Not a "Second Class" Agency: Applying *Chevron* Step Zero to EEOC Interpretations of the ADA and ADAAA

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Introduction

A key tenet of administrative law is that where Congress enacts statutory provisions for federal agencies to administer, courts should give agencies' interpretations of those statutes some level of deference.[1] The level of deference given to agencies depends on several factors: whether Congress explicitly or implicitly gave the agency the power to interpret the statute, the technicality of the subjects at issue, and the process by which the agency attempts to interpret the law.[2] Under Title I of the Americans with Disabilities Act of 1990 (ADA), Congress delegated to the Equal Employment Opportunity Commission (EEOC) the power to implement regulations that interpret Title I's goals of ending employer discrimination against individuals with disabilities.[3] When Congress passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), it seemingly gave the EEOC even more power to interpret Title I.[4] This Article will examine the level of judicial deference the courts give to the EEOC in its interpretations of Title I of the ADA and whether the passage of the ADAAA impacted any such deference given.

Under the Supreme Court's *Chevron* precedent, if a statute that an agency administers is ambiguous or silent on an issue, then the Court will defer to an agency's reasonable interpretation of that stat-

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1 *See generally* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833 (2001).

2 *See generally id.*

3 42 U.S.C. § 12116 (2012).

4 42 U.S.C. § 12205a (2012).

ute.[5] Some argue, however, that the Supreme Court has inconsistently applied with its precedent by not deferring to the EEOC as it should, treating the EEOC as a "second class" agency.[6] This Article concludes that these authors are mistaken by failing to take into account what has been academically characterized as "*Chevron* step zero."[7] *Chevron* only applies to situations where Congress explicitly or implicitly delegates the ability to render binding interpretations of statute to agencies.[8] The Court has been consistent that absent such a delegation, it is under no obligation to defer to agency interpretations.[9] Instead, the Court looks to agency interpretations for guidance only. Where the agency interpretation is unpersuasive in light of the Court's own analysis, the Court is free to disregard it.[10]

This Article argues that whenever the Supreme Court has faced the issue of whether to defer to an interpretation of the ADA by the EEOC, the Court has applied *Chevron* step zero to determine the amount of deference owed to the agency. Where the EEOC's interpretation has passed *Chevron* step zero, the Court has applied *Chevron* deference. Where the interpretation has failed *Chevron* step zero, the Court has applied a lesser standard of deference.

To fully understand how the courts have applied *Chevron* step zero to the EEOC's interpretations of the ADA, Part I of this Article gives a brief background on judicial deference to agency interpretations and how the Court has deferred to the EEOC generally. Part II discusses the amount of deference given by the Court to agency interpretations of the ADA, concluding that the Court consistently applies an implicit *Chevron* step zero analysis. Part II then examines how lower courts have analyzed deference to the EEOC's interpretations of the ADA based on Supreme Court precedent. Part III concludes by analyzing how the ADAAA's explicit proclamation of the EEOC's

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5 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

6 *See, e.g.*, Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532, 570 (2000); 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, 1578 (1999).

7 *See generally* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006); Merrill & Hickman, *supra* note 1, at 873.

8 NLRB v. Food and Commercial Workers, 484 U.S. 112, 123 (1987) (explaining that *Chevron* applies only to agency interpretations "promulgated pursuant to congressional authority").

9 Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 650 (1990).

10 *See, e.g., id.*

authority will clear up uncertainty among the lower courts in regard to the amount of deference owed for ADAAA interpretations.

I. BACKGROUND

As background for this Article's discussion of judicial deference to the EEOC's interpretations of Title I, Section A of this Part begins with a brief synopsis of judicial deference generally. Section B then discusses how the Court has applied these deferential principles to the EEOC overall.

A. *Defining Deference*

Before the 20th century, interpretations of statutes were solely a judicial function.[11] As time passed, however, courts began to see agencies as partners in shaping congressional mandates.[12] At first, courts only utilized agency interpretations to inform their own conclusions of law, "giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute."[13] Known as "*Skidmore* deference," courts would vary the amount of weight they would give to an agency interpretation "depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[14] Until the early 1980s, courts would only give strong deference to agency interpretations when the agency was given "a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision."[15]

However, in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[16] the Supreme Court "dramatically expanded the cir-

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[11] RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 156 (6th ed. 2011). *Cf.* Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1337 n.66 (2002) (discussing the scholarly debate of precisely when judicial deference to agency interpretations began).

[12] CASS, *supra* note 11, at 156.

[13] N.L.R.B. v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944). *See also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[14] *Skidmore*, 323 U.S. at 140.

[15] Rowan Cos., Inc. v. United States, 452 U.S. 247, 253 (1981); Merrill & Hickman, *supra* note 1, at 833.

[16] 467 U.S. 837 (1984).

cumstances in which courts must defer to agency interpretations of statutes."[17] The Supreme Court held that

> [C]ourts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering. The Court in *Chevron* blandly referred to such gaps and ambiguities as "implied" delegations of interpretative authority and treated these implied delegations as equivalent to express delegations.[18]

Scholars and judges characterize this seismic shift in administrative law as the "*Chevron* Revolution."[19]

The Court established a two-part test to determine when courts are required to defer to agency interpretations. Under "step one" of *Chevron*, courts ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[20] Under "step two" of *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[21] Even if the agency's permissible interpretation is not necessarily the best interpretation, the court must defer to the agency.[22] By requiring deference to agency interpretations of ambiguous statutes, the "*Chevron* Court recognized the policy choices inherent in statutory interpretation and concluded that those choices are better made by politically accountable agencies than by politically unaccountable courts."[23]

Despite the Supreme Court's strong presumption of deference to agency interpretations in *Chevron*, the Court still holds that there are

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17 Merrill & Hickman, *supra* note 1, at 833.

18 *Id.* at 833-34 (citations omitted).

19 William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1087 (2008).

20 *Chevron*, 467 U.S. at 842-43.

21 *Id.* at 843 (footnote omitted).

22 *Id.*

23 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, 77 (1995) (footnote omitted).

certain situations where an agency's view of the law should only be given *Skidmore* deference.[24] Interpretations that "lack the force of law," such as interpretations that have not gone through the notice and comment procedures required under the Administrative Procedure Act, "do not warrant *Chevron*-style deference."[25] Additionally, there are some instances where the boundary between *Chevron* and *Skidmore* is unclear. In such cases, a court must examine whether Congress intended that courts apply the mandatory deference framework of *Chevron* to an agency's interpretation or merely look at agency interpretations as persuasive guidance under *Skidmore*.[26] Scholars have termed this judicial examination a "*Chevron* step zero" analysis.[27]

The term "*Chevron* step zero" was first used by Thomas Merrill and Kristin Hickman to describe an "inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo."[28] Merrill and Hickman wrote their article after the Supreme Court's decision in *Christensen v. Harris County* where Justice Thomas first noted that agency interpretations "lack the force of law [and] do not warrant *Chevron*-style deference."[29] The following year, Justice Souter cited the Merrill and Hickman article with approval in his majority opinion in *U.S. v. Mead*.[30] The *Mead* Court further emphasized that agency interpretations receive *Chevron* deference where "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the

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[24] In addition to the *Chevron* and *Skidmore* deference dichotomy, some scholars observe that the Court's level of deference functions along a "*continuum*, ranging from an anti-deference regime reflected in the rule of lenity to the super-strong deference the Court sometimes announces in cases related to foreign affairs" as well as when an agency interprets its own regulations. Eskridge & Baer, *supra* note 19, at 1098.

