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# Sexual Orientation Discrimination Under Title VII After *Baldwin v. Foxx*

By Ryan H. Nelson\*

*The Equal Employment Opportunity Commission in Baldwin v. Foxx opined—for the first time—that employment discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964. This Article tackles the two administrative law questions that Baldwin poses: what level of deference should a court afford Baldwin, and should such deference force that court to overturn precedent holding that sexual orientation discrimination lies beyond the purview of Title VII?*

*First, after the Supreme Court's opinion in Barnhart, lower courts have split on whether Chevron Step Zero should be governed by the rule-of-law test announced in Christensen and Mead, or whether Barnhart's five-factor test provides a new standard for this inquiry. This Article explains why the Christensen/Mead rule-of-law test should govern Chevron Step Zero; why that test dictates that courts should analyze Baldwin under the deference test announced in Skidmore, not Chevron; and why Baldwin consequently deserves de minimis deference.*

*Second, the Supreme Court's opinion in Brand X held that judicial interpretations of ambiguous statutes must be overturned in the face of subsequent, contrary agency interpretations that would have earned Chevron deference but for stare decisis. Yet, no exception to stare decisis exists when an agency interpretation of an ambiguous statute earns mere Skidmore deference. This Article examines such a potential exception, concluding that stare decisis*

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*should trump agency interpretations of ambiguous statutes, Skidmore deference notwithstanding.*

*This Article concludes that Baldwin is far from a watershed moment for LGBT workplace equality. Rather, the courts—which have almost uniformly held that employment discrimination based on sexual orientation does not violate Title VII—should uphold such decisions despite Baldwin and the meager Skidmore deference it earns. Indeed, congressional action remains the only way to ban employment discrimination based on sexual orientation on a national scale.*

### I. Introduction

On July 16, 2015, the U.S. Equal Employment Opportunity Commission (EEOC) issued its opinion in *Baldwin v. Foxx*,<sup>1</sup> concluding that allegations of employment discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex within the meaning of Title VII of the Civil Rights Act of 1964 (Title VII).<sup>2</sup> While *Baldwin* is technically limited to workplaces in the federal sector, there is little doubt that the EEOC and the plaintiffs' bar will seek to use the opinion in litigation to support the position that employment discrimination on the basis of sexual orientation violates Title VII. To that end, this Article focuses on two of the prospective questions that will inevitably dog courts hearing such cases in the months and years to come: what level of deference should courts afford the *Baldwin* decision, if any, and should such deference force courts to overturn existing precedent holding that sexual orientation discrimination is beyond the purview of Title VII?

Part II of this Article argues that *Baldwin* presents an ideal opportunity for the Supreme Court to clarify whether an administrative agency interpretation must have the force of law for a court to analyze that interpretation under the deference test announced in *Chevron U.S.A., Inc. v. Natural Resources Defense*

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1. Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 16, 2015).

2. Civil Rights Act of 1964 tit. VII, Pub. L. No. 88-352, 78 Stat. 253 (1964). See *Baldwin*, 2015 WL 4397641, at \*10.

*Council, Inc.*,<sup>3</sup> as suggested by the Court's prior decisions in *Christensen v. Harris County*<sup>4</sup> and *United States v. Mead Corp.*,<sup>5</sup> or conversely, whether the five-factor test announced in *Barnhart v. Walton*<sup>6</sup> is more than mere dicta, providing instead a new standard in assessing which deference test applies to an agency's interpretation of a statute it administers. This Article concludes that the *Barnhart* factors are mere dicta, that the "force of law" rule endorsed by both *Christensen* and *Mead* should continue to control the *Chevron* Step Zero inquiry,<sup>7</sup> and consequently, that *Baldwin* should be analyzed under the framework established in *Skidmore v. Swift & Co.*,<sup>8</sup> not *Chevron*. Assuming the foregoing to be true, applying *Skidmore* demonstrates that *Baldwin* earns but a modicum of deference—so little, in fact, that one could question whether the opinion earns any deference at all.

Part III explores *Baldwin*'s potential to answer another administrative law question left as-yet unanswered by the Supreme Court. In *National Cable & Telecommunication Ass'n v. Brand X Internet Services*,<sup>9</sup> the Court settled the tension between judicial interpretations of ambiguous statutes and subsequent, contrary agency interpretations that would have been entitled to *Chevron* deference but for adherence to stare decisis.<sup>10</sup> In sum, *Brand X* announced a new rule that *Chevron* deference to an agency's interpretation must trump traditional notions of stare decisis so long as the statute at issue is ambiguous.<sup>11</sup> However, the Court has yet to address this tension when the agency's interpretation of an ambiguous statute lacks the force of law (for instance, when the interpretation earns only some level of

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3. 467 U.S. 837 (1984).

4. 529 U.S. 576 (2000).

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

6. 535 U.S. 212 (2002).

7. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) [hereinafter *Chevron Step Zero*] (providing "an understanding of the foundations and nature of the Step Zero dilemma" and suggesting how to resolve this dilemma).

8. 323 U.S. 134 (1944).

9. 545 U.S. 967 (2005).

10. *Id.* at 984–86.

11. *Id.*

*Skidmore* deference). This Article concludes that courts should stand by their interpretations of ambiguous statutes rather than uproot them in the face of subsequent, contrary agency interpretations lacking the force of law. Applying that conclusion here, and assuming *arguendo* the conclusion in Part I to be correct, the courts—which have almost uniformly held that employment discrimination on the basis of sexual orientation lies beyond the reach of Title VII<sup>12</sup>—should uphold their decisions, despite the *Baldwin* opinion and the meager *Skidmore* deference courts must afford it.

