 (D.C. Cir. 2005) (holding that the only two options are trial *de novo* or complete enforcement of EEOC decisions and that seeking to vary the relief ordered by the EEOC constitutes a request for a trial *de novo*); *Moore v. Devine*, 780 F.2d 1559, 1563 (11th Cir. 1986) (holding that a claim is not retried *de novo* where enforcement is sought, however, in limited circumstances, enforcement may not be possible).

212. *See Chandler*, 425 U.S. at 843, 864 (discussing the disagreements between courts of appeals as to the weight to be given to the administrative decision and concluding that a trial *de novo* is proper).

213. *See id.*

214. *See Laber*, 438 F.3d at 417 (noting that, where an enforcement proceeding is brought by an employee, the administrative decision of the EEOC is binding as to the agency and is not reviewed); *Moore*, 780 F.2d at 1563 (same).

215. The rare instance arises where an EEOC interpretation of the law is evaluated by a court in a proceeding different from the one where the interpretation was made. For example, the EEOC determined that it was entitled to order compensatory damages in the administrative process in the context of an adjudication. *Jackson v. Runyon*, EEOC Doc. No. 01923399, 1992 WL 1372557 (Nov. 12, 1992). The Supreme Court ultimately addressed this issue, but not directly; it came before the Court based on a question of exhaustion of remedies. *See West v. Gibson*, 527 U.S. 212 (1999). An employee sought compensatory damages in federal court after not requesting them

This situation establishes the EEOC as the sole and final arbiter of what Title VII means as to federal employees unless the employee sues in federal court. The implications of this for the administrative process are troubling. If employees believe that the EEOC's interpretations are worse for them than federal court interpretations, they will either opt out of the process at the 180 day mark, making the administrative process irrelevant, or seek a trial in federal district court – a lawsuit in which the outcome at the administrative level is disregarded and, once again, the administrative process is irrelevant. The employee, agency, and EEOC contribute significant time and money to the administrative process, all of which are lost.

A second possibility is that the EEOC is interpreting law more favorably to employees than the federal courts are.²¹⁶ This would result in a two-tiered system of law, with public sector employees receiving more favorable inter-

in the administrative process, and the district court was required to determine whether the EEOC had authority to order compensatory damages in order to determine whether the employee had exhausted his administrative procedures as to the compensatory damages claim. *See id.* at 212.

216. One recent situation where this has occurred is with regard to the standards for determining whether an employee has been harassed in retaliation for engaging in prior equal employment opportunity (EEO) activity under Title VII. *Lynch v. Nicholson*, E.E.O.C. Doc. No. 01A50839, 2006 WL 3983336 (Jan. 31, 2006). OFO articulated the test as follows: the employee must show that

- (1) [the employee] previously engaged in EEO activity;
- (2) [the employee] was subjected to unwelcome conduct related to her protected class;
- (3) the harassment complained of was based on prior EEO activity;
- (4) the harassment had the purpose or effect of unreasonably interfering with [the employee's] work performance and/or creating an intimidating, hostile, or offensive work environment, and
- (5) there is a basis for imputing liability to the agency.

Id. at *4 (citations omitted). This formulation allowed claims to be brought where the actions were intended to interfere with the employee's work. There was no requirement that it actually interfered with the employee's work or caused any harm. By contrast, even the most broadly worded approach in the federal courts of appeals required some harm to the employee. *See, e.g., Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (defining actionable retaliation as "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity" (citations omitted)). This example also highlights a different problem with OFO, which is its lack of consistency. In this formulation of the rule, OFO failed to follow the EEOC's own compliance manual definition of actionable retaliation, which requires that there be not only improper motive but also a result of that behavior – that it is reasonably likely to deter employees from engaging in protected activity. *See id.* The more protective standard enunciated by OFO was not adopted by the U.S. Supreme Court when it addressed the scope of protections against retaliation under Title VII in *Burlington Northern & Sante Fe Railway v. White*, 548 U.S. 53 (2006). There, the Court adopted an approach requiring that the employer conduct be "materially adverse" such that the employee is subject to an actual "injury or harm." *Id.* at 67-68.

pretations of employment discrimination laws than private sector employees – an outcome at odds with the statutory language establishing the same anti-discrimination protections for both groups.²¹⁷ Another negative repercussion of this situation is that agencies' relationships with the EEOC may become strained as the agencies perceive the EEOC to be biased against them.