[25] 5 U.S.C. § 553 (2012); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (citations omitted). *See also* United States v. Mead Corp., 533 U.S. 218, 227 (2001).

[26] Merrill & Hickman, *supra* note 1, at 912; Sunstein, *supra* note 7, at 191 (citing Barnhart v. Walton, 535 U.S. 212 (2002); *Mead Corp.*, 533 U.S. 218; *Christensen*, 529 U.S. 576).

[27] Merrill & Hickman, *supra* note 1, at 912; Sunstein, *supra* note 7, at 191.

[28] Merrill & Hickman, *supra* note 1, at 836.

[29] *Christensen*, 529 U.S. at 587 (holding that an opinion letter from the Department of Labor lacked the force of law).

[30] *Mead Corp.*, 533 U.S. at 232 n.11 (citing Merrill & Hickman, *supra* note 1, at 872) (holding that tariff decisions made from regional offices did not have the force of law); Daniel J. Gifford, *The Emerging Outlines of A Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 805-06 (2007).

agency interpretation claiming deference was promulgated in the exercise of that authority."[31]

The Supreme Court's most recent treatment of *Chevron* step zero occurred in the case of *Arlington v. FCC*.[32] In that case, the Court held that where a statute confers general rulemaking power to a specific agency, a court should apply *Chevron* deference to the agency's interpretation of an ambiguous provision that concerns the scope of the agency's authority in that statute.[33] Rather than a court conducting a separate inquiry into an agency's interpretive authority, "the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."[34] Viewed under the lens of a *Chevron* step zero analysis, the Court held that the statutory text expressly conferred to the agency the general interpretive authority, including interpretive authority over the specific provision at issue; therefore, the agency was entitled to *Chevron* deference to any reasonable interpretation of the statute.

Despite the express textual delegation of interpretive authority to the agency in *Arlington*, Justices Breyer, Alito, Kennedy, and Chief Justice Roberts would have further addressed whether Congress intended to grant the agency *Chevron* deference. In other words, they would have analyzed the *Chevron* step zero issue in more depth. In his partial concurrence, Justice Breyer agreed with the majority that the agency had acted within its statutory authority, but that:

> Deciding just what those statutory bounds are, however, is not always an easy matter . . . [judges must] decide independently whether Congress delegated authority to the agency to provide interpretations of, or to enact rules pursuant to, the statute at issue—interpretations or rules that carry with them "the force of law."[35]

Similarly, Chief Justice Roberts in dissent, joined by Justices Kennedy and Alito, held that "before a court can defer to the agency's interpretation of the ambiguous terms . . . it must determine for itself that Congress has delegated authority to the agency to issue those inter-

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31 *Mead Corp.*, 533 U.S. at 226-27.

32 *See* Arlington v. FCC, 133 S. Ct. 1863 (2013).

33 *Id.* at 1868, 1874.

34 *Id*. at 1871 (citations omitted).

35 *Id.* at 1875 (Breyer, J., concurring in part, concurring in judgment) (citing *Mead Corp.*, 533 U.S. at 229).

pretations with the force of law."[36] According to these four Justices, courts must always begin an analysis of agency interpretations with *Chevron* step zero.

While *Arlington* made it clear that an express delegation of rulemaking authority to an agency entitles that agency to *Chevron* deference, disagreement among the Justices in this case, and in many others, makes the exact contours of the *Chevron* step zero analysis somewhat ambiguous.[37] Like the original "*Chevron* Revolution,"[38] these ambiguities have sparked an outpouring of scholarly articles on the application of *Chevron* step zero.[39] This article attempts to aid in the clarification of the Supreme Court's application of *Chevron* step zero as applied to the ADA and ADAAA.

B. *Deference (Or a Lack Thereof) to the EEOC*

The Supreme Court's pronouncements on deference to agency interpretations have turned on the language of the statutes at issue and not on specific agencies. According to William Eskridge and Lauren Baer's analysis of deference given to all agency interpretations, the Supreme Court has deferred to agency interpretations in 76.2% of cases while invoking *Chevron* and 73.5% of the time while invoking *Skidmore*.[40] Nevertheless, Thomas Wern found that the Court has deferred to the EEOC's interpretations only 54% of the time.[41] The Court's application of deference to the EEOC's interpre-

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[36] *Id.* at 1885 (Roberts, C.J., dissenting).

[37] *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring); *id*. at 1014-15 (Scalia, J., dissenting); Barnhart v. Walton, 535 U.S. 212, 222 (2002) (Breyer, J.); *id*. at 226-27 (Scalia, J., concurring in part, dissenting in part).

[38] Eskridge & Baer, *supra* note 19, at 1087.

[39] *See, e.g.,* Bradley Lipton, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096 (2010); Gifford *supra* note 30; Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013 (2005); Sunstein, *supra* note 7; Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002).

[40] Eskridge & Baer, *supra* note 19, at 1099. The Court also sided with agency interpretations 66% of the time without invoking any sort of deference regime. *Id*. Eskridge and Baer's data spanned from 1983, the year of the *Chevron* decision, to 2005. *Id*. at 1094.

[41] Wern, *supra* note 6, at 1550. Wern's data spans from 1964, the Supreme Court term when the EEOC was established, to 1998. *Id*. at 1549. Wern's analysis of deference includes all levels of agency interpretations, not just regulations. *Id*. at 1549 n.86. *But see* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1945, 1948 (2006) (discussing how the Court has only applied *Chevron* to two EEOC interpretations,

tations seems to be "inconsistent with its articulated standards for administrative deference. Even under *Skidmore*, administrative interpretations should receive great respect if they are enacted with procedural care and reflect the application of expertise to a question on which there is statutory ambiguity."[42] This stark difference between the amount of deference to the EEOC and agencies generally has led some scholars to question whether the Supreme Court simply considers the EEOC as a "second class" agency.[43]

There are several possible reasons why the Court regularly rejects the EEOC's interpretations and prefers to "chart its own course" in interpreting employment discrimination statutes.[44] One reason is that the Court may not consider the issues of employment discrimination as necessarily requiring agency expertise.[45] The judiciary, on the other hand, has experience in defining and recognizing discrimination in other contexts such as under the Fourteenth Amendment or 42 U.S.C. § 1983. The Supreme Court may believe it does not need any technical assistance in interpreting what is discrimination in the employment context.[46] Additionally, *Chevron* requires the courts to defer to an agency with a reasonable, but not necessarily best, interpretation.[47] The Supreme Court may be hesitant to relinquish its influence in the "sensitive area" of discrimination and be "unwilling to defer to an agency interpretation with which it disagrees."[48]

A more likely reason for the relatively low amount of deference to the EEOC, however, is simply due to the statutes under the EEOC's purview. The EEOC's first statutory scheme to administer

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agreeing with the interpretation in only one, and applied *Skidmore* for the remainder, agreeing with the EEOC interpretation only twice). The difference in results could be due to methodology, timeframe, or how each author defines what is a *Chevron* or *Skidmore* application, e.g. as a specific citation to *Skidmore* versus the Court simply taking the interpretation into consideration.

42 Hart, *supra* note 41, at 1949.

43 Wern, *supra* note 6, at 1578. *See also* White, *supra* note 23, at 54.

44 Hart, *supra* note 41, at 1937.

45 *Id.* at 1938; Wern, *supra* note 6, at 1579. *But see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442-43 (1985) ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary") (discussing individuals with disabilities generally); S. REP. NO. 92-415, at 5 (1971) ("Employment discrimination as viewed today is a far more complex and pervasive phenomenon") (discussing the 1972 amendments to Title VII).