In sum, this Article concludes that *Baldwin* does not bring advocates of a national ban on employment discrimination on the basis of sexual orientation to the finish line; rather, it reminds us how much farther we still have to go. While the opinion reaches the right result, it earns *de minimis* deference, the likes of which should not overturn contrary court decisions interpreting Title VII. As such—even in the wake of *Baldwin*—the one and only way to ban employment discrimination on the basis of sexual orientation on a national scale is for Congress to act.

## II. Chevron Step Zero

The Supreme Court's landmark *Chevron* decision held that, under certain circumstances, courts must defer to an administrative agency's interpretation of a statute that it administers.<sup>13</sup> To qualify for *Chevron* deference, a court must ask whether Congress has directly spoken on the precise question at issue and, if so, give effect to Congress's unambiguously expressed intent (*Chevron* Step One); if the statute is silent or ambiguous, the court must defer to the agency's interpretation of the statute so long as it is permissible (*Chevron* Step Two).<sup>14</sup> In contrast, agency interpretations that do not qualify for *Chevron*

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12. See *infra* note 71 (enumerating cases in which courts have found that Title VII does not apply to sexual orientation discrimination).

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

14. *Id.* at 842–43.

deference are analyzed under the test announced in *Skidmore*,<sup>15</sup> which requires courts to afford weight to agency interpretations depending on: (i) the thoroughness evident in the agency's consideration; (ii) the validity of the agency's reasoning; (iii) the agency's consistency with earlier and later pronouncements; and (iv) all those factors that give the agency power to persuade, if lacking power to control.<sup>16</sup>

Yet, a trio of Supreme Court cases in the early 2000s attempted to address a vital threshold question colloquially known as *Chevron* Step Zero: which agency interpretations should be analyzed under the *Chevron* test, as compared to the *Skidmore* test?<sup>17</sup> As demonstrated below, those three cases lay out the precedent necessary to conclude that the EEOC's *Baldwin* opinion should be analyzed under *Skidmore*, not *Chevron*.

#### A. Christensen, Mead, and Barnhart

First, in *Christensen*, the Court considered what deferential weight to afford an opinion letter issued by the Wage and Hour Division of the U.S. Department of Labor, holding that

[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law [and were not arrived at after, for example, a formal adjudication or notice-and-comment rulemaking]—do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are “entitled to respect” under our decision in [*Skidmore*], but only to the extent that those interpretations have the “power to persuade.”<sup>18</sup>

Yet, the Court declined to clarify whether the opinion letter was not subjected to a *Chevron* analysis because: (i) it “lack[ed] the

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15. See *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (distinguishing decisions in the format of opinion letters from those subject to the *Chevron* test).

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

17. See *infra* Part II.A (discussing *Christensen*, *Mead*, and *Barnhart*).

18. *Christensen*, 529 U.S. at 587.

force of law”); (ii) it was not arrived at after formal adjudication or notice-and-comment rulemaking; or (iii) both.<sup>19</sup> Accordingly, post-*Christensen*, it was clear that such agency opinion letters are insufficient to be tested under the *Chevron* framework, but it was unclear precisely what would be sufficient or necessary to qualify for testing under *Chevron*.

Second, in *Mead*, the Court considered a tariff clarification ruling by the United States Customs Service.<sup>20</sup> Similar to *Christensen*, the Court found that *Skidmore* was the appropriate standard by which to test the agency’s interpretation, holding that *Chevron* deference applies “when it appears that Congress has delegated authority to the agency generally to make rules *carrying the force of law*, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>21</sup> With this proclamation, the *Mead* Court took a step farther than *Christensen* by noting that interpretations “carrying the force of law” are sufficient to garner *Chevron* deference. Moreover, the Court went on to note in dicta that *Chevron* deference can be, and has been, found “even when no . . . administrative formality was required and none was afforded,”<sup>22</sup> thereby taking yet another step beyond *Christensen* by stating that formal adjudication was unnecessary to garner *Chevron* deference.

Reading *Christensen* and *Mead* in tandem shows that an interpretation having the “force of law” is not only sufficient for that interpretation to be tested under *Chevron*, but necessary to do so. More specifically, post-*Christensen* but pre-*Mead*, we knew that one of the following three scenarios was true, although we did not know which:

1. It was necessary that the opinion letter possessed the force of law to be tested under *Chevron*. Whether it resulted from formal adjudication was irrelevant.

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19. See generally *id.*; see also *Chevron Step Zero*, *supra* note 7, at 211–12 (discussing the ambiguity created by the analysis in *Christensen*).

20. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

21. *Id.* at 226–27 (emphasis added).

22. *Id.* at 231.

2. It was necessary that the opinion letter resulted from formal adjudication to be tested under *Chevron*. Whether it possessed the force of law was irrelevant.

3. It was necessary that the opinion letter possessed the force of law and resulted from formal adjudication to be tested under *Chevron*.

Subsequently, *Mead's* dicta clarified that formal adjudication is unnecessary to test an interpretation under *Chevron*, thereby eliminating options two and three above. Accordingly, viewing *Christensen* through the lens of *Mead* demonstrates that an agency's interpretation must possess the force of law to be tested under *Chevron*.<sup>23</sup> This conclusion seemingly was thrown into doubt, however, by the third case in the *Chevron* Step Zero trio: *Barnhart*.

