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On the Borderlands of Chevron's Empire: An Essay on Title VII, Agency Procedures and Priorities, and the Power of Judicial Review

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*Barry Sullivan**

"O body swayed to music, O brightening glance,
How can we know the dancer from the dance?"[1]

I. INTRODUCTION

In the conventional taxonomy of governmental actors and functions, administrators are said to "execute" or enforce the law. Like courts, however, administrators also interpret law. Otherwise, execution or enforcement of the law would not be possible. In some cases, the burden of interpretation may be relatively undemanding. Congress may have given relatively specific instructions as to what an administrator, applicant for benefits, or regulated industry is required to do in a set of carefully defined situations, leaving little room or need for administrative "interpretation." In many cases, however, the task of interpretation will be more substantial. Congress's instructions will be less precise, and their proper application to the class of circumstances at hand will be subject to contest, requiring recourse to relevant interpretive materials, analysis, and the exercise of judgment. Administrators will be required to interpret the law, and will do so in much the same way that courts do, albeit from a perspective that may be more practical and informed, as well as more obviously interested. At the far end of the spectrum, Congress may have legislated in such a way that its

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1. W.B. Yeats, *Among School Children*, *in* Collected Poems of W.B. Yeats (1996).

signals are so sketchy or contradictory as to make interpretation nearly impossible.

In addition, the work of administrators sometimes includes "lawmaking" or legislation.[2] In some cases, Congress will have given that responsibility to administrators expressly, as when administrators are charged by statute with the responsibility for promulgating "legislative" or substantive rules—rules that are indistinguishable from statutes, have the force and effect of law, and directly create enforceable rights or duties.[3] Often the responsibility for crafting legislative rules will entail the making of choices about policy issues, large or small. In this class of cases, the proper field of administrative action, as well as the degree of discretion to be accorded the administrator's choices and determinations, may be

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2. Whether, and to what extent, one may legitimately distinguish between "interpretation" and "lawmaking" is a matter generally subject to dispute in contemporary legal scholarship. *See, e.g.*, Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463 (1992) (discussing interpretations of agency legislative rules). On the other hand, it is a distinction that the practice of administrative law requires us to make. Paul W. Kahn has written:

> At the very core of law's rule is the distinction between applying law and making new law, or between interpreting and creating law. No matter how many scholars question the distinction, the rule of law as a social practice is bound to it. We can imagine a policy science that is wholly unbounded by the past, but it is not law's rule.

Paul W. Kahn, The Cultural Study of Law: Reconstructing Legal Scholarship 44-45 (1999) (footnote omitted). It is also the case, of course, that agencies may engage in both "interpretation" and "lawmaking" within the formal frameworks of agency adjudication and agency rulemaking, or in less formal ways, as provided by their respective organic statutes and the Administrative Procedure Act, 5 U.S.C. §§ 552-559 (2001).

3. Michael Herz has provided a useful explanation of the distinction between "legislative" and "interpretive" rules:

> A legislative, or substantive, rule has the "force and effect of law." The rule itself is the "primary source of legal obligation," creating new law, rights, or duties. An interpretive rule, in contrast, merely states the agency's view of what the statute already requires. The statute remains the basis for any legal obligations or the imposition of liability, and the rule only clarifies or draws attention to the statutory requirements. The distinction is not crystal clear, and often evaporates in the application; nevertheless, it is conceptually coherent and doctrinally entrenched.
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> A second, slightly less common, line is sometimes drawn between legislative and interpretive rules; only legislative rules are adopted pursuant to a specific delegation of rulemaking authority. Thus, an agency rule that fleshes out a statutory term establishing legal obligations, which is interpretive under the approach outlined above, is legislative if Congress has specifically instructed the agency to issue such rules, even though, for example, the agency could bring an enforcement action with or without promulgating the rule.

Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin. L.J. 187, 191-92 (1992) (footnotes omitted).

broad or narrow, as Congress presumably will (or could) have determined. In other cases, where Congress has not expressly delegated lawmaking authority to an administrator, the need for such administrative action may nonetheless be implicit in the structure and design of the relevant statutory scheme. In yet another class of cases, delegation of lawmaking authority will not be implicit in the statutory scheme, but administrative experience and practical application of the statute may have demonstrated the need for further elaboration or application of statutory norms and objectives. In these last two circumstances, the absence of congressional direction necessarily leaves unanswered important questions about the permissible scope and legal effect of administrative action. Among other things, the extent to which such action will be permitted at all, the permissible scope of the action, and the proper characterization of the action within those permeable but necessary categories of lawmaking and interpretation, may not always be clear. The differences in legal consequences, however, may be substantial.

Administrators, then, do not simply "enforce" the law; they also interpret law, make law, and decide on policy initiatives. Different legal consequences may flow from the characterization of administrative action as one or the other of these activities, and attempts to draw bright lines are often unconvincing. With these three points in mind, one can begin to appreciate the tension and complexity inherent in the practice of judicial review of administrative interpretations and applications of law. Which branch of government is to have the final word with respect to a particular category of administrative action, and, if that responsibility should happen to fall to the judicial branch, what degree of respect, if any, should be accorded to the views of administrators? In some cases, these questions will implicate basic principles relating to delegations of legislative power under a republican form of government. In all cases, the answers will depend on ascertaining various principles of deference to administrative action and their relationship to politics and the rule of law.

In 1984, the Supreme Court set forth an apparently simple test for resolving some of these questions. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[4] the Court created a now-familiar

4. 467 U.S. 837, 104 S. Ct. 2778 (1984). *Chevron* involved the Environmental Protection Agency's construction and enforcement of the Clean Air Act, 42 U.S.C. §§ 7401-7671 (1970). In 1981, the EPA altered its previous construction of the statutory term "stationary source" and eased the regulatory burdens imposed upon industry in states that had not yet achieved national air quality standards. *Chevron*, 467 U.S. at 840, 104 S. Ct. at 2780. By treating all pollution-emitting devices within an industrial grouping as though they were encased in a "bubble," the EPA's new plant-wide or "bubble" regulations allowed

two-step test for determining whether particular administrative interpretations of law should be upheld. According to *Chevron*, a reviewing court, using traditional methods of statutory construction, must first determine whether Congress has "spoken directly to the precise question at issue."[5] If the court concludes that Congress did have a specific intention with respect to the precise question at issue, Congress's intention controls, and the agency's interpretation will stand only if the court is satisfied that the interpretation reflects congressional intent. On the other hand, if the reviewing court determines that Congress did not have a specific intention with respect to the precise question at issue, the court must proceed to step two of the analysis. At step two, the court's role is limited to determining whether the administrator's interpretation of the statute is "reasonable."[6] If the reviewing court determines that the administrator's interpretation is "a permissible interpretation of the statute," that interpretation must be given effect, even if the court, making a *de novo* determination based on traditional principles of statutory construction, might have chosen a different interpretation as being more plausible or efficacious. At least in theory, step two of the *Chevron* test creates a default rule favoring strong deference to agency interpretations of law.[7] More generally, *Chevron's* two-step

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companies to install or modify one piece of equipment without meeting otherwise applicable permit conditions, so long as the alteration did not increase the total emissions from the plant. *Id.* at 841, 104 S. Ct. at 2781. The District of Columbia Circuit set aside the new regulations as contrary to law, but the Supreme Court reversed, holding that the regulations constituted a reasonable construction of the statutory term. *Id.* at 865, 104 S. Ct. 2792.

5. *Id.* at 842, 104 S. Ct. at 2781.

6. *Id.* at 844, 104 S. Ct. at 2782.

7. Whether the *Chevron* analysis is more deferential in fact obviously depends upon a number of factors, including the level of specificity required of Congress at the first step. Then-Judge Ginsburg made that point in *Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099 (D.C. Cir. 1991). She observed that:

> The Supreme Court indicated in *Chevron* itself that it meant the term "precise question at issue" to be interpreted tightly. . . . The Court did not focus on whether Congress had expressed any intention regarding the meaning of the general statutory term, 'stationary source.' Rather, it considered, more pointedly, whether 'Congress . . . actually had an intent regarding the *applicability of the bubble concept* to the [statutory] program.' By narrowing the question at issue, the Court reduced the opportunities for a reviewing court to substitute its own interpretation for that of the agency. Under '*Chevron* Step I,' a court is entitled to supplant an agency's interpretation only where Congress intended another interpretation, in the precise circumstances that the agency's action presents.

Id. at 1104 (emphasis in original) (citation omitted). Similarly, Richard Pierce has noted that:

approach is thought to have replaced a pragmatic, contextual set of inquiries with a more systematic and disciplined mode of inquiry, and to have replaced an approach that made deference a matter of degree with an approach that makes deference an all-or-nothing matter.[8]

All this is commonplace. Nonetheless, students of administrative law soon learn that the apparent simplicity of the *Chevron* test is illusory at best, and that its application in practice is sometimes complex or uncertain. Just as *Chevron* quickly became one of the most frequently cited cases in American jurisprudence, it also quickly became a major focus for legal scholarship.[9] Both trends continue

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> In the process of applying *Chevron's* first step, the court should refrain from teasing meaning from the statute's ambiguous or conflicting language and legislative history; it should eschew the process of 'creative' statutory interpretation that is otherwise essential and appropriate in judicial decision making. Creative statutory interpretation is not appropriate in the administrative law context because [it] permits judges to make policy decisions that should be made instead by agencies.

Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301, 308 (1988). *Compare with* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S. Ct. 1291 (2000) (contrary application of *Chevron*). In some respects, the analytic problem is similar in form to that presented by the "clearly established law" requirement in the law of official immunity, that is, the level of generality at which the law must have been established with clarity. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982); Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987). *See also* Larry Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381 (1996) (explaining that in the administrative law context the courts accept "reasonable" agency determinations whereas in the habeas context, Congress is not able to delegate law making authority to state courts and then instruct the federal courts to accept state court decisions); Linda R. Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. Rev. 1467 (1996) (explaining the similarities between the administrative deference principles of *Chevron* and the doctrine of qualified immunity where public officials are not liable for ordinary violations of the law that were not "clearly established" at the time they acted).

8. *See* text accompanying *infra* notes 71-79.

9. Orin Kerr has usefully divided the scholarly commentary into three parts, each representing a different intellectual approach:

> The scholarly critique of *Chevron* offers three distinct models of how courts view agency interpretations of statutory law. The first is a contextual model, which acknowledges that the two-step test exists on paper, but posits that in practice judges continue to adhere to the multi-factored, contextual approach to judicial review that judges are understood to have followed before the *Chevron* case was decided. According to the proponents of the contextual model, the pre-*Chevron* "traditional factors" continue to influence judicial decisions to accept or reject agency interpretations despite the contrary logic of the two-step test. The second popular critique of the doctrine is a political model, which views *Chevron* through the result-oriented lens of politics. Followers of the political model consider the two-step test to be a justificatory ritual that legitimates results reached to further judges' political agendas.

today. Some scholars have regarded *Chevron* as a revolutionary break with the past; others have thought its impact limited. Some scholars have criticized *Chevron* on theoretical and doctrinal grounds; others have attempted in various ways to measure its impact empirically or statistically.[10] The doctrinal relationship of the *Chevron* test to "arbitrary and capricious" review under the Administrative Procedure Act[11] has been an abiding concern, and a number of commentators have made various suggestions for refining the *Chevron* framework or replacing it with another approach.[12]

The extent to which *Chevron* may have covered the field, and thereby rendered the older methods of analysis "an anachronism," as Justice Scalia has suggested,[13] remains a central and hotly contested issue within the Court. At present, an overwhelming majority of the

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> Accordingly, outcomes are best explained in terms of the political ideologies of individual judges. The third critique of *Chevron* is an interpretive model. The interpretive model predicts that deference in individual cases depends upon a judge's approach to statutory interpretation—in particular, the likelihood that the text will be considered ambiguous at *Chevron*'s step one. In contrast to the contextual and political models, the interpretive model accepts that judges will attempt to apply the two-step test objectively. Nonetheless, the doctrine is considered inherently unstable because individual judges will defer more or less often depending upon how readily they perceive ambiguity in statutory text.

Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Reg. 1, 3-4 (1998) (footnotes omitted).

10. *See, e.g.*, Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1003-12 (1992); Peter Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984 (1990); Kerr, *supra* note 9; Aaron P. Avila, Note, *Application of the Chevron Doctrine in the D.C. Circuit*, 8 N.Y.U. Envtl. L.J. 398 (2000).

11. *See* 5 U.S.C. § 706(2)(A) (2001) ("The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."). *See, e.g.*, Herz, *supra* note 3, at 214; Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 Rutgers L. Rev. 313, 332 (1996). *See also* United States v. Mead Corp., 533 U.S. 218, 313, 121 S. Ct. 2164, 2179 (2001) (Scalia, J., dissenting) (footnotes omitted) ("There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act, which it did not even bother to cite. But it was in accord with the origins of federal-court judicial review.").

12. *See* Merrill, *supra* note 10, at 1003-12; Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253 (1997); Gary Lawson, *Reconceptions of Chevron and Discretion: A Comment on Levin and Rubin*, 72 Chi.-Kent L. Rev. 1377 (1997); Ernest Gellhorn & Paul Verkuil, *Delegation: What Should We Do About It? Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989 (1999).

13. *See* Christensen v. Harris County, 529 U.S. 576, 589, 120 S. Ct. 1655, 1663 (2000) (Scalia, J., concurring).

Court seems committed to the view that the *Chevron* test is not exclusive, and that less formal agency interpretations, such as those contained in opinion letters, policy statements, agency manuals, and enforcement guidelines should continue to be evaluated under *Skidmore v. Swift & Company*,[14] which requires that the courts evaluate administrative interpretations by considering a number of factors, including the thoroughness of the agency's consideration and the strength of its reasoning.[15] Nonetheless, some members of the Court would apply the *Skidmore* test so as to find deference more easily justified, as well as more conclusive or determinative, than would others. In Justice Scalia's view, of course, the *Chevron* test is exclusive.[16] At the most fundamental level, commentators have disagreed about whether *Chevron* actually provides an engine of inquiry or framework for analysis, as opposed simply to a conventional mode of discourse for explaining conclusions otherwise reached.[17]

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14. 323 U.S. 134, 65 S. Ct. 161 (1944).

15. *Id.* at 140, 65 S. Ct. 164. For example, Justice Stevens observed in *Christensen* that an agency interpretation should be accorded *Skidmore* deference if it has been "thoroughly considered and consistently observed." *Christensen*, 529 U.S. at 595, 120 S. Ct. at 1667 (Stevens, J., dissenting). Justice Breyer took issue directly with Justice Scalia's statement that *Skidmore* is an "anachronism," but noted that "[i]f statutes are to serve the human purposes that called them into being, courts will have to continue to pay particular attention in appropriate cases to the experience-based views of expert agencies." *Id.* at 597, 120 S. Ct. at 1668 (Breyer, J., dissenting). *See also Mead Corp.*, 533 U.S. 128, 121 S. Ct. 2164 (2001) (according *Skidmore* deference to letter opinions); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 114 S. Ct. 2381 (1994) (upholding Secretary's interpretation of regulation). Professor Herz has argued that *Chevron* does not require the courts to cede to administrative agencies their traditional role in interpreting statutes, and that the decision is therefore less revolutionary than some commentators have suggested:

> *Chevron* merely refines longstanding principles most evident in the distinction between standards for judicial review of interpretive and legislative rules. An agency's view as to what Congress meant is entitled to *Skidmore* deference, but no more. An agency's decision within the sphere of delegated authority binds the courts. Congress never implicitly delegates the authority to make binding determinations of what Congress had in mind; that interpretive task remains for the courts. Congress does and can delegate the authority to make binding rules when it has not made them. That legislative task must be left to the agencies.

Herz, *supra* note 3, at 232.

16. *See, e.g.*, *Mead Corp.*, 533 U.S. 218, 238, 121 S. Ct. 2164, 2177 (Scalia, J., dissenting).

17. *See generally* Merrill, *supra* note 10, at 1032 (discussing *Chevron* deference and the rivalry between the mandatory and discretionary deference models), Katrine B. MacGregor, Note, *Kennecott Utah Copper Corp. v. United States Department of the Interior: The Validity of Interior's Interpretation of "Promulgated" Within the Statute of Limitations Provisions of CERCLA*, 83

The path of the present inquiry is somewhat different. In view of the existing scholarship, it seemed a worthwhile, and perhaps even a necessary exercise to take one longstanding, unresolved issue of statutory interpretation—one that has been disputed since before the Court's decision in *Chevron*—and to try and trace the effects, if any, of the evolving doctrine of judicial review of agency interpretations and applications of law. With this narrow focus, one might provide a window for viewing presumed connections between the concerns of high theory and the work of the courts in practice. Given the seemingly limitless range of interpretive issues to which *Chevron* may be applied, it did not seem possible to find a "typical" issue for investigation, nor did it seem likely that this method of inquiry would produce systematically verifiable conclusions, at least without being repeated many times with respect to a variety of issues. Nonetheless, even for the limited purposes of this investigation, it seemed that the background issue should meet several requirements: it should be accessible in the sense of being relatively straightforward and capable of explanation; it should be the subject of a relatively substantial, but not overwhelming, body of case law; and the courts' failure to resolve the issue definitively should extend over a period of time that is meaningful relative to the timing of the *Chevron* decision.

An appropriate subject matter for this investigation recently was suggested by the District of Columbia Circuit's decision in *Martini v. Federal National Mortgage Association*,[18] in which the court invalidated a longstanding rule of the Equal Employment Opportunity Commission concerning the issuance of right-to-sue letters. Section 706(f)(1) of Title VII[19] provides, among other things, that "the Commission . . . shall . . . notify the person aggrieved," that is, issue a right-to-sue letter, if, "within one hundred and eighty days," the Commission has neither (1) entered into a satisfactory conciliation agreement with respect to an administrative charge of discrimination, nor (2) commenced a lawsuit.[20] It is also clear under Section 706(f)(1) that the Commission may issue a right-to-sue letter prior to the expiration of the 180-day period when the Commission has dismissed a charge during that period. The practical justification for issuing such "early" right-to-sue letters typically has rested on the need to spare charging parties the delay occasioned by large Commission backlogs, particularly where the Commission is unlikely to reach the charge within any reasonable time, and the charging party, in addition to needing immediate relief under Title VII, may

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Cornell L. Rev. 1383 (1998) (arguing that *Chevron* ambiguities enable courts to use the *Chevron* test to reach a predetermined conclusion).

18. 178 F.3d 1336 (D.C. Cir. 1999).

19. 42 U.S.C. § 2000e-5(f)(1) (1993).

20. *Id.*

also have state law claims subject to various limitations periods and other procedural requirements. However, the import of Section 706(f)(1) has long been disputed in cases in which the Commission has not dismissed the administrative charge of discrimination, but has nonetheless issued a right-to-sue letter within the 180-day period. Based on its reading of Section 706(f)(1), Section 706(b) of Title VII, and the statute as a whole, the *Martini* court held that the Commission generally lacks the power to issue right-to-sue letters during the 180-day period, and that the regulation was therefore invalid.[21] The practical result of the court's decision in this sexual harassment and retaliation case was to set aside a $903,500 damage award (which the district court already had reduced on remittitur of a jury verdict totaling almost $7million), and to order the case remanded to the Commission for completion of the 180-day period and the eventual refiling of the lawsuit in federal district court.[22]

The Commission's regulation is perhaps atypical in some respects and thus defies easy characterization. Title VII does not grant general legislative rulemaking authority to the Commission, but Section 713(a) of Title VII invests the Commission with the "authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of [Title VII]."[23] In conventional terms, therefore, the Commission's regulation is not a "legislative" or substantive rule, but it is, nonetheless, a rule within the agency's special ken and competence, as recognized by Congress in its organic statute.[24] The

21. *Martini*, 178 F.3d at 1347. *See* Section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).

22. The case subsequently was settled after cross-petitions for writs of certiorari had been filed. *See* Martini v. Federal Nat'l Mortgage Ass'n, 528 U.S. 1147, 120 S. Ct. 1155 (2000).

23. Section 713(a) of Title VII, 42 U.S.C. § 2000e-12(a) (2001). The Commission does have substantive or legislative rulemaking authority under the Age Discrimination in Employment Act and the Americans with Disabilities Act. *See* 29 U.S.C. § 628 (2001); 42 U.S.C. § 12116 (2001).

24. In 1989, the Administrative Conference of the United States took the position that merely "interpretive" rules and other relatively informal agency interpretations should not be given deference under *Chevron*. *See* 54 Fed. Reg. 28970 (July 10, 1989), *available at* http://www.law.fsu.edu/library/admin/acus/-305895.html. The Administrative Conference emphasized the importance of procedural formality as a condition for giving binding effect to interpretations and recommended that "[i]n developing an interpretation that is intended to be definitive, an agency should use procedures such as rulemaking, formal adjudication, or other agency statutory interpretations." *Id.* Given the broad array of circumstances in which agencies are required to "interpret" statutes, the Administrative Conference believed it important that *Chevron* deference be accorded only to interpretations provided in formal circumstances. *Id.* The rationale for such a position with respect to "interpretive" rules necessarily is different from that which would condition the granting of deference upon compliance with procedural formalities. One presumably relates to the legal

rule invalidated by the District of Columbia Circuit in *Martini* was promulgated by the Commission in 1977, after compliance with notice-and-comment rulemaking procedures,[25] and is based on an even more longstanding Commission practice. The legitimacy of the Commission's practice and rule was first challenged in the courts more than a quarter century ago. The question has produced conflicting and diverse answers in the district courts, but the Commission's rule was uniformly upheld in the relatively few challenges that reached the courts of appeals before the District of Columbia Circuit's decision in *Martini*.[26] The Supreme Court has not directly considered the question.

Part II of this essay will briefly consider the general context and contribution of the *Chevron* analysis. Part III will describe the statutory and regulatory background of the "early" right-to-sue letter problem. Part IV will examine the case law concerning early right-to-sue letters and compare the approaches taken before and after the *Chevron* decision. Part V will attempt to draw some broader conclusions from the present analysis of the courts' treatment of this narrow and discrete issue.

Among other things, Part V will explore certain ramifications of the courts' traditional and habitual role of "say[ing] what the law is,"[27] that is, the extent to which the courts' traditional understanding of the judicial role may overwhelm doctrinal initiatives that attempt to place some part of that responsibility in other hands. Not surprisingly, the traditional institutional orientation of the courts has proved a powerful, if unacknowledged, force in this area. Thus, the case law reflects a strong tendency on the part of the courts to frame

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character of the product, while the other relates to the degree to which the interpretation has been subjected to scrutiny by those responsible for the administration of the law. *See also* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833 (2001).

25. *See* 29 C.F.R. § 1601.28(a)(2) (2001).

26. It is not entirely clear why so few cases have reached the courts of appeals. In some cases, however, the district courts have held that the lawsuit was premature but the time in which the case was pending in the district court should be counted towards satisfaction of the 180-day period, thus providing a technical victory for the defendant without having any real practical effect on the plaintiff, particularly where the total elapsed time exceeds 180 days. In such circumstances, there would be little incentive to mount an appeal. *See, e.g.*, Eldrege v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm., 440 F. Supp. 506 (N.D. Cal. 1977). In other cases, the time entailed by a remand for completion of the 180-day period may be shorter than that required to prosecute an appeal in most cases, and the cost is likely to be considerably less as well, particularly if the Commission is not in a position to pursue the case actively. *See, e.g.*, Connor v. WTI, 67 F. Supp. 2d 690 (S.D. Tex 1999) (calling defendant's proposed remedy to have plaintiff's complaint remanded to the EEOC for thirty-four days "nonsensical").

27. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

the question, not in terms of the degree of deference, if any, to be accorded an agency's construction or application of the statute, but in terms of determining the "correct" answer to the "legal" question presented in the case. In this way, questions of policy may be reduced to questions of law, and decisions about policy tend to fall within the authority of the courts. Likewise, courts retain the flexibility to decide whether to give close scrutiny to administrative determinations. The District of Columbia Circuit's decision in *Martini v. Federal National Mortgage Association*,[28] by emphasizing the need for courts to look at statutes as a whole, well illustrates the broad practical sweep of the courts' authority in this area, particularly with respect to the application of statutes that are themselves broad, sweeping, and informed by conflicting and inconsistent policy goals.

II. AGENCY INTERPRETATIONS OF LAW BEFORE AND AFTER *CHEVRON*

Before 1984, when the Supreme Court announced its decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[29] prevailing approaches to the problem of judicial deference to agency interpretations of law seemingly were predicated on the view that courts are principally responsible for determining the meaning and proper application of statutory provisions, and that the role of administrators is necessarily limited and secondary in that regard. This division of responsibility was based, in turn, on a particular understanding of constitutional tradition, rooted in Chief Justice Marshall's famous observation in *Marbury v. Madison*,[30] that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[31] and, at least to some extent, on a judicial

28. 178 F.3d 1336 (D.C. Cir. 1999).
29. 467 U.S. 837, 104 S. Ct. 2778 (1984).
30. 5 U.S. (1 Cranch) 137 (1803).
31. *Id.* at 177. In 1983, the year before the Supreme Court decided *Chevron*, Henry P. Monaghan strongly challenged the view that this division of responsibility was mandated by *Marbury*. *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1 (1983). Professor Monaghan noted that *Marbury* was "among the Court's first encounters with the propriety of judicial deference to administrative interpretation of statutes " and that the decision contains "no hint of acquiescence in a reasonable but contrary administrative interpretation of the relevant congressional legislation." *Id.* at 2 (footnotes omitted). Nonetheless, Professor Monaghan observed that "there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes." *Id.* at 33 (footnotes omitted). At least in part because of the existence of "alternative methods of control, both political and administrative in nature," Professor Monaghan argued, "the judicial duty [in reviewing agency interpretations of law, as opposed to constitutional questions] is to ensure that the administrative agency stays within the

understanding and appreciation of law enforcement or administration that was both formalisitc and narrowly circumscribed. This minimalist view of administration is well-captured by the opinion in *Humphrey's Executor v. United States*,[32] in which Justice Sutherland explained the need for insulating members of the Federal Trade Commission from every vestige of presidential influence by reference to the nature of the Commission's characteristics and responsibilities: "The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law."[33] Although

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zone of discretion committed to it by its organic act." *Id.* at 33. *But see* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 513 ("It is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law. . . . Surely the law, that immutable product of Congress, is what it is, and its content—ultimately to be decided by the courts—cannot be altered or affected by what the Executive thinks about it . . . .") (citations omitted).

32. 295 U.S. 602, 55 S. Ct. 869 (1935).

33. *Id.* at 624, 55 S. Ct. at 872. Justice Sutherland's statement obviously was intended to describe the work of an expert, independent agency and was specifically linked to the "quasi-judicial and quasi-legislative" nature of the Commission's responsibilities. *Id.* at 624, 55 S. Ct. 872. Presumably, the need for insulating the Commission from presidential influence arose because the Commission, unlike the president, was charged with "quasi-judicial" responsibilities requiring impartiality, while the president, unlike the Commission, necessarily was charged with the enforcement of a broader range of policies. However, Justice Sutherland's statement also reflects more general suppositions that are not necessarily related to independence from the executive branch: an understanding of law and policy that permits a sharp distinction to be drawn between the two realms, a belief in the neutrality of expertise, and a confidence in the ability of the legislative branch to craft legislation in ways that minimize the need for administrative interpretation or discretion. That style of legislation is costly, both because each legislative initiative must consider countless particularities in great detail and because only a limited number of such resource-intensive initiatives can be undertaken. Presumably, Congress could also narrow the "policymaking" opportunities of administrators within the executive branch simply by legislating in very precise and narrow terms, so that they, too, would be "charged with the enforcement of no policy but the policy of the law." Indeed, much administrative law traditionally was predicated upon the assumption that the work of administration simply consists of following directions delivered by Congress. *Compare with Chevron*, 467 U.S. at 865, 104 S. Ct. at 2793 ("an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments"). Finally, President Roosevelt's view was quite different from Justice Sutherland's. President Roosevelt recognized the practical need for presidential influence over those who made policy decisions for which the president might well be held accountable. Thus, as William E. Leuchtenburg has pointed out in his masterly study of the Humphrey dispute:

> If his critics were sanctimonious, the President himself was careless about quieting uneasiness regarding the vast power concentrated in his hands

uttered within the context of a challenge to the possible insinuation of presidential influence into the workings of an "independent" agency, and in the spirit of distinguishing such agencies from the traditional departments of the executive branch, Justice Sutherland's words also may have reflected a world view that recognized lawmaking to be primarily the province of Congress and (at least until *Erie Railroad Company v. Tompkins*[34]) of the federal courts, with administrators, whether officials of the executive branch or of independent agencies, operating within a narrower compass. In this view, effectuation of the rule of law meant that the primary responsibility of administrators was to execute policy choices made by others.[35]

Some took a more expansive view of administration, and, not surprisingly, in the era of *Panama Refining Co. v. Ryan*[36] and *A.L.A. Schechter Poultry Corp. v. United States*,[37] they were less concerned with the need to ensure agency independence and insulation from presidential direction than with the constraining influence that the courts could exercise with respect to administrative initiatives. Thus, as Justice Breyer recently observed in *FDA v. Brown & Williamson Tobacco Co.*,[38] "[t]hat Congress would grant the FDA such broad jurisdictional authority should surprise no one. In 1938, the President and much of Congress believed that federal administrative agencies needed broad authority and would exercise that authority wisely—a view embodied in much Second New Deal legislation."[39] James M.

> and about the threat that was perceived to the civil service and the capacity of officials to render disinterested judgments. Roosevelt's action in removing Humphrey was not an arbitrary deed but a rational attempt to enable the President to shape the economic policy for which he would be held responsible.

William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 81 (1995).

34. 304 U.S. 64, 58 S. Ct. 817 (1938). For those who see the history of administrative law in the United States as a struggle for judicial influence over administration, the case law pertaining to implied private rights of action under federal regulatory statutes provides an interesting exception to the principle set forth in *Erie*. *See, e.g.*, J.I. Case v. Borak, 377 U.S. 426, 84 S. Ct. 1555 (1964); Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080 (1975); Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946 (1979); Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 102 S. Ct. 1825 (1982).

35. *See also* American Textile Mfgs. Inst. v. Donovan, 452 U.S. 490, 543, 101 S. Ct. 2478, 2508 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671, 100 S. Ct. 2844, 2878 (1980) (Rehnquist, J., dissenting).

36. 293 U.S. 388, 55 S. Ct. 241 (1935).

37. 295 U.S. 495, 55 S. Ct. 837 (1935).

38. 529 U.S. 120, 120 S. Ct. 1291 (2000).

39. *Id.* at 161, 120 S. Ct. at 1316 (Breyer, J., dissenting). Justice Breyer continued by quoting from the Supreme Court's decision in *Gray v. Powell*, 314

Landis elaborated an even stronger view of administration when he suggested that administrators should have the final word on questions of law:

> The interesting problem as to the future of judicial review over administrative action is the extent to which judges will withdraw, not from reviewing findings of fact, but conclusions of law. If the withdrawal [from the review of findings of fact] is due to the belief that these issues . . . are best handled by experts, a similar impulse to withdraw should become manifest in the field of law.[40]

While the courts did not take up Dean Landis's suggestion that they should "withdraw" from the field, neither did they ignore the work of administrators, to whose views they not infrequently deferred in practice.[41] In doing so, however, the courts invariably "stressed that the decision regarding deference, and the ultimate responsibility for interpreting the statute, remained theirs."[42] As Thomas Merrill

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U.S. 402, 62 S. Ct. 326 (1941), in which the Court noted that Congress "could have legislated specifically [but decided] to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable [determination]." *Id.* at 166, 120 S. Ct. at 1318.

40. *See* James M. Landis, The Administrative Process 144 (1938). For the sake of completeness, it is important to note that Dean Landis conceived of administrative agencies as constituting "not . . . simply an extension of executive power," but as possessing "an assemblage of rights normally exercisable by government as a whole." *Id.* at 15. That is an important point, but one that is not particularly relevant to the present inquiry. In Dean Landis's view, the courts not only were ill-suited to do the work of administration, but were antagonistic toward the administrative process. Thus, "[t]o lodge a great interpretative power in the judiciary involved the risk that a policy, which initially was given to the administrative to formulate, might be thwarted at its most significant fulcrum by judgments antagonistic to its own." *Id.* at 97. At the very least, Dean Landis suggested, the scope of judicial review should be extremely deferential, that is, "something akin to [the scope] of judicial review over the validity of legislation challenged under the due process clause." *Id.* at 147. In his view, therefore, the existence of a "reasonable belief . . . that such practices tend to promote fraud and deceit in the securities market" would be sufficient for upholding an agency's rules. *Id.* at 147-48.

41. In one sense, as Robert Rabin has suggested, the three decades following *Panama Refining* and *Schechter Poultry* were characterized to a significant extent by a judicial attitude of deference to administrative action. *See* Robert Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189 (1986). For various reasons, some of which are more obvious than others, that approach shifted in the early 1970s. *Id.* at 1315. *See also* Herz, *supra* note 3, at 188 ("For a century now, the courts have struggled to determine the limits, if any, on what governmental tasks can be handed over to administrative agencies. The Supreme Court has rarely held that these limits have been exceeded.").

42. *See* Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 Tex. L. Rev.

has pointed out, the pre-*Chevron* case law shows that the courts regularly accorded deference to agency interpretations of law under a variety of rules and approaches that were nonetheless characterized by two significant features: a particularized consideration of multiple contextual factors, and the grant or withholding of deference, not as a binary or categorical matter, but by degree.[43] The contextual factors on which the courts looked with favor in deferring to agency interpretations of law were of various kinds, but may fairly be viewed, as Professor Merrill has also suggested, "as reflecting deep-seated judicial intuitions about the kinds of considerations that ought to bear on the decision to defer."[44]

Reliance on these contextual factors, which always framed the inquiry but seldom were seen to yield a certain and unequivocal answer to the deference inquiry, was justified in various ways. Some contextual factors were thought to be reliable indicators of Congress's intent, either with respect to the degree of deference that Congress intended the courts to give to the views of administrators in a particular regulatory context or with respect to the accuracy with which the substance of a specific administrative interpretation reflected Congress's regulatory intent. Other factors were somewhat less obviously connected to congressional intent, but may also have been thought useful in protecting established reliance interests and, thus, conducive to efficiency and the maintenance of stability and continuity in the law.[45] If the exigencies of modern times required some degree of judicial deference to the legal interpretations of expert

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83, 87-88 (1994). As other commentators have suggested, the pre-*Chevron* case law effectively was divided into two lines of authority. One line of cases emphasized the ultimate responsibility of the courts, while the other emphasized the various factors that might counsel in favor of according deference to agency determinations. *See, e.g.*, Avila, *supra* note 10, at 398-99.

43. Merrill, *supra* note 10, at 972-75.

44. *Id.* at 975.

45. Dean Landis noted that the rise of the "independent agency" was based in part on the hope "that the independent agency would make for more professionalism than that which characterized the normal executive department," and that the predominance of professionalism over politics might make for "[p]olicies [that were] more permanent and . . . fashioned with greater foresight than might attend their shaping under conditions where the dominance of executive power was pronounced." Landis, *supra* note 40, at 111. As a practical matter, Dean Landis did not attribute a great deal of significance to the "independence" of the so-called independent agencies. *See id.* at 47-48. As Professor Jaffe has noted, Dean Landis thought that "[t]heir independence is so tenuous . . . that it hardly stands in the way of any real presidential demand for coordination; and on the other hand, in the absence of actual pressure from the President himself (which can only rarely be exercised) the executive agencies will just as effectively resist coordination." Louis L. Jaffe, *James Landis and the Administrative Process*, 78 Harv. L. Rev. 319, 327 (1964).

administrators, the courts could at least provide strong incentives for administrators to act with deliberation and consistency.[46] A main focus of the courts in determining whether to give deference to agency interpretations was to evaluate the intellectual and persuasive power of an agency's reasoning.[47] At least from the days of the New

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46. *See* Landis, *supra* note 40, at 134-35:

> The insistence that the administrative process in these phases must be subject to judicial review is to be explained in part, I believe, by economic determinism. But the deeper answer lies in our traditional notions of 'law' as being rules administered and developed by courts. We must remember that until a comparatively short time ago Anglo-American government was essentially government by judges. The great mass of our law was developed by the resolution of conflicting claims in courts where the governing rules were evolved by the judge.

See also Ethyl Corp. v. EPA, 541 F.2d. 1, 223-24 (D.C. Cir.) (Leventhal, J., concurring), *cert. denied*, 426 U.S. 941, 96 S. Ct. 2663 (1976):

> In the case of legislative enactments, the sole responsibility of the courts is constitutional due process review. In the case of agency decisionmaking, the courts have an additional responsibility set by Congress. Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.

Of course, the organization of the federal courts along regional lines, together with the limited ability of the Supreme Court to review a sufficient number of cases from the regional courts of appeals to ensure national uniformity of legal requirements imposed on the administration of federal programs, except in relatively rare and infrequent circumstances, is itself an impediment to the accomplishment of consistency. *See generally* Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093 (1987). *See also* Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution*, 15 J.L. & Pol. 515, 516-17 (1999) (critiquing courts of appeals' view of their role as "that of making national law as applied to their geographical territories," as opposed to relieving the Supreme Court of the responsibility of correcting errors of single judges, assuring defeated litigants that the judicial power brought to bear in their cases was not simply the work of one, possibly idiosyncratic judge, and correcting the actions of administrative agencies which might otherwise be "at risk of politically motivated or bureaucratic mischief"). In recent years, the number of cases decided by the Supreme Court each Term has declined further. *See, e.g.*, David M. O'Brien, Opinion, *Justice; Supreme Court Can No Longer Duck the Big Issues*, Los Angeles Times, Oct. 3, 1999, at M1 (explaining that in October Term 1998, the Supreme Court heard oral arguments in 90 cases out of the more than 8,000 on the docket, a decline of fifty percent since the early 1980s when about 180 cases were decided each term); Linda Greenhouse, *In Year of Florida Vote, Supreme Court Also Did Much Other Work*, N.Y. Times, July 2, 2001, at A-12 (commenting on the 79 merits cases decided during October Term 2000).

47. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944) (persuasive power of agency regulations varies according to thoroughness of

Deal, however, the courts also had given substantial weight to such other factors as whether the agency's interpretation of the statute was more or less contemporaneous with the enactment and initial implementation of the regulatory scheme,[48] whether the agency had played a significant role in framing the legislation on which the regulation was based,[49] whether the agency's interpretation was recently adopted or longstanding, and whether the agency's interpretation had been consistently articulated and followed over time.[50] To some extent, consideration of these factors undoubtedly

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interpretation, validity of their reasoning, consistency with earlier and later announcements, and other factors).