46 White, *supra* note 6, at 538; Wern, *supra* note 6, at 1579.

47 Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n.11 (1984).

48 White, *supra* note 6, at 571.

was Title VII of the Civil Rights Act of 1964. Under Title VII, the EEOC is only empowered by statute to implement "procedural regulations," not regulations with the "force of law."[49] Consistent with *Chevron* step zero, it is not surprising that the Court does not regularly defer to the EEOC's interpretations of Title VII.[50] By not giving the EEOC the authority to implement regulations with the force of law, Congress did not intend for agencies' interpretations to be given mandatory deference.

II. DEFERENCE UNDER THE ADA

Unlike Title VII, however, Congress gave the EEOC explicit power under the ADA to promulgate regulations with the force of law. The ADA expressly states that "the Commission shall issue regulations in an accessible format to carry out this subchapter."[51] The ADA also provides a specific cause of action for individuals alleging violations of the EEOC regulations interpreting the ADA.[52] Enacted in the post-*Chevron* era, "Congress knows (or should know) that conferring rulemaking authority and/or enacting ambiguous statutes constitutes an implied (or explicit) delegation of interpretive authority."[53] Despite the explicit grant of regulatory power to the EEOC under the ADA, critics of the Supreme Court's application of deference insist that the Court's relationship with the EEOC under Title VII has tainted its view of the agency.[54] Rather than looking at the statutes involved, these critics argue that the Court has "a mild presumption of

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[49] 42 U.S.C. § 2000e-12(a) (2012) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter"); Wern, *supra* note 6, at 1551.

[50] *See* White, *supra* note 6, at 571; Wern, *supra* note 6, at 1555 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-143 (1976); Washington v. Davis, 426 U.S. 229 (1976); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1975)).

[51] 42 U.S.C. § 12116 (2012).

[52] 42 U.S.C. § 12117 (2012). *See also* White, *supra* note 23, at 89.

[53] White, *supra* note 6, at 551 (citing AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999)). *See also* White, *supra* note 23, at 89 (citing Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520-21 (1989)).

[54] Wern, *supra* note 6, at 1578. *See also*, Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's "Disability" Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177, 194 (2004); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 139 (1999).

invalidity to EEOC guidance, and ultimately strikes down that guidance in a reflexive manner."[55]

Nevertheless, a close examination of Supreme Court opinions involving agency deference to the EEOC shows that rather than there being any sort of presumption of invalidity, the Court applies deference across all agency interpretations of the ADA. Section A of this Part shows how the Court has consistently applied *Chevron* step zero to non-EEOC interpretations of the ADA. While this article focuses on deference to the EEOC's interpretations, any discussion of deference to agencies under the ADA by the Supreme Court is highly relevant to this analysis. Just as Congress instructed the EEOC to promulgate regulations to under Title I, Congress gave the same instructions to other agencies that carry out the other Titles of the ADA.[56] Section B then demonstrates the same application of *Chevron* step zero to the EEOC's interpretations. Section C summarizes how the key aspect of all the Court's *Chevron* step zero determinations were based on whether the specific issue being interpreted had been delegated by Congress through a provision of the ADA. Section D concludes that despite the Court's implicit application of *Chevron* step zero, most circuit courts broadly apply *Skidmore* deference to all the EEOC's interpretations of the ADA without regard to *Chevron* step zero.

A. *Applying* Chevron *Step Zero in Non-EEOC Interpretations of the ADA*

The Supreme Court first addressed the level of deference due to an agency interpretation of the ADA in the case of *Bragdon v. Abbott*.[57] In *Bragdon*, a patient sued her dentist for refusing to perform dental services in his office because of the patient's HIV status, offering instead to treat her in a hospital at an increased cost.[58] The plaintiff sued the dentist under Title III of the ADA.[59] Title III prohibits discrimination in services performed in places of public accommodation, such as a dentist office, because of an individual's

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[55] Wern, *supra* note 6, at 1578.

[56] 42 U.S.C. § 12134(a) (2012) (Department of Justice); 42 U.S.C. §12186(a) (2012) (Department of Transportation); 42 U.S.C. §12186(b) (2012) (Department of Justice).

[57] Bragdon v. Abbott, 524 U.S. 624 (1998).

[58] *Id.* at 628-29.

[59] *Id.* at 629 (citing 42 U.S.C. § 12182 (1994)).

disability.[60] One of the issues before the Court was whether an individual who was HIV-positive, but still asymptomatic, was a covered individual with a "disability" within the meaning of the ADA.[61] Writing for the majority, Justice Kennedy held that because HIV impacts the major life activity of child bearing, an asymptomatic HIV-positive individual is covered by the ADA.[62]

Only after the Court rendered its opinion about the meaning of disability did it reference agency interpretations of the statute, using the agencies' interpretations to simply reinforce its own conclusion.[63] First, the Court looked at the regulations interpreting the meaning of disability under the ADA's precursor, the Rehabilitation Act (Rehab Act).[64] The Court analyzed the Rehab Act because the ADA explicitly states that its provisions shall not be "construed to apply a lesser standard" than the Rehab Act.[65] Much like the ADA, several agencies administered the various provisions of the Rehab Act, and each of them found asymptomatic individuals with HIV were covered under the statute.[66] The Court chose not to address whether multiple agency interpretations impact the application of *Chevron* deference.[67] Instead, it was "enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[68]

The Supreme Court next looked at current agency interpretations under the ADA, finding that its determination was "further reinforced" by the views of the Department of Justice (DOJ), which is tasked with administering Title III.[69] Citing *Chevron*, the Court held that "the Department's views are entitled to deference" because the DOJ was directed by Congress to issue implementing regulations.[70] Additionally, the Court drew "guidance from the views of the agen-

60 42 U.S.C. § 12182 (2012).

61 *Bragdon*, 524 U.S. at 628.

62 *Id.* at 641.

63 *Id.* at 642, 646-47.

64 *Id.* at 646. *See generally* Rehabilitation Act of 1973, Pub. L. No. 93-112 (1973).

65 42 U.S.C. § 12201(a) (2012); *Bragdon*, 524 U.S. at 642.

66 *Bragdon*, 524 U.S. at 642.

67 *Id.*

68 *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)).

69 *Id.* at 646 (citations omitted).

70 *Id.* (citing 42 U.S.C. § 12186(b) (1994)); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

cies authorized to administer other sections of the ADA," including the EEOC.[71]

The *Bragdon* Court's view of the level of deference to agency interpretation of the ADA was not explicit. While the Court cited to *Chevron* in stating that the DOJ is entitled to deference, the Court questioned, but did not decide, whether an agency interpretation would be entitled to *Chevron* deference where multiple agencies were interpreting the same provision, such as under the ADA and Rehab Act.[72] This questioning of *Chevron*'s applicability was an implicit *Chevron* step zero analysis. Although the Court did not state whether *Chevron* deference was applicable, the Court applied its own analysis of the statute using agency interpretation to only bolster its conclusion. If the Court was truly giving *Chevron* deference to the DOJ, the Court would not have perceived a need to formulate its own analysis.[73] Under *Chevron*, the Court would only have asked whether the statute spoke directly to the precise question at issue, and if not, whether the DOJ's interpretation was reasonable.[74] Instead, the Court found *Chevron* inapplicable and gave the DOJ's interpretation of disability *Skidmore* deference as persuasive guidance to its own conclusion.[75]

Another Supreme Court opinion that discussed deference to non-EEOC agency interpretations of the ADA was *Olmstead v. L.C. ex rel. Zimring*.[76] In *Olmstead*, the Court resolved the issue of whether the ADA's discrimination prohibitions require the placement of persons with mental disabilities in community settings rather than in institutions.[77] Writing for the Court, Justice Ginsburg cited to the DOJ's "integration regulation," which states that a "public entity shall

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[71] *Bragdon*, 524 U.S. at 647 (citations omitted).