In *Barnhart*, the Court considered a Social Security Administration regulation that had been adopted after notice and comment procedures,<sup>24</sup> although the agency had first adopted the interpretation informally.<sup>25</sup> The Court found that *Chevron* was the appropriate means of testing the regulation for deference, citing *Mead's* dicta for the proposition that the agency did not lose the protection of *Chevron* merely because it had previously reached its interpretation without resorting to formal rulemaking.<sup>26</sup> In so doing, *Barnhart* transformed *Mead's* dicta into binding law.<sup>27</sup> Yet, interestingly, *Barnhart* did not stop there. The Court went on to explain that *Chevron* deference was the appropriate test because of (i) the interstitial nature of the legal question; (ii) the related expertise of the agency; (iii) the importance of the question to the administration of the statute; (iv) the complexity of that administration; and (v) the careful consideration the agency had given the question over a long period of time.<sup>28</sup>

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23. *Id.* at 237–38.

24. *Barnhart v. Walton*, 535 U.S. 212 (2002).

25. *Id.* at 221–22.

26. *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001)).

27. *Id.* at 222.

28. *Id.*

Predictably, the introduction of these *Barnhart* factors into *Chevron* Step Zero threw the lower courts into “a kind of Step Zero chaos”;<sup>29</sup> some have maintained that *Christensen* and *Mead* dictate that an agency interpretation must be tested under *Chevron* if it carries the force of law, while others have held that interpretations must be analyzed pursuant to *Barnhart*’s five-factor test to make the same call.<sup>30</sup> This split in authority is most relevant to the instant matter; indeed, as demonstrated below, *Baldwin* should be tested under *Skidmore* if the *Christensen/Mead* rule-of-law test governs and under *Chevron* if the *Barnhart* five-factor test governs.

### B. Applying the Chevron Step Zero Trio to Baldwin

Foremost, it is clear that Congress did not give the EEOC the authority to promulgate regulations under Title VII.<sup>31</sup> As such, the EEOC cannot issue opinions interpreting Title VII that carry the force of law.<sup>32</sup> Indeed, the Supreme Court has held that EEOC guidance interpreting Title VII does not carry the force of law,<sup>33</sup> and the only court to consider whether EEOC opinions carry the force of law has likewise concluded that they do not.<sup>34</sup>

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29. *Chevron* Step Zero, *supra* note 7, at 221.

30. *Compare* Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 316 F.3d 913, 922 (9th Cir. 2003), *rev’d en banc on other grounds*, 353 F.3d 1051 (9th Cir. 2003) (applying *Mead*), *and* *Schneider v. Feinberg*, 345 F.3d 135, 144 (2d Cir. 2003) (same), *with* *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1011–13 (9th Cir. 2002) (applying *Barnhart*), *and* *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002) (same), *and* *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 61 (2d Cir. 2004) (same), *and* *Robert Wood Johnson Univ. Hosp. v. Thompson*, 297 F.3d 273, 281–82 (3d Cir. 2002) (same). For a detailed discussion of this split in authority, see Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1458–64 (2005).

31. *See* *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (“Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title.”), *superseded by statute on other grounds*, Pregnancy Discrimination Act, Pub. L. No. 95-555, § 995, 92 Stat. 2076 (1978).

32. *Id.*

33. *See* *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–59 (1991), *superseded by statute on other grounds as stated in* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 n.8 (2006).

34. *See* *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 943 (8th Cir. 2007)

Thus, if the *Christensen/Mead* rule-of-law test governs *Chevron* Step Zero, *Baldwin* should be tested under *Skidmore*.

Yet, if *Barnhart*'s five-factor test controls, the analysis is far more complex. The first of the five *Barnhart* factors (that is, whether the nature of the legal question at issue is "interstitial")<sup>35</sup> poses a surprisingly difficult question, given that the Court has failed to define which legal questions it considers "interstitial" and which it does not. Indeed, the Court has only referenced this "interstitial" language once since *Barnhart*, and in so doing gave an example of an allegedly interstitial legal question but failed to explain why the question was interstitial.<sup>36</sup> Respected scholars have defined interstitial per *Barnhart* to mean interpretations that are "less central to a [regulatory] scheme"<sup>37</sup> or raise less important questions of law.<sup>38</sup> Professor Sunstein even buttresses his view by quoting a now-famous 1986 law review article written by the author of the *Barnhart* opinion—then Judge Breyer on the First Circuit Court of Appeals: "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."<sup>39</sup> Accordingly, it appears that the author of the *Barnhart* opinion himself believed interstitial to mean "of less importance," as compared to "major questions."

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("An agency's interpretation that is found in an opinion letter, policy statement, agency manual or enforcement guide 'lack[s] the force of law' . . .").

35. *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

36. See *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 89–90 (2007) ("[T]he matter at issue—i.e., the calculation method for determining whether a state aid program 'equalizes expenditures'—is the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide."). The Court failed to clarify whether "highly technical" and "specialized" are synonyms for "interstitial," or whether "interstitial" modifies the word "matter" in some other way. *Id.*

37. David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1934 n.65 (2014).

38. See *Chevron* Step Zero, *supra* note 7, at 198–99 (describing how the importance of the question of law inversely relates to its interstitial nature).