48. *See, e.g.*, Fawcus Mach. Co. v. United States, 282 U.S. 375, 378, 51 S. Ct. 144, 145 (1931) ("contemporaneous construction[s] by those charged with the administration of the act are . . . entitled to respectful consideration, and will not be overruled, except for weighty reasons"); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 311-15, 53 S. Ct. 350, 357-59 (1933) (administrative practice that is consistent and unchallenged will not be overturned except for cogent reasons, and administrative practice will be given "particular weight when it involves a contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new"); United States v. American Trucking Ass'n, 310 U.S. 534, 549, 60 S. Ct. 1059, 1067 (1940) (administrative interpretation given great weight, especially when interpretations are contemporaneous constructions of statute); Black v. Magnolia Liquor Co., 355 U.S. 24, 26, 78 S. Ct. 106, 108 (1957) (consistent course of administrative interpretation more persuasive than inference to be drawn from fact that agency requested Congress to amend statute to reflect its interpretation); FHA v. Darlington, Inc., 358 U.S. 84, 90, 79 S. Ct. 141, 145 (1958) (agency's contemporaneous construction of statute can "carry the day against doubts that might exist from a bare reading of the statute"); FTC v. Mandel Bros., Inc., 359 U.S. 385, 391, 78 S. Ct. 818, 823 (1959) ("contemporaneous construction entitled to great weight even though it was applied in cases settled by consent rather than in litigation"); Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 801 (1965) (court shows great deference to administrative interpretation of statute, especially when administrative practice involves a contemporaneous construction of the statute by those responsible for administering it).

49. *See, e.g.*, Miller v. Youakim, 440 U.S. 125, 144, 99 S. Ct. 957, 968 (1979) (administrative interpretations are especially persuasive when the "agency participated in developing the provision"); Adams v. United States, 319 U.S. 312, 315, 63 S. Ct. 1122, 1123 (1943) (court gives great weight to view of agencies that co-operated in developing statute); *American Trucking Ass'n*, 310 U.S. at 549, 60 S. Ct. at 1067 ("Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provision's enactment to Congress").

50. *See, e.g.*, United States v. Clark, 454 U.S. 555, 565, 102 S. Ct. 805, 811 (1982) (statutory construction of agency "charged with administering statute entitled to great deference, particularly when interpretation has been followed consistently over a long period of time"); Haig v. Agee, 453 U.S. 280, 291, 101 S. Ct. 2766, 2744 (1981) ("consistent administrative construction of . . . statute must be followed by courts unless there are compelling indications that it is wrong"); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17, 101 S. Ct. 817, 823

could be justified in terms of ascertaining legislative intent, even if that intent often was constructed from inferences based on acquiesence rather than positive evidence. But a readier and more realistic explanation in many cases was the perceived need for certainty and finality. This was especially so where compliance with regulatory programs depended on public understanding and reliance or entailed substantial outlays of private funds. The common law's traditional respect for longevity doubtless also had a hand in the practice.

By the final quarter of the twentieth century, the value of these conservative virtues no longer seemed so obvious. Among other things, the sheer volume of federal legislation had increased dramatically, and many of the subjects to which Congress was turning its attention seemed qualitatively different from previous subjects of legislation, administrative interpretation, and judicial review. These differences in subject matter, together with qualitative differences in the nature of the legislative work product occasioned by the increased amount and broader scope of legislative activity, raised issues for administration that seemed different in kind from those with which administrators and the courts previously had dealt.[51] In addition, claims to agency authority based on expertise were generally met with a new sense of skepticism, and the value once attributed to expertise was now modified by demands for transparency, participation, and consensus.[52]

To be sure, expert administrators had long been charged with giving particularized effect to broad statutory terms, especially in the areas of competition, securities, and common carrier regulation,

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n.17 (1981) (agency's contemporaneous construction of its organic statute deserves special deference when the construction has remained consistent over a long period of time); Zenith Radio Corp. v. United States, 437 U.S. 443, 450, 98 S. Ct. 2441, 2445 (1978) (agency's interpretation of statute which is consistently and uniformly maintained entitled to considerable weight); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275, 94 S. Ct. 1757, 1762 (1974) (courts accord great weight to a longstanding agency interpretation of a statute, especially when the statute has been reenacted without pertinent change).

51. In the real world, of course, there is some connection between the degree of specificity and precision with which a legislative body is capable of legislating and the number of laws the body is able to enact. Calls for greater specificity in legislation may sometimes be understood as calls for less legislation. *See, e.g.*, Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 Cardozo L. Rev. 1663 (1991).

52. *See* Gordon C. Young, *Judicial Review and Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record,"* 10 Admin. L.J. Am. U. 179, 206 (1996) (explaining that between 1971 and 1978, "the notion of participation by comments in rulemaking" was expanded to require an agency to make available for public comment any factual material on which it would significantly rely in justifying its rule and to respond to any significant comment which challenged its rationality).

where Congress often had legislated in terms that required substantial further amplification, either by agency adjudication, rulemaking, or some less formal means of administrative interpretation or application.[53] Whether particular categories of business practices would constitute "insider trading" or "unfair trade practices," for example, were not questions for which any statute was likely to provide an immediate and complete answer.[54] Nor was the "reasonableness" of a particular common carrier's rate likely to be determined directly from the terms of a statute, no matter how carefully drawn.[55] These were questions that could be answered in time, however, by an agency steeped both in the policy of the law and in the customs and practices of the relevant industry, and having sufficient resources to undertake the necessary investigation, research, and analysis.[56] It might take even an expert agency considerable time and effort to develop solutions that achieved

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53. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1, 4 (1998) (explaining that agencies were "[c]reated and empowered by Congress . . . to fill the gaps in legislation that, due to scarcity of congressional time, information or political capital, is vague and open-ended"). Professor Croley also notes that agency decisions "dwarf those of the other three branches, certainly by volume and quite possibly by importance as well." *Id.* at 3. *See also* FTC v. Mandel Bros., Inc., 359 U.S. 385, 392, 79 S. Ct. 818, 824 (1959) ("[The Federal Trade Commission] is not limited to prohibiting 'the illegal practice in the precise form' existing in the past. This agency, like others, may fashion its relief to restrain 'other like or related unlawful acts.'") (citations omitted).

54. *See, e.g.*, Robert A. Katzmann, Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy 70 (1980) (discussing open-textured quality of key statutory terms to be applied).

55. *See, e.g.* Louisville and Nashville R.R. Co. v. Garrett, 231 U.S. 298, 34 S. Ct. 48 (1913) (calling on the Railroad Commission to aid in prescribing reasonable intrastate rates). *See also* Gerald C. Henderson, *Railway Valuation and the Courts* (parts I & II), 33 Harv. L. Rev. 902, 1031 (1920).

56. James Q. Wilson has argued that the enforcement of broadly defined legal policy often depends on the professional norms of the various groups employed in the government's law enforcement efforts. In the Federal Trade Commission, for example, lawyers and economists often take different views concerning enforcement priorities and decisions. Similarly, the regulatory approach of the National Highway Traffic Safety Administration is thought to have been deeply influenced by the high concentration of engineers among its workforce. *See* James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 59-65 (1989). A recent study of the Equal Employment Opportunity Commission's handling of disability discrimination cases suggests that "local office cultural factors are what really drive the EEOC handling process." Kathryn Moss & Scott Burris, *Unfunded Mandate: An Empirical Study of the Implementation of the ADA by EEOC*, 50 Kan. L. Rev. 1 (2001). *See also* Daily Labor Report, *EEOC: Upcoming Study Finds Wide Differences Among EEOC Offices Handling ADA Charges* (Aug. 6, 2001), *available at* http://www.adaenforcementproject.unc.edu /Westlaw2.doc.

acknowledged regulatory objectives without creating unforeseen negative consequences, but it was assumed that such solutions could be formulated and subjected to critical analysis, given sufficient agency expertise and access to relevant information.[57]

The "new" areas of regulation—such as highway safety, occupational safety and health, and environmental protection—seemed to challenge these assumptions and presented new problems for legislation and administration. If Congress were to legislate at all, the dynamic nature of these subject matters required that Congress act "provisionally," providing administrators with the ability to act effectively in conditions of complexity, scientific uncertainty, and rapid change.[58] As in other areas, the challenge for

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57. To the extent that legal issues were thought to be raised at the margin, because of Congress's inability to legislate in any but the broadest terms *ex ante*, those issues were often characterized as delegation issues. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660 (1944); Amalgamated Meatcutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971). The implementation of legislation dealing with wage and price controls presented some of the same problems of rapid response amidst conditions of uncertainty as would the design of later legislative schemes pertaining to health, safety, and environmental quality. Challenges to legislation based on the nondelegation principle have been singularly unsuccessful, although the specter of a successful challenge may have some restraining effect on the scope of delegations. *See* Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 Am. U. L. Rev. 531, 546 (1989) ("Although it frequently asserts the nondelegation principle, the Supreme Court almost always sustains the constitutionality of challenged delegations. In doing so, the Court has taken various approaches to accommodate increasingly broad congressional delegation."). *See also* Whitman v. American Trucking Ass'n, Inc., 531 U.S. 457, 121 S. Ct. 903 (2001) (Scalia, J.) (Section 109(a) of the Clean Air Act does not constitute impermissible delegation of legislative power because "intelligible principle" prevents delegated authority from being classified as legislation); *id.* at 921 (Stevens, J., concurring) (denial that delegated authority is legislative in nature is disingenuous).

58. Judge Laurence Silberman has addressed this issue from the perspective of statutory "ambiguity." In his view, there are three explanations for statutory ambiguity:

> Ambiguous legislation, as the ambiguity appears in a given case, typically suggests that Congress has not concretely resolved the policy issue that the case presents. That may well be because Congress deliberately chose statutory language such as "feasible," "reasonable," "likely," or "probable," language that on its face suggests a broad delegation to an agency to strike the policy balance. Or it may be that a particular eventuality or series of events was simply not foreseen—even dimly. Or it may be that the legislative draftsmen were less than exacting so that congressional policy decisions were not reflected precisely in the legislation (or in the legislative history). Although deference may seem most appropriate when Congress chooses language that implies deference, in all of these circumstances, to a greater or lesser extent, whoever interprets the statute will often have room to choose between two or more plausible interpretations. That sort of choice implicates and sometimes

administrators in the new areas of regulation often involved developing information and harnessing available expertise, and the quality of administrative action necessarily depended upon the quantity and quality of available administrative resources. In addition, however, the challenge for administrators in these new areas also often entailed coping with subtle questions of judgment, the comparison of incommensurable goods, and decisions to be made at the borderlands of scientific knowledge. For many of these decisions, the stakes were very high. The practical effects of such regulations might include removal from the market of products that industry and the public had previously deemed essential (or at least the most cost-effective means of accomplishing particular goals), the enforced obsolescence of whole industries, the need for massive investments of new capital, and the restructuring of whole areas of industry and the economy. The additional challenges posed by these new areas of regulation necessarily called into question existing assumptions about the neutrality of scientific and technical knowledge and the wisdom of relying on expertise in administration.

If administration was properly conceived as "filling in details," the scope of the "details" had broadened considerably in the new areas of regulation, and the nature of the "filling in" seemed to have been transformed by the character of the inquiries to be undertaken and the decisions to be made.[59] It was one thing for an expert administrator to decide whether a particular class of trade practices

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> squarely involves policy making. The agencies—even the independent ones—have superior political standing to the life-tenured federal judiciary in performing that policy-making function.

Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 823 (1990).

59. In *Chevron*, Justice Stevens used the expression "filling gaps," and that has become the dominant metaphor. *See* Chevron U.S.A., Inc., v. Natural Resources Defense Council, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782 (1984). As Professor Herz has pointed out, the linear character of this metaphor is at odds with the reality of the role that agencies typically play in this area:

> A better metaphor would be vertical rather than horizontal and so capture the role of agencies in adding specificity to the generalized statements of Congress. One possibility is the scheme of biological classification. In its broadest enactments, Congress has identified the kingdom and nothing else. Congress occasionally gets down to the species level, but that task is generally left for agencies. Under this metaphor, the courts' role is to ensure that as the agency becomes more specific it remains within the larger boundaries established by Congress.

Herz, *supra* note 3, at 230-31. Whether the subject matters of the "new" regulations were inherently more value-laden, or simply seemed to be so because the stakes were higher and the effects more widespread, the issues certainly were perceived to be more properly subject to contest. In addition, the social mores of the time were more generally open to contest and less conducive to recognizing and giving deference to expertise.

should be considered "unfair;" it was something else to require that she locate the precise threshold at which the concentration of cotton dust in the ambient air would constitute a "significant" risk of material harm to the public health and safety.[60] In the latter case, the relevant information or "legislative facts" might not merely be hard to obtain; the necessary factual information might not exist at all. Or, it might be obtainable, but provisional and highly subject to change. The information might also be subject to widely divergent expert interpretations. In other words, the tasks of administration in the "old" and "new" areas of regulation might formally appear to be the same, but their reality was somewhat different. In short, the questions presented in these areas of regulation often seemed "political," rather than simply "technical." If nothing else, the stakes seemed higher, both in terms of human life and in terms of economic consequences. Finally, the legitimacy of administrative "interpretations" would have to depend upon their "effectiveness" in accomplishing Congress's sometimes only partially-formulated and incompletely expressed objectives amidst these conditions of uncertainty and developing knowledge. In these circumstances, the idea of deference based on longevity or pedigree therefore seemed less meaningful.[61] Indeed, in a world of uncertainty and change, a consistent and longstanding agency interpretation might better evidence administrative sloth or incompetence than adherence to rule of law values.

A new view as to the appropriate understanding of administrative interpretation may have had its genesis in the epistemological challenges presented by some of the new areas of regulation, as well as the extent to which they implicated serious economic and human costs, but the reasoning did not stop there.[62] If the nature of these new subject matters required Congress to leave significant policy choices to administrators, and to give administrators considerable

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60. *See, e.g.*, American Textile Mfgs. Inst., Inc. v. Donovan, 452 U.S. 490, 101 S. Ct. 2478 (1981). *See also* Barry Sullivan, *When the Environment is Other People: An Essay on Science, Culture, and the Authoritative Allocation of Values*, 69 Notre Dame L. Rev. 597 (1994).

61. Of course, Congress's objectives often were articulated only at the most general level, and then only in inconsistent and conflicting terms.

62. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 374, 109 S. Ct. 647, 656 (1989) (Blackmun, J.) (asserting, in opinion upholding placement in Sentencing Commission of broad discretionary authority to formulate mandatory sentencing guidelines, that the judicial branch's unwillingness to strike down broad delegations of legislative power "has been driven by a practical understanding that in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives"). *But see* Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. Pa. L. Rev. 777 (1981) (detailing costs of incomplete and overly generalized legislation).

latitude or flexibility in making these choices, it was only natural for new administrations to think that they should choose for themselves rather than be saddled with choices made by previous administrations.[63] After all, such choices could have profound effects on the national economy or other matters of paramount importance to the goals and success of an incumbent administration, and administrators saw no reason why their hands should be tied. It might be the case, of course, that tightening requirements for new technology could be unfair to segments of regulated industries that already had invested substantial resources in complying with a former rule, just as the loosening of restrictions might confer the benefit of rents on late entrants and on previously recalcitrant or non-conforming segments of the industry, but those were often thought to be practical problems that could be worked out.

At all events, the virtue of consistency and durability of regulatory interpretation came to be challenged in a powerful way, not only because of widespread recognition of obsolescence, but also by the strong, competing idea, firmly rooted in political realism, that regulation is a formidable engine of politics and should above all reflect the views of the incumbent administration, at least where Congress has not absolutely foreclosed that possibility.[64] The power of this idea was fortified by another feature of the intellectual climate in which it was developing, namely, the sense that less regulation is generally preferable to more regulation, that the costs and benefits of various regulatory approaches should be quantified and precisely evaluated, and that any case for preferring regulation over market

63. Of course, there are still substantial costs to attempting to reverse regulatory actions. In the final days of the Clinton Administration, the president took numerous actions through the promulgation of executive orders, such as the setting aside of vast areas as national monuments, but the new administration, while opposed to many of these policies in substance, decided not to set aside the executive orders. *See, e.g.*, Naftali Bendavid, *Bush Reluctant to Undo Clinton Edicts*, Chicago Tribune, Feb. 22, 2001, § I at 1.

64. A distinct but related phenomenon is the contemporaneous move towards greater centralization and presidential control over administrative policymaking. *See, e.g.*, Exec. Order No. 12,044, 3 C.F.R. 152 (1979) (President Carter); Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (President Reagan); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (President Clinton). *See also* Hal Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533 (1989); Christopher DeMuth & Douglas Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075 (1986); Alan Morrison, *OMB Interference with Agency Rulemaking*, 99 Harv. L. Rev. 1059 (1986); Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised By Executive Order No. 12,291*, 23 Ariz. L. Rev. 1199 (1981); Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order No. 12,291*, 80 Mich. L. Rev. 193 (1981).

forces must be compellingly made.[65] Illustrative both of the new areas of regulation and of the new approaches they engendered is the protracted, twisting course of the passive restraints rule, which began with the enactment of the National Traffic and Motor Vehicle Safety Act of 1966,[66] during the administration of Lyndon B. Johnson, and ended some time after the District of Columbia Circuit's 1986 decision in *State Farm Mutual Automobile Insurance Co. v. Dole*,[67] late in the administration of Ronald Reagan. Along the way, the administrative process included no fewer than sixty different notices of proposed rulemaking.[68] Finally, if the logic of these arguments appeared most forcefully in connection with the new areas of regulation, those were not the only areas to which the arguments were applied. Similar arguments could also be made with respect to any area of regulation in which Congress had left open the making of significant policy choices.

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65. In James Landis's somewhat triumphalist view of regulation, the justification for regulation could easily be found in the seeming inability of common law courts to solve a particular problem, and a multiplicity of regulatory agencies was seen as a strength, rather than a weakness, of the regulatory system. *See* Landis, *supra* note 40, at 24. To the extent that that view was widespread among Dean Landis's contemporaries, it had changed dramatically by the late 1970s and early 1980s. In the area of economic regulation, it was now thought necessary, as a general matter, to establish the appropriateness of regulation by demonstrating the existence of a market failure, the possibility of improving the situation (without undesirable, unforeseen consequences) through regulation, and the appropriateness and efficacy of a particular regulatory strategy. *See, e.g.* Stephen G. Breyer, Regulation and Its Reform 27-28 (1982); Charles Wolf, *A Theory of Non-Market Failures*, 55 The Public Interest 114 (1979).

66. *See* 15 U.S.C. §§ 1381-1426 (repealed 1994 and superceded by 49 U.S.C. § 30169 (1994)); Motor Vehicle Mfgs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856 (1983); Jerry Mashaw & David Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. on Reg. 258 (1987). The statute directs the Secretary of Transportation or her delegee to issue motor vehicle standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. § 1392(a) (1976). In 1967, the Secretary issued standard 208, which simply required the installation of seatbelts in all automobiles, but it soon became obvious that the level of seatbelt use was too low to reduce traffic injuries to an acceptable level. By 1969, the Secretary had proposed a standard which required the installation of passive restraints, thus commencing a series of rulemakings and adjudications that would endure for almost twenty years. *See Motor Vehicle Mfgs. Ass'n*, 463 U.S. at 35, 103 S. Ct. at 2862.

67. 802 F.2d 474 (D.C. Cir. 1986).

68. *Motor Vehicle Mfgs. Ass'n*, 463 U.S. at 34, 103 S. Ct. at 2862. *See* Kurt B. Chadwell, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141, 145 (1992) ("The airbag controversy . . . outlast[ed] seven presidents, at least eight heads of the Department of Transportation, and more than eight Administrators of the National Highway Traffic Safety Administration."). *See also* Gareth G. Cook, *The Case for Some Regulation, Part 2: The Politics of Auto Safety Regulation*, 27 Wash. Monthly 34 (1995) (detailing the political history of passive restraints regulations).

These developments, and particularly the history of the passive restraints rule, reflected a more sophisticated view of regulation that had been building for some time.[69] Added impetus for change came with the 1980 election of Ronald Reagan which brought to power an administration deeply opposed to many governmental policies that administrations of both parties had followed routinely, albeit with varying degrees of enthusiasm, for many years. Much that had been taken for granted was now put on the table for discussion and debate. President Reagan understood his election to represent a mandate for fundamental change in the conduct of American government, and his administration immediately set about altering government policy, through legislation where necessary, but also through changes in administrative interpretations and in governmental litigating positions.[70] Even if not explicitly expressed, the substance of the Reagan Administration's position with respect to administrative interpretations of law was straightforward: If a statute gives administrators broad authority to determine government policy in a particular area, why should it matter that the agency's interpretation was first set down in the presidency of Franklin D. Roosevelt and has been followed consistently ever since? If those currently charged with responsibility for administering a statute should be inclined to take a different view, whether based on changed circumstances or different values and policy judgments, why should they be required to overcome some judicially imposed presumption? In addition, the classical conception of "unity in the executive"[71] was to be given a

69. The courts were not unmindful of these trends and clearly sensed the need for comparable judicial innovations. Among other things, the cases of the period reflect a judicial uneasiness with respect to the adequacy of the traditional "arbitrary and capricious" standard. *See, e.g.*, Automobile Parts & Accessories v. Boyd, 407 F.2d 330 (D.C. Cir. 1968) (McGowan, J.); Citizens to Protect Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814 (1971).

70. For example, the government defended the OSHA standard relating to occupational exposure to cotton dust in an oral argument before the Supreme Court on January 21, 1981, the day following the inauguration of President Reagan. Within a few weeks, the Secretary of Labor had filed a memorandum with the Court suggesting that the case might be dismissed based on the Secretary's interest in revisiting the rule administratively. *See* American Textile Mfgs. Ass'n v. Donovan, 452 U.S. 490, 505 n.25, 101 S. Ct. 2478 n.25 (1981). More important, the new administration, within a few weeks of taking office, promulgated Executive Order 12,291, requiring coordination of rulemaking and the use of cost-benefit analysis in federal regulatory programs. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981). In the area of civil rights, the Reagan Administration also quickly began reorienting the government's litigating positions, often taking positions in appellate courts directly contrary to the positions the government had taken in the same case in the lower courts. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 102 S. Ct. 3187 (1982).

71. *See, e.g.*, The Federalist No. 70 (Alexander Hamilton).

new and more ambitious construction. Since it was the president who was elected by the people (albeit indirectly), should not the power to set policy be centralized more completely in the president, rather than distributed throughout the government?[72] These arguments thus weighed in favor of greater centralization and presidential control of administrative action, whether located in the executive branch or in the so-called "independent" agencies. Ironically, the Reagan Administration may have rejected the substantive goals which President Roosevelt sought to achieve, but the view of "unity in the executive" which they thought essential to freeing the government from the legacy of the New Deal was similar to that which impelled President Roosevelt to fight the battle of *Humphrey's Executor*.[73]

The Reagan Administration's positions also raised important questions about the proper allocation of authority between administrators and courts in interpreting the meaning of statutes which Congress had charged agencies with administering. The Reagan Administration may not have raised these issues directly, in the sense of pressing in court for the articulation of a new standard by which agency interpretations of law are to be evaluated, but the aggressiveness with which the Administration pursued its substantive agenda of regulatory reform, often in the face of long-settled policy determinations, surely caused thoughtful observers to reconsider the sources, wisdom, and legitimacy of the old understandings. As the practical consequences of these new views of administration increasingly found their way onto the docket of the Supreme Court, the Justices themselves must have wondered about the adequacy of the old doctrines to accommodate these new realities.[74]

In 1984, the Supreme Court offered a now familiar answer to some of these questions in *Chevron*. Whether by design or not, the

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72. *See supra* note 33.

73. *See supra* note 33 and accompanying text.

74. *Compare* Motor Vehicle Mfgs. Ass'n of U.S., Inc. v. State Farm Mutual Insurance Co., 463 U.S. 29, 59, 103 S. Ct. 2856, 2875 (1983) (Rehnquist, J., concurring and dissenting) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.") *with* FDA v. Brown and Williamson Tobacco Co., 529 U.S. 120, 188, 120 S. Ct. 1291, 1329 (2000) (Breyer, J., dissenting) ("Finally, administration policy changed. Earlier administrations may have hesitated to assert jurisdiction for the reasons prior Commissioners expressed... Commissioners of the current administration simply took a different regulatory attitude... As for the change of administrations, I agree with then Justice Rehnquist's statement in [*Motor Vehicle Manufacturers Association of U.S., Inc. v. State Farm Mutual Insurance Co.*]." *See also* FDIC v. Philadelphia Gear Co., 476 U.S. 426, 441, 106 S. Ct. 1931, 1939 (1986) (Marshall, Blackmun, and Rehnquist, JJ., dissenting) ("the inflexibility of the statute as applied to modern financial transactions is a matter for Congress, not the FDIC or this Court, to remedy").

Court articulated the ground rules for deference to agency interpretations of law in a way that worked an apparently revolutionary change in legal doctrine.[75] In place of the "pragmatic and contextual"[76] approach that the courts previously had employed, the Supreme Court directed that judicial review of administrative interpretations of law should now proceed under a new two-step test: Courts were instructed to determine whether Congress had "spoken directly to the precise question at issue."[77] If that was not the case, the courts were to determine only whether the agency's interpretation was "reasonable."[78] The test seemed designed to increase the flexibility of administration and give administrators a more significant role in determining the meaning and application of the laws they were charged with enforcing.[79]

Initially, it was thought that *Chevron* covered a broad field, including both express and implicit delegations of interpretive and lawmaking powers, and that it looked to the character and consequences of an agency interpretation rather than its form. In later cases, however, it seemed far from obvious that *Chevron* had covered the field, as the courts gave considerable attention and controlling legal significance to the precise form in which agency action or interpretation has occurred.

For example, in *EEOC v. Commercial Office Products*,[80] the Supreme Court adopted the Commission's interpretation of the

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75. Numerous commentators have questioned whether the *Chevron* Court intended the revolutionary change which others soon perceived in the decision. Among other things, the *Chevron* Court was sitting at reduced strength. The Court consisted of only six justices, and none of the justices expressed the view that Justice Stevens's opinion for the Court signified any change in existing law. In addition, the Court continued after *Chevron* to decide cases without mentioning the *Chevron* test, and Justice Stevens himself soon limited the application of the *Chevron* test in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S. Ct. 1207 (1987). *See, e.g.*, Merrill, *supra* note 10, at 985-86; Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071 (1990); Lawson, *supra* note 12, at 1379; Herz, *supra* note 3, at 222.

76. Merrill, *supra* note 10, at 972.

77. Chevron U.S.A., Inc., v. Natural Resources Defense Council, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781 (1984)

78. *Id.* at 844, 104 S. Ct. at 2782.

79. For Supreme Court cases according "*Chevron* deference," see INS v. Aguirre-Aguirre, 526 U.S. 415, 119 S. Ct. 1439 (1999); United States v. Haggar Apparel Co., 526 U.S. 380, 119 S. Ct. 1392 (1999); Regions Hosp. v. Shalala, 522 U.S. 448, 118 S. Ct. 905 (1998); Smiley v. Citibank, 517 U.S. 735, 116 S. Ct. 1730 (1996); National Bank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57, 115 S. Ct. 810, 813 (1995); Pauley v. Bethenergy Mines, 501 U.S. 680, 111 S. Ct. 2564 (1991); Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759 (1991). *But see* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 118 S. Ct. 927 (1998) (no *Chevron* deference); United States v. LaBonte, 520 U.S. 751, 117 S. Ct. 1673 (1997).

80. 486 U.S. 107, 108 S. Ct. 1666 (1988).

statutory provisions relating to the charge-filing time limits of Title VII, although the Commission's interpretation—that "a state agency terminates its proceeding when it declares that it will not proceed, if it does at all, for a specific period of time"[81]—was memorialized only in an *amicus curiae* brief. The Court apparently was not troubled by the form in which the agency's interpretation appeared, observing that "the Commission's interpretation need only be reasonable to be entitled to deference."[82] Three years later, however, the Court in *EEOC v. Arabian American Oil Company*[83] rejected outright the Commission's proffered interpretation of another provision of the statute which would have permitted the Commission to regulate the employment practices of United States employers employing United States citizens abroad.[84] The Court first determined that the Commission's interpretation was not legally correct,[85] and then invoked *Skidmore* to reject the idea that deference should be paid to the Commission's interpretation of its organic statute.[86]

In *Christensen v. Harris County*,[87] the Court also rejected the applicability of *Chevron* and invoked the deference principles laid down in *Skidmore* to determine the weight to be given an interpretation of law contained in an agency opinion letter. In addition, the Court indicated that *Skidmore* would be applied to similar administrative interpretations, such as agency policy statements, manuals, and enforcement guidelines.[88] Of the current members of the Court, only Justice Scalia thought that the *Chevron* analysis had categorically supplanted *Skidmore*, which he called an "anachronism."[89] On the other hand, Justice Stevens, while following

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81. *Id.* at 115, 108 S. Ct. at 1671.

82. *Id.* An interesting comparison may be made with the Court's decision in *Barclays Bank PLC v. Franchise Tax Bd. of California*, 572 U.S. 298, 114 S. Ct. 2268 (1994). In *Barclays Bank*, the Court held that Congress may "passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential' [and] need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce . . . ." *Id.* at 323, 114 S. Ct. at 2283 (citations omitted). On the other hand, the Court in *Barclays Bank* found no basis for deferring to "a series of [contrary] Executive Branch actions, statements, and amicus filings." *Id.* at 328, 114 S. Ct. at 2285.

83. 499 U.S. 244, 111 S. Ct. 1227 (1991).

84. *Id.* at 245-56, 111 S. Ct. at 1229-34.

85. *Id.*, 111 S. Ct. at 1229-34.

86. *Id.* at 257, 111 S. Ct. at 1235. Chief Justice Rehnquist's opinion in *Arabian American Oil Company* relied extensively on his earlier opinion in *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46, 97 S. Ct. 401, 410-13 (1976).

87. 529 U.S. 576, 120 S. Ct. 1655 (2000).

88. *Id.* at 587, 120 S. Ct. at 1662.

89. *Id.* at 589, 120 S. Ct. at 1664.

Skidmore, would have treated the agency's opinion letter with something like the level of deference applicable at the second step of *Chevron*. In Justice Stevens's view, *Skidmore* deference "clearly" should be afforded to an agency interpretation that is "thoroughly considered and consistently observed."[90]

Most recently, in *United States v. Mead Corporation*,[91] the Supreme Court determined that tariff classification "ruling letters," some 10,000 of which are issued each year by the forty-six regional offices of the U.S. Customs Service, are not entitled to deference under *Chevron*, but held that the "ruling letters" should be accorded the degree of deference appropriate to whatever persuasive value they may have under *Skidmore*.[92] Writing for eight members of the Court, Justice Souter observed:

> We granted certiorari . . . to consider the limits of *Chevron* deference owed to administrative practice in applying a statute. We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a

90. *Id.* at 595, 120 S. Ct. at 1667. One case that follows Justice Stevens's understanding of *Skidmore* deference is *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 119 S. Ct. 2176 (1999). In *Olmstead*, two mentally retarded patients brought suit under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 (2001), challenging the state's decision to hold them in custodial institutions rather than place them in community care residential programs. *Id.* at 587, 119 S. Ct. 2181. The Court held that the views of the Department of Justice "warranted respect" because those views had been put forth consistently in judicial briefs. *Id.* at 598 n.9, 119 S. Ct. at 2185, 2186 n.9. The Court decided not to employ *Chevron* deference analysis, but instead relied on the principle 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.'" *Id.* at 598, 119 S. Ct. at 2186 (footnotes omitted). *See also* Local No. 93 Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 106 S. Ct. 3063 (1986) (according *Skidmore* deference to EEOC guidelines); Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196 (1998) ("body of experience and informed judgment").

91. 533 U.S. 218, 121 S. Ct. 2164 (2001).

92. *Id.* at 308, 121 S. Ct. at 2175. The court of appeals had previously determined that the rulings were not entitled to deference under *Chevron*. Unlike the Supreme Court, however, the court of appeals thought that that determination ended the matter, and it made no inquiry into the subject of *Skidmore* deference. *See id.* at 308, 121 S. Ct. at 2175.

> comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.[93]

As in *Christensen*, Justice Scalia again dissented in *Mead Corporation*, asserting that the majority's opinion marked an "avulsive change in judicial review of federal administrative action."[94] Justice Scalia wrote:

> Whereas previously a reasonable agency application of an ambiguous statutory provision had to be sustained so long as it represented the agency's authoritative interpretation, henceforth such an application can be set aside unless "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," as by giving an agency "power to engage in adjudication or notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent," and "the agency interpretation claiming deference was promulgated in the exercise of that authority." . . . What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary. And whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference. We will be sorting out the consequences of the *Mead* doctrine, which has totally replaced the *Chevron* doctrine, for years to come.[95]

Notwithstanding the lopsided vote in *Mead*, one may wonder whether the majority opinion truly represents the synthesis and end of discussion that its rhetoric suggests. The Court's experience in this area has not been linear, and *Mead* undoubtedly settles less than it supposes. In theory, the extent to which the field has been covered by *Chevron*, and in what circumstances, remain contested questions. In practice, the effect of *Chevron* is even less clear.[96]

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93. *Id.* at 303, 121 S. Ct. at 2171.
94. *Id.* at 311, 121 S. Ct. at 2177.
95. *Id.* at 311-12, 121 S. Ct. 2177-78 (citations and footnotes omitted).
96. Among other things, the Supreme Court has not decided whether *Chevron* applies to agency interpretations given in the context of informal adjudications. *See, e.g.*, Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000); Gonzalez *ex rel.*

III. THE PROBLEM OF THE "EARLY" RIGHT-TO-SUE LETTER

The Civil Rights Act of 1964,[97] the Voting Rights Act of 1965,[98] and the Fair Housing Act of 1968[99] are now deeply entrenched in the landscape of American law and social life, and in the commercial and industrial practices of the nation. One measure of that entrenchment is the growth of civil rights litigation, particularly employment discrimination litigation under Title VII of the Civil Rights Act of 1964, from a statistically insignificant part of the workload of the federal courts to one of its major components.[100] Another measure is the extent to which the concept of equal opportunity in employment, at least in the abstract, has become an accepted value of American society. We may differ at the edges, on issues such as affirmative action, and we may divide over the existence and need for redressing present effects of past discrimination, but our formal commitment to civil rights is unquestioned. That is the conventional wisdom, and there is a great deal of truth to it. Certainly, the nature of our public conversation and the terms in which we talk about these matters now reflect that prevailing wisdom.[101]

Gonzalez v. Reno, 215 F.3d 1243 (11th Cir. 2000).

97. 42 U.S.C. § 2000e-2(a)(1) (1999).

98. 42 U.S.C. §§ 1971, 1973 (1994).

99. 42 U.S.C. §§ 3601-3619, 3631 (2001).

100. On average, between 21,000 and 24,000 employment discrimination cases were filed in the federal courts each year during the period 1996 to 2000. *See* Administrative Office of U.S. Courts, *U.S. District Courts—Civil Cases Commenced, By Nature of Suit, During the Twelve-Month Periods Ended September 30, 1996 Through 2000*, Table C-2A (2000), *available at* http://www.uscourt.gov/judbus2000/contents.html (visited June 27, 2001). Recent studies suggest, however, that the increase in the volume of Title VII litigation has not been accompanied by an increase in recoveries by plaintiffs. Theodore Eisenberg and Stewart J. Schwab have noted that only 26.8 percent of trials in employment discrimination cases result in victories for plaintiffs, as opposed to the 44.2 percent win rate for federal plaintiffs generally. *See* Theodore Eisenberg & Stewart J. Schwab, Double Standard on Appeal: *An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals*, *at* http://www.findjustice.com/mmr/news/eisenber-schwab/schwab-report.htm (visited July 27, 2001). Of course, many employment discrimination cases are dismissed prior to trial. Moreover, as Professors Eisenberg and Schwab have shown, plaintiff trial victories are reversed on appeal 43.61 percent of the time, whereas defense victories are reversed on appeal only 5.8 percent of the time. *Id.* By way of comparison, the authors observe, "Even prisoner civil rights and *habeas* plaintiffs have an easier time holding their trial victories on appeal than do employment discrimination plaintiffs. . . . Only the wardens in prisoner *habeas corpus* petitions are better able to hold their trial judgments on appeal than an employer in a discrimination case." *Id.*

101. Of course, the reality of our performance may be quite different. A

Our current commitment to equal opportunity in employment and other areas tends to mask the depth and the extent of the disagreement and controversy that surrounded the civil rights legislation that Congress enacted during the 1960s. It is not easy today to appreciate the extent to which the voices supporting these reforms, albeit true to one traditional version of the American vision, were thought profoundly discordant to many of the background values that drove the public conversation of the times.[102] Nor is it easy to remember the very serious opposition, both within Congress and in the country at large, that had to be overcome before the civil rights bills (particularly the omnibus legislation that became the Civil Rights Act of 1964) could be enacted into law. That resistance was quelled in various ways,[103] but particularly through certain political compromises that have had lasting effects on the specific provisions and administration of these laws. As one commentator on Title VII and the Fair Housing Act observed in 1969, "Both Acts, born in the House, were transfigured in the Senate by those who wished to save them from an otherwise certain death. Each is the result of a political compromise, a product more of the desire for passage than the desire

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Chicago Tribune columnist recently wrote about Jesse Jackson's critics, noting that some "honestly object" to Jackson's "boycott-driven tactics," his "outside-with-a-bullhorn style," and his "lust for the limelight." David Greising, *Good News Heard Despite Jackson's Hype*, Chicago Tribune, Aug. 10, 2001, § 3 at 1. According to the columnist, however, "others dislike Jackson because he fights for blacks" in what these critics see as a zero-sum game world—one in which any gains by African-Americans necessarily diminish them. *Id.* In addition, the columnist noted that:

> Low-grade discrimination is common in the workplace. Overt racism is hardly rare.
>
> Recent past cases have shown us disgusting banter in the executive suite at Texaco, denial of opportunity throughout the ranks at Coca-Cola, nooses in the employee locker room at Southern Company and Klan-style dress showing up at an R.R. Donnelley plant in Dwight, Ill.
>
> With racism abounding, it's no wonder Jackson uses boycott threats, walkouts, or public bullying—whatever it takes.

Id.

102. *See, e.g.*, Taylor Branch, Pillar of Fire: America in the King Years, 1963-65, at 357 (1998) (detailing Senator Goldwater's characterization of civil rights bill as "threat to the very essence of our basic system"); *id.* at 456 (describing Governor George Wallace's demand that Civil Rights Act be repealed); Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*, 60 Tul. L. Rev. 314, 339 (1985).

103. Among other things, cloture was invoked for only the second time in the history of the United States Senate. *See* Francis Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 (1966). *See also* Francis T. Coleman, *Title VII of the Civil Rights Act: Four Years of Procedural Elucidation*, 8 Duq. L. Rev. 1 (1969-70); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. Chi. L. Rev. 430 (1965).

for a rational scheme for uprooting discrimination."[104] Nowhere, perhaps, is the reality of that desire for compromise more evident, or its current effects more deeply felt, than in the procedural aspects of Title VII of the Civil Rights Act of 1964.[105]

A. Section 706 of Title VII

The central purpose of Title VII was to prohibit invidious discrimination in employment. In Title VII, Congress identified certain "unlawful employment practices," and prohibited employers, employment agencies and unions from practicing invidious discrimination, based on race, color, religion, national origin, and sex, with respect to a broad class of employment-related decisions and conditions of employment. Congress also established the Equal Employment Opportunity Commission ("EEOC"), a commission-

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104. Note, *Discrimination in Employment and Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 Harv. L. Rev. 834, 835 (1969). *See also* Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969) (discussing legislative development of Title VII). In 1971, the editors of the Harvard Law Review discussed some of these tensions:

> Although the substantive provisions of the Act appear quite sweeping, closer analysis reveals a number of tensions inherent in this product of political compromise. Underlying Title VII is the public interest in eliminating employment discrimination in order to guarantee to minorities the economic status necessary to a free society and to insure maximum utilization of human potential. But the Act also reflects the private individual's interest in securing equal employment opportunity. Similarly, there is a tension between the judgment that informal, private, and local methods of eliminating employment discrimination are preferable, and the desire for prompt, judicial redress of discrimination grievances.

Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1195-96 (1971).

105. The Harvard editors noted:

> These tensions are apparent in the Act's procedural mechanisms. The Act provides for three instrumentalities of enforcement: the aggrieved individual; the Equal Employment Opportunity Commission (EEOC); and the Attorney General. The aggrieved party bears the primary responsibility for enforcing Title VII through the mechanism of a private action in federal district court. The EEOC, which as the bill was originally conceived bore the primary enforcement responsibility, lost its adjudicatory and coercive powers through a series of political compromises. This shift in responsibility for enforcement of the Act has been characterized as a basic change in the philosophy of the title . . . [which] implied an appraisal of discrimination in employment as a private rather than a public wrong, a wrong, to be sure, which entitles the damaged party to judicial relief, but not one so injurious to the community as to justify the intervention of the public law enforcement authorities.

Id. at 1196.

form federal agency consisting of five members appointed for five-year terms by the president, with the advice and consent of the Senate, and charged with enforcing the provisions of the Act.[106] Congress was deeply divided, however, with respect to the nature and extent of the enforcement powers to be entrusted to the Commission. As Rebecca Hanner White has recently reminded us, "a major source of disagreement during passage of the Act was the character and level of regulatory authority to be conferred upon the EEOC."[107]

The House proponents of employment discrimination legislation had looked initially to the National Labor Relations Board as a model for the new commission. However, the Labor Board was endowed with a broad array of investigatory and adjudicatory powers, including the authority to enter "cease and desist" orders, subject to judicial review on "substantial evidence" grounds, as well as full rulemaking authority.[108] In addition, the National Labor Relations Act did not create any private cause of action for those affected by unfair labor practices; their claims were to be determined administratively by the Board, subject, of course, to limited judicial review.[109] As Professor White has suggested, the Labor Board model did not recommend itself to many opponents of the civil rights bill, some of whom undoubtedly would have favored curtailing the powers of the Board rather than duplicating those broad powers in a new agency, particularly one concerned with employment discrimination.[110] The opponents won the day. During the course of

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106. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 253, 258 (1964).

107. 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, 58 (1995). The thrust of Professor White's thesis is that "the courts should find an implied delegation to the EEOC of authority to interpret Title VII." *Id.* at 57-58. Professor White makes a strong case in support of that argument, but the argument is not one that is made without difficulty, as she acknowledges. *Id.* In a sense, the concern of the present essay is a narrower one. The regulation at issue here is a procedural regulation, and the compromise effected by Congress in the adoption of Title VII indisputably included the granting of rulemaking power in that area to the Commission. *See* Section 713(a) of Title VII, 42 U.S.C. § 2000e-12(a) (2001).

108. *See* 29 U.S.C. §§ 156, 160 (1988). Of course, the Labor Board has chosen not to rely heavily on its rulemaking powers. *See* Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 Duke L.J. 274 (1991).

109. Orders issued by the Labor Board in unfair labor practice cases normally are subject to review in the regional courts of appeal. *See* 29 U.S.C. §§ 160(e), (f) (2000). The Board may also seek injunctive relief in a federal district court. *See* 29 U.S.C. § 160(j) (2000).

110. Thus, "there was considerable resistance to creating a civil rights enforcement agency that could not only investigate and prosecute but also determine employer liability." White, *supra* note 107, at 59.

the legislative process, Congress deleted the "cease and desist" power contained in the original bill, deleted the grant of authority to the Commission to prosecute violations of the statute in the federal district courts, and reduced the agency's rulemaking authority to include only the issuance of "suitable procedural rules."[111]

Congress's rejection of the Labor Board model, together with the various limitations it imposed on the Commission's activities, resulted in an enforcement authority unlike that given to any other federal regulatory body. Persons aggrieved by discrimination were required to have their administrative claims processed initially by qualifying state and local authorities; their claims would then be considered by the Equal Employment Opportunity Commission or, in the case of a pattern or practice charge, by the Attorney General.[112] Unless the Commission was able to broker a settlement between the charging party and the respondent, however, the aggrieved party generally would be required to bring a private action in federal district court to secure redress for violations of Title VII.[113] The role of the courts was to decide claims of discrimination, not to review Commission determinations; and the first stage of judicial decision-making was to take place in the district courts, not the court of appeals.[114] Professor White has well summarized the ultimate product of the 1964 legislative process in this way:

> Created by the Civil Rights Act of 1964, the EEOC "was a strange hybrid creature." It was responsible for processing all charges of discrimination under Title VII, and filing a charge with the EEOC was a jurisdictional prerequisite for suit. Moreover, the EEOC had authority to investigate charges, to determine whether there was probable cause to believe Title VII had been violated, and to conciliate the claims. Furthermore, employers were given immunity for actions taken in "good faith . . . reliance on any written interpretation or opinion of the Commission." But the EEOC lacked the authority to issue cease-and-desist orders or to file suit.

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111. *Id.* at 60 (citing 110 Cong. Rec. 2575 (1964)). The provision granting authority to issue "suitable rules" was altered, without explanation or debate, with the insertion of the word "procedural" during floor consideration of the bill. *See id.* at 60-61.

112. *See* Coleman, *supra* note 103, at 9 n.30 (citing 29 C.F.R. § 1601.12) which sets forth the general policy with respect to coordination with state agencies). *See also* Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b) (2001).

113. *See* Coleman, *supra* note 103, at 4.

114. The legislative determination that cases should be brought as original litigation in the district courts, rather than as review actions in the courts of appeals, has greatly increased the number of judicial decision-makers and has had significant consequences for the development of legal principle.

> Rather, a charging party, after receiving a right-to-sue letter from the EEOC, was entitled to bring an enforcement action, which would be heard de novo by a trial court. Additionally, the Attorney General, not the EEOC, had authority to bring actions alleging an employer's pattern and practice of violating the Act.[115]

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115. White, *supra* note 107, at 61 (footnotes omitted). Thus, the Commission had no authority to litigate claims of discrimination, but was authorized to resolve claims of discrimination only through efforts at conference, conciliation, and persuasion. In these circumstances, there was little incentive for employers to reach agreement, and the Commission's efforts were largely unsuccessful. *See, e.g.*, Comment, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1195, 1245 (1971) [hereinafter Comment, *Developments in the Law*]. It should be noted, however, that individual members of the Commission were authorized to file *administrative* charges of discrimination with the Commission if they had reasonable cause to believe that Title VII had been violated. *See* Coleman, *supra* note 103, at 9 (explaining that the Commissioner's charges are filed and processed in the same manner as individual complaints). This provision was thought important because it permits the commencement of the administrative process when the person affected by discrimination chooses to remain anonymous or is unwilling to verify her charge because of fear of retaliation. *See* Comment, *Developments in the Law*, *supra*, at 1199.

As originally enacted in 1964, Title VII set forth a number of time periods for various steps in the administrative process. Under Section 706(d) of Title VII, as originally enacted, a person aggrieved by an unlawful employment practice was required to file a charge with the Commission "within ninety days after the alleged unlawful employment practice occurred." Pub. L. No. 88-352, § 706(d), 78 Stat. 253, 260 (1964). An early commentator noted:

> In cases where the alleged unfair labor practice also falls within the jurisdiction of certain state laws of equal employment opportunity, this statutory limitation period is extended to two hundred and ten days following the occurrence of the alleged discrimination, or thirty days after the state or local authority has concluded its action on the matter, whichever comes first.

Coleman, *supra* note 103, at 6. The Commission was then required to investigate, determine reasonable cause, and attempt conciliation. No time limits were placed on the Commission with respect to these activities, but once the period of thirty days had elapsed, the Commission was ordinarily required to issue a notice of right-to-sue upon demand by an aggrieved party. However, if the Commission determined that further efforts at conciliation were warranted, it could delay issuing the right-to-sue letter for one additional thirty-day period. Section 706 of Title VII, Pub. L. No. 88-352, § 706, 78 Stat. 253, 259 (1964). *See also* Note, *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 Colum. J.L. & Soc. Probs. 1, 6 (1969) [hereinafter Note, *Title VII*]. Finally, the party aggrieved by discrimination was required by Section 706(e) of Title VII to bring suit in federal district court within thirty days after being notified by the Commission of her right to sue. Section 706(e) of Title VII, Pub. L. No. 88-352, § 706(e), 78 Stat. 253, 260 (1964).

In 1972, Congress amended Section 2000e-5(f) as part of the Equal Employment Opportunity Act. *See* Equal Employment Opportunity Act of 1972,

In 1972, Congress amended Title VII to grant litigating authority to the Commission for the first time. The amendments authorized the Commission to bring suits against private employers in the event that the Commission was unable to conciliate individual claims of discrimination, and the authority to initiate "pattern and practice" litigation was transferred from the Attorney General to the Commission.[116] However, contemporaneous efforts to endow the Commission with "cease and desist" authority, which would have permitted judicial review of Commission determinations rather than leaving claims of discrimination to be determined by trials *de novo* in the federal district courts, were unsuccessful. Thus, notwithstanding the very significant changes in certain aspects of Title VII enforcement brought about by the 1972 amendments, the basic nature of the administrative enforcement procedure created by the 1964 Act remained the same. The administrative enforcement scheme applicable to Title VII claims is set forth in Section 706 of Title VII, which outlines a complex series of administrative procedures to be followed. Many of the procedural requirements set forth in Section 706, both those that are meant to guide the actions of the charging party and those that are directed to the Commission for guidance in the discharge of its duties, are accompanied by references to time periods, which almost invariably provide for the taking of action "within [so many] days." For example, the statute directs that a charging party file her civil action "within ninety days after the giving of . . . notice [of right to sue]."[117] At least in this example, the word "within" is meant to communicate the maximum time period within which a lawsuit ordinarily must be filed or the right to do so abandoned. That meaning seems consistent with common experience and customary legal practice.[118] The various procedural provisions

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Pub. L. No. 92-261, § 4, 86 Stat. 103, 104 (1972) (codified at 42 U.S.C. § 2000e-5(f)(1) (1988)). The 1972 amendments altered these time periods, as explained below. The new provision extended the time for filing an administrative charge of discrimination from ninety to one-hundred-eighty days. It also retained the individual's right to file a private civil action and extended the time periods for bringing an EEOC action from thirty to one-hundred-eighty days, for issuing a right-to-sue letter to a private party from thirty to one-hundred-eighty days, and for bringing a private civil action from thirty to ninety days. 42 U.S.C. § 2000e-5(f)(1) (1993).

116. *See* 42 U.S.C. § 2000e-6(e) (1988).

117. 42 U.S.C. § 706(f)(1) (1993).

118. It is natural, of course, to assume that words will be used in the same sense throughout a particular statutory provision, but that is not invariably held to be the case. *See* Atlantic Cleaners & Dryers, Inc. v. United States, 286 U.S. 427, 433, 52 S. Ct. 607, 608-09 (1932). *See also* William N. Eskridge et al., Legislation and Statutory Interpretation 264, 376 (2000). *See also* Seybert v. West Chester Univ.,

and their respective requirements as to timing warrant some discussion here.

Under Section 706(f)(1), a "person aggrieved" by "an unlawful employment practice," who wishes to avail herself of the substantive protections afforded by Title VII, is required to file a "charge" with the Commission

> within one hundred and eighty days after the alleged unlawful employment practice occurred . . . , except that in a case [in which] . . . the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . , such charge shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . .[119]

Within ten days of the filing of such a charge of discrimination, according to Section 706(b), "the Commission shall serve a notice of the charge . . . [on the party or parties alleged to have committed the unlawful employment practice], and shall make an investigation thereof."[120] Section 706(b) also provides that:

> If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . . The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge . . . .[121]

Additional procedural provisions and requirements are also outlined in Section 706(f)(1). Among other things, these provisions

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83 F. Supp. 2d 547, 551 n.10 (E.D. Pa. 2000) (considering the meaning of the word "if" in § 2000e-5(f)(1): "Does it preclude private suits unless one of the two conditions occurs—or, used in connection with "shall," does it suggest the contrary?"). *Compare* Spencer v. Banco Real, 87 F.R.D. 739, 743 (S.D.N.Y. 1980) *with* Figueira v. Black Entm't Television, 944 F. Supp. 299, 305 (S.D.N.Y. 1996).

119. Section 706(e)(1) of Title VII, 42 U.S.C. § 2000e-5(e)(1) (1993).

120. Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b) (1993).

121. *Id.*

permit the Commission, absent the negotiation of a satisfactory conciliation agreement, to bring suit *within* thirty days of the filing of a charge. They also authorize the Commission to notify a charging party of his right to bring suit if the charge has been dismissed by the Commission, or if, *within* 180 days, the Commission has not entered into a satisfactory conciliation agreement or commenced a lawsuit. In terms, the statute provides that:

> If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure . . . a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or . . . has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleged was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending . . . further efforts of the Commission to obtain voluntary compliance.[122]

The language of Section 706 may seem impenetrable at first reading, especially with respect to the various time limits that attach to one aspect or another of the administrative process, but several

122. Section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1) (1993). For the sake of simplicity, the provisions relating to cases in which the respondent is "a government, governmental agency, or political subdivision," in which case certain actions are to be taken by the Attorney General, rather than by the Commission, have been omitted.

points are relatively clear nonetheless. Among other things, these provisions spell out two discrete alternatives for commencing a Title VII action in federal district court. First, the Commission may initiate a civil action "[i]f within thirty days after a charge is filed with the Commission . . . [it] has been unable to secure from the respondent a conciliation agreement acceptable to the Commission."[123] On its face, this language would seem to suggest that the Commission need not wait until the expiration of any otherwise relevant time period to commence a civil action in federal district court, but may file such an action even within the first thirty days after a charge has been filed, so long as a conciliation agreement satisfactory to the Commission has not yet been reached—in which case the Commission would not be entitled to bring suit, and, presumably, would have no reason to do so.[124] More important, this provision does not impose on the Commission any particular requirements as to what the Commission must do before determining that litigation is the best route to follow; nor does it make proof of any particular course of administrative conduct, or compliance with any particular set of requirements, a condition precedent to the filing of such a lawsuit. The Commission is not required to detail for the court any efforts that it may or may not have undertaken to secure a satisfactory conciliation agreement, nor is the court authorized to evaluate the efficacy or good faith of any such efforts. In short, the decision whether to file a lawsuit apparently is a decision committed to agency discretion.[125]

Second, this provision also contemplates the possibility that a private lawsuit will be filed by the "charging party," and it lays out the requirements for that. Here, two different scenarios are

123. *Id.* Presumably, the Commission's legal authority to initiate a civil action would not expire at the conclusion of thirty days because the Commission could not normally be expected to decide whether to commence litigation within that time period. Here, as elsewhere, Congress seems to have included a reference to a specific time for the purpose of expressing an opinion as to an optimal time period, rather than attempting to create a hard and fast limitation.

124. Although this understanding of the statute seems correct, the Commission appears not to have asserted its authority to begin an action within the 30-day period unless it is also seeking preliminary or temporary relief under Section 706(f)(2) of Title VII, 42 U.S.C. § 2000e-5(f)(2) (1993). *See* 29 C.F.R. § 1601.27 (2000). This fact is not surprising. Absent the need for preliminary or temporary relief, the Commission ordinarily would have no reason to file its own action within the 30-day period.

125. The significance of these omissions may be demonstrated by a comparison with the rulemaking provisions of Section 553(b) of the Administrative Procedure Act. *See* 5 U.S.C. § 553(b) (1993). Those provisions allow an agency to depart from notice-and-comment rulemaking when, among other things, "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.*

contemplated. First, "[i]f a charge filed with the Commission . . . is dismissed by the Commission, . . . [it] shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought . . . by the person claiming to be aggrieved . . . ."[126] In other words, once the Commission determines that the charge should be dismissed, presumably because the Commission believes that there is "not reasonable cause to believe that the charge is true," the Commission is required to notify the charging party, who may then bring a civil action within ninety days. Again, there is no requirement that the Commission await any specified period of time before dismissing the charge. Nor is there any requirement that the Commission give any explanation or justification for its determination.

The statute provides that the Commission's determination to dismiss the charge be made "after . . . investigation," but the statute does not prescribe any particular requirements for this investigation. Nor does the statute make the dismissal determination subject to judicial review, let alone require that any particular showing be made to any court for the purpose of establishing the adequacy of the Commission's investigation. Of course, the effect of the Commission's determination is limited. The determination has no preclusive effect, and the charging party is entitled to press her claim on a clean slate in federal district court.[127] On the other hand, the determination has the important practical effect of terminating the administrative proceeding and transferring resolution of the conflict from the administrative realm to the courts, assuming, that is, that the person aggrieved has access to the financial and professional resources necessary to sustain federal court litigation. In this sense, the determination is significant: it deprives both the charging party and the respondent of the good offices of the Commission in helping to resolve their dispute without litigation; it limits the charging party's enforcement options, so that she can pursue her grievance, if at all, only through litigation; and it may require the respondent to make her defense in federal district court, with the attendant expense that requirement entails.[128] Thus, the Commission's dismissal of a

126. Section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1) (1993).

127. Although the Commission's determination has no *res judicata* effect, some courts have recently held that the Commission's dismissal of a charge for failure to cooperate with its administrative processes should preclude the subsequent filing of a Title VII action in federal court. *See, e.g.*, Pack v. Marsh, 986 F.2d 1155, 1158-59 (7th Cir. 1993); McLaughlin v. State Sys. of Higher Ed., No. 97-CV-1144, 1999 U.S. Dist. LEXIS 4325 (E.D. Pa. Mar. 31, 1999).

128. Of course, a charging party may also avail herself of remedies provided by available alternative dispute resolution processes. *See* Section 118 of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991) ("[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute

charge may not finally and irrevocably determine the parties' substantive legal rights, but it may well alter their respective positions in not insignificant practical ways. Most important, and notwithstanding these effects, the legitimacy of the dismissal does not depend in any way upon the lapse of any particular time period from the filing of the charge or with compliance with any other time limits.

A private lawsuit may come about in a second way. Section 706(f)(1) further provides that:

> [I]f within one hundred eighty days from the filing of such charge . . . , the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought.[129]

On its face, and consistent with other uses of the word "within" in Section 706, this provision also would seem not to require that some particular period of time be required to elapse arbitrarily, without regard to what the Commission may or may not have attempted or achieved with respect to the charge. In other words, a plausible reading of this provision (made even more likely by the context in which it appears) is that the Commission, when it has not filed a lawsuit or entered into a conciliation agreement to which the person aggrieved is a party, may issue a right-to-sue letter to the person aggrieved at any time within 180 days after the charge of discrimination has been filed. According to this reading, the Commission could make the determination to issue a right-to-sue letter at any time during the 180-day period, which would make sense in many situations, as, for example, when an employer or other respondent categorically refuses to participate in conciliation. After the expiration of that period, the Commission presumably has no discretion to withhold issuance of a right-to-sue letter, but must then issue one, at

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resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title [including sections 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, and 2000e-16]."); 42 U.S.C. § 1981 note (1999). *See also* R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 La. L. Rev. 1533 (1994).

129. Section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). This second possibility actually encompasses two different scenarios: (a) where a civil action is not commenced by the Commission within 180 days, and (b) where the Commission has not entered into a conciliation agreement within 180 days. *Id.* In the latter scenario, conciliation presumably will have been attempted without success, while the former scenario need not have included any effort at conciliation. The result is the same, however, in that a right-to-sue letter may issue in either case.

least when requested by the charging party.[130] That is not to say, of course, that the Commission necessarily must terminate its investigation at that point; the Commission could choose to continue its investigation of the charge even after the 180-day period has expired and a right-to-sue letter has been issued—a scenario that is most likely to occur in circumstances where the Commission perceives the possibility of building a pattern and practice case on factual circumstances uncovered in its investigation of one or more charges of discrimination, including that with respect to which the right-to-sue letter has been requested.[131]

Further support for this reading may be found in the legislative history of the 1972 amendments, which, among other things, granted litigating authority to the Commission for the first time.[132] The section-by-section analysis of those amendments shows that Congress considered abolishing the private right of action during the process of amending Title VII, but decided not to do so. Notwithstanding the grant of litigating authority to the Commission, Congress thought that retention of the private right of action was important for two reasons: (a) to ensure that charging parties would not be denied a remedy solely because of an adverse agency determination (either dismissal of the charge or the adoption of a conciliation agreement deemed unsatisfactory by the charging party), and (b) to ensure that charging parties would be protected against administrative stonewalling and delay. The section-by-section analysis articulated these concerns in this way:

> The retention of the private right of action, as amended, is intended to make clear that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim

130. In some circumstances, a charging party's failure to request a right-to-sue letter may affect her substantive rights. *See, e.g.*, Churchill v. Star Enters., 183 F.3d 184, 191 (3d Cir. 1999); Heylinger v. State Univ. & Comm. Coll. Sys. Of Tenn., 126 F.3d 849, 855 n.2 (6th Cir. 1997), *cert. denied*, 522 U.S. 1117, 118 S. Ct. 1054 (1998); Cleveland Newspaper Guild, Local 1 v. The Plain Dealer Publ'g Co., 839 F.2d 1147 (6th Cir. 1988) (en banc); Holden v. Burlington Northern, Inc., No. 3-81-994, 1984 U.S. Dist. LEXIS 15851 (D. Minn. June 15, 1984).

131. Indeed, the section of the EEOC Compliance Manual dealing with the issuance of "early" right-to-sue letters specifically states that it is the policy of the Commission to investigate all charges, and that it may be appropriate to continue (or begin) investigations even after the issuance of a right-to-sue letter. *See* EEOC Compl. Man. (CCH) No. 915.001, § 6.3 (1987). On the other hand, the Fifth Circuit has recently held that the Commission has no legal authority to continue its investigation after the issuance of a right-to-sue letter, although it did reserve judgment as to whether the Commission could bring an enforcement action after that date. *See, e.g.*, EEOC v. Hearst Corp., 103 F.3d 462, 469-70 (5th Cir. 1997).

132. Under the Civil Rights Act of 1964, as originally enacted, the Commission was not authorized to commence litigation. Thus, a charging party's only options, in the absence of successful conciliation of her claim, were to commence a private action on her own behalf or abandon her claim.

> merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint. Moreover, it is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission or Attorney General does not act with due diligence and speed. Accordingly, the provisions described above allow the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.[133]

B. The Commission's Early Practice and Regulation 1601.28(a)(2)

Virtually from the time of its organization and earliest operations,[134] the Commission was inundated with a far greater volume of charges of discrimination than it was able, given its level of funding and other resources, to process in a timely manner. Among other things, the extendable thirty-day period after which a right-to-sue letter *must* issue at the request of a charging party proved insufficient, and Congress extended that period to one hundred eighty days in the 1972 amendments.[135] It soon became clear, however, that the Commission's caseload often made even the 180-day period an insufficient amount of time for the Commission to complete its investigation and processing of a charge, including the making of a reasonable cause determination, and culminating in either the entry of a conciliation agreement, the issuance of a right-to-sue letter to the charging party, or (after 1972) the commencement of a civil action by the Commission.[136] Indeed, in view of the Commission's administrative case backlog, the Commission was often unable even to commence processing a charge within the statutory one hundred

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133. 188 Cong. Rec. 7168 (1972).

134. Barbara L. Schlei & Paul Grossman, Employment Discrimination Law 776 (1976) [hereinafter Schlei & Grossman, Employment Discrimination]. The Commission was disorganized and inadequately staffed during its early months of operation. The five commissioners were not appointed until May 10, 1965, less than two months before the Commission was to begin functioning under the statute. The first year of operation was devoted to organizational problems, and three Chairmen passed through the agency in the first three years of its existence. The Commission struggled through the first year of operation with only seven permanent investigators and did not operate with a full staff until March 1968. *See* Note, *Title VII*, *supra* note 115, at 13.

135. *See supra* note 115 (discussing the 1972 Amendments).

136. Schlei & Grossman, Employment Discrimination, *supra* note 134, at 776.

eighty-day period.[137] In light of this bureaucratic morass,[138] the Commission adopted the practice of sometimes issuing right-to-sue notices when requested by a charging party before the expiration of the 180-day period.[139]

In 1977, following a major internal study of its organization and operations, the Commission proposed a series of changes that the Commission's chair, Eleanor Holmes Norton, called the most extensive overhaul of the Commission's structure and processes since its inception in 1965.[140] The purpose was to streamline the agency's procedures, integrate the litigating authority conferred by the 1972 amendments with the Commission's preexisting investigative and conciliation functions, and generally improve the enforcement of Title VII. Among the procedural improvements adopted by the Commission were the introduction of a rapid case processing system, a separate backlog case processing system, a "direct service" consumer-oriented structure, integration of investigation, conciliation, and litigation functions, and the establishment of a program to deal specifically with cases of systemic discrimination.[141] As part of this administrative reform effort, and pursuant to notice-and-comment rulemaking procedures, the Commission proposed the promulgation of a rule that codified its longstanding practice of issuing right-to-sue letters, in certain circumstances, before the expiration of the 180-day period.[142] In a

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137. *Id.*

138. In 1977 the Commission's backlog figure numbered nearly 130,000. *Oversight Hearings on Federal Enforcement of Equal Employment Opportunity Laws*, 94th Cong., 2d Sess., 11 (1977) (statement of Eleanor H. Norton, Commissioner, EEOC).

139. Schlei & Grossman, Employment Discrimination, *supra* note 134, at 776.

140. *See Oversight Hearings on Federal Enforcement of Equal Employment Opportunity Laws*, 94th Cong., 2d Sess., at 6 (1997) (statement of Hon. Eleanor H. Norton); 42 Fed. Reg. 161 at 42023 (Aug. 19, 1977) (notice of rulemaking).

141. *Oversight Hearings on Federal Enforcement of Equal Employment Opportunity Laws*, 94th Cong., 2d Sess., at 23 (1997) (statement of Hon. Eleanor H. Norton).

142. In the notice of proposed rulemaking that initiated the period of public comment on these reforms, the Commission stated that the proposed rule was not technically subject to the requirements of notice-and-comment rulemaking, inasmuch as the proposed rule was a "procedural regulation" under Section 713(a) of Title VII, which the Commission was authorized to issue without such compliance under Section 553(b) of the Administrative Procedure Act. *See* 42 Fed. Reg. 152, at 40,023 (1997). However, the Commission thought that following the procedures for notice-and-comment rulemaking would be appropriate because it would be "useful to solicit public comment with regard to some of the contemplated changes." *Id.* With respect to that part of the rule with which this article is concerned, the Commission explained that the proposed rule was grounded in Section 706(f)(1) of Title VII, as interpreted by the courts in various decisions, including *Bauman v. Union Oil Corp.*, 400 F. Supp. 1021 (N.D. Cal.

statement accompanying the rule, as finally adopted, the Commission explained further:

> The Commission is willing to issue notices before 180 days when it is clear that the administrative process cannot be completed, based on the legal principle that a party is not required to perform a useless act, i.e., wait for the passage of one-hundred-eighty days when the passage of such time will not accomplish any purpose.[143]

The regulation authorized the issuance of "early" right-to sue letters, but only if one of several specifically enumerated Commission officials had determined that it was unlikely that the Commission would be able to take final action before the expiration of the 180-day period. The regulation, which is codified at Section 1601.28(a)(2) of Title 29, Code of Federal Regulations, provides the following:

> When a person claiming to be aggrieved requests, in writing, that a notice of right-to-sue be issued, and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission may issue such notice as described in § 1601.28(e) with copies to all parties, at any time prior to the expiration of 180 days from the date of filing the charge with the Commission; provided, that the District Director, the Area Director, the Local Director, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Field Management Programs, Office of Program Operations has determined that it is probable that the

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1973). In other words, the new regulation was meant to confirm the Commission's existing interpretation of Section 706(f)(1) of Title VII, which it understood as authorizing the issuance of right-to-sue letters prior to the expiration of the 180-day period. It should also be noted that the Supreme Court had referred to the 180-day period as "mandatory" in *dicta* in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361, 97 S. Ct. 2447, 2452 (1977), and the regulation has sometimes been characterized as the Commission's attempt at counteracting that *dicta*. *See, e.g.*, Seybert v. West Chester Univ., 83 F. Supp. 2d 547, 549 (E.D. Pa. 2000); Johnson v. Cook Composites and Polymers, Inc., No. 99-4916 (JEI), 2000 U.S. Dist. LEXIS (D. N.J. Mar. 3, 2000). In fact, *Occidental* definitively construed other procedural provisions of Title VII, but provided little guidance on this one.

143. 42 Fed. Reg. 47,828, 47,831 (Sept. 22, 1977). The Commission made this statement in response to a public comment that took the position that the Commission lacked legal authority to promulgate this rule. To the extent that compliance with the time period was considered to constitute an "exhaustion of administrative remedies" requirement, the Commission's position was consistent with the established principle that exhaustion is excused when it would be futile. *See* Kenneth C. Davis & Richard C. Pierce Jr., Administrative Law Treatise § 15.3 (3d ed. 1994); Kenneth C. Davis, Administrative Law Treatise § 20.07 (1958).

> Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.[144]

C. *The Question of Consistency*

Whether Section 1601.28(a)(2) is a legally permissible agency interpretation of Title VII is a question of long standing. As will be discussed further, Title VII respondents have attacked the rule on various grounds and theories over the past quarter century, and the courts have not only given conflicting answers to the question, but have sometimes given significantly different rationales even in support of the same answers. The district courts have long been divided on the issue, but the Ninth and Eleventh Circuits, until recently the only two courts of appeals to have considered the issue directly, have consistently upheld the regulation. Although the Supreme Court has not spoken directly to the validity of this regulation, the Court has had other occasions to consider the nature of the Commission's rulemaking authority,[145] and it is against the

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144. 29 C.F.R. § 1601.28(a)(2) (2001).

145. The Court's approach to the degree of deference owed to Commission interpretations of Title VII has not been consistent over time. In a number of early cases, the Court suggested that strong deference should be paid to the Commission's views, although that sentiment was neither universal nor uniform in its application. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34, 91 S. Ct. 849, 854 (1971) ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference [where] . . . the Act and its legislative history support the Commission's construction . . . ."); Espinoza v. Farah Mfg. Co., 411 U.S. 86, 94-95, 98 S. Ct. 1278, 1328 (1973) (Marshall, J.) (citations omitted) ("The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference, but that deference must have limits . . . Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.'"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431, 95 S. Ct. 2362, 2378 (1975) ("The EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress. But they do constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'"); McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 279, 96 S. Ct. 2574, 2578 (1976) (interpretations contained in Commission decisions entitled to "great deference"); General Elec. Co. v. Gilbert, 429 U.S. 125, 140-41, 97 S. Ct. 401, 410-11 (1976) (Rehnquist, J.) (Commission Guidelines are entitled to consideration, but not to the degree of deference accorded rules which Congress has intended to have the force of law or supply a basis for the imposition of liability); Nashville Gas Co. v. Satty, 434 U.S. 136, 142 n.4, 98 S. Ct. 347, 351 n.4 (1977) (Rehnquist, J.) (Commission guidelines entitled to weight where not inconsistent with past Commission interpretations, interpretations of other responsible enforcement agencies, or legislative history); Oscar Mayer & Co. v.

background of Supreme Court precedents more generally concerned with judicial review of agency interpretations of law that the lower federal courts have struggled with this problem intermittently over the years.

The most important development in recent years came with the District of Columbia Circuit's 1999 decision in *Martini v Federal National Mortgage Association*.[146] The *Martini* case began when Elizabeth Martini filed an administrative charge of sexual harassment and retaliation against Federal National Mortgage Association ("Fannie Mae"), her former employer, and several former supervisors

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Evans, 441 U.S. 750, 761, 99 S. Ct. 2066, 2074 (1979) (Commission interpretation entitled to "great deference"); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115, 108 S. Ct. 1666, 1671 (1988) (Marshall, J.) ("[T]he EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. [It] need only be reasonable to be entitled to deference."); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256-57, 111 S. Ct. 1227, 1234-35 (1991) (Rehnquist, C.J.) (Commission policy statement entitled only to *Skidmore* deference). *See also* Crosslin v. Mountain States Tel. & Tel. Co., 400 U.S. 1004, 1005, 91 S. Ct. 562, 563 (1971) (Douglas, J., dissenting) (citations omitted):

> The proper functioning of the various Civil Rights Acts is of critical importance. This Court has recently reemphasized the importance of deference to an administrative interpretation by the agency charged with the initial interpretation of a new law. . . . The court below rejected the administrative interpretation of 706(b). In so doing it requires pursuing a state remedy classified as inadequate by the EEOC.

146. 178 F.3d 1336 (D.C. Cir. 1999). In recent years, the Court has divided on the extent to which determinations should be made under *Chevron*, as opposed to *Skidmore*, and the effects to be given to legislative rules, as opposed to other forms of interpretation. *See supra* pages 344-348. *See also Arabian Am. Oil*, 499 U.S. at 259-60, 111 S. Ct. at 1236-37 (Scalia, J., concurring):

> In an era when our treatment of agency positions is governed by *Chevron*, the "legislative rules vs. other action" dichotomy of Gilbert is an anachronism; and it is not even a correct description of that anachronism to say that *Gilbert* held that the EEOC (as opposed to all agency action other than legislative rules) is not entitled to deference. [In *EEOC v. Commercial Office Products Co.*, we said] that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." I would resolve these cases by assuming, without deciding, that the EEOC was entitled to deference on the particular point in question. But deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.

Justice Scalia's comments in *Arabian American Oil Co.*, concerning possible differences between the theory and practice of deference to administrative interpretations of law, may profitably be compared to *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 118 S. Ct. 818 (1998), in which his opinion for the Court substituted his version of the standard of proof applicable to agency adjudications for that previously and uniformly followed by the National Labor Relations Board, and also criticized the Board for applying the standard in a way that did not, in his view, accurately reflect the announced formulation.

on April 10, 1995, shortly after her discharge.[147] Martini had started work for Fannie Mae in 1988, when she was hired as a debt manager.[148] By 1995, she was earning $71,000 a year and held valuable stock options.[149] In 1994, according to Martini, one of her co-workers, Forrest Kobayashi, "began harassing her because of her sex, humiliating her with abusive comments in the presence of colleagues and subordinates, and excluding her from meetings to which she should have been invited."[150] Martini complained to Linda Knight, her supervisor, about Kobayashi's conduct, but Knight did not solve the problem.[151] Instead, she recommended Kobayashi for a promotion and then asked him to reorganize his department, which he did by eliminating Martini's job.[152]

Pursuant to Martini's request under Section 1601.28(a)(2) of Title 29, Code of Federal Regulations, the Commission issued a right-to-sue letter to her twenty-one days after she filed her charge.[153] Martini filed her federal court action eighty days later, or 101 days after the filing of her administrative charge.[154] In addition to her Title VII claims, Martini also sought relief under the parallel provisions of the District of Columbia Human Rights Act.[155] Fannie Mae moved for dismissal prior to trial, on the grounds that Section 2000e-5(f)(1) of Title VII establishes a 180-day waiting period for the filing of civil actions, and that Section 1601.28(a)(2) of Title 29, Code of Federal Regulations, which permits the issuance of right-to-sue letters (and, thus, the commencement of civil actions) in certain circumstances prior to that time, is inconsistent with that provision of Title VII.[156] The court denied Fannie Mae's motion, and the case proceeded to trial.

Following an eleven-day trial, the jury awarded Martini nearly seven million dollars in damages.[157] In post-trial motions, Fannie Mae renewed its motion to dismiss the case based on the "early" right-to-sue letter and also sought a remittitur. The trial court again

147. *Martini*, 178 F.3d at 1339.
148. *Id.* at 1338.
149. *Id.*
150. *Id.* at 1339.
151. *Id.*
152. *Martini*, 178 F.3d at 1339.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Martini*, 178 F.3d at 1339. The trial judge tendered a single set of instructions for both the Title VII and Human Rights Act claims. *Id.* The jury awarded Martini $153,500 in back pay, $1,894,000 in front pay and benefits, and $3,000,000 in punitive damages under Title VII, as well as $615,000 in compensatory damages and $1,286,000 in punitive damages under the Human Rights Act. *Id.*

denied the motion to dismiss, but granted a remittitur, reducing the damages award to $903,500.[158]

On appeal, a panel of the District of Columbia Circuit created a conflict among the circuits on this issue by holding, under step one of the *Chevron* test, that the Commission's regulation was not a permissible interpretation of Title VII because it was contrary to Congress's intent on the "precise question at issue."[159] The court reached this conclusion based not on a determination that the regulation was inconsistent with any provision of Section 706(f)(1) of Title VII, but on the regulation's alleged inconsistency with the Commission's duty under Section 706(b) to investigate charges of discrimination—a ground which Fannie Mae had not urged, and one upon which no other court had relied in a quarter century of litigation.[160] Speaking for the court, Judge Tatel wrote:

> Thus, neither section 2000e-5(f)(1)'s language nor the legislative history cited by Fannie Mae reveals "the unambiguously expressed intent of Congress" on "the precise

158. *Id.*

159. *See id.* at 1343.

160. Indeed, the court rejected a number of other arguments before ultimately deciding in favor of Fannie Mae on this ground. For example, the court rejected the argument that the Supreme Court already had decided the issue in *Occidental Insurance Co. v. EEOC*, 432 U.S. 355, 361, 97 S. Ct. 2447, 2452 (1977). As the court of appeals noted, the issue was neither raised nor decided in that case, and the language upon which Fannie Mae relied was purely *dicta*. *Martini*, 178 F.3d at 1341-42. The court also rejected Fannie Mae's *expressio unius* argument, that is, the argument that Congress, by providing expressly that a right-to-sue letter would issue after 180 days, necessarily intended that a right-to-sue letter not issue before that time. Without support from the structure or legislative history of Title VII, the court thought that maxim "too thin a reed to support the conclusion that Congress has clearly resolved [the] issue." *Id.* at 1343 (citation omitted). The court also was unpersuaded by Fannie Mae's argument that its construction of the statute was required by the parallel nature of the 180-day period provision and the thirty-day period for Commission suits contained in the first sentence of Section 706(f)(1). "On numerous occasions, both the Supreme Court and this court have determined, after examining statutory structure, context, and legislative history, that identical words within a single act have different meanings." *Id.* The court also rejected Fannie Mae's related argument that "private suits within 180 days would impermissibly upset Title VII's enforcement scheme in cases where timely EEOC-negotiation is improbable." *Id.* at 1344. Finally, the court was unconvinced by Fannie Mae's argument that Congress,"[b]y choosing a 180-day window for informal resolution of charges despite knowing that many charges would not be resolved within one hundred eighty days, . . . clearly intended the 180-day period to be the minimum time complainants must wait before going to court, even if EEOC processing would be futile." *Id.* at 1345. The legislative history upon which Fannie Mae relied contained "the same ambiguity as the statutory language itself: Did Congress simply intend to *guarantee* the right to sue after 180 days, or did it further intend to *prohibit* private suits within 180 days?" *Id.* (emphasis added by court).