[72] *See* Arlington v. FCC, 133 S. Ct. 1863, 1883-84 (2013) (Roberts, C.J., dissenting) ("A congressional grant of authority over some portion of a statute does not necessarily mean that Congress granted the agency interpretive authority over all its provisions. . . . An example that might highlight the point concerns statutes that parcel out authority to multiple agencies . . . [such as] the Americans with Disabilities Act") (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 478 (1999)); Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 650 (1990); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 208 (2006)).

[73] White, *supra* note 6, at 559.

[74] *Id.*

[75] *But see* Eichhorn, *supra* note 54, at 192-93 (noting how the *Bragdon* court gave the DOJ interpretation the "highest deference" under *Chevron*).

[76] Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

[77] *Id.* at 587.

administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[78] Like the *Bragdon* Court, the *Olmstead* Court did not determine whether to give *Chevron* deference to the DOJ's interpretation.[79] Instead, the Court gave the DOJ interpretation *Skidmore* deference.[80] The majority held that because the DOJ "is the agency directed by Congress to issue regulations implementing Title II . . . its views warrant respect" and has a "body of experience and informed judgment to which courts and litigants may properly resort for guidance."[81] Relying heavily on the DOJ's interpretation, the Court then agreed with the DOJ that undue institutionalization qualified as discrimination under Title II of the ADA.[82]

Unlike *Bragdon*, the *Olmstead* Court did not give any indication as to why it did not apply *Chevron*. The Court explicitly stated that the DOJ was given the authority to issue regulations concerning discrimination by public entities.[83] Therefore, the DOJ's interpretation should have passed *Chevron* step zero and undergone a full *Chevron* analysis. Even so, the Court did not state why it did not apply *Chevron*.

One possibility as to why the Court did not apply a full *Chevron* analysis is that the Court conducted an implicit *Chevron* step zero analysis just as it did in *Bragdon* and *Sutton v. United Air Lines*, a case decided on the same day as *Olmstead*.[84] Rather than applying the *Chevron* step zero test to the DOJ's interpretations of Title II, which would satisfy the test, the Court instead applied *Chevron* step zero to the DOJ's ability to render binding interpretations of the meaning of

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[78] *Id.* at 592 (citing 28 C.F.R. § 35.130(d) (1998)).

[79] *Id.* at 598. *But see id.* at 622 n.5 (Thomas, J., dissenting) (applying *Chevron* to the DOJ's interpretation in his dissent, but rejecting the interpretation under *Chevron* step two as an impermissible construction). Citing to a precedent from the *Chevron* line of cases, Justice Thomas stated, "the Court need not review the integration regulation promulgated by the Attorney General . . . . Deference to a regulation is appropriate only 'if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.'" *Id.* (citing Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 483 (1997)). According to Justice Thomas, the DOJ's interpretation of discrimination contradicts the language of the statute and therefore is unreasonable and not entitled to deference. *See id.*

[80] *Id.* at 597-98 (majority opinion).

[81] *Id.* (citing Bragdon v. Abbott, 524 U.S. 624 (1998); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

[82] *Olmstead*, 527 U.S. at 607.

[83] *Id.* at 589-91.

[84] Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). *See infra* Part II.B.

"discrimination." While Congress directed the DOJ to issue regulations interpreting Title II, Title II does not have any provisions for the DOJ to interpret about the meaning of discrimination.[85] Title II only states that no qualified individuals with a disability shall be discriminated against.[86] In contrast, Title I explicitly defines what the term discrimination means.[87] By including a definition of discrimination in Title I, but not Title II, it must be presumed that Congress intended not to give the DOJ the authority to make binding interpretations of the meaning of discrimination in Title II.[88] Because Congress did not delegate to the DOJ the ability to interpret the definition of under Title II, the Court could not have given *Chevron* deference to the DOJ's interpretation. Therefore, while the Court heavily referenced and agreed with the DOJ's interpretation, it could only look to the DOJ regulations for persuasive guidance rather than afford it mandatory deference.

A close reading of Justice Kennedy's concurrence and Justice Thomas' dissent echoes the majority's implicit *Chevron* step zero analysis that the DOJ was not authorized to render binding interpretations on the meaning of "discrimination." According to Justice Kennedy, "[d]iscrimination, of course, tends to be an expansive concept and, as legal category, it must be applied with care and prudence."[89] Any reasonable interpretation of § 12132's prohibition on discrimination "cannot cover all types of differential treatment of disabled and nondisabled persons."[90] While the DOJ's "regulations are an important tool," they only "serve as a useful *aid for courts to discern* the sorts of discrimination with which Congress was concerned."[91] Likewise, Justice Thomas focused on how *the Court* has consistently interpreted the meaning of discrimination in various statutory

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85 *Olmstead*, 527 U.S. at 598 (citing *Bragdon,* 524 U.S. at 642).

86 42 U.S.C. § 12132 (2012).

87 42 U.S.C. § 12112 (2012).

88 Bates v. United States, 522 U.S. 23, 29-30 (1997) (citing Russello v. United States*,* 464 U.S. 16, 23 (1983)) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). *Cf*. Olmstead, 527 U.S. at 622-23 (Thomas, J., dissenting) (criticizing the majority and the DOJ import of Title I's definition of discrimination).

89 *Olmstead*, 527 U.S. at 613 (Kennedy, J., concurring).

90 *Id.*

91 *Id.* (emphasis added).

frameworks.[92] "Absent a clear directive to the contrary," the Court must interpret discrimination in light of the common judicial understanding of the term.[93] Unlike Title I, which has a unique definition of discrimination, "Congress did not provide that this definition of discrimination, unlike other aspects of the ADA, applies to Title II."[94] While the Justices may have disagreed on the meaning of discrimination, the majority, concurrence, and dissent each implicitly agreed that Congress did not give the DOJ authority to render binding interpretations over the meaning of discrimination. Therefore, the Court appropriately gave the DOJ's interpretation *Skidmore* deference.

B. *Not a "Second Class" Agency: Applying the Same* Chevron *Step Zero to EEOC Cases*

While the *Bragdon* and *Olmstead* cases discussed deference to ADA interpretations by the DOJ and agencies generally, the Supreme Court only fully addressed the issue of EEOC deference to an ADA interpretation in the cases of *Sutton v. United Airlines* and *Chevron v. Echazabal*.[95] In *Sutton*, the plaintiffs were myopic pilots seeking employment from United Airlines.[96] The main issue of the case was whether the plaintiffs' use of corrective lenses should be considered in determining if they had a covered "disability" under the ADA.[97] Shortly after the adoption of the ADA, the EEOC implemented regulations and interpretive guidance, both following notice and comment,

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92 *Id.* at 616 (Thomas, J., dissenting) (discussing the meaning of discrimination under Title VII and the Rehabilitation Act of 1973).