39. *Id.* at 200 n.62 (citing Hon. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

With all due respect to these scholars, and especially to Justice Breyer, interstitial does not mean less central to a regulatory scheme or less important. On the contrary, interstitial is defined as anything “related to or situated in the [spaces that intervene between things],”<sup>40</sup> meaning that something is interstitial because it relates to the spaces or gaps between things—not necessarily because it is less central to a regulatory scheme or less important. This begs the question: when does an agency interpretation relate to the spaces or gaps between things? As it turns out, the Court has already answered that question. In *Brand X*, the Court held that a statute has no “gap[s]” if it “unambiguously forecloses the agency’s interpretation.”<sup>41</sup> Unsurprisingly, the Court has adopted a well-established line of precedent aimed at determining whether a statute unambiguously forecloses the agency’s interpretation—indeed, this is the very question posed by *Chevron* Step One.<sup>42</sup>

Now, combine all of these propositions: The interstitial nature of an agency interpretation is arguably relevant to *Chevron* Step Zero (see the first of *Barnhart*’s five factors), meaning that an agency interpretation relating to gaps (see the dictionary definition of “interstitial”) is more apt to be tested under *Chevron* than an agency interpretation that does not, and because an interpretation relates to gaps if it progresses past *Chevron* Step One (see *Brand X*), application of *Barnhart*’s five factors implies that *Chevron* Step One is relevant to determining *Chevron* Step Zero. In other words, if an agency’s interpretation would progress from *Chevron* Step One to *Chevron* Step Two, then the agency’s interpretation is necessarily interstitial, which supports a finding that *Chevron* is the appropriate standard à la *Barnhart*’s multi-factor test of *Chevron* Step Zero. Notably, such

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40. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 655 (11th ed. 2006).

41. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

42. *See Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 93 (2007) (“Neither the legislative history nor the reasonableness of the Secretary’s method would be determinative if the statute’s plain language unambiguously indicated Congress’ intent to foreclose the Secretary’s interpretation.”) (citing *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

an interpretation is consistent with *Barnhart* itself because the *Barnhart* Court's analysis proceeded to *Chevron* Step Two.<sup>43</sup>

Applying this understanding of *Barnhart* here, the EEOC's opinion in *Baldwin* must be interstitial because Congress has never spoken on the precise issue of whether sexual orientation qualifies as sex discrimination,<sup>44</sup> thereby implying that the agency's interpretation would progress from *Chevron* Step One to Step Two, were *Chevron* the appropriate standard. Accordingly, this factor weighs in favor of *Chevron* being the appropriate test here. Note that courts would likely reach the *opposite* result if interstitial meant less central to a regulatory scheme or less important. In fact, there arguably are fewer issues of more importance to Title VII than which classifications are protected and which are not, and scant issues enjoy more importance today than whether employers should have the right to discriminate against applicants and employees on the basis of their sexual orientation; after all, the inclusion of "sexual orientation" as stand-alone language in Title VII has been raised in practically every congressional session for the past twenty years.<sup>45</sup>

The second *Barnhart* factor concerns the agency's related expertise.<sup>46</sup> The EEOC certainly carries expertise in what constitutes sex discrimination under Title VII, as it serves as the sole federal agency charged with enforcing that statute.<sup>47</sup> Hence, this factor strongly supports testing *Baldwin* under *Chevron*.

The third *Barnhart* factor asks not whether the interpretation is important generally, but whether the

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43. See *Barnhart v. Walton*, 535 U.S. 212, 218–19 (2002) (proceeding from a determination that the statute was ambiguous to an assessment of whether the agency interpretation was reasonable).

44. See Michael Gold, *7 Questions About the Employment Non-Discrimination Act You Needed Answered*, BALTIMORE SUN (Nov. 4, 2013), [http://articles.baltimoresun.com/2013-11-04/features/bal-questions-about-the-employment-nondiscrimination-act-20131104\\_1\\_gender-identity-enda-senate-vote](http://articles.baltimoresun.com/2013-11-04/features/bal-questions-about-the-employment-nondiscrimination-act-20131104_1_gender-identity-enda-senate-vote) (last visited Oct. 7, 2015) (discussing the lack of existing federal legislation protecting sexual orientation from discrimination) (on file with the Washington and Lee Law Review).

45. *Id.*

46. *Barnhart*, 535 U.S. at 222.

47. Civil Rights Act of 1964 tit. VII, Pub. L. No. 88-352, § 706, 78 Stat. 253 (1964).

interpretation is important “to the administration of the statute.”<sup>48</sup> Here, the EEOC’s *Baldwin* opinion is incredibly important to the administration of Title VII because it determines whether the EEOC will accept and pursue charges of discrimination alleging sexual orientation discrimination. Had the *Baldwin* decision determined that sexual orientation discrimination is not tantamount to sex discrimination, the EEOC’s administration of Title VII would be markedly different going forward. As such, this factor almost assuredly weighs in favor of *Chevron* being the appropriate test here.

The fourth *Barnhart* factor concerns the complexity of the agency’s administration of the statute,<sup>49</sup> where (ostensibly) the more complex the administration of a statute, the more likely the agency’s interpretation would be to trigger *Chevron* as the appropriate test. Here, Title VII is simply not a complex statute, especially when contrasted against the Social Security Act,<sup>50</sup> which the *Barnhart* Court identified as being complex.<sup>51</sup> For one thing, if a statute is complex, it would be more likely that Congress would vest in the agency responsible for administering that statute the right to promulgate regulations to ensure its appropriate administration. Yet, as noted above, Congress did not vest in the EEOC the power to promulgate regulations under Title VII.<sup>52</sup> Moreover, the sheer breadth of the Social Security Act (over 70 sections spanning over 1000 pages) dwarfs that of Title VII (16 sections spanning 14 pages).<sup>53</sup> Accordingly, this factor arguably weighs in favor of *Skidmore* being the appropriate test for *Baldwin*.