The third possibility is that there is no systemic approach by the EEOC to interpret the law more in favor of the employee or the agency than do the federal courts. In other words, the EEOC may be acting exactly as it should, as a neutral decision-maker. This is the best possibility for the EEOC. But, even if this is the case, because the employee can always start the case over in federal court, there is unnecessary duplication of effort – two trials occur, and two appeals are taken.

In sum, all three possible EEOC approaches to interpreting the law result in some negative repercussions for the EEOC and the litigants.

In addition to the costs imposed by the policy on the EEOC and litigants, there are costs imposed on third parties. In the cases handled by the EEOC, the alleged discriminating official(s) are not parties. They are, however, directly impacted by the EEOC's decisions. Agencies are under pressure to prevent discrimination in the workplace. This pressure intensified in the past few years, after Congress passed the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 ("No Fear Act").²¹⁸ The No Fear Act requires agencies to provide annual data on discrimination claims filed against the agency and to pay for the costs when it is found to have engaged in discrimination.²¹⁹ One of the purposes of the No Fear Act was to pressure agencies into taking effective action to prevent discrimination.²²⁰ One of the obvious ways of preventing discrimination is to terminate employees who engage in discrimination. If the EEOC's nonacquiescence policy causes discrimination to be found by the agency when it would not be so found in the federal courts, because the agency is unable to obtain any judicial review of this decision, the result is that a federal employee will likely be subjected to discipline up to and including termination under an interpretation of the law not entitled to *Chevron* deference.²²¹

b. Contextual Concerns: Repeat Players and Lack of Policing

Looking at the final set of considerations to evaluate the EEOC's non-acquiescence policy, contextual considerations suggest that the policy is not

217. Compare 42 U.S.C. § 2000e-2 (2006), with 42 U.S.C. § 2000e-16 (2006).

218. Pub. L. No. 107-174, 116 Stat. 566 (2002).

219. *Id.* §§ 201, 203.

220. *Id.* § 101.

221. The potential impropriety of subjecting a person to sanctions for past behavior, without warning, by a decision-maker other than a federal judge was noted by Cynthia Farina. See Farina, *supra* note 102, at 453.

justified. The specific concerns raised by the EEOC's policy include a potential repeat player problem and the lack of sufficient oversight over OFO.

As to the repeat player phenomenon, while the individual employee subject to discrimination in the federal sector changes with each case, the employing agencies do not. There is such a limited number of agencies that the specter of special treatment for these repeat players must be considered as a factor suggesting that OFO is not particularly well placed to create its own interpretations of Title VII. This possibility is made more likely by the dual role of OFO vis-à-vis other federal agencies. OFO is not limited to acting as an adjudicator. Rather, OFO is also charged with assisting federal agencies in their efforts to comply with Title VII.²²² This puts OFO in the position of having to help agencies improve their anti-discrimination efforts while simultaneously judging how effective their anti-discrimination efforts are in any given case. If OFO has just been working with an agency to improve its responses to sexual harassment claims, it seems less likely that OFO is going to find that a response to sexual harassment by that agency is legally insufficient.²²³

Compounding the repeat player concern and the problem raised by OFO's dual responsibilities toward the agencies is the factual reality that the EEOC is subject to political pressure even though it is nominally an independent agency.²²⁴ Unlike federal court judges, the EEOC's employees deciding federal employee cases are not given life tenure. And, on a larger scale, the EEOC's budget is subject to pressure from both the Executive and Congress. These problems of political pressure²²⁵ and agencies as repeat players, when coupled with the lack of special expertise at the EEOC, suggest that the EEOC's nonacquiescence policy is inappropriate.

In addition, one of the perpetual difficulties with the administrative law state, that of effectively policing an agency,²²⁶ is present for the EEOC. As to

222. See Statement of Carlton Hadden, Director, Office of Federal Operations, Meeting on Federal Sector EEO Investigations (Sept. 7, 2006), available at <http://www.eeoc.gov/abouteeoc/meetings/9-7-06/hadden.html> (last visited July 1, 2008).

223. This is a variation on the point that, when an agency is self-interested, it should be entitled to less deference in its interpretations of law. See Sunstein [Chevron], *supra* note 16, at 2076, 2101 (discussing agency bias).

224. The President selects the Chairman of the Commission, for example. 29 U.S.C. § 791(a) (2006).

225. This point might strike some as inconsistent with one of the rationales for deferring to agency construction of a statute – that is, they are preferable policymakers over federal judges because they have political accountability. However, the relative obscurity of OFO's office itself and even greater obscurity of its decisions suggest that the normal political accountability of agencies is lacking here.