93 *Id.* at 621.

94 *Id.* at 622.

95 Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 76 (2002); Sutton v. United Air Lines, Inc., 527 U.S. 471, 478-80 (1999). The Supreme Court has partially addressed deference to the EEOC interpretations of the ADA in one other case. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449 n.9 (2003). However, the interpretation at issue was within the EEOC's compliance manual, not regulations subject to notice and comment. While agreeing with the EEOC interpretation, the Supreme Court noted that the compliance manual was "not controlling—even though it may constitute a 'body of experience and informed judgment' to which we may resort for guidance" because compliance manual did not have the force of law. *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)). The issue of agency deference to interpretations outside of regulations would be an interesting topic to discuss, but it is beyond the scope of this article.

96 *Sutton*, 527 U.S. at 475.

97 *Id.* at 482.

about the definition of disability.[98] One aspect of the EEOC's definition of disability included having a "physical or mental impairment that substantially limits one or more of the major life activities of such individual," with "major life activities" including "functions such as . . . seeing."[99] The EEOC's interpretive guidance stated that "whether an individual is substantially limited in a major life activity must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[100]

In reviewing the EEOC's regulations, the Court noted that the term "disability" is located in the pre-Title I definitional section of the ADA.[101] Unlike other definitional sections in the ADA, the definition of "disability" applies to the entire Act.[102] The Supreme Court held that no agency "has been given authority to issue regulations implementing the generally applicable provisions of the ADA . . . [including] the term 'disability.'"[103] However, because both parties to the litigation accepted the "regulations as valid, and determining their validity is not necessary to decide this case, [the Court had] no occasion to consider what deference they are due, if any."[104] Similarly, the Court also declined to determine the amount of deference due to the EEOC's interpretive guidance.[105]

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98 Equal Employment Opportunity for Individuals With Disabilities, 56 Fed. Reg. 35726 (July 26, 1991).

99 29 C.F.R. §§ 1630.2(g)(1), (i) (2011).

100 *Sutton*, 527 U.S. at 480 (citing 29 C.F.R. § 1630, App. § 1630.2(j) (1998) (describing § 1630.2(j)).

101 42 U.S.C. § 12102(1) (2012). *See Sutton*, 527 U.S. at 479.

102 42 U.S.C. § 12102(1); *Sutton*, 527 U.S. at 479.

103 *Sutton*, 527 U.S. at 479. Justice Breyer, in his dissent, disagreed with the majority's conclusion that the EEOC was not delegated the authority to interpret and implement definitions from § 12102. *Id.* at 514 (Breyer, J., dissenting). Justice Breyer believed that since Title I provisions include the pre-Title I defined terms, "EEOC might elaborate, through regulations the meaning of 'disability' . . . if elaboration is needed in order to 'carry out' the substantive provisions" of Title I. *Id.* The placement of "the definitional section seems to reflect only drafting or stylistic, not substantive, objectives." *Id.* at 515. Since the EEOC's interpretation is consistent with other agency interpretations, "[t]here is no reason to believe that Congress would have wanted to deny the EEOC the power to issue such a regulation." *Id.* at 514-15.

104 *Id.* at 480 (majority opinion).

105 Sutton v. United Air Lines, 527 U.S. 471, 480 (1991). The Supreme Court has used a similar rationale to dodge the issue of deference to EEOC interpretations in two others cases where the parties did not question the agency's regulations and interpretive guidance. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 n.10 (1999) (citing *Sutton*, 527 U.S. at 479-80) (decided on the same day as *Sutton*); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002) (holding that the persuasive authority of the EEOC's regulations are unclear).

Instead, the Court simply concluded that "the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA."[106] The Court held that the EEOC's mitigating measures position ran counter to the individualized inquiry required throughout the ADA.[107] Additionally, when Congress passed the ADA in 1990, it noted that there were 43 million individuals with disabilities in the country, and "[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."[108]

Similar to *Bradgon* and *Olmstead*, the Supreme Court refused to address the level of deference due to agency interpretations of the ADA. Nevertheless, a close reading of the opinion shows that the *Sutton* Court implicitly applied *Chevron* step zero to the EEOC's regulation.[109] Although the Court assumed that the EEOC regulations were valid because neither party argued they were not, the Court also expressly stated that Congress did not delegate to the EEOC the authority to interpret the term "disability" or any other provision in the pre-Title I section of the ADA.[110] *Chevron* deference only applies where there is an explicit or implicit delegation of lawmaking authority to an agency. According to the *Sutton* Court, there was no such delegation. Therefore, the Court only looked to the EEOC's interpretation as persuasive *Skidmore* authority to the meaning of disability. The Court, however, found the EEOC unpersuasive when compared to its own analysis of congressional findings and the ADA's individualized inquiry requirements.[111]

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106 *Sutton*, 527 U.S. at 482.

107 *Id.* at 483.

108 *Id.* at 484, 487.

109 *But see* White, *supra* note 6, at 564 (applying *Chevron* step one).

110 *Sutton*, 527 U.S. at 479-80.

111 *Id.* at 483-84, 487. *Cf. id.* at 501-02 (Stevens, J., dissenting) (citing Bragdon v. Abbot, 524 U.S. 624, 642 (1998); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980); Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1994)) (finding the EEOC regulations persuasive, especially since the agency plays a pivotal role the statutory process and constitutes a body of experience and informed judgment from which courts may resort for additional guidance). The Court also made this implicit *Chevron* step zero analysis in Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563-67 (1999), and Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194-99. In *Albertson's*, the Court once again found the EEOC's interpretation of disability including mitigating measures unpersuasive. 527 U.S. at 565-67. In *Toyota*, the Court seemed to give more weight to the EEOC's interpretation of "substantially limited" within the ADA's definition of disability than it

The only Supreme Court case that explicitly applied a *Chevron* analysis to the EEOC's regulations interpreting the ADA ironically also involved Chevron as a party to the litigation. In *Chevron v. Echazabal*, an independent contractor working on an oilrig owned by Chevron fired the plaintiff who had Hepatitis C because the plaintiff's work on the oilrig would allegedly worsen the plaintiff's health condition.[112] In defense of the action, Chevron pointed to a Title I provision that allows employers to use qualification standards that tend to screen out individuals with disabilities so long as the standards are "job-related and consistent with business necessity."[113] The EEOC's regulations interpreting that provision stated that the standards may screen out individuals who pose "a direct threat to the health or safety to the individual or others in the workplace."[114] However, the ADA itself makes no mention of the safety of the individual with a disability.[115] The issue before the Court was whether interpreting the ADA to include a "direct threat" to the individual with a disability himself was a permissible construction of the Title I provision.[116]

To answer the question of permissible construction, the Supreme Court applied a full *Chevron* analysis.[117] Under *Chevron* step one, the Court found that the text of the statute did not directly answer the question.[118] The Court rejected the plaintiff's arguments that the statutory language and history precluded interpreting the statute to include self-harm.[119] Instead, the Court found that the omission of the term "self-harm" from the ADA statutory language could be interpreted in several ways, none of which was sufficient to show congressional intent.[120] Having found that "Congress has not spoken exhaustively on threats to a worker's own health," the Court next determined whether the self-harm regulation was a reasonable interpretation of a qualification standard that is "job-related and consistent

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did in *Sutton* and *Albertson's*, but nevertheless the Court rejected the EEOC's interpretation as too broad. *Toyota*, 534 U.S. at 195-99. *Compare id.* at 198, *with* 29 C.F.R. § 1630.2(j) (2001).