The fifth and final *Barnhart* factor asks about “the careful consideration the agency had given the question over a long

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48. *Barnhart*, 535 U.S. at 222.

49. *Id.*

50. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935).

51. *See* *Barnhart v. Walton*, 535 U.S. 212, 222–25 (2002) (describing the many components of the statute and the kinds of claims it encompasses).

52. *See supra* note 31 and accompanying text.

53. *Compare* 49 Stat. 620 (detailing the administration of social security benefits), *with* Civil Rights Act of 1964 tit. VII, Pub. L. No. 88-352, 78 Stat. 253 (1964) (providing for equal employment opportunities).

period of time.”<sup>54</sup> As the Supreme Court has held, an EEOC interpretation “does not fare well” when it was neither contemporaneous with its enactment nor consistent since the statute came into law.<sup>55</sup> Applying that standard here, this factor strongly supports testing the opinion under *Skidmore* because *Baldwin* was issued over fifty years after Title VII passed and because the EEOC concedes that it held a contrary view of Title VII until very recently.<sup>56</sup>

In sum, three of the five *Barnhart* factors arguably weigh in favor of *Baldwin* being tested under *Chevron*, whereas two factors arguably point toward *Skidmore* as the appropriate test. All factors being equal (an assumption that certainly could be challenged), *Baldwin* should be tested under *Chevron* if the *Barnhart* factors control the *Chevron* Step Zero analysis. Yet, to say this conclusion is tenuous is a gross understatement as it relies upon a novel interpretation of the word interstitial, as well as several assumptions that could rightly be deemed judgment calls (for example, that the question posed in *Baldwin* is important to the administration of Title VII). As such, my point here is not that *Baldwin* would be tested under *Chevron* if the *Barnhart* test controls, but that *Baldwin* could—and probably should—be tested under *Chevron* if the *Barnhart* test controls. This Article aims only to demonstrate the need for clarification from the Court, given that the *Christensen/Mead* line of cases and *Barnhart* arguably point in different directions when applied to the *Baldwin* opinion.

### C. Which Approach Is Correct?

The *Christensen/Mead* rule-of-law test should control *Chevron* Step Zero. Foremost, had the *Barnhart* Court meant to

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54. *Barnhart*, 535 U.S. at 222.

55. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–58 (1991) *superseded by statute on other grounds as stated in* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 n.8 (2006).

56. *See supra* note 2 (noting that in *Baldwin* the EEOC opined for the first time that employment discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964).

revise its rule-of-law test—a test it had endorsed just a term earlier in *Mead*—it almost assuredly would have done so explicitly. And, if that were the case, the Court probably would have devoted more than a single paragraph to revising itself. Moreover, the *Barnhart* Court did not need the five-factor test to arrive at the result it reached, further suggesting that the factors were mere dicta. Indeed, the Court noted that the regulations at issue had the force of law and subsequently concluded that the agency’s interpretation should be tested under *Chevron*. That conclusion is hardly novel; it is the very conclusion reached by the *Mead* court, which *Barnhart* approvingly cites.

Subjecting *Baldwin* to the *Christensen/Mead* rule-of-law test, the result is clear: the *Baldwin* opinion does not have the force of law because the EEOC has not promulgated regulations implementing Title VII. As such, the opinion must be tested under *Skidmore*, not *Chevron*.<sup>57</sup> Applying *Skidmore* to *Baldwin* does not bode well for the EEOC. Arguably, the first *Skidmore* factor—the thoroughness of the agency’s reasoning—is a toss-up, weighing neither for, nor against, deference. True: the opinion is thorough when discussing the points of view that support its conclusion, but it fails to distinguish the myriad cases holding that employment discrimination based on sexual orientation is not tantamount to sex discrimination under Title VII. A thorough argument not only illuminates those propositions that support it, but also decries those propositions that oppose it.<sup>58</sup> *Baldwin* accomplishes only half of this imperative.

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57. See also Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 976 (2009) (“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.”).

58. HOWARD KAHANE & NANCY CAVENDER, LOGIC AND CONTEMPORARY RHETORIC: THE USE OF REASON IN EVERYDAY LIFE 226 (10th ed. 2006) (“Never simply ignore counterarguments or reasons.”); WILLIAM PUTMAN & JENNIFER ALBRIGHT, LEGAL RESEARCH, ANALYSIS, AND WRITING 213 (3d ed. 2002) (“Counteranalysis is the process of discovering and presenting counterarguments to a legal position or argument. It is important because to adequately address a legal problem, all aspects of the problem must be considered.”).

The second and fourth *Skidmore* factors—the validity of the agency’s reasoning and the agency’s “power to persuade”—have always confused scholars.<sup>59</sup> They appear to encourage courts to defer to agency interpretations that are well-reasoned. Yet, that proposition is puzzling. The very notion contravenes the theory of deference to administrative agencies; the necessity of deference to administrative agency opinions is borne of a divergence between the agency’s view and that of the judiciary. If those views harmonized, there would be no need for deference. As such, this Article finds only that these factors encourage a court to “defer” to the EEOC if it already agrees with the EEOC’s opinion. Again, therefore, these factors are a toss-up when it comes to a court deferring to *Baldwin*.