> question at issue" in this case. . . . If our inquiry were to end here, we likely would agree with the Ninth and Eleventh Circuits that the early right-to-sue regulation does not violate section 2000e-5(f)(1). Under *Chevron's* first step, however, we have a duty to conduct an "independent examination" of the statute in question, . . . looking not only "to the particular statutory language at issue," but also to "the language and design of the statute as a whole" . . . .
>
> Section 2000e-5(b) prescribes the EEOC's duties once a charge is filed. . . . It says that the Commission "shall" investigate the charge and "shall" make a reasonable cause determination "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." . . . Thus, although the statute allows some flexibility in the timing of reasonable cause determinations, the Commission's duty to investigate is both mandatory and unqualified. Yet an early right-to-sue notice typically terminates EEOC investigation of the charge, . . . precisely what happened in this case. . . . We cannot square this early termination of the process or the regulation authorizing it, . . . with section 2005-5(e)'s express direction to the Commission that it investigates all charges.
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> Of course, Fannie Mae does not challenge [the regulation permitting early termination of the Commission's investigatory process], but we think that section 1601.28(a)(2) alone violates section 2000e-5(b) of the statute for the same reason. Even in the absence of a regulation formally terminating administrative processing, issuance of an early right-to-sue letter would have the same effect. We think it implausible that an agency as chronically overworked as the EEOC would either begin or continue to investigate charges for which it has authorized an alternative avenue of relief. In most such cases, the charge will simply go to the bottom of the pile. Although after 180 days this result comports with congressional intent, . . . prior to 180 days it conflicts with section 2000e-5(b)'s unambiguous command.[161]

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161. *Id.* at 1345-46 (citations omitted). Whether the court was entitled to make assumptions about the way in which the agency was likely to enforce the law, in view of its case load, is a question addressed in subsequent decisions. *See infra* Part IV.E. Significantly, the court also failed to consider the possibility that Congress's use of the word "shall" was intended to signal something other than a

Based on this analysis, the *Martini* court held that Title VII could not be construed to permit either the issuance of a right-to-sue letter to a charging party, or the subsequent filing of a federal lawsuit by the charging party, within a period less than 180 days after the administrative filing of a charge of discrimination. The court held that the Commission's regulation was inconsistent with that understanding of Title VII and therefore invalid.

IV. THE SEVERAL PHASES OF CASE LAW

For purposes of this analysis, it may be useful to divide the case law into four periods. The first, which contains only a few relevant, reported cases (none of which directly addresses the question presented here), is the period from the initial implementation of the Civil Rights Act of 1964 to 1972, the date of the amendments made by the Equal Employment Opportunity Act of 1972. The second period consists of the interval between the 1972 amendments and the announcement of the Supreme Court's 1984 decision in *Chevron*. The third period consists of the "*Chevron* era" decisions, that is, the cases decided from the time of the *Chevron* decision until the announcement of the District of Columbia Circuit's decision in *Martini* in 1999. The fourth covers the interval between *Martini* and December 2000.

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categorical, mandatory directive. *See, e.g.*, Martinez v. Lamagno, 515 U.S. 417, 432 n.9, 115 S. Ct. 2227, 2236 (1995) ("Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.' For example, certain of the Federal Rules use the word 'shall' to authorize, but not to require, judicial action."); Tonkawa Tribe of Oklahoma v. Richards, 75 F.3d 1039, 1046 (5th Cir. 1996) ("Because the essence of the 1866 Act was to provide subsistence for the Tribe until such time as the Federal government took the Tonkawas in charge and provided for them, rather than to set apart particular real estate, we conclude that the 'shall' language in question was not mandatory."); Lewis v. Jacksonville Bldg. and Loan Ass'n, 540 S.W.2d 307, 310 (1976) ("Although the word 'shall' is generally construed to be mandatory, it may be and frequently is held to be directory."); Muskego-Norway Cons. Schs. Joint Sch. Dist. No. 9 v. Wisconsin Employment Relations Bd., 32 Wis. 2d 478, 485 (Wis. 1967) ("shall" may be mandatory or directory); Allen County Dep't of Public Welfare v. Ball Mem'l Hosp. Ass'n, Inc., 252 N.E.2d 424, 427 (Ind. 1969) ("The general rule in this state, and in most other jurisdictions, is that the words 'shall' and 'may' will sometimes be read interchangeably to prevent defeat of the legislative intent."). More generally, as Professor Davis has pointed out, "[s]tatutes and ordinances generally provide that agencies or officers 'shall' take action against violators," but the reality is that most enforcement is selective and discretionary, rather than mandatory. *See* Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 163 (1971). Of course, the word "shall" sometimes is used to signal a directive that is categorical and mandatory. *See, e.g.*, Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S. Ct. 956, 962 (1998) ("the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion").

A. Early Cases and Commentary Under the 1964 Act: Exploring The Power of Technical Defenses

The Commission's practice of issuing "early" right-to-sue letters apparently was longstanding by the time that the Commission formulated Section 1601.28(a)(2) in 1977. While it is clear that the practice antedated the regulation, it is not clear exactly when the practice developed.[162] Before the adoption of the Equal Employment Opportunity Act of 1972, charging parties may have sought "early" right-to-sue letters for the purpose of seeking immediate equitable relief, but that possibility is not necessarily confirmed by the reported case law.[163] In the ordinary case, in which interlocutory equitable relief was not being sought, it might have seemed that the statutory thirty-day time period for agency investigation and conciliation efforts (even when extended to sixty days) was sufficiently short to cause most charging parties to wait out the completion of the agency process, at least when that occurred within the thirty or sixty-day period. In addition, the administrative process under Title VII was said to be designed with lay litigants in mind, and many charging parties in those days (except for those involved in significant test cases) would not have been represented by counsel during the administrative phase. Many charging parties doubtless would have needed the thirty or sixty days to try and find a lawyer willing to take their case, while others might have chosen to wait out the statutory period before asking the court to appoint counsel to represent them.[164] In any event, the earliest set of reported cases does not include cases involving the validity of "early" right-to-sue letters or their legitimacy and permissibility.

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162. *See, e.g.*, Howard v. Mercantile Commerce Trust Co., 8 Empl. Prac. Dec. (CCH) P9842 (E.D. Mo. 1974) (finding that the words "within one hundred and eighty days" connote some measure of flexibility); Gary v. Indus. Indem. Co., 7 Empl. Prac. Dec. (CCH) P9224 (N.D. Cal. 1973) (finding there was no jurisdictional bar to actions where the Commission issues a right-to-sue notice despite failure to exhaust the full one hundred eighty day period).

163. Indeed, later case law reflects that some charging parties simply filed their federal court lawsuits and requests for immediate equitable relief without having requested or received a right-to-sue letter, thus raising the question whether a later-received right-to-sue letter should relate back to the date on which the lawsuit was filed. *See, e.g.*, Drew v. Liberty Mutual Ins. Co., 480 F.2d 69 (5th Cir. 1973). *But see* Collins v. Southwestern Bell Tele. Co., 376 F. Supp. 979, 983 (E.D. Okla. 1974) (arguing that "in view of the comprehensive nature of the legislative scheme embodied in Title VII, . . . it was the intention of Congress that only the EEOC had the right to temporary or preliminary injunctive relief").

164. *See, e.g.*, H. Kessler & Co. v. EEOC, 472 F.2d 1147, 1152 (5th Cir. 1973) ("competent lawyers are not eager to enter the fray in behalf of a person who is seeking redress under Title VII").

On the other hand, this set of cases does contain several decisions in which defendants interposed other technical arguments aimed at leveraging the Commission's seeming inability to keep current with its workload into a means of avoiding a judicial determination on the merits of the charging party's claim of discrimination.[165] In these cases, the defendants sometimes argued that the Title VII claim should be dismissed on statutory "exhaustion" grounds. According to this argument, exhaustion did not simply mean that charging parties were required to show that they had filed a charge and given the Commission thirty (or sixty) days in which to attempt conciliation; charging parties also would be required to show that the Commission actually had made efforts to conciliate the charge during that period. On this reasoning, lawsuits would be subject to dismissal for having been filed too early. Defendants also sometimes argued that the plaintiffs' lawsuits had been filed too late, usually on the ground that the various time periods under Title VII should be cumulated or "stacked," so that the separate statutory periods—ninety days to file a charge with the Commission, sixty days for the Commission to investigate, conciliate, and issue a right-to-sue letter, and thirty days for the charging party to file a lawsuit after receiving a right-to-sue letter—simply became one 180-day period. The statute, of course, does not require the Commission to complete its investigation within any set period of time; nor does it require the charging party to demand a right-to-sue letter at any specific point. The 180-day period could easily elapse without the Commission having completed (or even begun) its investigation and without the charging party having asked for a right-to-sue letter. Thus, given the Commission's apparent inability to process its caseload on a timely basis, together with the lack of sophistication of most Title VII plaintiffs, this conflation of statutory time periods would have resulted in the dismissal of many Title VII claims.

Two additional general points may be made about these early cases. First, although the holdings do not turn on the characterization, it is noteworthy, in light of subsequent developments, that the cases generally refer to the various statutory requirements for filing suit as "jurisdictional" requirements. These references tend to be off-hand, however, and not the product of sustained analysis.[166] Second, the cases sometimes speak in terms of

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165. *See* Comment, *Developments in the Law*, *supra* note 115, at 1202 ("In efforts to impede Title VII actions, respondents have raised a myriad of jurisdictional objections ostensibly designed to protect the conciliation process").

166. *See, e.g.* Jamison v. Olga Coal Co., 335 F. Supp. 454, 458 (S.D. W. Va. 1971) (holding that the thirty-day provision for instituting suit in the district court, like the ninety-day provision for filing administrative charge, is jurisdictional); Washington v. T.G.&Y Stores, 324 F. Supp. 849, 854-55 (W.D. La. 1971)

the deference due to the Commission's construction of the statute, but the courts' methodology normally bespeaks the practice of *de novo* review, with the Commission's interpretation mainly being used by the court as a check on the correctness of its own construction.

The technical defenses pressed in the early cases are well illustrated by the Fifth Circuit's 1969 decision in *Miller v. International Paper Co.*,[167] a race discrimination class action in which the plaintiffs were represented by lawyers from the NAACP Legal Defense Fund and in which the Commission participated as an *amicus curiae*. The named plaintiffs were five African-American employees of International Paper Company who purported to sue on behalf of themselves and certain similarly-situated fellow employees. The defendants were International Paper Company, four local unions, and three international unions. The case was filed in the Southern District of Mississippi, and the trial judge granted summary judgment in favor of the defendants.[168]

In *Miller*, the defendants made the prematurity and lateness arguments described above, but the court of appeals rejected both arguments. The Fifth Circuit first considered the "lateness"

(concluding that there are two jurisdictional requirements under Title VII: (1) party aggrieved by discrimination must file a charge with the EEOC, and (2) party aggrieved by discrimination must receive the statutory notice from the Commission that it has been unable to obtain voluntary compliance). Whether any of the Title VII exhaustion requirements is jurisdictional has remained a controversial point. *See, e.g.*, Gibson v. West, 201 F.3d 990, 993 (7th Cir. 2000).

167. 408 F.2d 283 (5th Cir.1969). It may be argued, of course, that the participation of the NAACP Legal Defense Fund and the Commission in this litigation makes the case exceptional, and that the arguments may have been made in a more thorough and persuasive way than would normally be the case.

168. The flavor of the litigation is well demonstrated by the fact that Chief Judge W. Harold Cox also imposed sanctions against the plaintiffs, ostensibly for their failure to comply with discovery. Costs and attorneys' fees were assessed against plaintiffs because of their refusal to appear for Saturday depositions, which defendants insisted they were required to do, based on notices of deposition that called for the plaintiffs to attend "beginning on Wednesday, July 5, 1967 . . , and continuing thereafter from day to day as the deposition may be adjourned and until the deposition of each of said Plaintiffs named herein shall have been completed." *Id.* at 292. In Chief Judge Cox's view, the plaintiffs were required to comply with the defendants' unusual construction of this language or seek relief from the court. The Fifth Circuit disagreed, holding that the district judge had abused his discretion. *Id.* at 293 ("If the unions' notice had stated that depositions were to be taken on the weekend, the burden may well have been upon the appellants to seek protection. But it is not encumbent upon a party to attempt to obtain an eleventh-hour order protecting himself against an unreasonable construction of the terms of the notice."). *See also* Gerald M. Stern, *Judge William Harold Cox ant the Right to Vote in Clarke County, Mississippi, in* Southern Justice 165-86 (Leon Friedman ed., 1965) (detailing Judge Cox's handling of voting rights cases in Mississippi); Note, *Judicial Performance in the Fifth Circuit*, 73 Yale L.J. 90, 101 n.71, 107 n.87 (1963) (discussing Judge Cox's performance in civil rights cases).

argument, that is, the argument that the time periods should be aggregated or considered together, and that compliance with them should be measured by the overall lapse of time between the filing of the administrative charge and the filing of the lawsuit. The district court had accepted this argument, holding that Section 706(e) did not establish a series of independent time limits which must be met, but a cumulative or "stacked" limitations period, and thus required that a charging party commence litigation in federal district court within "sixty days [of] filing his charge with the EEOC"[169] regardless, presumably, of the Commission's progress (or lack of progress) in investigating and conciliating the charge. If the charging party failed to file within the sixty-day period, according to the district court, "the action and the right of action no longer exist, and the defendant is exempt from liability."[170] In this case, the plaintiffs had filed their federal court complaint within thirty days after the Commission had notified them of their right to sue, but the Commission had taken several months to process the charge. Thus, the court filing date was some five and one-half months after the plaintiffs had filed their administrative charges with the Commission. In these circumstances, the federal lawsuit would be deemed timely if the charging party were simply required to file his or her complaint within thirty days after receiving a right-to-sue letter from the Commission, but the stacking theory (in effect, attributing the Commission's delay to the charging party) would have been fatal to the plaintiffs' claims.[171]

The court of appeals rejected the district court's reading of the statutory time limits on both logical and congressional intent grounds. The Fifth Circuit found the district court's construction implausible on logical grounds because, under the district court's view, an action might be deemed untimely even in cases in which the Commission had taken no more than sixty days to investigate and attempt conciliation, and the charging party had filed her

169. *Id.* at 285 (quoting Miller v. International Paper Co., 290 F. Supp. 401, 403 n.1 (S.D. Miss. 1964)).

170. *Id.*

171. In a footnote, the Fifth Circuit pointed out that the Commission's General Counsel had taken the position in 1965 that a right-to-sue letter must be sent "within a reasonable time after the expiration of the statutory period, or after an earlier disposition of the charge," but the Commission took a different view the following year when it adopted regulations providing "that notice will not be served prior to the processing of the charge unless the charging party demands notice." *Id.* at 286 n.12 (citations omitted). The court further noted: "In this same vein, a number of district court decisions have held that the limitation period on conciliation is directory rather than mandatory." *Id.* (citations omitted).

lawsuit within thirty days of receiving notice of her right to sue. The court observed:

> Since by the explicit terms of section 706(e) the EEOC has up to sixty days to attempt conciliation, the limitation period applicable to the complainant could in no event be sixty days after the filing of charges with the EEOC. By stacking the thirty-day post-notice period on top of the sixty-day conciliation period it would not be completely unreasonable to argue that the applicable limitation period is ninety days from the filing of charges. But even that construction is untenable. Suppose, for example, a party files a charge with the EEOC and the latter, after holding the charge for exactly sixty days, mails notice of failure to effect voluntary compliance; the charging party receives the notice two days after mailing and then on the thirtieth day thereafter files suit in the district court. Here, every term of the statutory provision has been complied with and yet, if the aggregated periods fixed the time within which suit must be filed, the charging party would be two days too late. The logical discrepancy is a clear portent that the two time periods provided in section 706(e) were not intended to apply as an aggregation.[172]

The court of appeals also based its decision on the legislative history of Title VII, tracing the apparent ambiguity in the final version of the statutory time limitations to the complicated evolution of those provisions during the legislative process. The court noted that the original version of Title VII (H.R. 405) would have given both investigatory and enforcement powers to the Commission, but the Commission's power to enforce the statute had been deleted in a subsequent iteration of the bill (H.R. 7152).[173] At the same time, the Commission had been invested with the authority to institute a civil action on behalf of the charging party. Still later in the legislative process, however, Congress deleted the Commission's authority to commence civil actions on behalf of private parties, leaving charging parties solely to their own devices. As the ongoing legislative process altered positions with respect to the preferred means of enforcing the statute, there were significant consequences for the time periods set forth in the draft legislation. If authority which previously had been given entirely to the Commission were to be divided between the Commission and private parties, the time for exercising that authority also would

172. *Id.* at 285-86 (footnote omitted).
173. *Id.* at 286-87.

have to be apportioned. Thus, as the court of appeals pointed out in *Miller*:

> Section 707(b) of H.R. 7152, as drawn when it reached the Senate, gave the EEOC ninety days after receiving the charging party's complaint to file suit. . . . A serious wrinkle appeared in the legislative fabric, . . . when the right to bring suit was vested exclusively in the charging party. The drafters of the bill appear simply to have allocated the first sixty days of the original ninety-day limitation period to the EEOC's conciliation efforts and the last thirty days to the grievant's right to file suit, without any consideration of the relationship between the two separate periods.[174]

The court of appeals further noted that "Section 706(e) of the Act provides that notice of failure to conciliate shall be sent by the EEOC and 'within thirty days thereafter' the aggrieved person may file suit."[175] Thus, the court concluded that the limitation period applicable to the charging party does not begin to run "until notice of the failure to obtain voluntary compliance has been sent and received."[176] In a footnote, the court observed that its construction of Section 706(e) was consistent with that given by the Commission, and that the Commission's construction was entitled to "considerable weight" because the Commission was "the administrative body charged with investigation and negotiation of rights under Title VII."[177] Because the court also found that the charging party could not be charged with responsibility for any failure by the Commission to abide by any time limitations applicable to it, the court concluded that the suit should not have been dismissed on lateness grounds.[178]

With respect to the second issue, whether the complaint should be dismissed as premature, the court of appeals rejected the defendants' argument that compliance with the exhaustion requirement not only meant giving the Commission the opportunity to investigate and

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174. *Id.* at 287-88. The court relied on the views of John Chipman Gray:

> The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.

Id. at 287 (quoting John Chipman Gray, The Nature and Sources of Law § 370, at 165 (1948)).

175. *Miller*, 408 F.2d at 287.

176. *Id.*

177. *Id.* at 287 n.18.

178. The court also pointed out that the Commission could not defeat a charging party's right to sue simply by refusing to issue the appropriate notice. *Id.*

engage in conciliation, but also required proof that the Commission actually had engaged in conciliation efforts during the relevant thirty or sixty-day period. The question was significant because the record "does not indicate what, if anything, the EEOC did toward conciliating the appellants' grievances"[179] and the plaintiffs admitted that they were not aware of any efforts the Commission might have undertaken to conciliate their charges.[180] The defendants argued that their position was supported by the legislative history. However, the court of appeals was not persuaded by the defendants' recitation of certain "legislative remarks," which the defendants apparently found "comforting," but which, in the court's view, only generally "extoll[ed] the value of conciliation or . . . ambiguously state[d] the procedural chronology, i.e., that judicial enforcement follows conciliation."[181] The court did not find these legislative comments to be particularly helpful or pertinent to the precise question presented for decision:

> Granting that conciliation is important and that it precedes court action, the question is, what effect should the EEOC's failure to conciliate have upon the charging party's right to file suit? The appellees assume a crushing burden when they attempt to convince this court that the value of conciliation should supersede the value of enforcement. The means devised cannot be more important than the end envisioned. We do not believe that the procedures of Title VII were intended to serve as a stumbling block to the accomplishment of the statutory objective. We agree with the view expressed by Judge Butzner in *Quarles v. Philip Morris, Inc.*:
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> > The plaintiff is not responsible for the acts or omissions of the Commission. He, and the members of his class, should not be denied judicial relief because of circumstances over which they have no

179. *Id.* at 288. As the court of appeals noted, the right-to-sue letters indicated that no reasonable cause determination had yet been made, but that the notices were being issued because of the demand made by counsel for the charging parties based on the fact that "more than sixty (60) days have elapsed since the filing of your charge in the above case." *Id.* at 288 n.21. Significantly, the letter also noted that the administrative process would continue: "The Commission will continue to process your case. You should be aware, however, that failure to institute suit within this thirty-day period may cause you to loose your right to seek judicial relief against the Respondent." *Id.* Finally, the court noted that "[t]he reason given by the EEOC for its failure to attempt conciliation is that it was not staffed and financed sufficiently to cope with the volume of complaints it has received." *Id.* at 289 n.22. Citing the Commission's first annual report, published in 1967, the court observed that "[t]his reason is supported by facts." *Id.*

180. *Id.* at 288.

181. *Id.* at 290 (footnote omitted).

> control. The plaintiff exhausted administrative remedies and satisfied the requirements of the Act by filing a complaint with the Commission and awaiting its advice. He is not required to show that the Commission has endeavored to conciliate. To insist that he do so, would require him to pursue an administrative remedy which may be impossible to achieve. If the Commission makes no effort to conciliate, the remedy is ineffective and inadequate.[182]

Thus, the court held that a charging party was entitled to bring suit if voluntary compliance had not occurred (presumably without regard to the reason for failure of voluntary compliance) within sixty days after filing her charge with the Commission, and the Commission's action or inaction could not affect the charging party's substantive rights under the statute. Finally, the court of appeals reiterated a prior holding of the court: "[A]n effort to conciliate by the EEOC is not in any sense a condition precedent to the charging party's right to seek judicial consideration of his grievance."[183]

In *Miller*, the Fifth Circuit reached substantially the same conclusions that the Seventh Circuit had reached the previous year in *Choate v. Caterpillar Tractor Company.*[184] In *Choate*, the employer had moved to dismiss a Title VII sex discrimination action[185] on the ground that the federal court complaint did not recite

> that the charge filed with the Commission was "under oath" as required by [S]ection 706(a) of the Act or that the plaintiff received from the Commission notice . . . that it had

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182. *Id.* (footnotes omitted).

183. *Id.* at 291. The court in *Quarles* followed an earlier decision by the Eastern District of Virginia, in which the court observed: "All [Title VII plaintiffs] have to do under the Act is to show that voluntary compliance has not been accomplished within the said sixty-day period. To require more would be to deny a complainant the right to seek redress in the courts, resulting wholly from circumstances beyond their control." Evenson v. Northwest Airlines, Inc., 268 F. Supp. 29, 31 (E.D. Va. 1967). *But see* Dent v. St. Louis-S.F. R.R. Co., 265 F. Supp. 56 (N.D. Ala. 1967) (finding that the commission is not required to undertake conciliation of charges within the sixty day period in order for a civil action based on the charge to be timely filed thereafter).

184. 402 F.2d 357 (7th Cir. 1968).

185. Choate charged in her complaint that she had been denied work at Caterpillar, being told that "she would not be given a job for the reason that as long as men were available for beginning factory jobs, men would be hired to the exclusion of women." *Id.* at 358.

> been "unable to obtain voluntary compliance by Caterpillar, and that . . . the action was barred by reason of the time limitations contained in the statute."[186]

The district court granted the motion, holding that "resort to the remedy of conciliation is a jurisdictional prerequisite to the right to file a civil action," and that "the filing of a verified charge with the Commission is necessary to invoke the statutory enforcement procedures."[187]

The court of appeals reversed. First, the Seventh Circuit held that the administrative verification requirement was directory and technical, rather than mandatory and substantive, that it related only to the administrative features of the statute, and that noncompliance could have no bearing on the charging party's ultimate right to file a lawsuit.[188] The court of appeals concluded:

> Given the fact that the administrative remedy alone may be insufficient to vindicate the rights of aggrieved parties, we believe that it would be unnecessarily harsh and in derogation of the interests of those whom the Act was designed to protect to interpret the statutory language as denying substantive rights in the district court because of procedural defects before the Commission.[189]

Second, the court of appeals rejected the argument that the complaint should be dismissed because of the plaintiff's failure to support her complaint with allegations concerning the Commission's efforts to effectuate a conciliation of the charge. All that is required, the court said, is that it be clear that the Commission had the "opportunity to investigate and conciliate," and the complaint demonstrated on its

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186. *Id.* at 359.

187. *Id.*

188. *Id.* Significantly, however, the court did not question the district court's characterization of the filing requirement as a "jurisdictional prerequisite." Indeed, the court noted that there were only "two additional jurisdictional prerequisites . . . first, a notification to the aggrieved party by the Commission that it has been unable to obtain voluntary compliance and, second, the action must be filed within thirty days after the notification." *Id.* The Seventh Circuit did not cite any authority to support this characterization, but simply assumed the proposition to be true, an assumption which seems regularly to have been indulged by the courts during this period.

189. *Id.* at 360. The court further noted that the Commission's treatment of the merits of an unsworn charge should be considered a permissive waiver of that requirement, a view the court found to be supported by a recently-adopted Commission regulation which permitted charging parties to amend their charges to "cure technical defects and omissions, including failure to swear to the charge." *Id.*

face that that was the case.[190] Finally, the Seventh Circuit rejected the employer's contention that the various time periods should be cumulated to yield the conclusion that the complaint was filed too late.[191]

Shortly after the Fifth Circuit decided *Miller*, the Ninth Circuit also rejected the notion that the time periods set forth in Title VII should be "stacked." In *Cunningham v. Litton Industries*,[192] the district court had dismissed a Title VII sex discrimination complaint on the ground that it had not been filed within 180 days of the date on which the act of discrimination allegedly had occurred.[193] The court of appeals reversed, holding that Section 706 should not be read as "providing for any gross one hundred eighty day period . . . within which a civil action must be filed," that "Commission action and issuance of notice within sixty days is not a condition precedent to an aggrieved person's right to sue" and that "the 30 day period within which suit may be filed in federal district court begins to run when the aggrieved party receives notice of failure to effect voluntary compliance from the EEOC, regardless of the period of time the Commission has taken to process the charge."[194] Three years later, in

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190. *Id.* at 361. The Commission had that opportunity between March 14, 1966, when the charge was filed, and October 5, 1966, when the reasonable cause letter issued. *Id.* The court observed:

> A complainant may have no knowledge when he receives the required notification of what conciliation efforts have been exerted by the Commission. And more importantly, even if no efforts were made at all, the complainant should not be made the innocent victim of a dereliction of statutory duty on the part of the Commission.

Id. (footnote omitted). Two years later, in *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 488 (7th Cir. 1970), the Seventh Circuit noted the "flexible interpretation" that the conciliation requirement had been given by other courts, concluding that "[a]ctual conciliation or even an attempt at conciliation by the EEOC no longer presents a jurisdictional barrier to filing suit in a district court." The Seventh Circuit emphasized the importance of avoiding "unnecessarily harsh" requirements under a statutory scheme that depended for its enforcement on actions by lay people untrained in the law, and noted that "the policy in favor of conciliation should not be transformed into a technical device used to obstruct the enforcement of prohibitions against racial discrimination in employment and to deny relief to those Congress has sought to protect." *Id.* at 488, 489.

191. *Choate*, 402 F.2d at 361. "Although certain time limits affirmatively appear in the Act, . . . the time period within which the Commission must notify the complainant after its attempt to obtain a voluntary compliance is nowhere prescribed. Consequently, the statute contains no definite overall time limitation which could bar the instant suit." *Id.*

192. 413 F.2d 887 (9th Cir. 1969).

193. The administrative charge was filed with the Commission on September 14, 1966. *Id.* at 889 n.2. The Commission made a reasonable cause determination on March 30, 1967, and issued a right-to-sue letter on June 7, 1967. *Id.* at 889.

194. *Id.* at 890. Among other things, the court found support for its decision in

Jefferson v. Peerless Pumps Hydrodynamic Division of FMC Corporation,[195] the Ninth Circuit also determined that "an EEOC investigation, finding of reasonable cause, and attempt at conciliation [are] not . . . condition[s] precedent to a grievant's right to sue in federal court."[196] The court further stated:

> The statute does not condition an individual's right to sue upon the EEOC's performance of its administrative duties. The grievant need not wait for the EEOC to complete its investigation, make its finding, or attempt a conciliation. . . . Once the grievant has given the EEOC an opportunity to make an investigation and attempt a conciliation, and he has been notified that the EEOC has been 'unable' to do so, he may bring his cause into federal court.[197]

In 1971, the editors of the Harvard Law Review summed up the then-current state of Title VII law and pointed out areas in which the statutory scheme could be strengthened. With respect to the procedural requirements set forth in Title VII, the editors noted that the statutory scheme looks in two quite different directions.[198] On the one hand, the statute reflects Congress's intention to provide prompt judicial vindication of Title VII rights. On the other hand, the statute reflects Congress's apparent intention that informal means of conciliation and persuasion be given a chance to work, notwithstanding the fact that these processes may lead to delay. In the editors' view, however, the statutory scheme allowed ample

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Regulation 1601.25a which extended the time for investigation and conciliation in all cases from thirty to sixty days and also provided that:

> [T]he Commission shall not issue a notice . . . prior to a determination under § 1601.19 or, where reasonable cause has been found, prior to efforts at conciliation with respondent except that the charging party or the respondent may upon the expiration of sixty days after the filing of the charge or at any time thereafter demand in writing that such notice issue and the Commission shall promptly issue such notice to all parties.

29 C.F.R. § 1601.25a (1968). The same regulation provided that issuance of a right-to-sue letter "does not terminate the Commission's jurisdiction of the proceeding, and the case shall continue to be processed." *Id.*

195. 456 F.2d 1359 (9th Cir. 1972). In granting summary judgment, the district court had found that it lacked jurisdiction for three reasons: (1) the passage of more than ninety days between the filing of the administrative charge and the commencement of the federal court action; (2) the plaintiff's alleged failure to file with the state agency; and (3) the Commission's failure to "exhaust its powers" by making a reasonable cause determination and attempting to obtain voluntary compliance. *Id.* at 1360.

196. *Id.* at 1361.

197. *Id.*

198. Comment, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109 (1971).

room for the courts to effectuate a resolution of the tension between these conflicting policy concerns:

> [S]ince at least some of the jurisdictional requirements formulated in deference to conciliation are not unambiguously declared in the Act, courts are often free to determine for themselves whether conciliation is really serving the ends intended for it, and thus to give the conciliation policy as much force as experience warrants.[199]

The editors noted that the conciliation process had several "inherent" weaknesses, principally the Commission's lack of enforcement authority, which substantially impaired its credibility in the conciliation and persuasion process.[200] According to the editors, these inherent weaknesses were aggravated by "the fact that the EEOC is physically unable to perform its conciliatory function within the time limits afforded by Title VII."[201] Thus, the editors observed:

> The EEOC has only sixty days from the date the charge is filed to investigate for reasonable cause and to seek conciliation before the charging party may commence his civil suit. But the EEOC's present backlog is such that there is a four to five month delay before investigation begins, and beyond that, the EEOC takes an average of about twenty months to complete the conciliation process. While this administrative incapacity suggests that the full potential of the EEOC-administered conciliation process for eliminating job discrimination has never been tested, it also militates against a court's enhancing the importance of conciliation in the present statutory scheme.[202]

Significantly, the editors suggested that the Commission should exercise "prosecutorial discretion" in determining which charges to investigate and attempt to conciliate, an enforcement strategy for which they found ample authority in the statute:

> [G]iven the fact that the EEOC lacks the resources to conciliate all cases where reasonable cause is found, some rational way to further reduce the cases subject to conciliation should be developed. Although the statute provides that the EEOC "shall endeavor" to conciliate cases wherein reasonable cause has been found, that language can hardly be construed to withhold from the Agency prosecutorial

199. *Id.* at 1200.
200. *Id.* at 1200-01.
201. *Id.* at 1201.
202. *Id.* at 1201-02.

> discretion to decide which cases it will decide to conciliate first. Rather than get to no charges within a reasonable period, the EEOC would do well to direct its immediate conciliatory efforts toward those cases which present a fair likelihood of successful conciliation and which have a significant public impact. Cases meeting only the latter criterion should be immediately referred to the Justice Department as a candidate for a pattern and practice suit. The EEOC should send notice to a complainant whose case has been deferred that while the charge has merit, the Commission will be unable to attempt conciliation within the sixty days allotted. He should be informed that at the end of the period he may bring suit or wait in line for conciliation, but that those complainants waiting in line are not taken on a first-come, first-served basis. Of course, complainants whose charges have no merit would continue to receive no-cause letters.[203]

The editors' analysis is persuasive in several respects. Certainly, it makes sense for the Commission to establish priorities in the face of a demand for its services that greatly exceeds its resources, particularly if the discretion to do so can be found in its statutory grant of authority.[204] Moreover, assuming that the statute does not preclude the Commission from categorically declining to attempt conciliation in cases that seem not "to present a fair likelihood of conciliation and . . . have a significant public impact," it would have made sense for that class of cases to be diverted immediately to the Department of Justice. On the other hand, if it is clear, because of the great demands placed on the Commission's limited resources, that charges not selected for conciliation at the outset will never be selected, it is not obvious that any statutory purpose would be served

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203. *Id.* at 1206 (footnotes omitted).

204. An analogy could be drawn to the practice of the National Labor Relations Board, which has long declined to exercise its jurisdiction in certain categories of cases, based on prudential and resource allocation grounds. *See, e.g.*, NLRB v. Pease Oil Co., 279 F.2d 135, 137 (2d Cir. 1960):

> Early in its history, . . . the Board came to the conclusion that if it were to take cognizance of all complaints within its statutory grant of power it would be unable to decide any complaint with the thoroughness and promptitude necessary to achieve the objectives of the Act. Therefore the Board refused to hear certain complaints which clearly were within its statutory power to decide. . . . [A] principal criterion the Board adopted was the volume of interstate commerce engaged in by the employer.

See also 2 Patrick Hardin et al., The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 1639-53 (3d ed. 1992); Thomas Beetham, *1996-97 Annual Survey of Labor and Employment Law*, 39 B.C. L. Rev. 365, 379 (1998).

by requiring those charging parties to await completion of the sixty-day period before bringing suit. In this respect, the charging party with an obviously meritorious claim would be worse off, as the editors noted, than a charging party whose administrative charge was found by the Commission (perhaps erroneously) to be without merit, resulting in the immediate issuance of a right-to-sue letter. An argument could be made, of course, that this disparity does not necessarily make sense in terms of the overall policy of the statute, but that it is required by the language of the statute itself. These difficulties naturally would be exacerbated by lengthening the statutory period from sixty to 180 days, particularly if that extension of the statutory period did not cure the backlog problem. Many of the cases below follow logically from these considerations.

B. Pre-Regulation Cases Under the 1972 Amendments: Exploring The Commission's "Duty to Investigate" and The Purposes of the 180-Day Provision

In 1973, the United States District Court for the Northern District of California issued what appears to have been the first decision in an "early" right-to-sue notice case since the 1972 amendments had extended the statutory period from 60 to 180 days.[205] Although courts throughout the country were soon called upon to determine the

205. *See* Bauman v. Union Oil Co., 400 F. Supp. 1021 (N.D. Cal. 1973). After the enactment of the Equal Employment Opportunity Act of 1972, which also provided for the first time that the Commission could bring a civil action on behalf of a person aggrieved by discrimination, some courts took the position that the Commission was required to bring suit, if at all, within 180 days of the filing of an administrative charge of discrimination. *See e.g.* EEOC v. Kimberley-Clark Corp., 380 F. Supp. 1106, 1112 (W.D. Tenn. 1974), *rev'd*, 511 F.2d 1352 (6th Cir. 1975). Most courts disagreed. *See, e.g.*, EEOC v. Meyer Bros. Drug Co., 521 F.2d 1364, 1364-65 (8th Cir. 1975); EEOC v. Occidental Life Ins. Co. of Cal., 535 F.2d 533, 536 (9th Cir. 1976); EEOC v. Duval Corp., 528 F.2d 945, 947 (10th Cir. 1976); EEOC v. E.I. duPont de Nemours and Co., 516 F.2d 1297, 1298 (3d Cir. 1975); EEOC v. Louisville & Nashville R.R., 505 F.2d 610, 612 (5th Cir. 1974); EEOC v. Cleveland Mills Co., 502 F.2d 153, 154 (4th Cir. 1974). The Supreme Court eventually held that neither the language nor the legislative history of Section 706(f)(1) "imposes [any] limitation upon the power of the EEOC to file suit in a federal court." Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 366, 97 S. Ct. 2447, 2454 (1977). *See also* EEOC v. Appleton Elec. Co., 487 F. Supp. 1207, 1210 (N.D. Ill. 1980) (Commission may continue to investigate a charge of discrimination after issuing a right-to-sue letter, notwithstanding 29 C.F.R. § 1601.28(c), which "basically provides that issuance of a right-to-sue letter automatically terminates processing of a charge brought by a complainant"). The question also was raised as to whether an individual affected by discrimination could bring an action for preliminary relief during the 180-day period, given the fact that the amendments expressly granted such authority to the Commission. *See, e.g.*, Drew v. Liberty Mutual Ins. Co., 480 F.2d 69 (5th Cir. 1973).

validity of "early" right-to-sue letters, the Northern District of California appears to have been the first to speak, and a surprisingly large number of the most influential cases from this period originated in that judicial district. Indeed, the debate during this period can be followed largely through the jurisprudence of the Northern District of California.

In *Bauman v. Union Oil Company*,[206] an employer sought dismissal of a sex discrimination complaint on several jurisdictional grounds, including the contention that the court lacked jurisdiction because the Commission had issued right-to-sue letters in a period less than 180 days after the filing of the respective administrative charges.[207] The employer argued "that before a valid right to sue letter may issue, the existence of which is necessary to this Court's jurisdiction, the Commission must, absent dismissal, hold the charges in abeyance for a period of 180 days."[208] According to the employer's argument, a right-to-sue letter issued before the expiration of that period is void and "cannot confer jurisdiction on the Court."[209]

The *Bauman* court rejected these arguments. According to the court, the alleged prematurity of the right-to-sue notices was not material because the disputed notices involved claims that related back to the plaintiff's original charge, and those claims were therefore covered by an earlier, concededly proper right-to-sue letter.[210] The court also noted, however, that it would have rejected the employer's argument in any event:

> Even if defendant's contentions were made with respect to an original charge upon which a right to sue letter was issued before the expiration of 180 days the Court seriously doubts

206. 400 F. Supp. 1021 (N.D. Cal. 1973).

207. The jurisdictional arguments also involved issues relating to compliance with the requirement that the Commission defer action pending consideration of a charge by qualifying state agencies. *See id.* at 1024-26.