112 Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 76 (2002).

113 42 U.S.C. § 12113(a) (2012); *Echazabal*, 536 U.S. at 77.

114 *Echazabal*, 536 U.S. at 79 (citing 29 C.F.R. § 1630.15(b)(2) (2001)).

115 42 U.S.C. § 12113(b) (2012).

116 *Echazabal*, 536 U.S. at 79.

117 *Id.* at 79-87.

118 *Id.* at 79-84.

119 *Id.*

120 *Id.* at 82-83.

with business necessity" under *Chevron* step two.[121] Keeping in mind the paternalistic aspects of the ADA and the congressional policy of protecting workers present in other statutes, the Court found the EEOC regulation to be a reasonable interpretation of the statute.[122]

Similar to *Sutton*, the *Echazabal* Court underwent an implicit *Chevron* step zero analysis. Only this time the Court readily found a specific statutory provision in Title I that Congress delegated to the EEOC to interpret.[123] Having passed step zero, the Court then applied the remaining steps of *Chevron* and found the EEOC's interpretation reasonable.

C. *The Supreme Court's* Chevron *Step Zero Determinations Have All Turned on Whether the Specific Issue Had Been Delegated to the Agency Through a Specific Provision of the ADA*

The Supreme Court has consistently utilized agency interpretations to aid in its own readings of the ADA. In each opinion the Court has implicitly applied *Chevron* step zero to determine whether Congress has delegated an agency the authority to render a binding interpretation of the ADA. Where the Court found that the agency had been given authority, the Court applied *Chevron* deference.[124] Where the Court has questioned whether or found that the agency did not have authority, the Court applied *Skidmore* deference. The Court has found the agency's interpretation persuasive in some cases,[125] and unpersuasive in others.[126]

Whether or not the agency's interpretation survived *Chevron* step zero depended on if Congress delegated to the agency the authority to interpret the provision at issue. In *Echazabal*, the EEOC easily met this threshold question. The issue of "direct threat" came explicitly

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121 *Id.* at 84-87; Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984).

122 Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 84-86 (2002) (citing 29 U.S.C. § 654(a)(1) (2000)).

123 *Id.* at 84 (citing 42 U.S.C. § 12113(a) (2012)).

124 *Id.* at 84.

125 Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 597-98, 607 (1999); Bragdon v. Abbott, 524 U.S. 624, 642, 646-47 (1998).

126 Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194-99 (2002); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563-67 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999).

from the EEOC's interpretation of a provision that Congress delegated the authority to interpret.[127] The *Bragdon* and *Sutton* line of cases, in contrast, dealt with the meaning of the term "disability."[128] The disability provision is located outside of the statutes that the agencies were authorized to implement; therefore, Congress could not have delegated the power for the agencies to make binding interpretations on them.[129] Although not explicit, the Court implicitly applied a similar rationale in *Olmstead* by refusing to apply *Chevron* deference to the DOJ's meaning of "discrimination," despite the DOJ being specifically authorized to implement Title II. Because the term "discrimination" was not a term located in Title II for the DOJ to interpret, the agency could not survive *Chevron* step zero.

D. *ADA Deference Applied by Lower Courts*

This Article has established that the Supreme Court has consistently applied a *Chevron* step zero analysis before determining the amount of deference it gave the EEOC for its interpretations of the ADA. However, this application of *Chevron* step zero has only been implicit, causing confusion among the circuit courts of appeals as to what exact level of deference should be applied to the EEOC's interpretations.[130] Without the Supreme Court's explicit application of *Chevron* step zero, courts of appeals consider the exact amount of deference given to the EEOC's interpretations of the ADA to be an "open question."[131]

Rather than applying a *Chevron* step zero analysis, most courts of appeals give the EEOC's interpretations *Skidmore* deference, under various labels.[132] These courts of appeals give *Skidmore* deference

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127 *Echazabal*, 536 U.S. at 78-79 (citing 29 C.F.R. § 1630.15(b)(2) (2001)).

128 *Sutton*, 527 U.S. at 482; *Bragdon*, 524 U.S. at 628,

129 *Cf.* Petrone v. Hampton Bays Union Free Sch. Dist., No. 2:03-CV-4359, 2013 WL 3491057, at *17 (E.D.N.Y. July 10, 2013) (citing *Sutton,* 527 U.S. at 479) (noting that Congress "did not delegate to any agency the authority to interpret the term 'disability'").

130 *See, e.g.,* Muller v. Costello, 187 F.3d 298, 312 n.5 (2d Cir. 1999) (noting how *Sutton* drew into question the degree of deference due to the EEOC's interpretations of the term "disability but that '[n]onetheless, until a more definite pronouncement is forthcoming, it remains the law of this Circuit that we will give weight to the EEOC's interpretations'").

131 *See, e.g.*, Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 713-14 (8th Cir. 2003).

132 *See*, Duvall v. Georgia-Pac. Consumer Prods., L.P., 607 F.3d 1255, 1261 n.2 (10th Cir. 2010) (citations omitted) (according the views of the EEOC substantial deference); Harrison v. Benchmark Elecs. Huntsville, Inc., 593 F.3d 1206, 1215 n.9 (11th Cir. 2010) (citation omitted) (noting EEOC regulations are entitled to substantial judicial deference); Taylor v. Fed. Express

even to the EEOC's interpretations of Title I provisions.[133] The Third Circuit, however, applies *Chevron* deference to the EEOC's interpretations.[134] No matter what deference regime the courts of appeals apply to the EEOC's regulations, none of them analyze whether Congress gave the EEOC the authority to implement regulations entitled to mandatory deference under *Chevron* step zero. Instead, the courts of appeals look to bright-line rules created from precedent as to whether the EEOC receives *Chevron* or *Skidmore* deference.

III. THE ADAAA'S NEW DELEGATION OF AUTHORITY ENSURES SURVIVAL OF *CHEVRON* STEP ZERO FOR PROPERLY IMPLEMENTED REGULATIONS

In response to the Supreme Court's narrow construction of the ADA and the confusion created by decisions in the courts of appeals, Congress amended the statute in the ADA Amendments Act of 2008 (ADAAA).[135] Congress stated that while the ADA was intended for broad coverage, the Supreme Court's decisions interpreting the ADA had not fulfilled that intention.[136] Therefore, Congress passed the ADAAA to reassert its intention to apply the ADA's protections expansively.[137]

Section A of this Part discusses how Congress attempted to ensure that the ADAAA was applied broadly. Congress accom-

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Corp., 429 F.3d 461, 464 n.3 (4th Cir. 2005) ("EEOC guidelines 'while not controlling upon the courts . . . do constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance'") (quoting Meritor Sav. Bank, FSB v. Vinson, 477 US. 57, 65 (1986)); E.E.O.C. v. Sears, Roebuck & Co., 417 F.3d 789, 800 (7th Cir. 2005) (holding EEOC's regulations are a source for guidance); Waldrip v. Gen. Elec. Co., 325 F.3d 652, 655 n.1 (5th Cir. 2003) (noting EEOC regulations are persuasive authority that "provide significant guidance") (quoting Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995)); Reeves v. Johnson Controls World Servs., 140 F.3d 144, 150 n.3 (2d Cir.1998) (according "great deference to the EEOC's interpretation of the ADA) (quoting Francis v. City of Meriden, 129 F.3d 281, 283 n.1 (2d Cir. 1997)).