Finally, the third *Skidmore* factor—the agency’s consistency with earlier and later pronouncements—weighs strongly against the EEOC. As noted above, in *Baldwin* itself the agency concedes that the opinion contradicts earlier-held agency interpretations.<sup>60</sup> Thus, it is difficult to definitively argue that *any* of the *Skidmore* factors weigh in favor of deferring to the EEOC. At most, the *Baldwin* decision should earn de minimis deference under *Skidmore*, yet it seems more reasonable that *Baldwin* should earn no deference at all.

### III. A Brand X for *Skidmore* Deference?

The Supreme Court’s opinions in *Maislin Industries, Inc. v. Primary Steel*,<sup>61</sup> *Lechmere, Inc. v. NLRB*,<sup>62</sup> and *Neal v. United*

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59. See, e.g., John F. Coverdale, *Chevron’s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings after Mead*, 55 ADMIN. L. REV. 39, 58 (2003) (noting that, although “deference is compatible with a court[] ultimately reaching a conclusion different from the agency’s after weighing the agency’s opinion,” it is “incompatible with reviewing the agency’s interpretation only after the court has already interpreted the statute, and rejecting the agency opinion if it does not coincide with the court’s”).

60. See *supra* note 56 and accompanying text (presenting the EEOC’s evolution of interpretation regarding sexual discrimination under Title VII).

61. 497 U.S. 116 (1990), *superseded by statute on other grounds as stated in* Allstate Fin. Corp. v. U.S. Gypsum Co., No. 2: 93-CV-323, 1994 U.S. Dist. LEXIS 21540, at \*11 (S.D. Ohio May 10, 1994). See *id.* at 131 (noting that, if the court finds the statute to be clear, it must adhere to stare decisis and the court must

*States*<sup>63</sup> made it clear that if a court had previously found a statute to be unambiguous, then a subsequent, contrary agency interpretation of that statute would not trump traditional notions of stare decisis, regardless of what level of deference the interpretation was entitled to.<sup>64</sup> In other words, if a court has already found a statute to be clear, an agency cannot change that interpretation. After all, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>65</sup>

But, what if the law is unclear and Congress has vested in an administrative agency the authority to fill in the gaps? That issue was front and center in *Brand X*, where the Supreme Court held that if a court has *not* found a statute to be unambiguous, a subsequent, contrary agency interpretation of that statute that otherwise would have been entitled to *Chevron* deference would trump stare decisis.<sup>66</sup> In other words, so long as an agency is filling in the gaps by interpreting an unclear statute and that agency is acting pursuant to congressionally delegated authority to do so, then the agency’s interpretation should control (within the bounds of reason), despite a court’s prior pronouncement.

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“judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning”).

62. 502 U.S. 527 (1992). *See id.* at 536–37 (quoting *Maislin*, 497 U.S. at 131) (“Once 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.”).

63. 516 U.S. 284 (1996). *See id.* at 295 (“Our reluctance to overturn precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress. One reason that we give great weight to *stare decisis* in the area of statutory construction is that ‘Congress is free to change this Court’s interpretation of its legislation.’”).

64. *See also* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (ruling that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion”).

65. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

66. *See Brand X*, 545 U.S. at 982–85 (deciding that, instead of adhering to its own judicial precedent regarding an interpretation of Communications Act, the Ninth Circuit Court of Appeals should have accorded a Federal Communications Commission ruling *Chevron* deference).

The Supreme Court, however, has yet to fill in the final blank in this line of cases. That is, if a court has *not* found a statute to be unambiguous, should stare decisis prevail in the face of a subsequent, contrary agency interpretation that would *not* otherwise have been entitled to *Chevron* deference (for instance, the interpretation would have otherwise been entitled only to some level of *Skidmore* deference)?<sup>67</sup> In other words, if a court has already interpreted a statute to mean A, but that court declines to hold that the statute is clear, can an agency fill in the gaps by interpreting the unclear statute to mean B, even if it acts without the force of law?

Scholars are divided on how to answer this question,<sup>68</sup> although the lower courts appear to have held uniformly that stare decisis trumps an agency interpretation of an unclear statute unless and until the agency issues regulations to the contrary that earn *Chevron* deference.<sup>69</sup> The *Brand X* opinion

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67. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1304–05 (2007) (“*Skidmore* is neither discussed nor even cited in any of the opinions issued in *Brand X*, even though *Skidmore* deference shares the same tension with stare decisis as *Chevron* previously did.”).

68. Compare Bressman, *supra* note 30 at 1467 n.157 (asserting that an agency interpretation of an unclear statute entitled only to *Skidmore* deference should trump a court’s prior, contrary opinion), and Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2001 n.285 (2008) (“Professor Galle . . . believes it is inevitable that there soon will be a *Brand X* for the *Skidmore* doctrine.”), with Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 845 (2010) (“It is uncertain, but may be unlikely, that an authoritative agency interpretation that is eligible for *Skidmore*, but not *Chevron*, deference can displace a judicial interpretation that was made in the absence of an agency interpretation.”), and Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L.J. 1, 41 (2011) (describing how *Brand X* requires, under *Chevron*, a court to accept an agency’s reasonable construction of an ambiguous statute, even if the court has already disagreed with that interpretation, as opposed to “lesser standards of deference,” such as that of *Skidmore*, which “do not demand that a court give up its prerogative to discern the ‘best’ interpretation of a statute”), and Kristin E. Hickman & Matthew D. Krueger, *supra* note 67, at 1305 (“[I]t is far from clear . . . that *Skidmore* should trump judicial precedent.”).