208. *Id.* at 1027.

209. *Id.*

210. The Second Circuit carried this reasoning a step further in its 1975 decision in *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975). In that case, a right-to-sue letter had issued three days after the filing of the plaintiff's charge. Although the court thought that compliance with the 180-day rule was a jurisdictional prerequisite to suit, the court held that "rigid insistence on meticulous observance of technicalities unrelated to any substantive purpose is inappropriate." *Id.* at 412 (citation omitted). Compliance was excused in *Weise* because another employee's charge had been pending against the same employer for more than the required time, and it was clear that no conciliation was likely. *Id.* at 412. The court observed: "To require the EEOC to hold the second charge for 180 days would not have advanced the conciliation purposes of the Act and would only have served to delay the proceedings, contrary to the Act's policy of handling claims expeditiously." *Id.*

> that a jurisdictional problem would be presented. The Court has found no case which construes the 180 day requirement. However, several courts have held that the Commission's failure to observe the sixty day requirement contained in the former [Section] 2000e-5(e), which is the predecessor to the present statute, did not render a right-to-sue letter defective... In *Jefferson* . . . the court said:
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> > The statute does not condition an individual's right to sue upon the EEOC's performance of its administrative duties. The grievant need not wait for the EEOC to complete its investigation, make its finding, or attempt a conciliation. He may demand notification that the EEOC has been "unable" to effect conciliation within the lime limit set by [Section] 2000e-5(e). . . . Once a grievant has given the EEOC an opportunity to make an investigation and attempt a conciliation, and he has been notified that the EEOC has been "unable" to do so, he may bring his cause into federal court.[211]

The analysis articulated in *Bauman* was soon followed by another judge of the Northern District of California in *Gary v. Industrial*

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211. *Bauman*, 400 F. Supp. at 1028. The court also found no reason to believe that Congress had intended to call into question the rationale of these cases when it enacted the 1972 amendments. "This rationale is particularly applicable in light of the large backlog of cases which makes it unlikely that the Commission will reach, much less investigate and conciliate, complaints such as that of plaintiff within 180 days." *Id.* at 1028-29. In *Black Musicians of Pittsburgh v. Local 60-471, American Fed'n of Musicians, AFL-CIO*, 375 F. Supp. 902 (W.D. Pa. 1974), a case decided at about the same time, another federal district court dealt with the inverse problem, that is, a situation in which a lawsuit was filed before a right-to-sue letter had issued. In that case, the court emphasized that the defendant had not moved to dismiss the premature civil action until after the Commission had completed its administrative process, made a reasonable cause finding, attempted conciliation, and issued a right-to-sue letter. The court observed:

> Asserting one's rights too late is quite a different matter from asserting them too soon. This suit was not proper when it was filed and obviously would have been dismissed had the union moved to do so. But the issuance of the right to sue letter, in effect, validated the pending suit making it unnecessary to file another suit.

Id. at 907 (citation omitted). On the other hand, the court in *Troy v. Shell Oil Co.*, 378 F. Supp. 1042 (E.D. Mich. 1974), held that an employee could not seek preliminary injunctive relief in a federal district court action without having received a right-to-sue letter, notwithstanding the fact that the Commission "had a large backlog of cases and apparently could not or would not act on plaintiff's [charge] with the necessary dispatch." *Id.* at 1044. However, the court in *Troy* also emphasized that the exhaustion principle "is not indiscriminately applied to every administrative procedure specified in the statute, nor is it without its limited exceptions." *Id.* at 1045. Thus, the Commission's "failure to investigate or attempt conciliation . . . will not preclude court action." *Id.*

Indemnity Company,[212] a 1973 race discrimination case. In response to the employer's argument that the court lacked jurisdiction because of the premature issuance of the right-to-sue letter, the court stated that it was "not willing to foreclose plaintiff from this forum under the provisions of a remedial statute on the basis of a technicality."[213] The court noted that the statutory period is intended to "give the parties the opportunity for conciliation," but emphasized that the charging party had afforded the Commission an opportunity to follow its administrative procedures.[214] The Commission was unable to take advantage of that opportunity because of its own workload and priorities. Thus, the court emphasized that "the Commission is not being by-passed; they candidly admitted issuing the right-to-sue letter before passage of the 180 days."[215] The court supported this point by quoting from the Commission's letter to the charging party:

> [B]ecause of the very large backlog of charges pending in this office, the Commission will not be able to reach the subject charge for investigation, nor file suit, nor enter into a conciliation agreement within the 180 day period. We do not believe Congress intended to delay the right of aggrieved persons to file suit under such circumstances. Accordingly, we are honoring your request and hereby issue a notice of right to sue.[216]

The Eastern District of Missouri reached the same conclusion in *Howard v. Mercantile Commerce Trust Company*.[217] Approximately 100 days after the filing of Howard's charge, the Commission advised Howard that its backlog would prevent it from processing the charge within the 180-day period, issued a right-to-sue letter, and closed its file.[218] The employer moved to dismiss Howard's subsequently-filed lawsuit on the grounds that the Commission had exclusive jurisdiction during the 180-day period and that a right-to-sue letter issued during that period was null and void.[219] The *Howard* court rejected this argument, holding that "the words 'within one hundred

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212. 7 Fair Empl. Prac. Cas. (BNA) 193 (N.D. Cal. 1973). In this case, because of deferral to a state fair employment practices commission, the right-to-sue letter was received on March 14, 1973, "approximately 210 days after the original charges were filed with the Commission, but only 150 days after the Commission officially gained jurisdiction of the charges." *Id.* at 194. The civil action was filed sixty days later, on May 18, 1973. *Id.*

213. *Id.*

214. *Id.* at 194-95.

215. *Id.*

216. *Id.* at 195.

217. 8 Empl. Prac. Dec. (CCH) P9842 at 6502 (E.D. Mo. 1974).

218. *Id.* at 6503.

219. *Id.*

and eighty days' connote some measure of flexibility [and] could more easily be construed as a maximum than as a minimum time period."[220] The court also rejected the employer's exhaustion of administrative remedies argument, noting that a Title VII plaintiff has only two statutory obligations: (1) to file a charge with the Commission, and (2) to receive and act upon the right-to-sue notice.[221] The court further noted, "Both of those requirements have been met in this case, and it is difficult to see what further administrative remedies could be pursued and exhausted by plaintiff when she has been officially notified by the Commission that her file has been closed."[222] The court also was not persuaded by the employer's argument that issuance of the right-to-sue letter was contrary to a then-existing Commission regulation which counseled against the issuance of such letters.[223] "The courts have been very reluctant," the court observed, "to deny private plaintiffs access to the judicial process because of some procedural mistake by the Commission."[224]

In *Jones v. Pacific Intermountain Express*,[225] which was decided in 1975, a judge of the Northern District of California broke ranks with these decisions by granting summary judgment in favor of the

220. *Id.*

221. *Id.* The court based this response on the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 93 S. Ct. 1817, 1822 (1973).

222. *Howard,* 8 Empl. Prac. Dec. (CCH) at 6503.

223. *See* 29 C.F.R. § 1601.25b (1975) (stating that notice shall include (a) a copy of the charge, (b) a copy of the Commission's determination of reasonable cause, and (c) advice concerning his right to proceed in court under § 706(f)(1) of Title VII).

224. *Howard*, 8 Empl. Prac. Dec. (CCH) at 6503. Finally, the employer argued that "if this suit is allowed, the Commission would be able to examine its caseload and issue 'Right to Sue' notices on the same day that a charge is filed, if it determined that it would not be able to process the charge in 180 days." *Id.* at 6504. The court did not analyze the employer's argument, but seemingly concurred in the employer's assumption as to the undesirability of that outcome. The court responded to the argument by asserting that the problem presented in the hypothetical was not present here, where the Commission had the charge under submission for 90 days, and that the courts were well able, in any event, to deal with situations in which the Commission abused its discretion or the employer had been prejudiced by the Commission's action. *Id.*. It is not clear, of course, why it would ever be preferable for the Commission to retain jurisdiction over a case for 90 days or more, rather than issue a right-to-sue letter, if it is clear that the Commission will not be able to devote any substantive attention to it. Moreover, if the Commission knows on the day on which the charge is filed that it will never be able to take any substantive action with respect to the charge, there seems no reason for the Commission to hold the charge for some arbitrary period of delay. The contrary position has more emotional than intellectual power.

225. 10 Fair Empl. Prac. Cas. (BNA) 914 (N.D. Cal. 1975).

defendants on the ground that the case was premature. According to the court, the exhaustion requirement of Title VII means that "private plaintiffs, unlike the EEOC itself, simply may not sue before the 180th day after the filing of the charge with the EEOC."[226] However, in a second 1975 case, another judge of the Northern District of California reached the opposite conclusion. In *Lewis v. FMC Corporation*,[227] the Title VII plaintiff defended his right to bring suit based on an early right-to-sue letter by producing an affidavit from the Commission's District Director. The affidavit stated that "there is no possibility that the EEOC could investigate plaintiff's far-reaching charge against FMC within the 180-day period," and that the Commission's practice in the face of such an impossibility is "to issue, upon request, a right-to-sue letter within the 180-day period."[228] The court found that the Commission's practice was justified:

> The 180-day period is a period within which the EEOC has the power and the duty to conciliate a case. Given the present state of the agency's lack of resources and backlog of charges, however, many far-reaching charges cannot be investigated within the 180-day period. The purpose of the period is to encourage conciliation and voluntary settlement of disputes without litigation. In light of the inability of the EEOC to investigate and the issuance of the right-to-sue letter, it is difficult to conceive of any reason why this court should require the plaintiff to wait 180 days before initiating the lawsuit. In the absence of assistance and participation by the EEOC, the employer and the grieving employee stand in the same posture with respect to possible settlement of their dispute after suit is filed as they do while the charge is pending before the EEOC without any possibility of agency action. Deferral of the filing of the suit until the 180-day period has lapsed would serve only to require four or five months of additional idleness and further delay in reaching and ruling on the merits of the dispute.[229]

In *Budreck v. Crocker National Bank*,[230] which was decided in the year following the *Lewis* decision, Judge Renfrew of the Northern District of California rejected the reasoning of *Howard* and *Lewis*, which he found unfaithful to the statutory language, insufficiently attentive to the legislative history, and contrary to sound policy. Like

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226. *Id.* at 915 (citations omitted).
227. 11 Fair Empl. Prac. Cas. 31 (N.D. Cal. 1975).
228. *Id.* at 34.
229. *Id. See also* Westerlund v. Fireman's Fund Ins. Co., 11 Fair Empl. Prac. Cas. (BNA) 744 (N.D. Cal. 1975) (Carter, J.) (adopting reasoning of *Lewis*).
230. 407 F. Supp. 635 (N.D. Cal. 1976).

the courts in *Howard* and *Lewis*, the *Budreck* court assumed that the statutory language should be read as evidencing a general congressional intent that suits not be filed until the conclusion of the 180-day period. Thus, the question for the court was whether the state of the Commission's docket could justify a departure from that general rule. In determining that this was not the case, the *Budreck* court placed substantial emphasis on the grammar and syntax that Congress used in Section 706(f)(1):

> The wording of the statute is admittedly convoluted, but, in the Court's view, it is not ambiguous. And, while it is true that the statute does not state that "No action shall be brought unless * * *," it is also true that Section 2000e-5(f)(1) is the *only* statutory authorization for a private civil action under Title VII and that is expressly conditional. The statute appears to authorize private civil actions only where both of two conditions precedent have been met: (1) 180 days have passed since the filing of the charge, or it has been sooner dismissed, and (2) a right-to-sue letter has thereafter been obtained.[231]

The court could accept the plaintiff's argument, therefore, only by "ignor[ing] the conditional 'If * * *' phrasing of the statute."[232] In addition, the court noted that the relevant parts of the legislative history were framed in the same conditional language and thus provided further support for the "jurisdictional interpretation of the 180-day provision."[233] Based on its reading of the legislative history, the court thought that the Commission's policy was simply the redrawing of a line that Congress already had drawn and was based on circumstances that were already known to Congress when it drew that line:

> Because the 1972 amendments were enacted with specific recognition of the delay in Commission action and of the role of the private civil action in alleviating that problem, the conclusion seems inevitable that the 180-day provision represents a carefully considered Congressional judgment of the proper accommodation between dual concerns. On the one hand, Congress was concerned that the vindication of legitimate claims not be excessively delayed, and, on the other, it was concerned that the preferred process of conciliation of disputes have an ample opportunity to work.[234]

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231. *Id.* at 639 (emphasis in original) (footnote omitted).
232. *Id.* at 639.
233. *Id.* at 640.
234. *Id.* at 641.

The *Budreck* court found the argument that prevailed in *Howard* and *Lewis* to be "superficially attractive," but ultimately unpersuasive.[235] That argument failed to account for the fact that Congress was well aware of the Commission's administrative problems when it extended the time period from sixty to 180 days and, indeed, that the extension was in response to those problems. Moreover, according to the *Budreck* court, the argument gave insufficient attention to the purely supporting role that Congress intended for the federal courts in this area: "Although the federal courts have been given an important role [in remedying employment discrimination], it is a secondary role to that of the Commission, and because federal courts are courts of limited jurisdiction, the scope of their role as established by Congress must be accepted."[236] The court further stated that "[t]he unfortunate effect of the Commission's policy of immediate issuance of right-to-sue letters is . . . to make the federal courts the primary, rather than secondary, forum for Title VII disputes."[237] Thus, in the court's view, insistence on strict compliance with the time limits serves the purpose of delaying adjudication of these claims by the federal courts, thereby furthering the policy of the statute to afford only a secondary role to the federal courts in this area. Finally, the court did not see the delay as wholly unproductive from the viewpoint of conciliation because, "even without the intervention of the Commission, informal conciliation may be possible in some cases."[238]

Judge Renfrew revisited the subject of early right-to-sue letters the following year in *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*.[239] The court

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235. *Id.* at 643. The court summarized the argument as follows:

> The purpose of the 180-day provision is to allow time for the commission to attempt to conciliate the underlying dispute. If the backlog of cases before the Commission is so great that the Commission is willing to certify that it will be unable to reach a particular claim during the 180-day period, no statutory purpose would be served by enforcing the provision. Therefore, the argument concludes, Congress could not have intended to require such an exercise in futility as a prerequisite to the bringing of a civil action.

Id. at 642-43.

236. *Id.* at 643 (citation omitted).

237. *Id.* On the other hand, the issuance of "early" right-to-sue letters may do nothing more than cause cases to reach the federal courts somewhat earlier than they otherwise would, and any reduction in the number of cases that might be filed in the event that the charging party was required to wait might be an ambiguous factor at best, with nothing to suggest that it is only non-meritorious cases whose potential plaintiffs give up as a result of the delay.

238. *Id.* at 644.

239. 440 F. Supp. 506 (N. D. Cal. 1977). The complaint in this case alleged that

began its discussion of the exhaustion issue by paraphrasing the language of Section 706(f)(1). The words used by the court in paraphrasing the statute were carefully chosen. According to the court, Section 706(f)(1) "requires that [persons aggrieved by discrimination] file timely charges with the EEOC, defer filing suit for 180 days after those charges are filed, and obtain a right-to-sue letter from the EEOC."[240] As the court noted, "[t]here is a sharp division in the authorities as to whether this requirement is jurisdictional."[241]

In *Eldredge*, the plaintiffs sought a temporary restraining order and preliminary injunctive relief based on a right-to-sue letter issued eighteen days after the Commission had acquired jurisdiction over the charge. The *Eldredge* court rejected the plaintiffs' contention that a request for a temporary restraining order and preliminary injunctive relief "made compliance with the statutory period unnecessary for all purposes," but held that "in the circumstances of this case . . . jurisdiction was properly assumed to entertain those motions, and that the passage of 180 days prior to hearing on a motion to dismiss cured the jurisdictional defect that would otherwise have required dismissal of the action for permanent relief."[242] The court explained its reasoning as follows:

> The result of [issuing the early right-to sue letter] was to foreclose any possibility of conciliation—either formal or informal—prior to the hardening of positions and narrowing of issues that inevitably follow the assumption of roles as adversary parties in a judicial proceeding, impairing further efforts at voluntary settlement. In the ordinary case, such short-circuiting of the time periods contemplated by the statute frustrates the intention of Congress to promote

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the carpenters' joint apprenticeship and training committee discriminated against women applicants by denying them equal opportunity for placement on the new applicant referral lists used to supply names to union dispatchers for referral of applicants to jobs as beginning apprentices. *See id.* at 509.

240. *Id.* at 515 (emphasis added). It is clear, of course, that this section does not so provide in terms, but that Judge Renfrew's description of the plaintiffs' purported obligation to "defer filing suit for 180 days" is a gloss on the statute based on his previous holding in *Budreck*. The statute itself does not speak in terms of the plaintiffs' duty to defer for 180 days, but of the Commission's duty to notify the charging party of her right to sue if, "within one hundred and eighty days from the filing of such charge . . . , the Commission has not filed a civil action . . . or . . . entered into a conciliation agreement to which the person aggrieved is a party." Section 706 (f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1) (1993). As in many of these cases, *Eldredge* presented a second exhaustion issue, one involving exhaustion of state remedies under Section 706(c).

241. *Eldredge,* 440 F. Supp. at 515 (citations omitted).

242. *Id.*

> conciliation and voluntary settlement. Yet Congress itself recognized, by enacting a provision authorizing the EEOC to seek preliminary relief . . . that the interest in enforcement may outweigh the policy favoring nonjudicial settlement when an aggrieved person is threatened with irreparable injury that imperils the adequacy of any final relief. Congress failed to similarly provide for private litigants, however, and their efforts . . . have met with mixed results. The conflicting results derive from the courts' efforts to accommodate two competing concerns: first, that it would be unfair and unrealistic to require exhaustion where rights are threatened with irreparable harm, a failure to act may permanently foreclose adequate relief, and the EEOC's caseload precludes it from seeking preliminary relief, and second, that to permit individuals to bypass the statutory mechanism in cases where the EEOC does not seek prompt judicial relief would flood the courts with such requests . . . .
>
> Although the issue is currently before the United States Supreme Court [in *Richmond Unified School District v. Berg*], the law of this Circuit at the present time is that in a "limited class of cases" where there exists a high probability of success on the merits and the threat of irreparable harm, a court may entertain a suit to maintain the status quo pending administrative disposition.[243]

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243. *Id.* at 516-17 (citations omitted) (footnotes omitted). The *Eldredge* court relied on the Ninth Circuit's decision in *Berg v. Richmond Unified School District*, 528 F.2d 1208 (9th Cir. 1975), *vacated and remanded on other grounds, Richmond Unified School District v. Berg*, 434 U.S. 158, 98 S. Ct. 623 (1977), notwithstanding three significant differences between the two cases. First, the motion for preliminary injunctive relief had been withdrawn from the calendar in *Eldredge*, so the court was not required to make any findings as to the strength of the plaintiffs' claim, whereas the court in *Berg* had based its holding on its factual finding that "there exists a high probability of success on the merits." *Eldredge*, 440 F. Supp. at 516. In *Eldredge*, the court suggested that an analogue could be found in the Commission's "evaluation of the case as one appropriate for immediate preliminary injunction [which] would appear to satisfy the threshold test that there be some substance to the claim." *Id.* at 517. Second, the plaintiffs in *Berg* were employees seeking relief from threatened changes in the employment relationship and were thus asking for maintenance of the status quo, whereas the plaintiffs in *Eldredge* were seeking admission to a program. Third, the *Eldredge* plaintiffs "arguably sought more than interim relief pending administrative disposition, since the EEOC had prematurely issued its final right-to-sue letter, thus terminating the administrative phase." *Id.* On the other hand, the Commission had issued its right-to-sue letter based on a certification that it would be unable to reach the case within the 180-day period, and no administrative disposition would therefore be forthcoming. In addition, "the prospects of informal settlement are unlikely to have been impaired by the initiation of the suit for permanent relief to any greater extent than they would already have been impaired by the filing of the

In *Milner v. National School of Health Technology*,[244] Chief Judge Lord of the Eastern District of Pennsylvania pointedly rejected the reading of the statutory language that Judge Renfrew had developed in *Budreck* and reiterated with his paraphrase of the statutory language in *Eldredge*. After quoting the language of Section 706(f), Judge Lord stated his view that neither the statutory language itself nor sound policy provides any basis for concluding that the phrase "within 180 days" must be construed to mean "no earlier than 180 days."[245] But Judge Lord's argument was centered on his rejection of the legitimacy of the gloss that Judge Renfrew had put on that phrase:

> Defendants argue that [Section 706(f)] requires a minimum of 180 days for conciliation between the assumption of jurisdiction by the EEOC and the issuance of the right-to-sue letter.
>
> We cannot agree with this argument. The statute does *not* require a minimum of 180 days for conciliation; rather, it requires issuance of a right-to-sue letter within 180 days. The purpose of this subsection is to allow the Commission to attempt conciliation or to file its own civil action before allowing plaintiff to proceed in court. If the Commission determines that conciliation is unlikely, it serves no useful

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motion for a preliminary injunction." *Id.* In the court's view, and based on its responsibility to follow the Ninth Circuit's decision in *Berg*, the plaintiffs properly were before the court on their motion for preliminary injunction, but the question remained as to whether jurisdiction should be assumed over the underlying claim. At least where the prematurity of the right-to-sue letter was the result of a Commission backlog that would have prevented administrative disposition in any event, the court held that no purpose would be served by requiring dismissal of the lawsuit and refiling with the agency. *Id.* at 517-18. The *Berg* decision was vacated and remanded for further consideration in light of *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S. Ct. 347 (1977). *See* Richmond Unified Sch. Dist. v. Berg, 434 U.S. 158, 98 S. Ct. 623 (1977).

244. 409 F. Supp. 1389 (E.D. Pa. 1976).

245. *Id.* at 1392. As the court observed:

> The purpose of this subsection is to allow the Commission to attempt conciliation or to file its own civil action before allowing plaintiff to proceed in court. If the Commission determines that conciliation is unlikely, it serves no useful purpose to insist on the running of the full 180-day period before issuance of the right-to-sue letter.

Id. (citation omitted). In another case, *McGee v. Purolator Courier Corp.*, 430 F. Supp. 1285 (N.D. Ala. 1977), the court stated that "[t]he 1972 Amendments have been correctly interpreted to bar private actions for a period of 180 days after the EEOC charge [has been] filed," but offered no reasoning to support its assertion that this was the correct rule, and the plaintiff had not received a right-to-sue letter in any event. *McGee*, 430 F. Supp. at 1287-88.

> purpose to insist on the running of the full 180-day period before issuance of the right-to-sue letter.[246]

The foregoing decisions are representative of the case law during this period. The cases largely discuss the issues in terms of "jurisdiction," but the word does not seem to be used in its most technical sense. Thus, courts that discuss the issue in "jurisdictional" terms do not seem to see the jurisdictional barrier as necessarily insuperable or impenetrable. Those that contend that the Commission has exclusive jurisdiction for 180 days after the charge is filed generally base that contention on the plain language of the statute, but the language is admittedly "convoluted," as Judge Renfrew conceded in *Budreck*, and the argument is most effectively made by paraphrasing the statutory language, as he later did in *Eldredge*. There seems to be no connection between a court's approval of the Commission's practice and the giving of deference to the Commission's views. Courts on both sides of the issue simply approach the issue as a matter of statutory interpretation for their determination, with no discussion of the possibility that any degree of deference should be accorded to the views or expertise of the Commission. Those that find the practice impermissible tend to support their conclusion with the policy argument that Congress intended the courts to have only a secondary role in the enforcement of Title VII, whereas the practice of issuing early right-to-sue letters thrusts them into a primary role. It is ironic, of course, that the courts should attribute such importance to the primacy of the Commission's role in administering the statute, in terms of case processing, while paying so little attention to the Commission's views as to its own jurisdiction, statutory competency, and responsibility.

C. Gilbert, Zipes, and the Commission's Regulation: Title VII and Early Right-to-Sue Letters in the Pre-Chevron Period

In a number of early cases, the Supreme Court, albeit without much discussion or analysis, had held that the Commission's interpretations of its organic statute were entitled to "great deference."[247] By 1976, however, the Supreme Court was moving away from that commitment, and this shift in the Court's approach provides part of the context in which the lower federal courts would evaluate the Commission's new regulation.

In December 1976, the Supreme Court decided *General Electric Company v. Gilbert*.[248] In that case, the Court rejected a Title VII sex

246. *Id.* at 1392 (citations omitted) (emphasis added).
247. *See supra* note 145.
248. 429 U.S. 125, 97 S. Ct. 401 (1976). Congress subsequently enacted

discrimination challenge to an employee disability benefits plan that excluded coverage for pregnancy-related disabilities.[249] Contrary to the decisions of both courts below, the Supreme Court held that the exclusion of pregnancy-related disability benefits did not violate Title VII because the exclusion did not constitute "discriminat[ion] . . . because of . . . sex" under § 703(a)(1) of Title VII.[250] In reaching this conclusion, the Supreme Court emphasized that Congress had not defined "discrimination" under Title VII, paid little attention to the Commission's guideline (let alone to the possibility that Congress might have intended the Commission to play a critical role in giving meaning to that statutory term), and determined that the body of constitutional case law on sex discrimination provided a "quite relevant [resource] in determining whether or not the pregnancy exclusion did discriminate on the basis of sex"[251] in violation of Title VII. In these circumstances, the Court said, "we should not readily infer that [Congress] meant something different from what the concept of discrimination has traditionally meant."[252] Thus, the Court found that its decision in *Geduldig v. Aiello*,[253] which upheld a similar, pregnancy-related exclusion from coverage against constitutional attack, was virtually conclusive with respect to the issue presented in *Gilbert*[254] and

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legislation to overrule this decision and the decision in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S. Ct. 347 (1977). *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555 (codified at Section 701(k) of Title VII, 42 U.S.C. § 2000(k)).

249. The plan provided "nonoccupational sickness and accident benefits to all employees . . . in an amount equal to 60% of an employee's normal straight-time weekly earnings." *General Elec.*, 429 U.S. at 128, 97 S. Ct. at 404. Benefits were provided to employees who were totally disabled, and the maximum term of coverage was twenty-six weeks. *Id.* at 128, 97 S. Ct. at 404. Only pregnancy-related disabilities were excluded from coverage. The trial evidence established that, "with pregnancy-related disabilities excluded, the cost of the Plan to General Electric per female employee was as high as, if not substantially higher than, the cost per male employee." *Id.* at 130, 97 S. Ct. at 405 (footnote omitted).

250. Section 703(a)(1) provides in relevant part that it shall be an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1) (1993).

251. *General Elec.*, 429 U.S. at 133, 97 S. Ct. at 407.

252. *Id.* at 145, 97 S. Ct. at 412.

253. 417 U.S. 484, 94 S. Ct. 2485 (1974).

254. Justice Stevens found this reasoning unpersuasive. In dissent, he observed that:

> The word "discriminate" does not appear in the Equal Protection Clause. Since the plaintiffs' burden of proving a prima facie violation of that constitutional provision is significantly heavier than the burden of proving a prima facie violation of a statutory prohibition against discrimination, the constitutional holding in *Geduldig v. Aiello* does not control the

provided a solid basis for rejecting the Commission's contrary interpretation.

In earlier cases, the Supreme Court had suggested that Commission interpretations would be accorded "great deference," but the Court in *Gilbert* now stated that those interpretations were only "entitled to . . . consideration."[255] That was true, the Court emphasized, because Congress had not conferred upon the Commission "the . . . authority to promulgate rules or regulations,"[256] and "courts properly may accord less weight to . . . guidelines [created in such circumstances] than to administrative regulations which Congress has declared shall have the force of law, or . . . which . . . may themselves supply the basis for imposition of liability."[257] The Court therefore concluded that the value of the Commission's interpretation was to be determined under the test established in *Skidmore v. Swift & Co.*, and, under this test, the Commission's interpretation was entitled to very little weight, being neither a "contemporary" nor a "consistent" interpretation of the statute. In addition, the Commission's interpretation was inconsistent with the scant legislative history on the subject, as well as with the consistent and longstanding interpretation of the Wage and Hour Administrator.[258] Most important, perhaps, was the fact that the Commission's definition of discrimination under the statute did not accord with the "traditional" view of unconstitutional discrimination embodied in the Court's more recent jurisprudence. Speaking for the Court, Justice Rehnquist stated: "In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore*."[259]

In dissent, Justice Brennan took exception to Justice Rehnquist's synthesis of the prior case law relating to the degree of deference due to Commission interpretations. The prior cases had not held that the Commission's interpretations were "entitled to consideration."

> question of statutory interpretation presented by this case. And, of course, when it enacted Title VII of the Civil Rights Act of 1964, Congress could not possibly have relied on language which this Court was to use a decade later in the *Geduldig* opinion.

General Elec., 429 U.S. at 160-61, 97 S. Ct. at 420 (Stevens, J., dissenting).

255. *Id.* at 141, 97 S. Ct. at 410.

256. *Id.*, 97 S. Ct. at 410. In a footnote, the Court acknowledged that the Commission had been given the authority to promulgate "procedural" rules, but that rulemaking authority was not relevant to the issue before the Court. *Id.* at 141 n.20, 97 S. Ct. at 410 n.20.

257. *Id.* at 141, 97 S. Ct. at 410 (citations omitted). The Court did not discuss the deference due to agency interpretations of law made in the course of administrative adjudication.

258. *General Elec.*, 429 U.S. at 144-45, 97 S. Ct. at 412.

259. *Id.* at 143, 97 S. Ct. at 411.

According to Justice Brennan, the prior cases had held that the Commission's interpretations, whether embodied in guidelines or case decisions, should be given "great deference."[260] Moreover, the question presented in *Gilbert* substantiated the rationale and need for this approach:

> However one defines the profile of risks protected by General Electric, the determinative question must be whether the social policies and aims to be furthered by Title VII and filtered through the phrase "to discriminate" contained in § 703(a)(1) fairly forbid an ultimate pattern of coverage that insures all risks except a commonplace one that is applicable to women but not to men.
>
> As a matter of law and policy, this is a paradigm example of the type of complex economic and social inquiry that Congress wisely left to resolution by the EEOC pursuant to its Title VII mandate. See H.R.Rep.No.92-238, p.8 (1972). And, accordingly, prior Title VII decisions have consistently acknowledged the unique persuasiveness of EEOC interpretations in this area.[261]

Justice Brennan not only disagreed with the Court's statement of the legal principle governing review of the Commission's guidelines, but he found little merit in the two principal reasons that the majority advanced for declining to give deference to the Commission's view. The interpretation was not contemporaneous with the statute, Justice Brennan conceded, but that was so only because the Commission, "charged with a fresh and uncharted mandate, [thought] that further study was required before the contours of sex discrimination as proscribed by Congress could be defined."[262] Moreover, it was not surprising that the General Counsel opinion letters had declined to impose liability in the interim, while the Commission continued to study the problem.[263] Justice Brennan summed up by stating his view that the Commission's guideline merited "our 'great deference'" as

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260. *Id.* at 155-56, 97 S. Ct. at 418 (Brennan, J., dissenting).

261. *Id.* at 155-56, 97 S. Ct. at 417-18.

262. *Id.* at 156, 97 S. Ct. at 418. The circumstances in which the prohibition against sex discrimination had been inserted into Title VII led to many difficulties in the interpretation and application of these provisions. *See, e.g.*, Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 Hastings L.J. 305, 310-12 (1968) (detailing history of insertion of sex as a protected category into equal employment opportunity legislation). *See also* County of Washington v. Gunther, 452 U.S. 161, 183, 101 S. Ct. 2242, 2255 (1981) (Rehnquist, J., dissenting) (attempting to draw inference about statutory coverage based on history of insertion of sex as protected category).

263. *General Elec.*, 429 U.S. at 157, 97 S. Ct. at 418.

a "particularly conscientious and reasonable product of EEOC deliberations;" he further suggested that there was "no basis for concluding that [it] is out of step with congressional intent."[264]

Whatever the ultimate merits of the debate between Justice Rehnquist and Justice Brennan, it is clear that the degree of deference due to Commission interpretations was greatly reduced by Justice Rehnquist's synthesis and restatement of the case law in *Gilbert*. Whereas even Commission case decisions previously had been given "great deference," now carefully considered and crafted guidelines were only "entitled to consideration." In effect, the Court was sending a signal to the lower federal courts that Commission interpretations should not be afforded any significant degree of deference, and that the courts should basically look at the subjects of Commission interpretations on their own.

Shortly thereafter, the Commission promulgated the early right-to-sue letter regulation, thus formalizing its prior practice.[265] Notwithstanding the transformation of practice into rule, the terms of the debate in the lower federal courts remained essentially unchanged. The courts continued to divide on the correctness or propriety of the administrative interpretation, and the question continued to be framed in jurisdictional terms. Indeed, Title VII defendants increasingly were raising "jurisdictional" defenses, asking the courts to decide whether various time limits and other administrative requirements of Title VII were jurisdictional in a strict and strong sense or subject to equitable modification.[266] In *Zipes v. Trans World Airlines*,[267] which was decided in 1982, the Supreme Court held that the timely filing of a charge with the Commission was in the nature of a condition precedent to suit, rather than a jurisdictional requirement, and thus subject to equitable modification. The issue and holding in *Zipes* were narrowly framed, however, so that the question whether other provisions of Title VII were jurisdictional was one that required continued litigation. Thus, the case law concerning the 180-day period reflects this jurisdictional emphasis throughout this period. [268]

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264. *Id.* at 157-58, 97 S. Ct. at 419.

265. Some courts have suggested that the Commission promulgated the regulation to counteract *dicta* contained in the Supreme Court's then-recent decision in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361, 97 S. Ct. 2447, 2452 (1977). *See supra* note 142.

266. *See, e.g.*, Harris v. Norfolk & Western Ry. Co., 616 F.2d 377, 379 (8th Cir. 1980) ("That the time limitations appearing in the Act are jurisdictional is clear."); Rice v. New England College, 676 F.2d. 9, 10 (1st Cir. 1982) (requirements of Section 706(f)(1) are not "jurisdictional").

267. 455 U.S. 385, 102 S. Ct. 1127 (1982).

268. *See* Pinkard v. Pullman-Standard, 678 F.2d 1211, 1215 (5th Cir. Unit B 1982), *cert. denied*, 459 U.S. 1105, 103 S. Ct. 729 (1983) (receipt of right-to-sue letter not jurisdictional requirement, but condition precedent subject to

During the period following the promulgation of the regulation, some courts considered the question anew based on the added element of an agency regulation to support the prior administrative practice. Others seem to have simply looked to existing case law with the tacit understanding that the same result would follow in either case. In some cases, the regulation was not mentioned at all, which is not particularly surprising in an area in which the issuing agency is not normally a party to the litigation and the plaintiff's counsel may or may not have experience in the area. Nor is it surprising, in view of the decision in *Gilbert*, that many courts continued to frame the issue solely in terms of ascertaining the "correct" answer to a question of statutory construction without regard to the degree of deference due, if any, to the views of the expert agency that Congress has charged with administering the statute.

In other words, this phase of the case law is largely characterized by reliance on prior authorities and a relative absence of new, critical analysis. Typical of this period are cases such as *Loney v. Carr-Lowrey Glass Company*,[269] in which Judge Miller of the District of Maryland held that the court "lack[ed] jurisdiction under Title VII . . . because the EEOC did not retain jurisdiction of plaintiffs' charges for the 180-day period referred to in [Section 706(f)(1)] and suit was filed in this court prior to the expiration of said period."[270] The *Loney* court relied on Judge Renfrew's decision in *Budreck*, and on the description of the statutory scheme contained in the Supreme Court's *dicta* in *Occidental Life*, to reach the conclusion that the new regulation was inconsistent with congressional intent. The court did not discuss the degree of deference that might be due the Commission's construction of the statute; the prior case law simply showed that the practice (and the conforming regulation) were

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modification); Jackson v. Seaboard Coast Line R.R. Co, 678 F.2d 992, 1000 (11th Cir. 1982) (broadly interpreting prior decisions as holding that "the conditions precedent to filing a Title VII action are not jurisdictional prerequisites"); Fouche v. Jekyll-Island State Park Auth., 713 F.2d 1518, 1525 (11th Cir. 1983) ("*Jackson* mandates that all Title VII procedural requirements to suit are henceforth to be viewed as conditions precedent to suit rather than as jurisdictional requirements."); Moteles v. University of Pennsylvania, 730 F.2d 913 (3d Cir. 1984) (declining, on current state of record, to decide whether time limit is jurisdictional and Commission regulation invalid, but emphasizing importance of responsibilities assigned to Commission and need for Commission to have ample opportunity to fulfill those responsibilities); Hooks v. RCA Corp., 620 F. Supp. 1, 2 (E.D. Pa. 1984) (early right-to-sue letter not invalid where Commission had unsuccessfully attempted conciliation, and there was no indication that plaintiff attempted to bypass agency procedures).

269. 458 F. Supp. 1080 (D. Md. 1978).

270. *Id.* at 1081.

"inconsistent with an obvious congressional intent."[271] In *Hiduchenko v. Minneapolis Medical and Diagnostic Center, Ltd.*,[272] the court reached essentially the same conclusion, but it did so without refering to the regulation. In *Grimes v. Pitney Bowes, Inc.*,[273] the court reviewed the legislative history and case law before determining that it lacked jurisdiction, but the court principally contributed a colorful metaphor by comparing the Commission's regulation to "a swinging door that shifts the primary jurisdiction over employment discrimination charges from the EEOC to the courts."[274]

On the other hand, in *Bryant v. California Brewers Association*,[275] the Ninth Circuit followed an analysis similar to that which Judge Lord had used in *Milner*.[276] Like Judge Lord, the Ninth Circuit found no basis in the statutory language for assuming that the phrase "within 180 days" should be read to mean "no earlier than 180 days." Specifically, the Ninth Circuit discussed the defendants' contention that the Commission's "failure to observe the 180-day time period bars plaintiff's claim on the Title VII charge"[277] in these terms:

> Defendants' contention lacks merit. Section 2000e-5(f)(1) simply requires the EEOC to issue a notice of right-to-sue if it has failed to file suit or arrange a conciliation agreement within 180 days. Nowhere does the statute prohibit the

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271. *Id.* The *Loney* court noted the absence of any indication in the record that "the EEOC actually ceased processing of the [administrative charge] when the Notices of Right to Sue were issued on April 25, 1978." *Id.* at 1081 n.3. Similarly, there appears to have been no evidence to show that the Commission had ceased to investigate on the date on which the federal court complaint was filed, but the court adopted that date as the date on which the investigation should be deemed to have terminated. *Id.* Judge Kaufman of the District of Maryland reached the same result the following year in *Vanguard Justice Society v. Hughes*, 471 F. Supp. 670 (D. Md. 1979), holding that jurisdiction depends upon the issuance of a right-to-sue letter after the expiration of the 180-day period, but that the defect caused by an early right-to-sue letter could subsequently be cured. *Id.* at 681-82. In *Everett v. City of Chicago*, No. 78 C 2455, 1979 U.S. Dist. LEXIS 14408 (N.D. Ill. Feb. 15, 1979), the court held that it lacked jurisdiction over plaintiff's Title VII action. Everett had made three demands for a right-to-sue letter within the 180-day period, but no right-to-sue letter had issued, and the lawsuit had been filed one year later. The court cited no authority for the dismissal, rather it cited authority for a negative pregnant implication which it drew from certain language in *Johnson v. Railway Express Agency*, 421 U.S. 454, 458, 95 S. Ct. 1716 (1975).