133 *See*, *e.g.*, *Harrison*, 593 F.3d at 1215-16 (discussing medical examinations under 42 U.S.C. § 12112(d)(2)).

134 Tice v. Ctr. Area Transp. Auth., 247 F.3d 506, 515 n.8 (3d Cir. 2001) (citations omitted) (noting that while *Sutton* reserved the question whether the EEOC's regulations are owed deference under *Chevron*, the Third Circuit holds that the "regulations are owed 'substantial deference' under *Chevron*").

135 Americans with Disabilities Act of 1990, Pub. L. No. 110-325 § 2(a), 122 Stat 3553 (2008).

136 *Id.*

137 *Id.* § 2(b).

plished this by addressing the Supreme Court's concerns in *Bragdon* and *Sutton* and by expressly delegating to the EEOC the authority to issue regulations interpreting the pre-Title I definitional section of the ADA.[138] Now that Congress has expressly delegated the ability to interpret the definitions located in §§ 12102 and 12103, courts ought to defer to all properly promulgated EEOC regulations that are reasonable interpretations of the ADA. However, Section B concludes that despite the amended statute, most lower courts continue to apply *Skidmore* deference to the EEOC's interpretations of the ADA. Section C analyzes the only circuit court of appeals case so far to address the issue of deference under the ADAAA.[139]

A. *ADAAA Legislative Intent Shows Congress Intended Courts to Apply* Chevron *Deference to the EEOC's Interpretations*

In passing the ADAAA, Congress was aware of the issues surrounding the question of deference to the EEOC interpretations of the ADA by the courts.[140] That is why the ADAAA added § 12205a, which expressly authorized the EEOC and other agencies to implement regulations interpreting §§ 12102 and 12103.[141] In addition to § 12205a, the original House draft bill also stated that EEOC regulations interpreting the ADA "shall be entitled to deference by administrative bodies or officers and courts hearing any action."[142] The House Committee on Education and Labor, however, removed that provision.[143]

This deletion should not be interpreted as an indication that Congress intended for the agencies to receive less than strong deference for their interpretations. Instead, Congress removed the deference provision out of fear that it:

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138 42 U.S.C. § 12205a (2012) ("The authority to issue regulations granted to the Equal Employment Opportunity Commission . . . under this chapter includes the authority to issue regulations implementing the definitions of disability in section 12102 of this title (including rules of construction) and the definitions in section 12103 of this title, consistent with the ADA Amendments Act of 2008.").

139 *See* Summer v. Altarum Inst., Corp., 740 F.3d 325, 331-32 (4th Cir. 2014).

140 *See e.g.*, *Americans with Disabilities Act: Sixteen Years Later: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2 (2006) (statement of Rep. Chabot, Chairman, Subcomm. on the Constitution of the H. Comm. on the Judiciary).

141 *See* 42 U.S.C. § 12205a (2012).

142 ADA Restoration Act of 2007, H.R. 3195, 110th Cong. § 7(g) (2007) (as introduced, June 24, 2008).

143 H.R. Res. 1299, 110th Cong. (2008) (enacted).

> could have been incorrectly interpreted as running contrary to long-standing Supreme Court precedent, which requires that *certain threshold criteria* be met before a court defers to an agency interpretation of a statute that is a *reasonable* interpretation of the statute, when Congressional intent is unclear. That was not the intent of this provision. The Committee expects that the courts, applying Supreme Court precedent, will give the regulations and guidance implementing the ADA the deference currently accorded to agency regulations and guidance under *existing* statutory interpretation doctrine.[144]

Rather than confusing the courts by imposing a new deference regime, Congress simply affirmed that after an agency has gone through the "certain threshold criteria" of having the delegated authority and using proper rulemaking procedures, its reasonable interpretations are entitled to *Chevron* deference.[145] If the agency's interpretation has not met the "certain threshold criteria," courts should instead give the agency *Skidmore* deference.[146] The EEOC's interpretation of the ADA, as amended, should be treated the same as any agency's interpretation, not as a "second class" agency.

B. *Despite the ADAAA's Mandate for* Chevron *Deference, Most Lower Courts Continue to Apply* Skidmore *Deference*

Time will tell if the courts heed Congress's instruction in applying proper deference to the EEOC's interpretations of the ADA as amended. At the moment, however, most lower courts continue to apply *Skidmore* deference. These lower courts either apply their pre-ADAAA precedents about deference without regard to the statute's amendments or simply state that the EEOC interpretations bolster their own findings. Because the ADAAA is not retroactive in application,[147] not many opinions have been decided since the statute and regulations have been in force.[148] Of those decisions, few courts have

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144 H.R. REP. NO. 110-730, pt. 1, at 18 (2008) (emphasis added).

145 *See id.*

146 *See id.*

147 *See*, *e.g.*, E.E.O.C. v. Agro Distrib., LLC, 555 F.3d 462, 469 n.8 (5th Cir. 2009) (citing Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 (1994)).

148 *See* Americans with Disabilities Act of 1990, Pub. L. No. 110-325, § 8, 122 State 3553 (2008); Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 24 C.F.R. § 1630 (2011).

explicitly or implicitly addressed the issue of deference to the EEOC's interpretations under the ADAAA.

Only a small amount of district courts have expressly dealt with the issue of deference since the passage of the ADAAA. A Texas district court noted, "EEOC regulations implementing the ADAAA, though not binding precedent, provide helpful guidance to understanding the new disability standard."[149] A New York district court, while recognizing the ADAAA's changes to § 12102's disability definition, still applied the circuit's pre-ADAAA standard of "great deference" to the EEOC's interpretations of the ADA.[150] Other district courts similarly applied their pre-ADAAA precedents on the level of deference given to the EEOC's interpretations.[151] In one jurisdiction that already gave the EEOC *Chevron* deference under the ADA, the district court saw "no reason why that holding would change post-ADAAA given that the Act specifically gives the EEOC authority to issue regulations to implement the Act's definitions of disability."[152] Finally, two district courts have also given *Chevron* deference to the EEOC's interpretations under the ADAAA.[153] These courts did not cite to its circuit's pre- or post-ADAAA precedent; instead, the courts simply stated that the EEOC's regulations are entitle to *Chevron* deference.[154]

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149 Molina v. DSI Renal, Inc., 840 F. Supp. 2d 984, 995 (W.D. Tex. 2012) (footnote omitted).

150 Davis v. NYC Dept. of Educ., No. 1:10-CV-03812, 2012 WL 139255 at *5, *5 n.8 (E.D.N.Y. Jan. 18, 2012) (citing Reeves v. Johnson Controls World Servs., 140 F.3d 144, 150 n. 3 (2d Cir.1998)).

151 *See* E.E.O.C. v. Beverage Distribs. Co., LLC, No. 1:11-CV-02557, 2012 WL 6094152 at *1 (D. Colo. Dec. 7, 2012) (noting an EEOC regulation is entitled to substantial deference) (citing Jarvis v. Potter, 500 F.3d 1113, 1121 (10th Cir. 2007)); Pahuja v. Am. Univ. of Antigua, No. 11 CIV. 4607 (PAE), 2012 WL 6592116 at *10 (S.D.N.Y. Dec. 18, 2012) (deferring generally to EEOC regulations in construing the ADA's terms) (citing Giordano v. City of New York, 274 F.3d 740, 747 (2d Cir. 2001).