69. See *White & Case LLP v. United States*, 89 Fed. Cl. 12, 23 (2009) (declining to give the agency’s decision any form of deference); Michael Simon

itself purports to answer the question, albeit in dicta. Specifically, the *Brand X* majority responds to the concerns of Justice Scalia's dissent—that is, that the opinion makes “judicial decisions subject to reversal by executive officers”—by explaining that an agency vested with congressional authority to administer ambiguous statutes “remains the authoritative interpreter (within the limits of reason) of such statutes. In all other respects, the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable).”<sup>70</sup> Yet, because the underlying agency interpretation at issue in *Brand X* was entitled to *Chevron* deference, the Court's observation is not binding.

The resolution of this open issue is paramount here because none of the courts to address whether sexual orientation discrimination is tantamount to sex discrimination under Title VII have held that Title VII is clear on the issue (nor should they, because Title VII is anything but clear on the matter), and the overwhelming majority of those courts have reached the opposite conclusion as the EEOC.<sup>71</sup> This unique procedural posture

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Design, Inc. v. United States, 501 F.3d 1303, 1306 (Fed. Cir. 2007) (rejecting the government's argument that the court “did not accord the appropriate deference to Customs' rulings as called for by the Supreme Court in *United States v. Mead* . . .”).

70. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005); see also Kenneth A. Manaster, *Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation: Symposium: The Jurisprudence of Justice Stevens: Panel III: Administrative Law/Statutory Interpretation*, 74 *FORDHAM L. REV.* 1963, 2006 (2006) (citing the *Brand X* dicta for the proposition that “the Court seems to be acknowledging, albeit in passing, judicial power to articulate ‘binding law’ on the basis of ambiguous statutes in some cases” (that is, where *Chevron* deference does not apply)).

71. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (“[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII.”); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (“Title VII's protections . . . do not extend to harassment due to a person's sexuality.”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“Title VII does not prohibit discrimination based on sexual orientation.”); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“Title VII does not prohibit harassment or discrimination because of sexual orientation.”); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (“[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999)

positions *Baldwin* as a vehicle to answer the question left open after *Maislin*, *Lechmere*, *Neal*, and *Brand X*—assuming, of course, that the reviewing court maintains that Title VII is ambiguous on this issue and that binding precedent would compel the court to hold that sexual orientation discrimination would not run afoul of Title VII but for some modicum of *Skidmore* deference owed to *Baldwin*.<sup>72</sup>

To begin answering that question, we must ask why *Maislin*, *Lechmere*, and *Neal* favored *stare decisis* over agency interpretations and why *Brand X* did not. First, the *Brand X* Court noted that *Chevron* deference should trump precedent interpreting an ambiguous statute because of rule of law concerns. As the Court explained, “*Chevron* established a ‘presumption that Congress, when it left ambiguity in a statute

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(“Title VII does not proscribe harassment simply because of sexual orientation.”); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996) (“Title VII does not prohibit conduct based on the employee’s sexual orientation, whether homosexual, bisexual, or heterosexual.”); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (“Title VII does not prohibit discrimination against homosexuals.”); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (“Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978) (“We . . . hold that Title VII cannot be strained to [forbid an employer from rejecting a job applicant based on his or her affectional or sexual preference].”). *But see* *Terweer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying an employer’s motion to dismiss an employee’s claim under Title VII that his sexual orientation was not consistent with the employer’s gender stereotypes). Moreover, the Eleventh Circuit is bound by the Fifth Circuit’s *Smith* decision above because, “[u]nder *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), [the Eleventh Circuit] is bound by cases decided by the former Fifth Circuit before October 1, 1981.” *Baloco v. Drummond Co.*, 640 F.3d 1338, 1343 n.6 (11th Cir. 2011).

72. Although no court should conclude that Title VII is clear here, I readily concede that a reviewing court could distinguish controlling precedent, thereby obviating the need to reach the instant tension between *stare decisis* and *Skidmore* deference. For example, despite the near ubiquity of circuit courts dismissing claims of sexual orientation discrimination of Title VII, several of these opinions predate relevant legal theories that could point the court in the opposite direction (for example, the gender stereotyping theory announced in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”)).

meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”<sup>73</sup> Yet, were the Court to have held that *stare decisis* trumped *Chevron* deference, reviewing courts could have reached divergent results based solely upon the order in which the court and agency issued their interpretations. For example, assume a court construes an unclear statute to mean A before an agency promulgates regulations implementing it. If the agency then issues regulations stating that the statute means B, a court construing that statute thereafter would be bound by *Chevron* to find that the statute means B—assuming that such a construction is reasonable. As per *Brand X*, the possibility of such anomalous results counsels in favor of *Chevron* deference trumping contrary court interpretations of ambiguous statutes.

Second, the *Brand X* Court cited a separation of powers rationale. The majority echoed the concern Justice Scalia raised in his dissent in *Mead* that favoring *stare decisis* could ossify large swaths of statutory law, thereby eliminating the “exercise of continuing agency discretion,” despite Congress having vested in an agency that very discretion.<sup>74</sup> This apparent ability of the judicial branch to thwart the legislative branch and divest authority from the executive branch likewise counsels against upholding traditional notions of *stare decisis* here.

Now, apply these dual rationales to our instant dilemma. Both rationales presuppose that Congress has vested in the agency the power to promulgate regulations implementing the

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73. *Brand X*, 545 U.S. at 982 (quoting *Smiley v. Citibank*, 517 U.S. 735, 740–41 (1996)).