272. 467 F. Supp. 103 (D. Minn. 1979).

273. 480 F. Supp. 1381 (N.D. Ga. 1979).

274. *Id.* at 1385.

275. 585 F.2d 421 (9th Cir. 1978), *vacated and remanded on other grounds*, California Brewers Ass'n v. Bryant, 444 U.S. 598, 100 S. Ct. 814 (1980).

276. 409 F. Supp. 1389 (E.D. Pa. 1976).

277. *Bryant*, 585 F.2d at 425.

> EEOC from issuing such notice before the expiration of the 180-day period . . . .
> Furthermore, in 1973-1974 the undermanned EEOC staff faced a huge backlog of Title VII cases and, as a practical matter, was unable to handle Bryant's charges within the 180-day period. Given this state of affairs, it would be a travesty to require the EEOC and Bryant to mark time until 180 days were counted off.
>
> Title VII "does not condition an individual's right to sue upon the EEOC's performance of its administrative duties." In the circumstances of this case, we decline to hold that Bryant's Title VII claim is barred by any lack of compliance with the procedural requirements of § 2000e-5(f)(1).[278]

In two subsequent cases, *Saulsbury v. Wismer and Becker, Inc.*[279] and *Brown v. Puget Sound Electrical Apprenticeship & Training Trust*,[280] the Ninth Circuit reaffirmed its holding in *Bryant*. In each case, the court again rejected the argument that the Commission was required to wait 180 days before issuing a right-to-sue letter, but added nothing new to the analysis.[281]

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278. *Id.* In an important decision on the subject of seniority systems, the Supreme Court disagreed with the Ninth Circuit's holding on the merits. However, Supreme Court review was not sought with respect to the correctness of the Ninth Circuit's construction of Section 706(f)(1). *See* Pet. for Cert. No. 78-1548 (filed April 11, 1979). The Supreme Court did not address that issue, nor did the Court consider whether the lapse of 180 days between the filing of a charge and the issuance of a right-to-sue letter was a jurisdictional prerequisite to suit. On two previous occasions, the Supreme Court had described the private right of action under Title VII as arising after the expiration of the 180-day period. See *Johnson v. Ry. Express Agency*, 421 U.S. 454, 458, 95 S. Ct. 1716 (1975); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 104 n.12, 99 S. Ct. 1601, 1610 n.12 (1979). In both cases, however, the observation was clearly dicta, and no issue was raised as to the precise meaning of Section 706(f)(1). In a third case, *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 361, 97 S. Ct. 2447, 2452 (1977), the Court stated, "The 180-day limitation provides only that this private right of action does not arise until 180 days after a charge has been filed." It is difficult to quarrel with that broad statement, inasmuch as no court has ever held that a charging party is entitled to compel the issuance of a right-to-sue letter prior to the expiration of the 180-day period, but it also does not seem to address directly the issue with which this article is concerned. Whether the Commission may issue a right-to-sue letter before the expiration of the 180-day period, and thus permit the filing of a suit earlier than otherwise would be the case, is not a question to which the Court was required to respond in *Occidental*.

279. 644 F.2d 1251 (9th Cir. 1980).

280. 732 F.2d 726 (9th Cir. 1984).

281. The Ninth Circuit did emphasize that Congress's intention in establishing the 180-day period was to protect complainants from undue delay. *Id.* at 729. In *Rossini v. Ogilvy & Mather, Inc.*, No. 78 Civ. 1713-CLB, 1979 U.S. Dist. LEXIS 12985 (S.D.N.Y. Apr. 18, 1979), Judge Brieant of the Southern District of New

A few cases during this period stand out from the rest. Among them is Judge Sofaer's opinion in *Spencer v. Banco Real*.[282] In *Spencer*, Judge Sofaer extensively reviewed the arguments and authorities on both sides of the question before concluding that the Commission's regulation was invalid, and that jurisdiction could not be predicated upon a right-to-sue letter issued during the 180-day period. With respect to the statutory language, Judge Sofaer closely followed Judge Renfrew's analysis in *Budreck*, particularly the argument based on Congress's inclusion of the word "if" in Section 706 (f)(1). Judge Sofaer stated, "Judge Renfrew found [the] statute's wording 'convoluted,' but unambiguous: 'In order to accept the position advanced by plaintiffs, the Court would have . . . to ignore the conditional "If . . ." phrasing of the statute.'"[283] In Judge Sofaer's view, the legislative history of the 1972 amendments underscored that point:

> Descriptions of the 180-day provision in the legislative history also indicate that the right to bring federal suit is contingent, not upon the mere issuance of a right-to-sue notice, but rather upon the occurrence of one of the express conditions—dismissal or expiration of 180 days without agency action.[284]

That conclusion was further bolstered, the court said, by the overall design of the "statutory scheme of Title VII," which "suggests that exhaustion of the 180-day period was intended to be a jurisdictional prerequisite."[285] According to Judge Sofaer, the overall statutory

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York rejected a challenge to an early right-to-sue letter on the ground that the "internal discretionary determinations of the EEOC and whether or not it was appropriate to issue the right to sue notice . . . may not be attacked collaterally in this action in which the EEOC is not a party." Judge Brieant cited *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975), to support his assertion that the mere issuance of such a notice "is sufficient for jurisdictional purposes." Several other decisions from this period are also primarily cumulative. *See* Wells v. Hutchinson, 499 F. Supp. 174, 189 (E.D. Tex. 1980) (holding that the receipt of a right-to-sue letter is jurisdictional, but the Commission need not wait 180 days to issue it), Mills v. Jefferson Bank East, 559 F. Supp. 34, 35 (D. Colo. 1983) (regulation is inconsistent with the statute); True v. New York State Dep't of Correctional Servs., 613 F. Supp. 27, 29-30 (W.D.N.Y. 1984) (issuance of notice of right-to-sue prior to passage of 180 days presents jurisdictional deficiency requiring remand to agency); People of State of New York v. Holiday Inns, Inc., 656 F. Supp. 675, 680 (W.D.N.Y. 1984) (180-day period is period of exclusive agency jurisdiction).

282. 87 F.R.D. 739 (S.D.N.Y. 1980).

283. *Id.* at 743 (quoting Budreck v. Crocker Nat'l Bank, 407 F. Supp. 635, 639 (N.D. Cal. 1976)).

284. *Id.* at 743.

285. *Id.*

design shows that the aim of Title VII was not simply "to *permit* investigation and conciliation by the EEOC, but rather to *require* such agency action *and to place primary responsibility* for disposing of complaints *in the administrative process*."[286] According to Judge Sofaer, Congress's repeated use of the word "shall" also supports that reading of Title VII.[287]

The *Banco Real* court also found support for its conclusion in the Supreme Court's language in *Occidental Life Insurance Company*, where the Supreme Court held that the 180-day period imposes no limitation on the Commission's power to file suit *after* the expiration of that period. Significantly, *Occidental* did not involve a private right of action or the rules that might be appropriate thereto. Nonetheless, the Supreme Court observed in *Occidental* that:

> [A] natural reading of Section 706(f)(1) can lead only to the conclusion that it simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so. After waiting for that period, the complainant may either file a private action within 90 days after EEOC notification or continue to leave the ultimate resolution of his charge to the efforts of the EEOC.[288]

The court found this dictum persuasive. Further, the court invoked the *expressio unius* maxim, arguing that Congress's express authorization for the Commission to seek judicial relief *within* the 180-day period should be understood to signify a lack of intent to grant such authority to private plaintiffs.[289] Finally, Judge Sofaer was not persuaded by the argument from policy, that "a 180-day delay in filing suit is a 'travesty' or unconscionable when the EEOC certifies in advance that it will be unable to complete its duties within that period."[290] Relying again on the Supreme Court's research and analysis in *Occidental Life*, the court asserted that Congress was well aware in 1972 "of the enormous backlog of cases before the EEOC and the consequent delays of 18 to 24 months encountered by aggrieved persons awaiting administrative action on their

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286. *Id.* (emphasis added).
287. *Banco Real*, 87 F.R.D. at 744.
288. *Id.* at 744 (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. at 361, 97 S. Ct. at 2452). Of course, the question presented in *Occidental* had to do with the Commission's litigating authority rather than the rights of private parties to sue; being involved with the Commission's litigating authority, it had nothing to do with right-to-sue letters; and it had to do with Commission suits brought after the expiration of the 180-day period, not with right-to-sue letters issued before the end of that period.
289. *Id.* at 744.
290. *Id.*

complaints"[291] In addition, certain statements in the legislative history may be read to demonstrate that Congress not only knew about these delays, but also recognized that the 1972 amendments would aggravate, rather than alleviate, them.[292] From these sources, Judge Sofaer concluded the following:

> Thus, in drafting the 180-day provision, Congress protected aggrieved individuals only from what it regarded as undue delay—by definition a period of 180 days without final agency action, for whatever reason. If such a result is a "travesty," it is one that Congress intended, for it sought to compel attempts to determine or settle Title VII disputes at the agency level before resort to the federal courts.[293]

Nor was Judge Sofaer persuaded by the additional policy arguments proffered by the Commission, appearing as *amicus curiae*. The Commission argued that it could not serve any useful purpose if it were relegated to the status of a mere "warehouse, storing the claims of the victims of discrimination."[294] The Commission further argued that early notice would not prejudice defendants in any event, if "the EEOC [could not] assist the parties during 180 days due to its workload."[295] The court said:

> The 180-day period is not purposeless, merely because the agency claims it seems unlikely to take final action during that time. If complainants are required to remain before the agency for 180 days, the primary role of the agency in handling such claims is emphasized and assured. Complainants faced with such a rule will naturally press the agency for action, rather than for early right-to-sue letters. The agency, in turn, will be spurred by that pressure and work to improve its efficiency . . . . Merely commencing agency action within the 180-day period will in some cases lead to settlements and avoid litigation. In other cases, the agency may successfully conclude matters after the 180-day period. . . .
>
> The probable effect of the EEOC's regulation on the federal courts is another important consideration. Regulation 1601.28(a)(2) in effect permits the agency to expand federal jurisdiction whenever an aggrieved claimant is impatient . . .

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291. *Id.* (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. at 369, 97 S. Ct. at 2456).
292. *Id.* at 744-45.
293. *Banco Real,* 87 F.R.D. at 745.
294. *Id.* at 746.
295. *Id.*

> and the agency feels unable to complete its tasks within the statutory period. Early notices will mean more cases filed in federal courts than if the parties and the agency are required to spend 180 days attempting to resolve the controversy.[296]

During this period, Chief Judge Morton of the Middle District of Tennessee delivered a similarly thorough analysis reaching the opposite conclusion. In *Cattell v. Bob Frensley Ford, Inc.*,[297] the Commission had originally scheduled a fact-finding conference, but determined when that conference failed to materialize, that it would be unable to act on the charge within the 180-day period and therefore issued an "early" right-to-sue letter.[298] In these circumstances, the defendant argued, the court lacked "subject matter jurisdiction . . . until such time as the complaint has been pending before the EEOC for a minimum of 180 days."[299] In response, the court noted the existence of "substantial disagreement among the lower courts" on the question whether deferral for the full 180-day period should be considered a jurisdictional prerequisite to suit, and conceded that *dicta* in two Supreme Court cases provided some support for the view that it should be so considered.[300] However, the court found "[p]articularly instructive" the Ninth Circuit's analysis in *Bryant* which "pointed out that the statute . . . merely grants the aggrieved party a right to file suit following 180 days of Commission inaction or failure to achieve conciliation [and] [n]owhere . . . prohibit[s] the EEOC from issuing such notice before the expiration of the 180-day

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296. *Id.* at 746-47. The court also chastised the Commission for "giv[ing] no thought to how its regulation will be administered." *Id.* at 746. The court stated:

> The regulation creates an important new discretionary power, to be exercised in favor of some complainants and not others. It not only permits the agency to ignore part of its workload, but also enables certain agency officials to determine which part of the workload to ignore and which to address.

Id.

297. 505 F. Supp. 617 (M.D. Tenn. 1980).

298. *Id.* at 618. Cattell was discharged from her position on March 8, 1980. On March 25, she filed a charge with the Commission alleging that the discharge was the result of discrimination based on religion. A similar charge was filed at about the same time with the Tennessee Commission for Human Development, but the Tennessee agency deferred initial consideration of the charge to the Commission on April 14 based on a "worksharing agreement." On April 17, the Commission scheduled a fact-finding conference to be held on May 30, but that conference did not occur as scheduled. The Commission subsequently issued a right-to-sue letter, and Cattell filed suit in federal district court on July 3, 1980. *Id.* The defendant moved to dismiss the complaint, both on the ground that the Commission should have deferred to the Tennessee agency and on the ground that the Commission should have waited 180 days before issuing the right-to-sue letter. *Id.* at 619.

299. *Id.*

300. *Id.* at 619-20.

period."[301] Moreover, the court observed, the statute "does not on its face, contain any prohibition of an earlier suit, provided the Commission has determined that a right-to-sue letter should be issued."[302] In a footnote, the court further observed that '[t]he statute does, by implication, prohibit resort to the courts prior to the expiration of the 180-day period in cases where the Commission does not issue a right-to-sue letter."[303]

Similarly, when the court turned its attention to the Supreme Court's case law, it found the most compelling evidence of the Supreme Court's view not in the *dicta* contained in *Gladstone, Realtors v. Village of Bellwood*[304] and *Johnson v. Railway Express Agency*,[305] but in the action the Supreme Court took in *Bryant*. Although the Supreme Court vacated and remanded the Ninth Circuit's decision in *Bryant*, it did so on substantive grounds, without any discussion of the nature of the 180-day period. Thus, the court noted:

> While there is no indication the argument was raised, the conclusion that the Court does not view the requirement as jurisdictional is inevitable. It is a well-settled proposition that lack of subject matter jurisdiction may not be waived and will be raised by the courts *sua sponte* at any stage in the proceedings should it appear that there is a jurisdictional defect. . . . In *Bryant*, the Court proceeded to a consideration of the merits despite clear notice through the argument in the court of appeals that a jurisdictional question was present. The conclusion is inescapable that the Court considered itself and the lower courts in the case as having jurisdiction despite the fact that the 180-day period had not run prior to the commencement of the district court action.[306]

Turning to the portions of legislative history on which Judge Renfrew had relied in *Budreck*,[307] Chief Judge Morton noted that the

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301. *Id.* at 620 (quoting Bryant v. California Brewers Ass'n, 585 F.2d 421, 425 (9th Cir. 1978), *vacated and remanded on other grounds*, California Brewers Ass'n v. Bryant, 444 U.S. 598, 100 S. Ct. 814 (1980)).

302. *Id.*

303. *Id.* n.2. The court added:

> Such a result is clearly the only way in which to effectuate the plain congressional intent that the EEOC remedy should be pursued first. In the present case, however, plaintiff made no effort to resort to the courts until the EEOC had informed her that she had a right to sue, and that the Commission would not be able to act on her complaint before the expiration of 180 days.

Id.

304. 441 U.S. 91, 104 n.12, 99 S. Ct. 1601, 1610 n.12 (1979).

305. 421 U.S. 454, 458, 95 S. Ct. 1716, 1719 (1975).

306. *Cattell*, 505 F. Supp. at 620.

307. *Id.* at 621 (citing Budreck v. Crocker Nat'l Bank, 407 F. Supp. 635, 640

context in which the language was imbedded lent itself to quite a different reading.[308] The excerpt followed a discussion of both the increasingly heavy backlog of cases faced by the Commission and the need to amend the enforcement procedures to provide for more expeditious vindication of the rights created by Title VII. The legislative history also shows that Congress originally had thought that enforcement of Title VII would principally be accomplished through conciliation, rather than litigation, but that "[e]xperience . . . has shown this to be an oversimplified expectation incorrect in its conclusions."[309] Given the context, Chief Judge Morton noted, the language that Judge Renfrew invoked in *Budreck* takes on a different flavor:

> [W]hile Congress thought that administrative remedies should be pursued before resort to the district courts, it established a ceiling on the length of time that an aggrieved person would be required to wait for the EEOC to act. This reflected an accommodation of conflicting interests. As previously noted, conciliation of disputes was seen as a preferable alternative to litigation. Second, administrative remedies were seen as generally preferable because of the assumed expertise that an agency would develop through the processing of many similar claims. In addition, it was thought that the EEOC would usually process claims more expeditiously than would the courts, despite the backlog of cases facing the Commission. On the other hand, it was recognized that the heavy caseload would in some instances prolong a particular claim for an unsatisfactory length of time. "The primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available."
>
> Once the Commission has determined, as it did in this case, that it will be unable to complete administrative processing of a complaint within the 180-day period, none of the asserted objectives of the requirement would be served by forcing further delay. Clearly, the purpose of conciliation will not be served if the Commission is too busy to consider the charge. Likewise, any benefits of agency expertise will be lost. Neither can it be said that Commission action is the most expeditious route to dispute resolution in the particular case. And finally, such a rule would stymie the asserted

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(N.D. Cal. 1976)).

308. *Id.*

309. *Id.* (quoting H.R. Rep. No. 92-238, at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144).

primary concern for protecting the option to seek a prompt remedy.[310]

D. The Chevron-Commercial Office Products-Arabian American Oil Era Cases: High Theory and the Law in Action

A number of early right-to-sue cases were decided between the time of the Supreme Court's 1984 decision in *Chevron* and the District of Columbia Circuit's decision in *Martini*. However, most of the new cases added nothing new to the terms of the debate, and many did not even purport to analyze the issues in light of the Supreme Court's opinion in *Chevron*. In addition, however, the Supreme Court decided two cases during this period that directly address the degree of deference, if any, due to the interpretations of the Equal Employment Opportunity Commission.

In 1988, the Court decided *EEOC v. Commercial Office Products Company*,[311] which raised two questions relating to the time limits for the filing of charges with the Commission. The first question was whether a state agency's decision to waive its exclusive 60-day period for initial processing of a charge, pursuant to a state-federal work sharing agreement, "terminates" the state agency's proceedings within the meaning of Section 706(e) of Title VII,[312] so that the Commission may immediately deem the charge filed.[313] The second question was whether a complainant who has filed a charge that is untimely under state law is nonetheless entitled to the extended 300-day filing period provided by Section 706(e).[314] The Court answered both questions in the affirmative. Writing for the Court, Justice Marshall adopted the Commission's interpretation, apparently put forth only in its *amicus* brief, that "a state agency 'terminates' its proceedings when it declares that it will not proceed, if it does so at all, for a specified interval of time."[315] Justice Marshall further explained that the word "terminate" may bear other meanings, and, indeed, that other meanings might be more "natural[]" or "frequent[]"

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310. *Id.* at 621-22 (citations omitted). Finally, the court noted that the Commission's action was based on a previously adopted regulation, 29 C.F.R. § 1601.28(2), which the court was "unwilling, in light of the language of the statute and the relevant legislative history[,] to hold . . . beyond the scope of the EEOC's authority to promulgate." *Id.* at 622. Nor was there any "allegation of bad faith on the part of the appropriate EEOC officials in making the determination in this particular case that action would not be taken within the 180-day period." *Id.*

311. 486 U.S. 107, 108 S. Ct. 1666 (1988).

312. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e) (1994).

313. *Commercial Office Prods. Corp.*, 486 U.S. at 109-10, 108 S. Ct. at 1668.

314. *Id.* at 110, 108 S. Ct. at 1688.

315. *Id.* at 115, 108 S. Ct. at 1671.

in common usage.[316] Justice Marshall stated: "But it is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language, need only be reasonable to be entitled to deference."[317] In a concurring opinion, Justice O'Connor stated her belief that the result in the case was correct "solely due to the traditional deference accorded the EEOC in interpretation of this statute," which "is particularly appropriate on this type of technical issue of agency procedure."[318]

Three years later, in *EEOC v. Arabian American Oil Company*,[319] a majority of the Court, speaking through Chief Justice Rehnquist, rejected the Commission's position that it could regulate the employment practices of United States employers who employ United States citizens abroad. Without any reference to *Commercial Office Products*, and over strong disagreement from Justice Scalia and Justice Marshall,[320] the Chief Justice found that the degree of deference due to Commission interpretations was governed by *Skidmore v. Swift & Co.*, and that the Commission's interpretation in this case was not entitled to deference under that test. Some courts relied on the decision in *Commercial Office Products* during this period, but the conflict in reasoning between the two cases does not seem to have had much effect on the lower federal courts as they continued to struggle with the early right-to-sue letter issue.

For example, in *Rolark v. University of Chicago Hospitals*,[321] which was decided in 1988, Judge Moran of the Northern District of Illinois noted the settled division of authority among the district courts in other circuits and the fact that "[t]he only court of appeals to squarely reach the issue [the Ninth Circuit] decided that the early issuance of the notice of complainant's right to bring suit is in accordance with [Section] 706(f)(1)."[322] Judge Moran also noted that

316. *Id.*, 108 S. Ct. at 1671.
317. *Id.*, 108 S. Ct. at 1671.
318. *Id.* at 125-26, 108 S. Ct. at 1676-77.
319. 499 U.S. 244, 111 S. Ct. 1227 (1991).
320. Justice Scalia concurred in the judgment. *Id.* at 259-60, 111 S. Ct. at 1236-37. Justice Marshall, with whom Justice Blackmun and Justice Stevens joined, dissented. *Id.* at 260-78, 111 S. Ct. at 1237-46.
321. 688 F. Supp. 401 (N.D. Ill. 1988).
322. Arguably, the Fifth and Eleventh Circuits had come quite close to addressing the issue, although indirectly. *See* Miller v. International Paper Co., 408 F.2d 283, 290 (5th Cir. 1969) (stating substantive rights of victim are not affected by EEOC inaction or action); Sims v. Trus Joist MacMillan, 22 F.3d 1059, 1060 (11th Cir. 1994) ("hold[ing] that early issuance of a notice of right to sue based on the Commission's certification that it will be unable to process the charge within 180 days does not preclude a claimant from filing an action in federal court").

"[a]pparently no court in this jurisdiction has resolved the conflict."[323] In a footnote, Judge Moran observed that the Commission's regulation was "noted and not criticized by the Supreme Court in *Equal Employment Opportunity Commission v. Associated Dry Goods Corp.* . . . and by three justices in *Kamberos v. GTE Automatic Electric, Inc.* . . . (Justices White, Brennan and Marshall, dissenting from a denial of certiorari), although in neither instance was validity of the regulation an issue before the court."[324]

After briefly reviewing some of the major authorities on both sides of the question, Judge Moran concluded that the "180-day time period does not operate as an absolute jurisdictional bar."[325] Judge Moran noted that the rights of plaintiffs should not be made to depend on the action or inaction of administrative officials, and further observed:

> While Congress showed clear preference for conciliatory efforts at the administrative level prior to suit in federal court, there is nothing in the Act which prohibits the EEOC from relinquishing its jurisdiction. Further, defendant's use of [Section] 706(f)(1) as a shield for employers charged with discrimination turns the purpose of that section on its head. The 180-day period was intended to afford victims of employment discrimination a private cause of action where the EEOC does not act, or does not act in a timely fashion. The EEOC's regulation simply recognizes that the caseload will sometimes be so heavy that it can be determined early on that no action can be taken within 180 days and the issuance of an early right-to-sue letter is a reasonable implementation of the Act. We do not think that Congress has so clearly resolved the dispute that the EEOC, which has been delegated the authority to administer Title VII claims, has been proscribed from filling gaps that the Act has left open. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).[326]

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323. *Rolark*, 688 F. Supp. at 403. In the period between *Chevron* and *Martini*, at least four other judges of the Northern District of Illinois subsequently decided cases in which they concurred in the analysis offered by Judge Moran in *Rolark*. *See, e.g.*, Fischer v. Medical Imaging Corp. of Am., 57 Empl. Prac. Dec. (CCH) P41,165 (N.D. Ill. 1991) (Grady, J.); Martinez v. Labelmaster, No. 96C4189, 1996 WL 580893 (N.D. Ill. Oct. 4, 1996) (Plunkett, J.); Baker v. Gardner, Carton & Douglas, No. 97C2649, 1997 WL 781712 (N.D. Ill. Dec. 12, 1997) (Gettleman, J.); Advani v. Andrew Corp., No. 96 C 7628, 1999 U.S. Dist. LEXIS 3526 (N.D. Ill. Mar. 12, 1999) (Williams, J.). Additional cases were decided after *Martini*. *See infra* notes 355-57.

324. *Rolark*, 688 F. Supp. at 403 n.2 (citations omitted).

325. *Id.* at 404.

326. *Id.*

At first blush, Judge Moran's reliance on *Chevron* seems perfunctory, even an afterthought; there is no extended analysis or division of the issue into the familiar "step 1" and "step 2" phases of the inquiry. On the other hand, although Judge Moran's analysis is largely directed to an evaluation of the pre-*Chevron* case law relevant to the precise issue presented, the court's approach and ultimate determination are consistent with the spirit of *Chevron*. Clearly, the court believes that this is a decision concerning agency procedure that is best left to the agency, absent compelling evidence that Congress intended to the contrary:

> Finally, since the rule comes from the EEOC, not this court, we disagree with the authorities . . . describing the allowance of an early right-to-sue letter as unwarranted judicial modification of the Act. It is up to the EEOC to decide how to efficiently administer the Act, and unless its decisions contravene congressional intent we must afford them deference. Given the remedial aims of the Act and the specific purpose behind [Section] 706(f)(1), we do not think Congress intended to force victims of discrimination to undergo further delay when the district director has determined such delay to be unnecessary.[327]

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327. *Id.* Finally, the *Rolark* court also concluded that the 180-day challenge was effectively moot because the time taken up by the briefing and decision of the motion to dismiss had overtaken the shortfall in the time allotted to the completion of the administrative process. *Id. Accord* Rosario v. Copacabana Night Club, Inc., 77 Empl. Prac. Cas. (BNA) 463 (S.D.N.Y. 1998); Lemke v. International Total Servs., Inc., 56 F. Supp. 2d 472 (D.N.J. 1999). Other courts have taken the opposite view, finding that it is not the mere lapse of time, but the lapse of time during which the matter is actually committed to agency jurisdiction that is critical. *See, e.g.*, Wilk v. Intercontinental Hotel of N.Y., No. 92 Civ. 2068(TPG), 1993 WL 88230 (S.D.N.Y. Mar. 24, 1993); Meredith v. National Bus. Coll., Corp., No. 97-0031-R, 1997 U.S. Dist. Lexis 12677 (W.D. Va. July 28, 1997). As in *Martini*, those courts have insisted on remand to the Commission for whatever time remains in the 180-day period, measured from the date on which the right-to-sue letter was "improperly" issued regardless of the amount of time that has been devoted to the litigation of the federal court action. *See, e.g.*, Martini v. Fannie Mae, 178 F.3d 1336, 1338 (D.C. Cir. 1999). *See also Olszewski v. Bloomberg, L.P.*, No. 96 Civ. 3393(RRP), 1997 WL 375690 (S.D.N.Y. July 7, 1997) (observing that court's prior practice has been to permit early right-to-sue letter cases to go forward, but that increased volume of such cases has caused reconsideration of that policy). Similarly, in *White v. Federal Express Corp.*, 729 F. Supp. 1536 (E.D. Va. 1990), the court held that receipt of a right-to-sue letter was a jurisdictional prerequisite to suit, but that a suit filed before the expiration of the 180-day period, and without the issuance of a right-to-sue letter, would not be dismissed where the letter had been issued and received, and the 180-day period had already passed. On the other hand, in *Chandler v. Fast Lane, Inc.*, 868 F. Supp. 1138, 1140-42 (E.D. Ark. 1994), the court appeared not to appreciate the significance of the questions raised

Judge Merhige of the Eastern District of Virginia reached the same conclusion in *Hicks v. Maruchan Virginia, Inc.*[328] After acknowledging the substantial difference of opinion on the issue among the courts, Judge Merhige noted that the Commission was specifically authorized by its enabling legislation to issue procedural regulations, such as Section 1601.28(a)(2), and that such regulations must be upheld under *Commercial Office Products* and *Chevron*, "so long as [they are] reasonably related to the purposes of Title VII" and do not "clearly contradict[] the [statutory] language or intent."[329] Judge Merhige also found that the "twenty-year split among the district courts demonstrates that reasonable minds can differ over the language and intent" of the statutory section, and the Commission's interpretation of the section therefore "warrants deference in the absence of a specific statutory prohibition of 'early' right-to-sue letters."[330] He concluded: "It is the opinion of the Court that just as the timely filing of a charge is not a jurisdictional prerequisite, neither is the requirement that the right-to-sue notice be issued after the expiration of 180 days."[331]

In *Sims v. Trus Joist MacMillan*,[332] which was decided in 1994, the Eleventh Circuit joined the Ninth Circuit in upholding a Title VII plaintiff's right to file a civil action based upon an "early" right-to-sue letter which had been issued with a "certification that it will be unable to process the charge within 180 days."[333] In *Sims*, the Commission had received the plaintiff's charge on March 20, 1992, and, pursuant to his request, issued a right-to-sue letter on March 31, 1992, when it "certified that the charge would not be processed within 180 days."[334] Sims filed his civil action on June 26, 1992, and the district court dismissed the complaint for want of subject matter

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with respect to the issuance of a right-to-sue letter prior to the expiration of the 180-day period.

328. No. 3:96CV549, 1996 U.S. Dist. LEXIS 13754 (E.D. Va. Sept. 3, 1996).

329. *Id.* at *6-7.

330. *Id.* at *7.

331. *Id.* at *9. A number of other courts reached the same result during this period, without shedding much additional light on the subject. *See e.g.* Hollis v. Johnston-Tombigbee Furniture Mfg. Co., No. 1:93CV346-D-D, 1994 U.S. Dist. LEXIS 21197 (N.D. Miss. Dec. 21, 1994); Beaver v. Prudential Ins. Co. of Am., No. 94-4181-DES, 1995 WL 670119 (D. Kan. Oct. 20, 1995); Cortes v. McDonald's Corp., 955 F. Supp. 531 (E.D.N.C. 1996); Parker v. Noble Roman's, Inc., No. IP-96-65-C-D/F, 1996 WL 453572 (S.D. Ind. June 26, 1996); Figueira v. Black Entm't Television, Inc., 944 F. Supp. 299 (S.D.N.Y. 1996); Palumbo v. Lufthansa German Airlines, No. 98 Civ. 5005(HB), 1999 WL 540446 (S.D.N.Y. July 26, 1999). Many of these cases did not even mention *Chevron*.

332. 22 F.3d 1059 (11th Cir. 1994).

333. *Id.* at 1060.

334. *Id.*

jurisdiction, holding that the Commission has exclusive jurisdiction over charges of discrimination for 180 days.[335] The court of appeals reversed, holding that the 180-day period is not jurisdictional, but a time period in the nature of a statute of limitations subject to equitable modification.

Unlike many of the other cases considered above, the Eleventh Circuit in *Sims* began its consideration of the issues with a statement of the standards of review which it believed to be applicable, and thus ostensibly provided a structure for its analysis.[336] The district court's opinion was subject to *de novo* review, the court noted, because the dismissal of a case for want of subject matter jurisdiction presents a question of law. On the other hand, the court noted that under *EEOC v. Commercial Office Products Co.*,[337] the Commission's interpretation of Title VII was entitled to deference, so long as it is "reasonable."[338] The court of appeals also made clear the reason for according deference to the Commission's determinations in these circumstances:

> In enacting Title VII, Congress charged the Commission with the responsibility to enforce the statute and vested it with the authority "to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." . . . A regulation promulgated pursuant to section 713(a) must be upheld "so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, [93 S. Ct. 1652, 1660-61] (1973). *See EEOC v. Commercial Office Products Company*, 486 U.S. at 115, [108 S. Ct. at 1671] . . . (EEOC's interpretation of statute "need only be reasonable to be entitled to deference").

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335. *Id.* ("The district court also held that the running of the 180 days should be tolled from the date on which the EEOC issued its right-to-sue notice").

336. There are several instances in which the court departs from this structure. For example, immediately after providing this introduction, the court embarks upon a discussion of *Grimes v. Pitney Bowes, Inc.*, 480 F. Supp. 1381 (N.D. Ga. 1979), the key district court precedent upon which the lower court relied, and points out that that decision is entitled to little weight because it was decided before the Supreme Court's decision in *Zipes v. Transworld Airlines*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132 (1982), and the Eleventh Circuit's decision in *Fouche v. Jekyll-Island-State Park Authority*, 713 F.2d 1518, 1524 (11th Cir. 1983), had established that compliance with time limits prescribed by Title VII is not jurisdictional. *Sims*, 22 F.3d at 1061. Thus, almost in an aside, the court of appeals held that the district court erred in dismissing the complaint on the ground that the issuance of the early right-to-sue letter had deprived it of subject matter jurisdiction. *Id.*

337. 486 U.S. 107, 115, 108 S. Ct. 1666, 1671 (1988).

338. *Sims*, 22 F.3d at 1060-61. The court did not mention the Supreme Court's intervening decision in *EEOC v. Arabian American Oil*, 499 U.S. 244, 111 S. Ct. 1227 (1991).

> The regulation codified at 29 C.F.R. § 1601.28(a)(2) is such a procedural regulation and is consistent with congressional intent. The regulation states that when the Commission is unable to complete processing of the charge within 180 days, it may issue right to sue letters to charging parties. . . .
> The language and history of the statute reveal that this regulation is fully consistent with the purpose of section 706(f)(1) . . . .
>
> The language of this section clearly states that if the Commission dismisses the charge or if 180 days pass without action by the Commission, the charging party must be so notified and may then bring suit within 90 days. However, the statute on its face does not prohibit the Commission from issuing a right to sue letter before the 180 days have expired.[339]

Drawing heavily from the analysis contained in such previous decisions as *Rolark* and *Cattell*, the court easily concluded that the Commission's interpretation was supported both by the statutory language and by the legislative history relating to the 180-day period.[340] While preferring voluntary settlement to litigation, Congress nonetheless thought that "[t]he primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner possible."[341] Thus, the court explained: "When the Commission cannot process a claimant's charge within the prescribed time period and certifies that it is unable to process such charge, the avenue for a 'prompt remedy' is through the courts. . . . [N]o legitimate purpose is served by forcing delay."[342] Although the court relied on *Commercial Office Products*, it made no mention of *Chevron* in its opinion.[343]

The Southern District of New York reached the opposite conclusion in *Henschke v. New York Hospital-Cornell Medical Center*,[344] which

339. *Id.* at 1062 (citations omitted).
340. *Id.* at 1062-63.
341. *Id.* at 1063 (quoting H.R. Rep. No. 92-238 at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144).
342. *Id.*
343. The Eleventh Circuit had occasion two years later to explore further the meaning of equitable modification in this context. In *Forehand v. Florida State Hospital at Chatahoochee*, 89 F.3d 1562 (11th Cir. 1996), the court held that compliance with the 180-day requirement would not be excused in the case of a plaintiff who refused to cooperate with the Commission's processing of her charge. *Id.* at 1570. Her failure to cooperate, the court said, "disentitled her to equitable modification," and required her to exhaust her claims administratively before being allowed to sue in federal court. *Id.*
344. 821 F. Supp. 166 (S.D.N.Y. 1993).

was decided in 1993, the year before *Sims* was decided. Like the courts in *Rolark*, *Hicks*, and *Sims*, the *Henschke* court recognized the existence of a significant split in the lower federal courts on this issue, as well as the fact that the Ninth Circuit (at that time the only court of appeals to have decided the question directly) had repeatedly construed Section 706(f)(1) to permit the issuance of right-to-sue letters prior to the expiration of the 180-day period.[345] In this instance, however, there was no dearth of district court authority in the Second Circuit, and the *Henshke* court seems to have been most impressed by the fact that "[p]rior district court decisions within the Second Circuit are in direct conflict with the Ninth Circuit's [decisions]."[346] According to the court, "the issuance of an early right-to-sue letter does 'present a jurisdictional deficiency requiring suspension and a remand of plaintiff's Title VII claims to the EEOC.'"[347] The *Henschke* court also rejected the plaintiff's suggestion that it should "defer to the power of the EEOC to interpret Title VII because due weight must be given to the 'contemporaneous construction of a statute by the agency charged with its administration . . . .'"[348] No such deference was possible, the court said, when the agency's interpretation was directly contrary to congressional intent, which was the case here, because

> [t]he language of section 2000e-5(f)(1) explicitly requires that one of two events occur before the issuance of a right-to-sue letter: either (i) the EEOC must dismiss the complaint [sic]; or (ii) 180 days must have run from the filing of the charges with the EEOC during which time the EEOC has taken no action.[349]

According to the court, there was no need to answer the argument that requiring a plaintiff to wait 180 days would constitute "an injustice which contradicts the intent of Title VII."[350] The court concluded:

> [G]iven the Congressional mandate that Title VII claims can only be filed after a dismissal of the charges by the EEOC or the lapsing of 180 days without action by the EEOC, this

345. *Id.* at 170.
346. *Id.*
347. *Id.* (quoting True v. N.Y. State Dep't of Corrections, 613 F. Supp. 27, 29 (W.D.N.Y. 1984)).
348. *Id.* (quoting North Haven Bd. of Ed. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), *aff'd sub nom*, North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 102 S. Ct. 1912 (1982)).
349. *Henschke*, 821 F. Supp. at 170.
350. *Id.* at 171.