152 Estate of Murray v. UHS of Fairmount, Inc., CIV.A. No. 10-2561, 2011 WL 5449364, at *6 n.15 (E.D. Pa. Nov. 10, 2011) (citing Tice v. Ctr. Area Transp. Auth., 247 F.3d 506, 515 n.8 (3d Cir. 2001); Americans with Disabilities Act of 1990, Pub. L. 110-325 § 6(a)(2), 122 State 3553 (2008)).

153 E.E.O.C. v. Res. for Human Dev., Inc., 827 F. Supp. 2d 688, 694 n.5 (E.D. La. 2011) (citations omitted); Eastman v. Research Pharmaceuticals, Inc., 2:12-CV-02170, 2013 WL 3949236, at *8 n.15 (E.D. Pa. Aug. 1, 2013) (agreeing with the *Murray* court that EEOC is entitled to *Chevron* deference).

154 Res. for Human Dev., Inc., 827 F. Supp. 2d at 694 n.5; *Eastman*, 2013 WL 3949236, at *8 n.15. Additionally, in the case of Hoffman v. Carefirst of Fort Wayne, Inc., the court "further bolstered" its own conclusion of the meaning of disability under the ADAAA by using the EEOC's interpretive guidance. 737 F. Supp. 2d 976, 985 (N.D. Ind. 2010) (citations omitted).

Several other district courts have implied that EEOC interpretations of the ADAAA deserve *Skidmore* deference. However, these district courts did not discuss the issue directly. In analyzing whether a plaintiff's medical condition is covered by the ADAAA, several courts cited to the EEOC's definition of "disability" in 29 C.F.R. § 1630.2.[155] Ruling on a motion to dismiss, one court held that being HIV-positive was a limitation of a major life activity, consistent with the EEOC's regulations.[156] Two others courts held that the EEOC's regulations have "bolstered" their own holdings.[157] Some courts simply use the EEOC's definition of disability and then cite to the ADAAA's specific authorization for the EEOC to implement the definition of disability, as seen in 42 U.S.C. § 12205a.[158] Other courts also cite to § 12205a; however, they characterize the regulations as only providing "guidance."[159]

Without instructions from the courts of appeals or the Supreme Court, most lower courts rely on their established pre-ADAAA precedents or simply apply *Skidmore* deference. Soon, the Supreme Court and courts of appeals will apply *Chevron* step zero and address the issue of deference to the EEOC under the ADAAA. Once this occurs, lower courts will certainly follow in their lead.

C. *The Fourth Circuit Paves the Way By Applying* Chevron *Deference* to the ADAAA

Only one appellate court, the Fourth Circuit Court of Appeals, has formally addressed how the ADAAA's express delegation of con-

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However, as discussed in note 95, the issue of EEOC deference to interpretations outside of proper regulations is beyond the scope of this paper.

155 Doe v. Samuel Merritt Univ., 921 F. Supp. 2d 958, 965 (N.D. Cal. 2013) (attention deficit disorder); Angell v. Fairmount Fire Prot. Dist., 907 F. Supp. 2d 1242, 1251 (D. Colo. 2012) (cancer); Kravits v. Shinseki, CIV.A. 10-861, 2012 WL 604169, at *5 (W.D. Pa. Feb. 24, 2012) (sleep apnea); Karr v. Napolitano, C 11-02207 LB, 2012 WL 4462919, at *8 (N.D. Cal. Sept. 25, 2012) (sleep apnea); Feldman v. Law Enforcement Assocs. Corp., 779 F. Supp. 2d 472, 483 (E.D.N.C. 2011) (multiple sclerosis); Norton v. Assisted Living Concepts, Inc., 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011) (cancer); Horgan v. Simmons, 704 F. Supp. 2d 814, 819 (N.D. Ill. 2010) (HIV).

156 *Horgan*, 704 F. Supp. 2d at 819.

157 *Norton*, 786 F. Supp. 2d at 1185; *Feldman*, 779 F. Supp. 2d at 484 (characterizing ADAAA regulations as "interpretive guidance"). *See also Kravits*, 2012 WL 604169, at *6.

158 Gregor v. Polar Semiconductor, Inc., 0:11-CV-03306, 2013 WL 588743, at *3 (D. Minn. Feb. 13, 2013); *Angell*, 2012 WL 5389777, at *4 n.8.

159 *Doe*, 921 F. Supp. 2d at 965; *Karr*, 2012 WL 4462919, at *8; *Kravits*, 2012 WL 604169, at *5.

gressional authority has entitled the EEOC to *Chevron* deference.[160] In *Summers v. Altarum Institute*, the Fourth Circuit reversed a district court's holding that an individual temporarily in a wheelchair was not disabled.[161] The Fourth Circuit chastised the district court for ruling in a manner consistent with pre-ADAAA reasoning rather than the ADAAA's broadly construed definition of disability.[162] Congress specifically intended for the ADAAA to abrogate the Supreme Court's prior narrow meaning of disability.[163] Looking at the ADAAA's text and legislative history and EEOC regulations, the court found that the plaintiff in the case had met the definition of disability.[164]

In arguing its case, the defendant "contend[ed] that the EEOC regulations defining a disability to include short-term impairments do not warrant deference under *Chevron*."[165] However, the Fourth Circuit disagreed. First, the court conducted an implicit *Chevron* step zero analysis, noting that the EEOC promulgated its regulations created "pursuant to its delegated authority."[166] The court then "appl[ied] the familiar two-step *Chevron* analysis," deferring to the EEOC's interpretation.[167] Thus, the Fourth Circuit became the first appellate court to apply *Chevron* step zero and correctly defer to the EEOC's interpretations of the ADAAA.

CONCLUSION

In looking at the EEOC's win-loss record, some commentators argue that the Supreme Court seems to treat the EEOC as a "second class" agency.[168] However, as applied to the EEOC's interpretations of the ADA, this is just not true. Instead, the Court has consistently applied an implicit *Chevron* step zero analysis across all agency interpretations of the ADA. Whether an agency passes *Chevron* step zero depends whether Congress has delegated the agency authority to implement binding interpretations on the court. In many of the cases

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160 Summers v. Altarum Inst., Corp., 740 F.3d 325, 330 (4th Cir. 2014) (noting that it was the "first appellate court to apply the amendment's expanded definition of 'disability'").

161 *Id*. at 330, 333.

162 *Id*. at 330, 332-33.

163 *Id*. at 332.

164 *Id*. at 333.

165 *Id.* at 331.

166 Summers v. Altarum Inst., Corp., 740 F.3d 325, 330 (4th Cir. 2014).

167 *Id*. at 331.

168 *See e.g.*, White, *supra* note 6, at 571; Wern, *supra* note 6, at 1578.

involving EEOC interpretations of the ADA, Congress has given no such delegation. Therefore, the Court was not required to defer to the EEOC and instead looked to the agency interpretation for only guidance.

In passing the ADAAA, however, Congress gave agencies additional express delegations of authority over the ADA. This explicit delegation remedies the various faults in the EEOC's authority that in the past has caused the agency to falter under *Chevron* step zero. Additionally, the ADAAA should clarify the confusion among the courts of appeals as to the exact amount of deference that should be given to the EEOC. However, district courts have yet to embrace the changes to agency authority under the ADAAA by continuing to apply *Skidmore* deference. Once courts, following the lead of the Fourth Circuit Court of Appeals, recognize the changes that have occurred in the ADAAA, *Chevron* step zero will lead them to apply the proper level of deference due to the EEOC.