74. *See* *United States v. Mead Corp.*, 533 U.S. 218, 247 (Scalia, J., dissenting) (noting that “[w]orst of all, the majority’s approach will lead to the ossification of large portions of our statutory law. Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency’s ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion.”); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (discussing the ossification as a result of “precluding agencies from revising unwise judicial constructions of ambiguous statutes” and noting that “[n]either *Chevron* nor the doctrine of *stare decisis* requires these haphazard results”) (quoting *Mead*, 533 U.S. at 247 (Scalia, J., dissenting)).

statute in question. Yet, as noted above, Congress has not vested in the EEOC the power to promulgate regulations under Title VII.<sup>75</sup> Absent such congressional authority, the rule-of-law concern that the *Brand X* Court cited loses some of its strength. On one hand, courts *could* reach discordant holdings simply on account of an interposed agency interpretation. For example, assume a court interprets an unclear statute to mean A and an agency later issues informal guidance interpreting that statute to mean B. A court subsequently reviewing the statute could find it appropriate to afford the informal guidance *Skidmore* deference and that doing so tips the scales in favor of the agency's position. Such a result is not preordained, however; whereas a court bound by *Chevron* deference would be required to favor the agency's position so long as it is reasonable, *Skidmore* requires far less deference to an agency's position. What results is less risk of a rule-of-law problem, although the problem certainly persists.

Moreover, while it takes months, or even years, for an agency to navigate the notice-and-comment period required to promulgate regulations entitled to *Chevron* deference, there are no preconditions to an agency issuing an immediate interpretation deserving of *Skidmore* deference. Thus, agencies could eliminate any potential rule-of-law concerns by simply announcing their interpretation of a statute before courts have the opportunity to review that statute—or, at the very latest, via an amicus brief during pending litigation.

On a similar note, *Brand X*'s separation-of-powers rationale for favoring deference over *stare decisis* fades away entirely. After all, the judicial branch cannot thwart a congressional grant of authority when Congress has failed to grant such authority in the first place. While the risk of statutory law being ossified persists, it is not the mere freezing of statutory law that concerned the *Brand X* majority; what concerned the Court was the freezing of statutory law in the face of Congress vesting in an agency discretion to interpret a statute and change its mind as it pleases. That concern simply does not exist here, given that Congress has vested no such authority in the EEOC.<sup>76</sup>

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75. *See supra* note 31.

76. *Id.*

In sum, in light of rule-of-law and separation-of-powers concerns, *Brand X* announced a limited exception to stare decisis in the face of contrary agency interpretations of unclear statutes deserving of *Chevron* deference. Yet, when an agency interpretation of an unclear statute earns mere *Skidmore* deference—as *Baldwin* should earn—the agency can eliminate any rule-of-law concerns—limited as they may be—by making its position known immediately. Moreover, the specter of a separation-of-powers concern simply does not exist here because Congress has not vested the EEOC with any authority to promulgate regulations pursuant to Title VII. As such, there is no reason to deviate from stare decisis here. Assuming a court resolves that Title VII is ambiguous concerning its applicability to prohibiting sexual orientation discrimination, and so long as that court has already held that sexual orientation discrimination does not violate Title VII and there exists no way to distinguish that authority from the case at bar—the court should not overturn its own decision solely because of the *Skidmore* deference *Baldwin* earns.<sup>77</sup>

#### IV. Conclusion

*Baldwin* certainly serves as a tool to spread the news that the EEOC's doors are open to claims of sexual orientation discrimination and further serves as a repository for future

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77. This Article does not address the interplay between stare decisis and a contrary agency interpretation of an unclear statute that earns *Skidmore* deference when the agency has been vested with congressional authority to promulgate regulations implementing that statute (for instance, the interpretation could earn *Chevron* deference if the agency simply went through the required notice-and-comment period), but the agency has failed to issue such regulations. In such a case, “[b]ecause of the possibility that any judicial interpretation could be subsequently overridden by the agency, requiring a court to at least consider deference under *Skidmore* promotes judicial and administrative efficiency, and rule-of-law values in the predictability and stability of law.” Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 482 (2013). These countervailing concerns certainly support a *Brand X*-style exception to notions of stare decisis, although whether they are enough to tip the scales in favor of *Skidmore* deference remains to be seen.

litigants of some of the arguments plaintiffs have raised, and can raise, concerning sexual orientation discrimination under Title VII. Moreover, the opinion provides useful persuasive authority for those litigants seeking to distinguish cases that have held that such discrimination does not run afoul of Title VII and for those litigants who find themselves in that small universe of courts yet to address the viability of sexual orientation discrimination claims under Title VII.

Yet, a watershed moment for advocates of LGBT workplace equality *Baldwin* is not. Indeed, because *Skidmore* should serve as the appropriate test by which to measure the level of deference courts should afford to any EEOC opinion, because *Baldwin* should garner de minimis deference under *Skidmore*, and because courts should not overturn their own precedent in the face of an EEOC opinion interpreting Title VII that earns such *Skidmore* deference, *Baldwin* should have no effect on the majority of courts in this country. Despite the EEOC's efforts to fight LGBT discrimination in the workplace, the only way to ensure that courts will view Title VII as prohibiting employment discrimination on the basis of sexual orientation is for Congress to do what it should have done ages ago: pass the Employment Non-Discrimination Act<sup>78</sup> or its fresh-faced contemporary, the Equality Act.<sup>79</sup>

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78. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

79. Equality Act, H.R. 3185, 114th Cong. (2015).