> Court has no alternative but to grant the relief sought by the defendants on the Title VII cause of action.[351]

Significantly, the court never mentioned *Chevron*.[352]

E. The Post-Martini Cases: Innovation and Stasis

During the period from the *Martini* decision in July 1999 until December 2000, approximately twenty-five more cases were reported. With the exception of one appellate case (an officially unreported Second Circuit decision available on Westlaw[353]), all of

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351. *Id.*

352. Three additional cases from this period deserve some mention. In *Montoya v. Valencia County*, 872 F. Supp. 904 (D.N.M. 1994), the District of New Mexico also held that it lacked jurisdiction over a case in which the Commission had issued an early right-to-sue letter in accordance with its regulation. Citing *Chevron*, the court noted two relevant rules of judicial review. First, the court noted that "the [c]ourt owes deference to an agency's reasonable interpretation of a statute." *Id.* at 905. Second, "where an agency's statutory interpretation is manifestly contrary to congressional intent, the Court must reject it." *Id.* According to the *Montoya* court, the Commission's regulation was invalid because Section 706(f)(1) clearly "authorizes suit only after either the EEOC dismisses the charge, or after the EEOC has not filed a civil action or executed a conciliation agreement within 180 days." *Id.* According to the court, this section authorizes early right-to-sue letters only when a charge has been dismissed, and "makes no allowance for excusing compliance on grounds of administrative infeasibility." *Id.* at 906. In reaching this conclusion, the court relied principally on the Supreme Court's *dictum* in *Occidental Life*, and on its interpretation of Congress's preference for resolving Title VII claims through voluntary compliance. *Id.* at 905-06. Finally, the court expressed sympathy for the difficulties faced by the Commission, but observed that the Commission "may not excuse itself from carrying out its duties by administrative fiat." The court further observed that "[t]he Commission must look to Congress to amend the statute or otherwise ease its regulatory burden." *Id.* That may well be correct, but the observation seems somehow ironic in the context of judicial review of action taken pursuant to an administrative regulation that had been in effect for almost twenty years. In *Robinson v. Red Rose Communications, Inc.*, 77 Fair Empl. Prac. Cas. (BNA) 379 (E.D. Pa. 1998), Judge McGlynn of the Eastern District of Pennsylvania also held that a Title VII plaintiff could not file suit before the expiration of the 180-day period. Finally, in *Pearce v. Barry Sable Diamonds*, 912 F. Supp. 149 (E.D. Pa. 1996), Judge Dallzell of the Eastern District of Pennsylvania indicated that he would have invalidated the regulation if he had been "writing on a blank slate," although he did not explain why that would have been the case. *Id.* at 151. Because the Third Circuit had previously "frowned on the regulation, albeit in *dicta*," the district court determined that the issue should be certified to the court of appeals. *Id.* (There was also a related proceeding at *U.S. Metal & Coin & Jewelry Co. v. Jewelers Mut. Ins. Co.*, No. 96-846, 1996 U.S. Dist. LEXIS 12388 (E.D. Pa. Aug. 26, 1996).).

353. *See* Arroyo v. WestLB Admin., Inc., 213 F.3d 625 (table), No. 99-7942, 2000 WL 562425 (2d Cir. May 9, 2000). In *Arroyo*, the Second Circuit rejected

these decisions came from the district courts. In all but a handful, the courts rejected the holding in *Martini* and upheld the regulation.[354] It is clear, nonetheless, that the court in *Martini* powerfully redefined the problem and moved the center of doctrinal debate. It did this by asserting that the regulation was not inconsistent with Section 706(f)(1), but with Section 706(b).

In several cases representing outcomes on both sides of the issue, the decision in *Martini* seems to have provided a strong stimulus for reconsidering the question; several of these decisions reflect a more serious effort to come to grips with the central problem. On the other hand, many of the cases contain little sustained legal analysis, apparently coming to one result or the other based primarily on the decisions of other courts.[355] In some cases, the writing judge seems to have been impressed by the decision of another judge, often sitting

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plaintiff's appeal from an order granting the defendants' motion for summary judgment. Among other things, the plaintiff based his appeal on the argument that the judgment below was void because the district court lacked jurisdiction over his complaint, which was based on an early right-to-sue letter. Arroyo made this argument for the first time on appeal. In its summary order, the court of appeals noted that it had not previously decided whether a court may entertain a Title VII action when the Commission has issued a right-to-sue letter prior to the expiration of the statutory period. The infirmity, if any, was not jurisdictional in nature, however, and the point had not therefore been preserved for appeal. Thus, the court was not required to answer "this complicated question" in this case. *Id.* at *4.

354. In an additional case, an employer challenged the Commission's issuance of a right-to-sue letter some sixty-nine days after the filing of the plaintiff's administrative charge. *See* Tesfaye v. Carr Park, Inc., 85 F. Supp. 2d 37 (D.D.C. 2000). Unlike *Martini*, however, the Commission also dismissed the administrative charge, finding that "[d]iscrimination based on race or national origin does not appear to be in evidence." *Id.* at 38 (alteration in original). The district court upheld the validity of the right-to-sue letter in these circumstances, but certified the question for immediate appeal. *Id.* at 39.

355. In *Parker v. Metropolitan Transportation Authority*, 97 F. Supp. 2d 437, (S.D.N.Y. 2000), for example, the court briefly summarized the arguments on both sides of the issue and then stated that:

> In view of the well-known fact that the EEOC and state administrative agencies are so overwhelmed with charges that they could not possibly investigate more than a small fraction of them within 180 days, I find the *Sims-Saulsbury* line of cases to be the more persuasive [and] therefore decline to grant Defendants' motions on the ground of failure to exhaust administrative remedies.

Id. at 445. The court adopted a similar approach in *Hussein v. Pierre Hotel*, No. 99 Civ. 2715(DC), 2000 WL 776920 (S.D.N.Y. Apr. 20, 2000). Similarly, in *West v. Merillat Industries, Inc.*, 92 F. Supp. 2d 558 (W.D. Va. 2000), *Hammer v. ISS-International Service System, Inc.*, No. 99 Civ. 2992, 2000 WL 565115 (S.D.N.Y. May 8, 2000), and *Kahn v. Objective Solutions, Intl.*, 86 F. Supp. 2d 377, 379 (S.D.N.Y. 2000), the courts placed primary reliance on *Figueira v. Black Entertainment Television, Inc.*, 944 F. Supp. 299 (S.D.N.Y. 1996), without addressing the new arguments made in *Martini* three years later.

in the same district,[356] and many doubtless shared the sentiment expressed by Judge Sweet of the Southern District of New York, namely, that "[t]o add unnecessarily to these divergent lines of authority would simply be an act of hubris."[357] After so many years of litigation concerning this threshold question, and so many decisions by so many judges, some judges must have wondered whether, notwithstanding the wrinkle added by *Martini*, there was anything new to be said on the subject.[358]

To the extent that *Martini* reframed the terms of the debate about early right-to-sue letters, the new debate was a narrow one. After all,

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356. For example, several post-*Martini* cases were decided by judges of the Southern District of New York. *See* Parker v. Metropolitan Transp. Auth., 97 F. Supp. 2d 437 (S.D.N.Y. 2000) (McMahon, J.); Kahn v. Objective Solutions, Int'l., 86 F. Supp. 2d 377 (S.D.N.Y. 2000) (Sweet, J.); Nodelman v. Gruner & Jahr USA Publ'g, No. 98 Civ. 1231, 2000 WL 502858 (S.D.N.Y. Apr. 26, 2000) (McKenna, J.); Hammer v. ISS-International Serv. Sys., Inc., No. 99 Civ. 2992, 2000 WL 565115 (S.D.N.Y. May 8, 2000) (Pauley, J.); Huang v. Gruner & Jahr USA Publ'g, No. 99 Civ. 5058, 2000 WL 640660 (S.D.N.Y. Sept. 22, 2000) (Cote, J.); Deas v. Volunteers of America, 98 F. Supp. 2d 464 (S.D.N.Y. 2000) (Rakoff, J.); Hussein v. Pierre Hotel, No. 99 Civ. 2715, 2000 WL 776920 (S.D.N.Y. Apr. 20, 2000) (Chin, J.). In all but one of them, the early right-to-sue letter was sustained, and each cited, as either conclusive or strongly persuasive, the 1996 opinion of Judge Mukasey in *Figueira v. Black Entertainment Television, Inc.*, 944 F. Supp. 299 (S.D.N.Y. 1996). Only in *Deas v. Volunteers of America*, 98 F. Supp. 2d 464 (S.D.N.Y. 2000), did the court fail to follow the other decisions of the district. In *Deas*, Judge Rakoff held that the validity of the regulation was not at issue in the case due to the fact that the Commission had not followed it in any event:

> While its Notice recited that EEOC Director Spencer Lewis had "determined that it [was] unlikely that the EEOC [would] be able to complete its administrative processing within 180 days from the filing of this charge" and that the EEOC was therefore "terminating its processing of the charge," the record is clear that Director Lewis never made any such determination particular to this case and that the EEOC never processed the charge in any meaningful respect.

Id. at 466. According to the court, "in this case the Notice was a sham." *Id.*

357. Kahn v. Objective Solutions, Intl., 86 F. Supp. 2d 377, 379 (S.D.N.Y. 2000).

358. Thus, in *Thomas v. Bet Sound-Stage Restaurant/Brettco*, 61 F. Supp. 2d 448 (D. Md. 1999), the court simply noted the split in the circuits, as well as the absence of controlling Fourth Circuit precedent, before resolving the issue by stating that "this [c]ourt finds the reasoning as set forth in the Ninth and Eleventh Circuits' opinions to be convincing." *Id.* at 459. Similarly, in *Hall v. Flightsafety, International*, 106 F. Supp. 2d 1171 (D. Kan. 2000), the court gave scant consideration either to *Martini* or to *Shepherd v. United States Olympic Committee*, 94 F. Supp. 2d 1136, 1145 (D. Colo. 2000), another district court decision from the Tenth Circuit following *Martini*. The court mentioned the decisions but simply indicated that it found the rationale of the Ninth, Eleventh, and Second Circuits to be "persuasive." *Hall*, 106 F. Supp. at 1182. Because of the existence of serial administrative charges, the court placed particular emphasis on the Second Circuit's decision in *Weise v. Syracuse University*, 522 F.2d 397, 412 (2d Cir. 1975).

the *Martini* court found that "[n]othing in section 2000e-5(f)(1)'s language forecloses [the] view that the 180-day provision is simply a maximum, not minimum, waiting period for complainants seeking access to federal court."[359] Nor did the court discover anything in the structure, context, or legislative history of this section to call that conclusion into question.[360] Indeed, the *Martini* court observed that it probably would have adopted the view of the Ninth and Eleventh Circuits if, like those courts, it had terminated its inquiry after reviewing the language and legislative history of Section 706(f)(1).[361] Finally, the *Martini* court did not believe that compliance with the 180-day period was a jurisdictional prerequisite to suit.[362]

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359. Martini v. Federal National Mortgage Ass'n, 178 F.3d 1336, 1344 (D.C. Cir. 1999). As Judge Ellis noted in *Lauricia v. Microstrategy, Inc.*, 114 F. Supp. 2d 489, 495 (E.D. Va. 2000), Section 706(f)(1) is clear as to when a right-to-sue letter must issue, but not with respect to when the issuance of a right-to-sue letter is impermissible:

> [N]othing in the statutory language addresses or limits whether the EEOC may issue a right-to-sue letter prior to the expiration of the 180-day period. Had Congress intended such a result, they could easily have done so explicitly, by stating that right-to-sue letters will issue *only* in the circumstances prescribed, namely dismissal of the administrative complaint or expiration of the 180-day period.

Id. (emphasis in original).

360. *Martini*, 178 F.3d at 1344-45.

361. *Martini*, 178 F.3d at 1345 (citations omitted):

> Thus, neither section 2000e-5(f)(1)'s language nor the legislative history cited by Fannie Mae reveals "the unambiguously expressed intent of Congress" on "the precise question at issue" in this case. If our inquiry were to end here, we likely would agree with the Ninth and Eleventh Circuits that the early right-to-sue regulation does not violate section 2000e-5(f)(1). Under *Chevron*'s first step, however, we have a duty to conduct an 'independent examination" of the statute in question, looking not only "to the particular statutory language at issue," but also to "the language and design of the statute as a whole."

In this sense, the *Martini* court effectively rejected the reasoning of the many district courts that previously had held that the Commission lacked the power to issue right-to-sue letters prior to the expiration of the 180-day period. *See also* King v. Dunn Mem'l Hosp., 120 F. Supp. 2d 752, 755, 757 (S.D. Ind. 2000):

> In a thorough and painstaking opinion, . . . the [*Martini*] court actually rejected most of the employer's arguments against 29 C.F.R. § 1601.28(a)(2) and observed ambiguities in Title VII's language and legislative history. . . . This court finds much of the *Martini* opinion persuasive . . . However, the final step in the court's analysis, in which the court turned away from Section 2000e-5(f)(1) and the effects of an early right-to-sue letter on the recipient of that letter, and focused exclusively on Section 2000e-5(b) and on the policy goal of bringing long-term pressure to bear on the agency and Congress, goes beyond a persuasive application of *Chevron* principles.

362. *Martini*, 178 F.3d at 1348.

Only when the *Martini* court examined "the language and design of the statute as a whole,"[363] and focused on the language of Section 706(b), providing that "the Commission 'shall' investigate the charge and 'shall' make a reasonable cause determination 'as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge,'"[364] did the *Martini* court determine that the Commission's regulation could not be sustained. The court found that the Commission's duty to investigate was "both mandatory and unqualified,"[365] and incapable of being "square[d]" with the Commission's practice of "early termination of the process or the regulation authorizing it."[366] The court concluded that "the EEOC's power to authorize private suits within 180 days undermines its express statutory duty to investigate every charge filed, as well as Congress's unambiguous policy of encouraging informal resolution of charges up to the 180th day."[367] For those courts that accepted the *Martini* court's reformulation of the issue, the new question for decision was clear: whether Section 706(b) required a result that was not required by Section 706(f)(1).

In *Stetz v. Reeher Enterprises, Inc.*,[368] Judge McAvoy of the Northern District of New York, adopted the holding in *Martini*, and found that "the issuance of a right-to-sue letter by the EEOC prior to investigating a plaintiff's claims is inconsistent with the clear statutory mandate set forth in section 2000e-5(b)."[369] According to Judge McAvoy,

> [T]he issuance of a right-to-sue letter before the EEOC is permitted to investigate a plaintiff's allegation and attempt conciliation would result in an emasculation of the clear statutory language of Title VII and the Congressional policy underlying Title VII, which is aimed at having the EEOC, rather than the courts, resolving disputes involving unlawful employment practices.[370]

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363. *Id.* at 1345 (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 108 S. Ct. 1811, 1818 (1988)).

364. *Id.* at 1346 (quoting Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b) (1993)).

365. *Id.* at 1346.

366. *Id.*

367. *Id.* at 1347.

368. 70 F. Supp. 2d 119 (N.D.N.Y. 1999). Three of the plaintiffs filed their administrative charges on November 2, 1998, and they received right-to-sue letters on November 24, 1998. The fourth plaintiff filed her charge on November 18, 1998, and she received her right-to-sue letter on December 2, 1998. *Id.* at 120.

369. *Id.* at 123.

370. *Id.*

In the case at bar, the court noted, one of the plaintiffs had requested a right-to-sue letter before filing her administrative charge, and all of the plaintiffs had received right-to-sue letters within three weeks of filing their charges.[371] Thus, the court felt confident in stating that "no meaningful investigation of plaintiffs' claims was conducted, and no serious attempt to resolve the dispute was undertaken prior to initiating an action in federal court."[372] Interpreting the statute so as to permit "such early private suits is plainly inconsistent with the express language in Title VII, and works to undermine the purpose and effectiveness of the statute."[373] Finally, the court concluded that, "absent dismissal, the 180-day requirement in section 2000e-5(f)(1), read in conjunction with section 2000e-5(b)'s mandate that an investigation be conducted, clearly prohibits the issuance of a right-to-sue letter prior to the expiration of 180 days following the filing of the administrative complaint."[374] The court's opinion assumes that Section 706(b) generally requires an investigation of a particular kind and extent, but the opinion does not elaborate on those requirements for the simple reason that the statute itself does not. The opinion also assumes that those requirements were not met here, whatever they might be.[375]

Judge Spatt of the Eastern District of New York reached a similar result in *Rodriguez v. Connection Technology Inc.*,[376] although he initially framed the question as jurisdictional, asking "whether the Court presently has jurisdiction over the plaintiff's claims despite the fact that the EEOC issued an early right-to-sue letter."[377] Judge Spatt found that the court's analysis in *Martini* was persuasive and provided "a fundamental basis to conclude that the EEOC lacks the authority to issue early right-to-sue notices."[378] The court also

371. *Id.* at 124.
372. *Id.*
373. *Id.* at 125.
374. *Id.*
375. *Id.* at 123-25.
376. 65 F. Supp. 2d 107 (E.D.N.Y. 1999). In *Rodriguez*, the plaintiff filed her charge of discrimination on October 14, 1998, and received a right-to-sue letter on November 30, 1998. *Id.* at 109. She apparently was advised by the Commission that it was "unlikely that the EEOC [will] be able to complete its administrative processing within 180 days from the filing of [the] charge," and she thereafter requested and received a right-to-sue letter. *Id.*
377. *Id.* at 109.
378. *Id.* at 110. Although the court noted the many district court decisions that reached the same conclusion, the court did not note that the reasoning of those cases was often quite different from the reasoning in *Martini*. The court also noted that the Second Circuit's holding in *Weise v. Syracuse University*, 522 F.2d 397, 412 (2d Cir. 1975), was both limited and inapplicable to the present case. *Rodriguez*, 65 F. Supp. 2d at 111-12.

attempted to bolster its conclusion by relying on Judge Patterson's opinion in *Olszewski v. Bloomberg L.P.*[379] In that case, Judge Patterson had observed that the number of cases involving early right-to-sue letters had increased, thus suggesting that:

> [T]he EEOC has become indiscriminate in its issuance of these early notices, is not attempting to resolve disputes between the parties, and is ignoring its statutory obligations to review claims before they get to federal court, in order to unload its backlog of Title VII cases on the courts . . . [and, thus,] frustrating the concept of a two-tier resolution of such cases as envisioned by Congress.[380]

Finally, in *Simler v. Harrison County Hospital*,[381] Chief Judge Barker of the Southern District of Indiana accepted, in part, the reasoning of *Martini*. Judge Barker did not analyze the issues independently under *Chevron*, but started from the analysis contained in *Martini*. On that basis, Judge Barker was persuaded that previous decisions had failed to give appropriate attention to the Commission's duty to investigate under Section 706(b).[382] On the other hand, and unlike the courts in *Stetz* and *Rodriguez*, Judge Barker did not believe that the Commission's duty to investigate and attempt conciliation necessarily required it to maintain on its docket for at least 180 days all charges that were neither dismissed nor conciliated. According to Judge Barker, the proper focus was not "on the passage of time, [but] on the actions of the EEOC."[383] Thus, if the Commission had been able to complete its investigation in fewer than 180 days, a right-to-sue letter presumably could have issued. In Judge Barker's view,

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379. No. 96 Civ. 3393, 1997 WL 375690 (S.D.N.Y. July 7, 1997).

380. *Rodriguez*, 65 F.Supp.2d at 112 (quoting *Olszewski*, 1997 WL 375690, at *4). In two other cases, the courts ruled against the plaintiffs with even less analysis. In *Shepherd v. United States Olympic Committee*, 94 F. Supp. 2d 1136 (D. Colo. 2000), the District of Colorado indicated its agreement with the analysis in *Martini*, that a right-to-sue letter issued before the expiration of 180 days is invalid, and the resultant lawsuit untimely, because Section 706(b) mandates the investigation of every charge. *Id.* The court further relied on its own prior decision in *Mills v. Jefferson Bank East*, 559 F. Supp. 34 (D. Colo. 1983), but also indicated its belief that the holding in that case, framed in jurisdictional terms, was no longer technically correct. Significantly, the court described Section 706(b) as "requir[ing] the EEOC to investigate the charge for at least 180 days before issuing a right to sue notice." *Shepherd*, 94 F. Supp. 2d at 1143-44 (footnote omitted). Finally, in *Stafford v. Sealright, Inc.*, 100 F. Supp. 2d 137 (N.D.N.Y. 2000), Judge Mordue of the Northern District of New York simply recited the split of authority and noted his agreement with the holdings in *Stetz* and *Rodriguez*. *Id.* at 138-39.

381. 110 F. Supp. 2d 886 (S.D. Ind. 2000).

382. Nor did he specifically consider what degree of deference, if any, might be owed to the Commission's contrary interpretation of its statutory responsibilities.

383. *Simler*, 110 F. Supp. 2d at 888.

however, an "investigation" required more from the Commission than simply a determination that the Commission's caseload and resources would likely prevent the Commission from completing an investigation within 180 days. In effect, the duty to investigate, as understood by Judge Barker, required the Commission to make an actual investigation into the merits of "every charge filed with it that does not warrant dismissal on its face."[384] Judge Barker did not explain what type of investigation, let alone how much investigation, would be sufficient to justify the issuance of a right-to-sue letter in fewer than 180 days.[385] Notwithstanding the fact that he had remanded the case to the Commission for the purpose of conducting such an investigation, Judge Barker felt justified in leaving "for another day a determination of what type of investigation will meet statutory requirements."[386]

Those who were not persuaded by *Martini* typically thought that pointing to the Commission's duty to investigate was not sufficient to alter the result reached by the Ninth and Eleventh Circuits. For example, Judge Zagel of the Northern District of Illinois upheld the Commission's interpretation in *Berry v. Delta Air Lines, Inc.*,[387] finding that the regulation was "a reasonable interpretation of an ambiguous statutory provision."[388] In *Berry*, the Commission had issued a right-to-sue letter twenty-six days after the filing of the administrative charge of discrimination, based on the Commission's determination "that it would be unable to complete the administrative processing of the charge in less than 180 days."[389] One of the defendants moved to dismiss on the ground that "Title VII requires the EEOC to spend a minimum of 180 days investigating each charge of employment discrimination before issuing a right-to-sue letter."[390]

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384. *Id.* at 891.

385. The court recognized that its holding would "put considerable pressure on the EEOC to improve the efficiency of its operations," and "more funding or a change in the duties of the Commission may be in order." *Id.* The court left "these matters to others to resolve," confident that its duties had been discharged through its "analysis and decision that the obligations already imposed by Congress in 42 U.S.C. § 2000e-5(b) be complied with." *Id.* (citations omitted). In *Commadori v. Long Island University*, 89 F. Supp. 2d 353, 382-83 (E.D.N.Y. 2000), which upheld the regulation, the court dismissed such arguments, observing that they ignore the realities of caseloads and funding levels, and suggested that the Commission "cannot be cajoled into doing what it does not have the capacity to do." *Id.* at 382-83.

386. *Simler*, 110 F. Supp. 2d at 891.

387. 75 F. Supp. 2d 890 (N.D. Ill. 1999).

388. *Id.* at 891.

389. *Id.*

390. *Id.*

In the absence of apposite authority from the Seventh Circuit, Judge Zagel applied the *Chevron* test.[391] Even taking into account the Commission's statutory duty to investigate, Judge Zagel did not believe that the language and legislative history of Title VII "unambiguously express an intent to create a minimum 180-day investigation period, which is 'the precise question at issue.'"[392] Judge Zagel wrote in *Berry*:

> The Congressional intent is not as clear as *Martini* suggests. The question is whether Congress unambiguously intended to set a minimum waiting period of 180 days. As the *Martini* court noted, "nothing in section 2000e-5(f)(1)'s language forecloses [the plaintiff's] view that the 180-day provision is simply a maximum, not minimum, waiting period for complainants seeking access to federal court." The statute only says that if the EEOC has not acted in 180 days, it must issue a right-to-sue letter; it does not expressly make agency inaction for six months a condition precedent to the issuance of all right-to-sue letters. The text of the statute is ambiguous.
>
> Contrary to [the defendant's] suggestion, 42 U.S.C. § 2000e-5(b) does not resolve this ambiguity. That provision requires the EEOC to "make an investigation" whenever a charge is filed. In *Martini*, the court held that this mandatory duty to investigate is a clear expression of Congressional intent that cannot be reconciled with an early termination of EEOC proceedings. While it is clear that the EEOC must investigate, it is not clear that it must spend 180 days to do so. That is the question here. Nothing in 42 U.S.C. § 2000e-5(b) suggests that Congress wanted to dictate the duration of every investigation to the EEOC.
>
> The legislative history cited in *Martini* does not establish a clear Congressional intent to establish a 180-day minimum investigation period. Arguments made with rhetorical flair on the Senate floor suggested that the statute would force complainants "necessarily to sit around awaiting six months" and that it was a "180-day private filing restriction." These two isolated comments are not attributed to the entire Congress. Other evidence, particularly Congress's decision to use 180 days instead of 150 days, is also ambiguous; this could have been a decision to increase the maximum, not the minimum, amount of time allotted for an investigation.[393]

391. Of course, several judges of the Northern District of Illinois had spoken to the issue before the District of Columbia's decision in *Martini*. *See supra* note 232.

392. *Berry*, 75 F. Supp. 2d at 892 (citation omitted).

393. *Id.* (citations and footnotes omitted).

Proceeding to the second step of the *Chevron* analysis, Judge Zagel found that the regulation should be upheld as a "permissible construction of the statute."[394] Judge Zagel emphasized that the regulation does not permit the decision to issue an early right-to-sue letter to be made in an arbitrary or undisciplined way. The decision requires an official determination that the Commission probably will not complete the processing of the administrative charge within 180 days, which is equivalent to a "finding that a right-to-sue letter is likely to issue in any event."[395] Consistent with the Commission's duty to investigate and pursue informal resolution of charges of discrimination, the regulation "does not allow the wholesale abandonment of the EEOC's mandate," but "requires the agency's expert determination that a right-to-sue letter is probable."[396] In other words, "[w]here further investigation or conciliation is unlikely to prevent a right-to-sue letter from being issued (perhaps because the EEOC's workload prohibits many investigations from being completed within 180 days), the regulation allows the Commission to move on to the next case."[397] Taking into account the Commission's "expertise in administering the statute," the court thought that the regulation constituted "a permissible interpretation of its obligations under Title VII."[398]

Judge Hamilton of the Southern District of Indiana engaged in a similar analysis in *King v. Dunn Memorial Hospital*.[399] Like Judge Zagel, Judge Hamilton noted that the inquiry was governed by

394. *Id.*
395. *Id.*
396. *Id.* at 892-93.
397. *Id.* at 893. In *Simler v. Harrison County Hospital*, 110 F. Supp. 2d 886 (S.D. Ind. 2000), Judge Barker agreed with Judge Zagel's conclusion that a right-to-sue letter was not categorically precluded prior to the expiration of the 180-day period, but Judge Barker did not believe that the Commission's duty to investigate could be discharged in the manner suggested by Judge Zagel. *Id.* at 889-90. According to Judge Barker, a determination that the Commission probably would not be able to complete its investigation during the 180-day statutory period "is not tantamount to an investigation of the charge," but "simply an evaluation that the EEOC, an agency with an admittedly heavy caseload and comparatively few resources, prefers not to begin an investigation that it estimates it cannot complete." *Id.* at 890.
398. *Berry*, 75 F. Supp. 2d at 893. In *Maple v. Publications International, Ltd.*, No. 99 C 6936, 2000 WL 85951 (N.D. Ill. Jan. 21, 2000), Judge Conlon of the Northern District of Illinois reached the same result. In *Johnson v. Cook Composites and Polymers, Inc.*, No. Civ. A 99-4916, 2000 WL 249251 (D.N.J. Mar. 3, 2000), the District of New Jersey relied extensively on the analysis contained in *Berry*, as well as on the decision in *Seybert v. West Chester University*, 83 F. Supp. 2d 547 (E.D. Pa. 2000). In both cases, the courts considered those decisions in the context of their *Chevron* analyses.
399. 120 F. Supp. 2d 752 (S.D. Ind. 2000).

Chevron, the Seventh Circuit had not spoken to the precise question at issue, and the case law was divided. In addition to analyzing the issue under *Chevron*, Judge Hamilton gave considerable attention to *Martini* and to *Simler*, the latter having been decided by another judge of the Southern District of Indiana. Judge Hamilton closely reviewed the opinion in *Martini*, noting that the court in that case had "actually rejected most of the employer's arguments against 29 C.F.R. § 1601.28(a)(2) and observed ambiguities in Title VII's language and legislative history."[400] According to Judge Hamilton, however,

> [T]he final step in the [*Martini*] court's analysis, in which the court turned away from Section 2000e-5(f)(1) and the effects of an early right-to-sue letter on the recipient of that letter and focused exclusively [on] Section 2000e-5(b) and on the goal of bringing long-term pressure to bear on the agency and Congress[,] goes beyond a persuasive application of *Chevron* principles.[401]

Ultimately, the court concluded that *Martini* was inconsistent with a proper application of *Chevron*:

> Under *Chevron*, the court must ask "[f]irst, always . . . whether Congress has directly spoken to the precise question at issue." There is obviously some tension between Section 2000e-5(f)(1)'s grant of authority to dismiss a charge on the 180th day without regard for the status of the EEOC's processing of the charge and Section 2000e-5(b)'s mandate that the EEOC "shall investigate" every charge. This court is not persuaded that Congress has directly addressed the precise question at issue—whether an "aggrieved person" under Title VII can obtain a right-to-sue letter and bring suit before the EEOC has processed his charge for 180 days. The relevant legislative history does not resolve the statutory ambiguity. Congress was aware of the competing concerns when it passed the statutory provisions in question.
>
> By declaring an ambiguous record of congressional intent unambiguous, the *Martini* decision embraced Congress's policy preference for administrative resolution of complaints, but it did so at the expense of other congressional policy choices. *Martini* reflects an explicit policy choice to try to bring pressure on the EEOC and Congress to speed up agency

400. *Id.* at 755.

401. *Id.* at 757. As the *King* court pointed out, the parties had not thought that section 706(b) was relevant to the case, and that section had not been discussed in the briefs. *Id.* at 756.

> action. The decision does so through the mechanism of forcing many complaining parties to spend 180 futile days waiting for agency action that everyone involved is confident is not going to occur at all.
>
> In other words, under *Martini's* reasoning, the way to improve enforcement in the future is to penalize with futile delay those who seek a remedy today. This court respectfully disagrees. The *Martini* analysis goes beyond statutory interpretation and instead intrudes into the agency's responsibility for balancing its limited resources with expanding responsibilities. This approach strikes at the very heart of *Chevron* deference. Where congressional intent on the precise issue at hand is unclear, as it is here, the court may not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." Instead, the court must defer to an agency regulation if it is reasonable. . . .
>
> The EEOC regulation . . . is a reasonable response to rapidly growing caseloads that is consistent with the policy balance struck by Congress in Title VII. If a complaining party and attorney are prepared to pursue their case without the assistance of an EEOC investigation (one that can take many months or longer to complete), an early right-to-sue letter allows the agency to use those investigative resources for cases in which complainants do not have as many resources of their own.[402]

The *King* court also was not persuaded by the variation of *Martini* that Chief Judge Barker adopted in *Simler*. Unlike *Martini*, the *Simler* court did not hold that a right-to-sue letter may not issue prior to the expiration of the 180-day period. Instead, the *Simler* court held that the dispositive question was whether the Commission's investigation had been completed. If the Commission has "completed" its "investigation" in fewer than 180 days, it may issue a right-to-sue letter under the holding in *Simler*. The difficulty with this rule, apart from the question of its connection to congressional intent or administrative interpretation under *Chevron*, is that it raises more questions than it answers. As Judge Hamilton suggested, *Simler* "invites further litigation over just how much investigation" is sufficient to satisfy the Commission's statutory duty of investigation and permit the issuance of a right-to-sue letter prior to the expiration of the 180-day period.[403] If the Commission's statutory

402. *Id.* at 757-58 (footnotes and citations omitted).

403. *Id.* at 758-59. In *Connor v. WTI*, 67 F. Supp. 2d 690 (S.D. Tex. 1999), the Southern District of Texas thought the view taken by the Ninth and Eleventh

duty also extends to the seeking of conciliation, as it presumably does, the same question might be raised in that regard.

Similarly, in *Fernandes v. TPD, Inc.*,[404] Judge DiClerico of the District of New Hampshire found *Martini* to be unpersuasive. Although the District of Columbia Circuit in *Martini* had thought that "Congress unambiguously intended for the 180-day period to function [both] as a deadline for the EEOC to issue a right-to-sue notice [and] as a minimum waiting period within which the EEOC cannot issue a notice," the *Fernandes* court thought "Congress's intent regarding this matter [to be] far from clear."[405] According to Judge DiClerico, the statutory language is not revealing, and the legislative history reflects two separate goals, namely, a preference for discrimination charges to be resolved informally and an intention that charges be resolved quickly.[406] The court therefore observed that:

> Because of the EEOC's inability to promptly investigate every charge it receives, these two goals are somewhat contradictory. Congress struck a balance by ensuring that claimants must wait no more than 180 days after filing a charge before proceeding to court. The EEOC's early right-to-sue regulation, allowing claimants to proceed before 180 days have passed, furthers Congress's goal of avoiding unnecessary delay in resolving disputes. Moreover, the regulation does not interfere with Congress's mandate that the EEOC investigate charges any more than the 180-day deadline does. It merely permits the EEOC to make an earlier determination that it will not be able to investigate a particular claim within 180 days. Therefore, the EEOC's early right-to-sue notice regulation does not appear to contradict Congressional intent, to the extent Congressional intent can be discerned.[407]

The *Fernandes* court concluded that the agency's interpretation was a permissible construction of its organic statute and, therefore, valid under *Chevron*. In particular, the court noted that "[t]he regulation reasonably allows the EEOC to exercise its expert

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Circuits to be preferable to the view taken by the District of Columbia Circuit in *Martini*, but also thought *Martini* distinguishable on the ground that the right-to-sue letter in *Connor* had issued more than 120 days after the filing of the administrative charge, at which time the Commission's mandatory investigation period had passed. *Id.* at 697-98.

404. No. 99-33–JD, 2000 WL 1466108 (D.N.H. Jan. 7, 2000).

405. *Id.* at *3 (citation omitted).

406. *Id.* (citation omitted).

407. *Id.* (citations omitted).

judgment in determining which charges are unlikely to be processed within 180 days."[408]

Finally, Judge Ludwig of the Eastern District of Pennsylvania engaged in a similar analysis and reached similar conclusions in *Seybert v. West Chester University*.[409] Analyzing the question under *Chevron*, the court first considered the statutory text, which it found to be "not particularly helpful," and then proceeded to discuss the legislative history, which it found "not less equivocal."[410] With respect to the latter, the court pointed out that depictions of the Commission as the "preferred tribunal for resolving employment discrimination claims" are offset by assertions that primary concern must be given to protecting the "aggrieved person's option to seek a prompt remedy in the best manner available."[411] The legislation was not characterized by a single purpose, but by "multiple objectives."[412] Thus, the court found it "unsurprising[]" that the legislative history "does not conclusively point to a single interpretation."[413] In these circumstances, the court's duty under *Chevron* is clear: "The question is not whether the EEOC's view is correct, or whether another view, such as *Martini's*, is incorrect, but given the alternatives, whether the regulation is a plausible interpretation of Section 2000e-5(f)(1). Under *Chevron*, that suffices, and once upheld[,] the regulation is entitled to deference."[414]

On the one hand, the court was clear in upholding the regulation. On the other hand, Judge Ludwig, like other courts, was obviously uncomfortable with the degree of discretion that this construction of the statute gave to the Commission. Thus, the court attempted to draw a distinction between the "validity" of the regulation and its "applicability," and purported to reserve for the courts a significant role in reviewing administrative applications of the regulation. Notwithstanding the ambiguities and complexity of the statutory text and legislative history, the court asserted that "[e]arly right to sue notices should not be issued as of course," that the Commission "should not be regarded as a minor detour on the way to court," and that the Commission must act in a way that "assure[s] that misconception is not given credence."[415] The court

408. *Id.* at *4 (citation omitted).
409. 83 F. Supp. 2d 547 (E.D. Pa. 2000).
410. *Id.* at 551.
411. *Id.* at 551-52 (citation omitted).
412. *Id.* at 552.
413. *Id.*
414. *Id.*
415. *Seybert*, 83 F. Supp. 2d at 552-53.

took some consolation from the Commission's professed practice in issuing right-to-sue letters:

> It is the position of the EEOC that right to sue notices are issued only after careful consideration. Factors reviewed include: the agency's need to conduct extensive witness interviews; the respondent's history of cooperation; the time between the filing of the charge and the request; the pending caseload. Also, the policy of the Philadelphia office of the EEOC is to afford a settlement opportunity before an early notice is issued.[416]

Without any citation of authority, however, the court reserved to itself the power to review the Commission's determinations under the regulation: "If it appeared of record that a charge has received little, if any, consideration other than the issuance of a right to sue notice, a court should be able to remand the case for further administrative processing."[417] Taken seriously, that reservation of authority would doubtless require the Commission to justify its determination at the request of every defendant and possibly to be second-guessed by the courts, under not very clear standards, in virtually every case in which a right-to-sue letter was issued during the 180-day period.

V. DEFERENCE IN THEORY AND PRACTICE

The case analysis drawn out in the preceding section demonstrates, among other things, the difficulty of attempting to follow a single issue in a dynamic and evolving area of law over the course of a lengthy period of time in a vast, innovative, and decentralized jurisdiction. Law is not a laboratory science, and it is not possible in law to isolate a single variable, preserving an otherwise controlled environment. One can hope to isolate a particular issue and follow the course of its development, but every issue has a logical geography and is situated at various times and in various places within a complicated web of circumstances, including other evolving issues, all of which are also characterized by various degrees of constancy and change.[418] Some webs of circumstances are necessarily more dynamic than others, and some fields and periods of time are more innovative and dynamic than others. Similarly, the longer the period of time that is the subject of inquiry, the more complex the relationships and interactions among variables are likely

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416. *Id.* at 553 n.12.
417. *Id.* at 553.
418. *See* Barry Sullivan, Book Review, 4 Const. Commentary 452, 454-55 (1987).

to seem. One can focus, then, on a particular variable, such as the developing doctrine relating to judicial review of administrative interpretations of law, and focus further on how that variable is playing out with respect to a particular agency's interpretation of a discrete portion of a single statutory provision. But one can only attempt to pay close attention to such discrete things; one cannot truly isolate them or remove them from the dynamic contexts and circumstances that both affect them and contribute to their definition. Other factors and other trends constantly intrude on the artificial tidiness of a project such as this, and it is necessary to try and appreciate the extent of their influence and significance.

With respect to the subject under discussion, the significance of some of these background features became clear during the earliest period we have considered. At the most basic level, both the statute and its implementation evidence compromise and ambivalence. On the one hand, the legislation's earliest proponents perceived an acute need for fundamental change in a central aspect of American life. In 1964, after all, the system of industrial organization in many places reflected the organization of social life in the broader community. The system of industrial organization in various parts of the country was therefore characterized by formal racial segregation in the workplace, the structural relegation of racial minorities and women to lower-paid work units and seniority lines, and the representation of workers by racially-segregated or exclusionary local unions.[419] On the other hand, some congressional proponents of change were more cautious, saw the need for change as less acute, and thought that the main danger lay in proceeding either in directions that were unintended or at speeds that were unwise. Yet another group of legislators perceived any change to be unwarranted, unnecessary, and even unconstitutional. It is not surprising, therefore, that both the statutory text and the legislative history speak to many concerns, and that they speak to them in ways that are far from consistent. Once one goes beyond the general purpose of the statute, the statutory language and the legislative history afford many opportunities for

419. *See, e.g.*, Quarles v. Phillip Morris, 279 F. Supp. 505 (E.D. Va. 1968) (establishing the "present effects of past discrimination" concept of liability after a formal system of racial segregation ended, but the company continued a departmental seniority system in which blacks, wishing to transfer to formerly white departments, would lose their seniority once they transferred); Teamsters v. United States, 431 U.S. 324, 335, 97 S. Ct. 1843, 1854 (1977) (finding a pattern and practice of discriminatory hiring practices when the company "regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons [by refusing] to recruit, hire, transfer and promote minority group members on an equal basis with white people, particularly with respect to line-driving positions").

principled disagreement. It is possible to claim that Congress intended its goals in this area to be best accomplished by affording victims of employment discrimination expeditious redress in the forum of their choice. It is equally plausible to assert that Congress was principally interested in achieving its goals through the administrative resolution of charges of discrimination and without the need for judicial intervention. It is also the case, however, that these two goals are totally at odds in many cases, and in various ways that Congress, attempting to create novel and untested solutions to long-festering social problems, only dimly appreciated in 1964 or 1972, when it enacted and revisted Title VII.