226. The need for effective limitations on one branch of government by other branches dates back to the founding of this country. See THE FEDERALIST NO. 51 (James Madison). Its ongoing importance is well recognized. See Sunstein [Chevron], *supra* note 16, at 2071; Diller & Morawetz, *supra* note 59, at 828 (noting importance of judicial oversight of agencies); Coenen, *supra* note 61, at 1439 (discuss-

OFO, the policing issue is particularly disturbing. In administrative adjudication, the normal manner of policing an agency is by giving federal courts the authority to review agency adjudicative decisions.²²⁷ Facially, that seems to occur with regard to OFO's decisions. If dissatisfied, the employee claiming discrimination may bring suit in federal court and have his or her case heard *de novo*.²²⁸ While this seems to be a powerful policing tool, OFO has negated its power by refusing to be bound by federal circuit court decisions. By doing this, OFO has refused to allow itself to be policed. It is able to maintain its own body of law, and there is no mechanism through which its decisions can be directly criticized. In essence, once a case goes to federal court, it is irrelevant to OFO what happens there. OFO never receives any commentary on its interpretations of law in that case, and OFO refuses to be bound by interpretations of law in other cases.²²⁹

4. Resolving the EEOC Problem

It is unlikely that the EEOC will, of its own accord, change its practice and begin following federal courts of appeals decisions interpreting Title VII. The obvious solution to change the EEOC's current practice is via legislation. Congress could explicitly require the EEOC to follow federal courts of appeals decisions interpreting Title VII. However, this solution brings with it other questions, such as whether the EEOC should follow one particular circuit or follow the circuit in which the employee is located. In addition, while it is proper and appropriate for there to be consistency between the law as interpreted by the EEOC and as in the federal courts, this solution would not address the problem of EEOC decisions being non-reviewable by the federal courts. Thus, even if the EEOC were purporting to follow federal court decisions, policing the agency would be nearly impossible.

A better solution would be to overhaul the procedural process. One of three approaches here would be more appropriate. The first and best solution would be to amend Title VII to remove the right to a trial *de novo* in the federal courts. Instead, federal employee cases would be reviewed in a manner similar to other agency actions. Cases would be reviewed on the administrative record by the court of appeals for the circuit in which the employee

ing importance of limiting authority of executive agencies); Farina, *supra* note 102, at 493-95 (discussing the history and relevance to the deference debate).

227. Richard Pierce has suggested that inappropriate agency action, specifically inconsistent interpretations of the law within the agency, is "easily detected" by reviewing courts and thus presumably not a significant concern. See Pierce, *supra* note 100, at 2236. While this may be true in other contexts, the lack of substantive review of OFO interpretations indicates otherwise here.

228. See *supra* Part I.

229. If OFO were to declare its decisions unreviewable generally, that position would be of highly suspect legality. See Sunstein [Chevron], *supra* note 16, at 2102. In essence, though, OFO has achieved that result through its nonacquiescence policy.

worked, and the review would be with deference to the agency's factual findings and de novo as to the agency's legal conclusions. In addition to changing the manner of review, the agency itself should be given the right to seek review of the OFO decision to ensure appropriate policing of the EEOC.

There are several benefits to this approach. First, it ensures parity between treatment of employees in the federal government and all other employees as to the substantive interpretations of anti-discrimination laws, as they would all be governed by the law as interpreted by the federal court of appeals for the circuit in which they work. Second, it reduces the number of cases in the federal district courts, since review will be at the court of appeals, not the district court. Third, it reduces the federal government's overall costs for handling these claims because employees would no longer have two full trials (one at the administrative and one at the district court level). Fourth, it increases the value of the administrative process, which is the sole place where a record is created. Fifth, it will ensure consistency as to the outcome of each individual case, as the source of interpretations of Title VII will be the same at both the administrative and federal court level. And finally, but perhaps most important, the federal courts of appeals will be in a position to police the decisions of the EEOC and OFO and curb arbitrary or capricious agency decisions.²³⁰ However, it will result in the loss of a trial de novo in federal district court, removing parity between federal and private sector employees as to that right.

There are other options for solving the problem, but they are less desirable for various reasons. A variation on the first option would be to establish the Federal Circuit, or some other circuit, as the reviewing court for claims by federal employees. This is the system by which other non-discrimination employment claims of federal employees are handled.²³¹ There are several benefits of this approach. First, it retains the uniformity of law for the EEOC, merely replacing OFO as the final arbiter of Title VII with one of the federal circuit courts. Second, it ensures that all federal employees are subject to the same interpretation of the law, regardless of where they work. Thus, employees of an agency with offices throughout the country will all be subject to the same body of law rather than subject to the body of law within federal circuits, which are based on geographic location. Third, the Federal Circuit is currently charged with handling other federal employment claims involving the merit system. As a consequence, it has familiarity with the mechanics of agency employment decision-making, which is a complex matter at the heart of most employment discrimination claims.