The statute which the Commission was charged with enforcing was the product of political compromise, poor drafting, and often unexplained parliamentary maneuvers. The conditions were well-captured by the late insertion, by an opponent of the bill, of sex discrimination as a prohibited (but undefined) form of discrimination.[420] The statute was both complex and unclear, and it appeared to leave open many issues that needed to be settled. At the same time, the final version of the statute contained no grant of legislative or substantive rulemaking authority, which further constricted the Commission's room to maneuver. The Commission presumably could attempt to settle necessary details only through procedural rules, to the extent that the open issues were procedural, or through other avenues, such as the framing of guidelines that would not have the force of law, but would be costly and time-consuming to promulgate and implement. The need for further elaboration was obvious. Yet the wisdom of dedicating scarce resources to the formulation of guidelines might have seemed somewhat questionable, particularly in view of their non-binding character, the inherent complexity of the issues, the lack of guidance which the statute provided for their resolution, the high costs of attempting to resolve the issues in an intellectually and politically satisfactory way, and the Commission's competing need for resources to deal with its growing case backlog.

The ambivalence evidenced by the statutory language and legislative history also manifested itself in the substantial delays that accompanied the Commission's organization and staffing, and in the levels of funding that Congress provided for the Commission during its early years. Virtually from its inception, the Commission was unable to keep current with its caseload, and its underfunded, understaffed performance did little to inspire confidence.

Not surprisingly, Title VII defendants sought to take advantage of these circumstances. On the one hand, they attempted to exploit

420. *See, e.g.*, Kanowitz, *supra* note 262; Branch, *supra* note 102, at 231-34.

the Commission's inability to keep current with its caseload by arguing that the exhaustion doctrine prevented cases from being filed in federal court unless the plaintiff could show that the Commission had made real efforts to conciliate the dispute. Given the Commission's caseload and funding levels, it was unlikely that conciliation efforts could be undertaken or sustained in a large number of cases. Absent proof of such efforts, however, the defendants' theory would have required a case to be remitted to the Commission for further "action." On the other hand, Title VII defendants also argued that the various statutory time limits should be construed as one overall period of limitations, so that charging parties might find that their claims were time-barred when the Commission finally acted on them.

The courts eventually rejected both of these arguments, but two points of continuing importance can be made about them. First, these early cases tended to refer to the various statutory time limitations, albeit mainly in an off-hand way, as "jurisdictional" requirements. Even if unintended, this characterization proved important because jurisdictional issues were traditionally thought to rest within the province of the courts and to be less subject to deference than would the very same issues framed in non-jurisdictional terms. An assumption that the issue was jurisdictional was therefore likely to engender a further assumption that the courts would have principal responsibility for sorting it out. To the extent that this use of jurisdictional language continued and hardened in later cases, it was to have an important effect on the framing and resolution of the 180-day question.

Second, these early cases contain virtually no discussion of any role for the Commission to play in ascertaining the meaning and proper application of this complex, confusing, and, in some respects, essentially unfinished statute. In one sense, that may be attributable to the off-hand characterization of these issues as "jurisdictional." It is also consistent with the fact that the Commission had expressed its views only in the context of litigation, and agency litigating positions are not normally given great weight as indicators of statutory meaning.[421] Thus, the courts embarked on the process of construing these "jurisdictional" requirements without having to focus on what weight, if any, should be given to the Commission's views.[422] At

421. *See* William N. Eskridge, Jr., et al., Legislation and Statutory Interpretation 322 (2000); Lars Noah, 75 Tul. L. Rev. 137, 147-48 (2000). On the other hand, the Court had no trouble relying on such a litigating position in *Martin v. OSHRC*, 499 U.S. 144, 111 S. Ct. 1171 (1991), and Justice Scalia would have done so in *Christensen*. *See* Christensen v. Harris County, 529 U.S. 576, 589-92, 120 S. Ct. 1655, 1663-66 (Scalia, J., concurring in part and concurring in the judgment).

422. In cases in which the issue truly is jurisdictional, the weight to be given to

about the same time, however, Justice Douglas articulated a different view, when he dissented from the denial of *certiorari* in *Crosslin v. Mountain States Telephone and Telegraph Company*[423] on the ground that the court of appeals had given insufficient attention to the Commission's views.[424]

Although the first set of cases did not deal directly with the problem of early right-to-sue letters, the second set, decided between 1972 and 1977, involved notices issued under the Commission's pre-regulation practice of issuing early right-to-sue letters. In the second set of cases, as in the first, there is much talk about the "jurisdictional" nature of the time requirements under Title VII, and the mode of analysis in the cases reflects that characterization. The threshold question, as the *Milner* court suggested, is whether Section 706(f)(1) simply requires the Commission to issue a right-to-sue letter at the end of the 180-day period or also prohibits its issuance before the end of that period. If the statute simply requires that a right-to-sue letter be issued at the conclusion of the 180-day period, and does not prohibit the Commission from doing so earlier, then the Commission may issue an early right-to-sue letter, and there is no problem. If, on the other hand, the statute is to be read as affirmatively prohibiting the issuance of a right-to-sue letter before the end of the 180-day period, it becomes necessary to determine the precise extent and legal significance of that prohibition. Is there some reason for characterizing the issue in "jurisdictional" terms? If so, does it mean that the Commission has "exclusive jurisdiction" for the 180-day period, which it cannot waive or otherwise terminate, and that the federal courts therefore necessarily lack subject matter jurisdiction during the same period? Or, is it merely a question of "primary" jurisdiction, which may be overcome when necessary? If the prohibition is meant to be jurisdictional, is it absolute, or is there room for modification? Finally, if the statutory prohibition does not constitute a jurisdictional barrier to the issuance of an early right-to-sue letter, how is the prohibition to be understood, and what limits are to be placed on the Commission and the courts by virtue of the prohibition?

In several of these cases, the Commission's views do come before the court, even if only through the explanations that the Commission has offered in the right-to-sue letters on which the cases are premised.

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an agency's construction of its statute remains open. *See, e.g.*, Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989 (1999). It appeared that the Court might answer this question in *FDA v. Brown & Williamson Tobacco Company*, 529 U.S. 120, 120 S. Ct. 1291 (2000), but the Court did not reach the issue.

423. 400 U.S. 1004, 91 S. Ct. 562 (1971).

424. *Id.* at 1005, 91 S. Ct. at 563.

For the most part, however, there is little opportunity for the Commission's views to be taken into account in this group of cases, and the courts apparently see little relevance to those views in any event. As a general matter, these courts treat the issues presented as straight questions of law which call for the exercise of judicial expertise and experience rather than any special knowledge or expertise that the Commission might have to offer. Moreover, the judicial approach appears consistent across this group of cases. Specifically, it does not seem to vary depending on whether the court ultimately holds that Section 706(f)(1) does or does not prohibit the issuance of a right-to-sue letter within the 180-day period, or on whether the court ultimately deems such a prohibition to be jurisdictional or not. There is little discussion of the issue in terms of the Commission's authority to construe and implement its organic act and make decisions about the allocation of its own resources, let alone the degree of deference the courts might owe to such administrative determinations.

One additional point may be made about this group of cases, namely, the apparent lack of engagement with Supreme Court precedent on the part of the lower courts. As we have seen, there was a great deal of discussion in the Supreme Court cases during this period concerning the degree of deference, if any, that might be owed to the Commission's interpretations of Title VII. In his dissent in *General Electric Company v. Gilbert*,[425] for example, Justice Brennan pointed out that the Court's previous cases had given "great deference" to the Commission's interpretations of Title VII, even when those interpretations occurred in the context of case decisions or guidelines technically lacking the force of law.[426] In effect, Justice Brennan suggested that the Court had given special weight to the Commission's interpretations in part, perhaps, because of the novelty and difficulty of the subject matter with which they were concerned. Writing for the majority, Justice Rehnquist thought that the Commission's views were entitled to nothing more than "consideration."[427] In other words, there was a lively debate in the Supreme Court during this period concerning the proper treatment of Commission interpretations of Title VII. Indeed, if Justice Brennan's version is to be credited, there was a time before *Gilbert* when the Supreme Court seemed to accord greater weight than was otherwise customary to the Commission's views, and without regard to the precise form in which those views were presented. On the other hand, the cases decided by the lower courts during this period appear to have been little affected by that debate.

425. 429 U.S. 125, 97 S. Ct. 401 (1976).
426. *Id.* at 156, 97 S. Ct. at 418 (citations omitted).
427. *Id.* at 141, 97 S. Ct. at 410 (citations omitted).

In the next set of cases, which spans the period from 1977 to 1984, there are two important factors that warrant mention at the outset. First, the starting point for this period is marked by the promulgation of the Commission's regulation. Thus, an important question is the extent, if any, to which the courts' treatment of the early right-to-sue letter problem was affected by the fact that the issuance of such letters now rested, not merely on the Commission's established practice, but on a procedural regulation of the kind that Congress expressly authorized the Commission to promulgate. Second, the courts continued during this period to characterize the primary question as "jurisdictional." However, some courts began to doubt the accuracy of this characterization, particularly after 1982, when the Supreme Court, in *Zipes v. Trans World Airlines*,[428] determined that another one of the time limits provided in Title VII was not a jurisdictional requirement, but a period of limitations or condition precedent to filing suit, and therefore subject to equitable modification.

By and large, the existence of the regulation seems not to have greatly affected the approach taken by the courts. Although some courts now perceived the issue to concern the validity of the regulation, rather than simply the legitimacy of a particular right-to-sue letter, the legal analysis in most cases proceeded largely as it had in the past. For most courts, the outlines of the approach already had been determined, and the task was to apply the template without giving much additional consideration to the administrative law aspect of the problem. This attitude may be attributable in part to Justice Rehnquist's overly-broad assertion in *Gilbert*, that Congress had not conferred "rulemaking authority" (as opposed to *substantive* rulemaking authority) on the Commission, but it certainly was connected as well with a judicial disinclination to revisit settled matters.

Even Judge Sofaer's thoughtful opinion in *Spencer v. Banco Real*[429] approached the problem as simply a straightforward question of statutory construction for the courts to decide, without any discussion of the Commission's possible role in construing the statute. Notwithstanding the "convoluted" language of the relevant statutory provision, Judge Sofaer, following Judge Renfrew, was able to detect a clear congressional intent from the statutory language and legislative history. Judge Sofaer thought that the overall structure of the statute reflected the intended primacy of the administrative process and the jurisdictional quality of the 180-day provision. He dismissed out-of-hand the contrary policy arguments that the

428. 455 U.S. 385, 102 S. Ct. 1127 (1982).
429. 23 Fair Empl. Prac. Cas. (BNA) 1558 (1980).

Commission raised, as an *amicus curiae*, based on its practical experience in administering the statute. Moreover, Judge Sofaer thought that his legal conclusions would have salutary effects on both the agency and the courts; the former would have to become more efficient, while the latter would be spared work that Congress intended the Commission to perform. Judge Morton reached the opposite result in *Cattell v. Bob Frensley Ford, Inc.*,[430] as did the Ninth Circuit in *Bryant v. California Brewers Association*,[431] but the analyses in those cases followed the same general lines. Those courts mainly departed from Judge Sofaer in their reading of the statutory language, which they construed as requiring the issuance of a right-to-sue letter at the expiration of the 180-day period but not necessarily prohibiting its earlier issuance. Like Judge Sofaer, those courts gave little attention to questions of deference.

The period that began with *Chevron* and ended with *Martini* is an interesting and lengthy one. From a theoretical perspective, this period contains three major mileposts, although their ultimate, practical significance may be disputed. In 1984, the Supreme Court created the two-part test in *Chevron*. In 1988, the Court decided *Commercial Office Products*, once more taking an expansive view of the deference due to Commission interpretations of Title VII. In 1991, the Court decided *Arabian American Oil Company*. Without mentioning *Commercial Office Products*, the Court announced in *Arabian American Oil Company* that the Commission's interpretations were entitled only to the degree of deference due under *Skidmore*. In neither of these two Title VII cases did the Court talk specifically about the Commission's statutory rulemaking authority, much less the significance to be attributed to that grant of authority.

The practical significance of *Commercial Office Products* and *Arabian American Oil Company* for the resolution of the 180-day issue was considerably less than might have been expected. In the set of early right-to-sue cases decided in the interval between *Chevron* and *Martini*, the approach taken by the lower federal courts seems not to have been greatly influenced by the lack of consistency within the Supreme Court's jurisprudence. Indeed, the cases in this set generally reflect an awareness of *Chevron*, but they do not invariably refer to *Chevron* or its two-step analysis. Some cases also reflect a degree of reliance on *Commercial Office Products*. In the main, however, the cases also reflect the strong continued influence of the themes and modes of analysis that characterized even the earliest cases. Thus, this set of cases continues to be concerned with whether

430. 505 F. Supp. 617 (M.D. Tenn. 1980).

431. 585 F.2d 421 (9th Cir. 1978), *vacated and remanded on other grounds*, California Brewers Ass'n v. Bryant, 444 U.S. 597, 100 S. Ct. 418 (mem.) (1980).

the language of the 180-day provision of Section 706(f)(1) actually precludes the issuance of right-to-sue letters prior to the end of the 180-day period, and, if so, whether the 180-day provision has jurisdictional significance. On the other hand, *Zipes* and its progeny seem to have taken some of the wind out of the sails of the jurisdictional argument by this point, causing the use of jurisdictional nomenclature to be examined, rather than assumed. In addition, some of these cases emphasized the specific statutory authority to promulgate procedural rules that Congress had given to the Commission, the procedural nature of the early right-to-sue letter regulation, and the obligation of the courts to uphold such regulations, so long as they do not directly contradict statutory language or intent.[432] The courts that struck down the regulation during this period generally did so either because they construed Section 706(f)(1) to create a 180-day period of exclusive agency jurisdiction, which the Commission could not alter, or because they found that the regulation was not entitled to deference because it directly contradicted congressional intent.[433]

Compared to the overall length of the time period covered by this article, the *Martini* period (July 1999 to December 2000) is a tiny fraction, yet this period is also an important one from the perspective of this project. The importance of the period does not rest on the number of courts that rushed to follow the holding in *Martini* (those were relatively few in number), but on the power and speed with which the reasoning in *Martini* began to set the agenda for the doctrinal debate. Essentially, Judge Tatel's opinion in *Martini* took a tack different from that of every court that previously had addressed the issue. Judge Tatel agreed in part with everyone; he agreed in full with no one. The result Judge Tatel reached was one that others had also reached, but the reasons he gave for reaching it were different from those that others had given. At a time when overworked courts are relieved to find a case on point, and tend to view their responsibility as that of deciding whether to accept or reject the reasoning of prior decisions, the intellectual ambition reflected in Judge Tatel's opinion is itself noteworthy. In any event, by rejecting the proposition that the Commission's regulation was invalid because it was inconsistent with the plain meaning of Section 706(f)(1), the *Martini* court essentially disagreed with all of the courts that

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432. *See, e.g.*, Rolark v. University of Chicago Hosps., 688 F. Supp. 401 (N.D. Ill. 1988); Sims v. Trus Joist MacMillan, 22 F.3d 1059 (11th Cir. 1994); Hicks v. Maruchan Virginia, Inc., No. 3:96cv549, 1996 U.S. Dist. LEXIS 13754 (E.D. Va. Sept. 3, 1996).

433. *See, e.g.*, Henschke v. New York Hospital-Cornell Med. Ctr., 821 F. Supp. 166 (S.D.N.Y. 1993); Montoya v. Valencia County, 872 F. Supp. 904 (D.N.M. 1994).

previously had struck down the regulation. On the other hand, by holding that the regulation was nonetheless invalid because it was inconsistent with the Commission's duty under Section 706(b) to investigate all charges of discrimination, Judge Tatel implicitly disagreed with all the courts that had upheld the regulation.

Whether one ultimately agreed with Judge Tatel, the opinion was a *tour de force*. The opinion made a powerful argument to show that the regulation could not justifiably be struck down, based on its asserted inconsistency with Section 706(f)(1) of Title VII, under the first step of the *Chevron* test. Thus, to invalidate the regulation in the future under the first step of *Chevron*, it would be necessary to show (1) that Judge Tatel had been wrong about the meaning of Section 706(f)(1), or (2) that the regulation was inconsistent with Section 706(b) and the statute as a whole. On the other hand, to uphold the regulation, one would now be required to demonstrate that Judge Tatel was incorrect in his understanding that the Commission's statutory duty to investigate was inconsistent with the notion that some charges of discrimination could be released from the administrative process without either being investigated or having the 180-day period elapse. In other words, *Martini* moved the center of the debate, and it did so immediately.

Thus, courts that previously might have relied on a jurisdictional argument under Section 706(f)(1) quickly were won over to the new analysis. For example, Judge McAvoy of the Northern District of New York, where several judges had previously invalidated the regulation based on its incompatibility with Section 706(f)(1), now adopted the reasoning of *Martini* and rested his holding in *Stetz v. Reeher Enterprises*[434] on the duty to investigate under Section 706(b). In that particular case, the record apparently contained no information about the nature or extent of any investigation that might have occurred, but Judge McAvoy was willing to assume, based on the relative speed with which the right-to-sue letters had been produced, that no such investigation could have occurred.[435] Among other things, the emphasis on the Commission's absolute and categorical duty to investigate lent reinforcement to the idea (which some courts had long found congenial) that disputes of this kind generally should be settled within the confines of the Commission and should not routinely be heard in federal court.[436] On the other hand, some

434. 70 F. Supp. 2d 119 (N.D.N.Y. 1999).

435. *Id.* at 124.

436. *See, e.g.*, Rodriguez v. Connection Technology, Inc., 65 F. Supp. 2d 107, 112 (E.D.N.Y. 1999). Indeed, some courts had previously gone so far as to state that a prime concern of those who drafted Title VII was to protect the federal courts from an excessive caseload. *See, e.g.*, Stetz v. Reeher Enterprises, Inc., 70 F. Supp.

courts thought that the argument based on Section 706(b) showed less than its proponents thought. After all, the fact that Section 706(b) requires the Commission to "make an investigation" does not necessarily mean that the Commission is required to make an investigation of any particular kind. Nor, as Judge Zagel of the Northern District of Illinois pointed out, does it necessarily mean that the Commission is required to investigate for any particular length of time, and certainly not necessarily for the 180-day period set forth in Section 706(f)(1).[437] In Judge Zagel's view, therefore, the duty to investigate contained in Section 706(b) did not make the question of the regulation's validity any more susceptible to resolution at the first step of the *Chevron* analysis than it would have been if only Section 706(f)(1) had been involved. Thus, the court was required to proceed to the second step of the *Chevron* test, at which point the regulation was upheld as a "permissible construction of the statute."[438] Finally, as other courts pointed out, the ultimate result in *Martini* represented a construction of congressional intent that was far simpler and more univocal than the reality. The depiction of the Commission as the "preferred tribunal for resolving employment discrimination claims"[439] was technically correct, but misleading insofar as the legislation is not dominated by that concern. As one court observed, the legislation was not characterized by a single purpose, but by "multiple objectives."[440]

At all events, the decision in *Martini* transformed the content or terms of the debate over the early right-to-sue letter, and it did so in a spirit that even new decisions by the Supreme Court have not been able to capture. *Martini* did not announce any new legal principle, but simply took a fresh look at materials that had been on the table for a long time. Other courts did not necessarily agree with the conclusion in *Martini*, but they did respond to the way in which *Martini* had redefined the question. Most important, the decision in

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2d 119, 123 (N.D.N.Y. 1999) (explaining that an early issuance of a right-to-sue letter would result in an "emasculation of the clear statutory language of Title VII and the Congressional policy underlying Title VII, which is aimed at having the EEOC, rather than the courts, resolving disputes involving unlawful employment practices"). In *Olszewski v. Bloomberg L.P.*, No. 96 Civ. 3393 (RPP), 1997 WL 375690 (S.D.N.Y. July 7, 1997), Judge Patterson attributed a perceived increase in the number of early right-to-sue letters to the Commission's effort "to unload its backlog of Title VII cases on the courts, [thus] frustrating the concept of a two-tier resolution of such cases as envisioned by Congress." *Id.* at *4.

437. Berry v. Delta Airlines, Inc., 75 F. Supp. 2d 890 (N.D. Ill. 1999).

438. *Id.* at 892.

439. *See, e.g.*, Sebert v. West Chester Univ., 83 F. Supp. 2d 547, 551 (E.D. Pa. 2000); Richardson v. Valley Asphalt, Inc., 109 F. Supp. 2d 1332, 1337 (D. Utah 2000).

440. *Sebert*, 83 F. Supp. 2d at 552.

Martini reflected no new mode or style of analysis. As in the earliest cases we have considered, Judge Tatel looked at the regulation from the perspective that the issue was a question of law to be decided by the courts. If anything, his decision to look to other sections of this complex and somewhat contradictory statute took that mode of analysis to a new level, reinforcing the degree to which the courts would feel free to "say what the law is." After increasing the number of variables in this way, the court necessarily expanded the range and number of resources the courts could use to dominate the conversation.

VI. CONCLUSION

In the final analysis, this study may have raised more questions than it has answered. That is not surprising, given the narrow windows through which we have attempted to view the very large issues to which we have directed our attention. As suggested at the outset, the methodology we have chosen necessarily requires repetition. The longitudinal study of a single issue provides a powerful focus, but it also is subject to inherent limitations. The issue and its context may be unique in certain respects, and evolving doctrine in related areas may influence the study in ways that are difficult to sort out. It is only through repetition, that is, through application of this methodology to a number of different issues, that it would be possible to test in a reliable, definitive, and systematic way the conclusions that present themselves in such a study. Hopefully, others will attempt parallel studies with respect to similar issues and thus provide the framework necessary for evaluating the broader significance of those conclusions. On the other hand, the present study provides a strong basis for making some compelling observations about a number of subjects, including the extent to which the Supreme Court's decisions have actually influenced the development of the law in this area, the limitations inherent in attempting to apply a bright-line test like *Chevron* to a multi-vocal statute that is the product of compromise and defies efforts at simple construction, and the continuing power of the natural, institutionally self-interested inclinations of the courts in matters of statutory construction.

First, it seems clear that *Chevron* and its progeny have had a tangible and significant effect on the lower federal courts' treatment of the 180-day issue, although the effect of all of the Supreme Court's various holdings appears to be more modest than one might have predicted. For example, the Supreme Court suggested in several pre-*Gilbert* decisions that the Commission's interpretations of its organic statute should be entitled to "great deference," regardless of the

specific form those interpretations take. But the 180-day cases decided by the lower federal courts before *Gilbert* provide scant evidence of such an approach. On the other hand, the pre-*Gilbert* lower court decisions do not necessarily evidence the courts' adherence to any competing deference principle, such as that laid down in *Skidmore*. In many of the relevant Supreme Court cases, of course, the discussion of deference comes only at the conclusion of the Court's independent statutory analysis, and its purpose is typically limited to providing additional justification for the Court's own view of the statute. If anything, the lower federal courts' pre-*Gilbert* 180-day cases take their cue from that practice and attempt to ascertain the meaning of the statutory provision themselves without the assistance of (or any particular regard for) the views expressed by the agency.

Similarly, given Justice Rehnquist's pronouncement in *Gilbert* —that the Commission's interpretations of Title VII were entitled only to some "consideration" rather than the "great deference" suggested in earlier cases—one might have expected a sea change in the lower court cases. In the main, however, the post-*Gilbert* 180-day cases are substantively and methodologically consistent with the cases that came before. Perhaps because the lower courts in the pre-*Gilbert* cases had shown little interest in the on-going theoretical discussions about deference, Justice Rehnquist's reformulation of the law in *Gilbert* also seems to have had little direct or explicit effect on their thinking. Thus, while one might have expected judicial consideration of the new procedural regulation to include discussion of the Commission's statutory authority to issue procedural rules, the courts apparently had little reason to emphasize the deference principle in framing the issue prior to *Gilbert*, and they saw no greater reason to do so afterwards. Nor was there any occasion for taking issue with Justice Rehnquist's overly broad assertion that the Commission lacked "rulemaking authority." In any event, the lower federal courts in the pre-*Chevron* period settled into a pattern of conflict with respect to the validity of early right-to-sue letters, but that conflict was based on the courts' own disagreements about the meaning of Title VII; it seems to have been little influenced by upstream disagreements about the degree of deference to be paid agency interpretations of law.

On the other hand, the Supreme Court's decision in *Chevron* clearly influenced the approach that the lower federal courts took to the early right-to-sue letter cases. By creating this two-step mode of inquiry, the Court in *Chevron* established an approach that courts would be required to follow, at least formally, in ascertaining the validity of administrative interpretations of law. Especially at the beginning, courts seemed indifferent to the test and sometimes failed to acknowledge it. If courts departed from the template, however,

their lack of adherence to the requirements of precedent would be obvious. In addition, the influence of *Chevron* was not simply formal. The importance of the *Chevron* regime extended to substantive outcomes, as well as to the framing of issues. One might think that the *Chevron* test was sufficiently open-textured, and, in some respects, ill-defined as to make the result of its application in a particular case somewhat open to question. To some extent, of course, that is true. On the other hand, application of the test to the early right-to-sue letter problem became quite regular in at least one respect: The courts that struck down the regulation typically did so at the first step of the *Chevron* analysis, while those that upheld the regulation did so at the second step. Those that struck down the regulation did so on the ground that the plain language of Section 706(f)(1) manifested an unambiguous congressional intent that right-to-sue letters not issue during the 180-day period, except where a charge has been dismissed. Those that upheld the regulation invariably thought that the language of Section 706(f)(1) was far from "unambiguous" and found that the Commission's interpretation was supported on legal and policy grounds, taking into account the overall purpose and structure of the statute. In either event, however, the courts also continued to be concerned with the same types of issues with which they had been concerned from the outset, and they often continued to frame their concerns in the same terms as before.

Similarly, one might have thought that the broad language of *Commercial Office Products* would have had a strong impact on the case law in the lower federal courts, both during the period when *Commercial Office Products* stood alone as the Court's definitive statement about the weight to be given the Commission's interpretation of its organic statute, and in the period after it was "modified" by *Arabian American*. While these Supreme Court decisions obviously figure importantly in the early right-to-sue letter case law as specific applications of *Chevron* to the problems that arise under Title VII, they do not command center stage with quite the force one would expect. Many of the later cases, for example, do not analyze the issue in terms of the procedural character of the 180-day regulation, the Commission's explicit authority to promulgate procedural rules, or the meaning to be derived from a harmonization of *Commercial Office Products* and *Arabian American*. The cases also pay scant attention to the fact that the rule, although adopted pursuant to rulemaking authority and according to notice-and-comment procedures, is not, technically speaking, a "legislative" or "substantive" rule. Again, these cases evidence a continuing preoccupation with the same themes and issues that captured the attention of the courts in earlier periods.

In a sense, perhaps, the decision in *Martini* has had as strong an influence on this debate as have the various cases decided by the Supreme Court. Of course, *Martini* builds on *Chevron* and its progeny, and its importance cannot be divorced from that fact or those cases. On the other hand, the influence of *Martini* has been remarkable. Since *Martini* is not a Supreme Court decision, its influence in resetting the terms of the debate is therefore due not to the formal authority of the court's decision, but to other factors, including, no doubt, the pre-eminent position and reputation of the District of Columbia Circuit in administrative law matters, but also, and perhaps more important, to the ambition and manifest seriousness of its intellectual purpose. That intellectual ambition and seriousness is manifest in the emphasis the *Martini* court placed on the need not simply to reach the right result, but to reach the right result for the right reasons—an approach that required the court to undertake an analysis of the issue along lines that were both new and quite different from those that had been pursued previously. The seriousness and thoroughness of the court's approach is both unusual and compelling in today's world where the press of judicial business, particularly with respect to preliminary issues typically decided at the pretrial motion stage, often tempts judges to solve problems not by confronting them directly, but by placing excessive reliance on the conclusions previously adopted by other courts. In this way, judges are tempted to search for "plausible" answers to the issues they confront. As in other areas, many of the early right-to-sue letter decisions reflect the influence and effects of these constraints. The early right-to-sue cases also reflect a style of opinion writing that seems to thrive in our time, namely, one that pays scant attention to opposing views, exudes certainty, and treats the result the court has reached as inevitable, self-evident, uncontroversial, and not fairly subject to question. It is at least ironic that such a rhetorical posture should be pressed into service on behalf of decisions which, at best, too often reflect only the firm conviction that the intellectual work of a previous decision maker is "credible" and that the result is "plausible." In truth, these issues are not simple or straightforward, and they cannot be because the statutory and legislative materials on which they are based are themselves equivocal. This is true whether the decisions be based on preferring one construction to another on substantive grounds or by virtue of the degree of deference that may or may not be due.

The influence of *Martini* can be explained, at least in part, by the freshness of the analysis and by the court's manifest willingness to think through the issues in a new way. The freshness of Judge Tatel's approach was particularly influential because *Martini* was decided at a point when the *Chevron* analysis of the 180-day provision had

become exhausted, at least in the terms in which it had been framed. The problem cried out for a final answer from the Supreme Court, or, lacking that, for an infusion of new thought—an alternative way of defining the issue. *Martini* provided that element by conceding that the regulation could not be struck down solely under Section 706(f)(1) and by shifting the focus to the duty to investigate under Section 706(b). To applaud the ambition and power of Judge Tatel's opinion is not, of course, to agree with its conclusions. Judge Tatel's reliance on the "plain language" of Section 706(b) is also problematic, as Judge Zagel and others have ably demonstrated, and it is doubtful that Judge Tatel's resetting of the terms of the debate will have a lasting effect. At the end of the day, the reasons for the intellectual exhaustion of the debate have as much to do with the ultimately unsatisfactory nature of the legislative materials as with the courts' efforts at statutory construction. Moreover, *Martini* has captured only the terms of the debate; most courts have rejected its ultimate resolution of the question.

Most important, *Martini* was able to capture the debate not because what it had to offer was truly new, but because it was new only in a limited sense. The court's mode or style of analysis was actually similar to that of the cases that came before; it was different only in the sense that the *Martini* court chose to look at an additional section of the statute which others had neglected. If anything, by broadening the focus of the court's inquiry to include more sections of this complex and sometimes inconsistent statute, the *Martini* court reinforced the approach seen in the earlier cases and actually increased the likelihood that decisions with respect to the meaning and application of the statute would remain the work of the judges rather than administrators.

Second, the uncertain results of applying the *Chevron* test to the early right-to-sue letter problem may say something about the efficacy of the test itself. One ostensible purpose of the *Chevron* test is to simplify the old method of analysis, taking us away from the need to engage in a multi-variable, holistic analysis and bringing this area under the discipline of bright-line tests. In this general way, the *Chevron* approach is thought to reduce the authority of the courts and enhance the relative power of the popular branches of government, including the bureaucracies they have created to assist them in their work. There are, however, at least two problems with this view. First, as Justice Scalia has pointed out, the articulation of the first prong of the *Chevron* test in terms of the "precise question at issue" indirectly confers a great deal of discretion on the courts. In the present context, for example, it seems hard to sustain the proposition that Congress has spoken "unambiguously" on this subject whether one considers only Section 706(f)(1) or the statute as a whole; yet,

many courts have struck down the regulation on this basis. In other contexts, it is undoubtedly the case that courts have found "ambiguities" only through fly-specking at the *Chevron* step-one phase of the inquiry. Second, the *Chevron* test also has the purpose of disciplining and directing the legislative process, thus making it easier for the courts to discharge their reviewing functions. As Justice Scalia has also suggested, the advantage of an ostensibly bright-line test like *Chevron* over a holistic approach is that the former makes it easier for Congress to know and conform to the rules that the courts will apply. That is true, of course, and assuming that the Supreme Court really does have Congress's attention,[441] a bright-line test may be useful for that reason, at least in some circumstances. On the other hand, one need not be jaded or impious to wonder how often Congress loses much collective sleep during the legislative process worrying about the Supreme Court's possible reaction to draft legislation. Even if one were convinced that Congress regularly gave strong consideration in the legislative process to the Court's possible evaluation of legislation, one might still reasonably wonder how much difference such consideration would make. In circumstances such as those that led to the enactment of the Civil Rights Act of 1964, Congress may well have been ignorant as to the rules, but it is doubtful that Congress could have done anything different if it had known the rules. Clearly, the inadequacies in the statutory language, and the ultimate inability of even the legislative history to provide a convincing cure for those inadequacies, is due to a profound lack of congressional agreement about the scope and significance of the statutory enterprise itself.

If that is indeed the case, it may not be clear that a bright-line test is necessarily preferable to a more openly judgmental and honestly holistic approach. Certainly, an attempt to fit the issue into the template through efforts to find clarity (or the lack thereof) in doubtful cases does not seem preferable to an honest recognition of the need for judgment. If the process of statutory construction is to be determined by the application of a default rule with respect to factors over which Congress has little control, the bright-line test may

441. In *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983), the Court invalidated the legislative veto on which Congress had relied in attempting to limit the exercise of executive discretion. The legislative veto had been used into more than 200 laws in fifty years. *Id.* at 967, 103 S. Ct. at 2792 (White, J. dissenting). *See also* Murray Dry, *The Congressional Veto and the Constitutional Separation of Powers*, *in* The Presidency and the Constitutional Order 195 (Joseph Bessette & Jeffrey Tulis eds., 1980). From 1983 to 1990, Congress enacted more than 100 such legislative veto provisions. *See* Jonathan L. Entin, *Separation of Powers, the Political Branches and the Limits of Judicial Review*, 51 Ohio St. L.J. 175, 225 n.328 (1990).

simplify the responsibility of the courts, but it will not necessarily lead to better results in terms of the search for legislative intent. At bottom, however, one might wonder about the efficacy of the Supreme Court's current jurisprudence, which seemingly conditions application of *Chevron* or *Skidmore* on the nature of the medium used by an agency to express its views. The character of the organic statute might seem a more relevant factor.

Third, something should be said about the nature of the problem itself, and the posture in which it appears for judicial resolution, because those elements also are important factors in this project. First, Congress's decision to give limited enforcement powers to the Commission and depend principally on enforcement through private litigation has continued importance for the proper resolution of this issue. As we have seen, questions relating to the Commission's regulation have principally been raised in the context of private litigation in which the Commission is not typically a party. During the period prior to the promulgation of the regulation, the litigation of this issue was not only characterized by the absence (generally speaking) of the Commission as a party before the court, but it was also characterized by the absence of a formal and easily accessible statement of the agency's reasons for adopting this interpretation. Those circumstances were not congenial to the affording of consideration, let alone deference, to agency decisions, whatever the appropriate rule of construction might be.

In addition, the way in which these issues were characterized in those early cases has had a substantial continuing effect on their judicial treatment. Indeed, the same arguments about jurisdiction and the respective roles of the agency and the courts in the enforcement scheme have tended to characterize the consideration of these issues from the beginning. One of those arguments, of course, involves the workload of the federal courts and how the Commission's interpretation of Section 706(f)(1) will affect that workload. It was part of the discussion long before *Chevron*, and it remains part of the discussion now. Indeed, some courts have taken this concern so seriously as to suggest that an important purpose of the administrative scheme set up in Title VII was to protect the federal courts from additional work. That argument seems far-fetched, at least in that form, but there is obviously a strong congruency between the construction afforded by some courts and their institutional self-interest.[442] Moreover, the courts' collective concern is certainly not

442. The avoidance is only temporary, at least in theory, since most of these cases will not be settled under a regime in which they are never reached for substantive treatment. On the other hand, it is not clear how many cases will be abandoned during the 180-day period or what the profile of those claims might be in terms of merit. If meritorious claims are abandoned during the period, that fact

misplaced given the large number of Title VII cases that are filed in the federal courts, the substantial amount of judicial time and energy that these fact-intensive cases typically require, and the relatively small number of cases in which plaintiffs ultimately prevail on the merits.[443] The present system seems to require a great investment from the courts while promising little additional justice in return. Nonetheless, it is fair to say that the judiciary's institutional self-interest is at least as strong as that to which some courts have pointed in suggesting that the Commission's interpretation was motivated by the desire to "dump" its surplus cases on the courts. The courts that take this view seem to put great faith in the Commission's ability to investigate charges without adequate resources, but not in the Commission's ability to interpret and implement its organic act.

Finally, and most important, the courts' discussion of these issues reflects their traditional methodologies and concerns, and, to the extent that the cases reflect judicial concern with the ultimate meaning of the statute, as opposed to the reasonableness of the Commission's interpretation, those methodologies and concerns take on considerable importance. One is hard-pressed to assign a dominant role to the *Chevron* test in this particular area; even the judicial opponents of early right-to-sue letters seem disinclined to analyze the issue in *Chevron* terms, giving little attention even to the question whether the Commission's regulation meets the threshold requirements for *Chevron* deference. Whatever the appropriate standard of review, it seems difficult in practice for the courts to act in a way that is not rooted, at least implicitly, in an understanding that their role is to say what the law is, and to do so from a position that is privileged in comparison to that held by those whose job is merely to administer and execute the law. Ultimately, the cases we have considered do involve a "swinging door,"[444] if not of jurisdiction, as

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would obviously give cause for concern.

443. In recent years, as we have noted, approximately 21,000 to 24,000 private employment discrimination lawsuits have been filed each year. *See supra* note 100. The public and private costs of pursuing such litigation are substantial, and the recoveries tend too be small. *See, e.g.* Colin P. Johnson, Comment, *Has Arbitration Become a Wolf in Sheep's Clothing?: A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 Hamline L. Rev. 511, 535-36 (2000) (explaining that the potential damage award in Title VII cases is low and the cost of litigating a Title VII case is high); John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. Cal. L. Rev. 709, 711 (1993) (finding that the number of employment discrimination lawsuits filed in federal courts jumps dramatically and the plaintiff win rate falls when the economy goes into a recession).

444. *See* Grimes v. Pitney Bowes, 480 F. Supp. 1381, 1385 (N.D. Ga. 1979).

the court suggested in *Grimes*, then at least of competence and responsibility. On one side of the door are Article III courts; on the other side of the door are bureaucrats. How the door swings, and how work is apportioned between the rooms, is critically important, and nowhere more so than when decisions are made about internal agency procedures, the assignment of agency priorities, and the allocation of agency resources.

In other words, the approach taken by these courts consciously and necessarily reinforces their entitlement to say "what the law is," even when the law is profoundly unclear, while the courts also seek to protect themselves, at least in the short term, from having to decide factual disputes that they think more appropriate to the status of an administrative agency. Charles Hough is said to have remarked that he cared not who laid down the law of the land, so long as he was able to find the facts.[445] It is ironically appropriate, in an age when the power of law is exaggerated by friend and foe alike, and theory reigns supreme, that this realist dictum should be turned on its head.

445. *See* Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. Pa. L. Rev. 777, 797 (1981).