230. Another benefit of this approach is the potential benefit to the individuals accused of engaging in discrimination. At present, if OFO determines that discrimination has occurred, the alleged discriminator has no way of seeking review of that decision because the agency-employer is bound by the decision. The alleged discriminator will then be subject to disciplinary action.

231. See 5 U.S.C. § 7703(b)(1) (2006) (petition for review of MSPB decisions must be filed in the Federal Circuit).

There are, however, negative consequences to this approach that offset these benefits and make this option less attractive than the first. One downside is that absolute parity between private and federal employees is lost. Another negative repercussion of this approach is that it would involve a large increase in the Federal Circuit's docket, because it currently does not handle employment discrimination claims at all.²³² And finally, because the Federal Circuit currently does not handle employment discrimination claims, it lacks knowledge and expertise on the topic as compared with the other federal courts of appeals.

A more radical approach than those proposed above would be to overhaul the current system by removing the current complex administrative procedures and instead have federal employee claims handled in a manner similar to those of private sector employees. For private sector employees, the EEOC does process claims, but it does not conduct trial-like hearings or appeals. Instead, the EEOC investigates some claims, mediates some claims, engages in conciliation efforts on some claims, and litigates strategic cases.²³³ A significant number of claims are not investigated or otherwise handled by the EEOC at all; individual litigants opt out of the process and seek relief directly in federal court.²³⁴ In this option, OFO and administrative judges would not adjudicate cases, and, thus, there would be no reliance on the OFO-developed body of case law. The benefits of such an approach for the EEOC itself are significant. Instead of managing two entirely distinct systems of handling claims, the EEOC would be able to streamline its processes by having a single system for both private and federal sector employees. This would decrease costs for the EEOC, as the EEOC would no longer be required to field administrative judges to hear federal employee claims at a hearing nor review those cases again on appeal. Instead, the agency would be able to manage cases in the federal sector in the same manner that it does in the private sector – by directing the agency's limited resources toward the most meritorious and strategically important cases. In addition, the federal agencies would save significantly, as the current cumbersome administrative process would be shortened.

This option would require congressional involvement, and the EEOC would need to promulgate new procedural regulations to change the adminis-

232. As the federal courts currently handle cases from federal employees in their circuit who opt out of or are unsatisfied with the administrative process, the increase in caseload for the federal circuits would have less of an impact on the circuit courts than consolidation into one court would have on that court's docket.

233. See EEOC's Charge Processing Procedures, http://eeoc.gov/charge/overview_charge_processing.html (last visited July 2, 2008) (EEOC website describing the manner in which the agency processes discrimination complaints for private sector employees).

234. See Paul Igasaki, *Doing the Best with What We Had: Building a More Effective Equal Employment Opportunity Commission During the Clinton-Gore Administration*, 17 LAB. LAW. 261, 266 (2001).

trative process. It would also require that the EEOC, agencies, and federal employees accept a radically different approach than is currently used, which seems unlikely and makes this a less viable option than the others. Also, many federal employees are likely to protest this approach because of the increased difficulty of bringing a complaint to a hearing, as the federal courts will not likely be as accessible to them as was the EEOC.²³⁵ These practical difficulties make this option less viable than the other options.

V. CONCLUSION

The current system, with the EEOC asserting a right to ignore federal court of appeals decisions, is fundamentally flawed. Perhaps most disturbingly, it results in two separate bodies of law without a direct mechanism for reconciling them. It also decreases the value of the administrative process because, at the end of the day, the entire administrative process is meaningless if the employee does not like the outcome and sues in federal court. Further, it increases costs by allowing duplicative trials, one in the administrative process and one in federal court. And all of the negative repercussions result from the EEOC's assertion of power that is contrary to *Chevron* and its progeny as well as inconsistent with underlying constitutional and administrative law principles and theories. For these reasons, the EEOC's nonacquiescence practice must be halted.

235. The plaintiffs' bar is also likely to be unenthusiastic about this approach. There is a small but devoted group of attorneys who rely on federal employee claims as a significant portion of their practice, and they are unlikely to view the replacement of administrative judges with district court judges as a benefit to them or their clients.