

COMMENTS

Master of Its Own Case: EEOC Investigations after Issuing a Right-to-sue Notice

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The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the full arsenal of federal employment discrimination laws. But in addition to vindicating the rights of employment discrimination victims, the EEOC also serves as a gatekeeper to screen claims before they get to court. As part of that gatekeeping function, Congress requires that individuals alleging employment discrimination under Title VII of the Civil Rights Act of 1964 must obtain permission from the EEOC before they can bring legal action on their own.

Title VII's text leaves the EEOC's role after issuing a right-to-sue notice ambiguous. Despite this ambiguity, or perhaps because of it, the EEOC promulgated 29 CFR § 1601.28(a)(3), which interprets Title VII as allowing the agency to continue its investigation when it would further the broad antidiscrimination mission Congress tasked it to carry out. The EEOC typically terminates its investigation after it issues a right-to-sue notice. But the times it has continued to investigate, the EEOC often has faced litigation challenging its statutory authority to do so.

The circuit courts to confront the ambiguity regarding the EEOC's authority in this context have come to conflicting results. On one side, the Fifth Circuit has held that the issuance of a right-to-sue notice strips the EEOC of its authority to investigate. On the other, the Seventh and Ninth Circuits have held that the EEOC not only retains its authority to investigate employment discrimination claims after issuing a right-to-sue notice, but that continued investigations promote the broad purposes of Title VII.

This Comment addresses this unresolved question through the lens of judicial deference to administrative agencies, a doctrine that the circuit courts largely have ignored. Applying the two-step analysis from Chevron, this Comment first argues that the text of Title VII is ambiguous and that Congress intended to give the agency the authority to interpret the statute's procedural provisions. It then argues that § 1601.28(a)(3) is both procedural and a reasonable interpretation of Title VII and that, therefore, the EEOC's interpretation is entitled to Chevron deference.

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INTRODUCTION

Often dismissed as a second-class agency with little power,¹ the Equal Employment Opportunity Commission (EEOC) actually plays a crucial role in antidiscrimination efforts and is tasked with enforcing every employment discrimination statute in the federal arsenal.² Chief among the EEOC's responsibilities is its

¹ See Theodore W. Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 Ohio St L J 1533, 1584 (1999).

² See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 Fordham L Rev 1937, 1941 (2006). See also *Laws Enforced by EEOC* (Equal Employment Opportunity Commission), archived at <http://perma.cc/KG89-FYSF>.

mandate under Title VII of the Civil Rights Act of 1964³ to eliminate employment discrimination on the basis of race, color, religion, sex, or national origin.⁴ The ability to investigate charges of discrimination is central to this mission and is among the EEOC's most potent weapons.

A circuit split recently deepened regarding the scope of the EEOC's investigative authority. Under Title VII, the EEOC has exclusive authority over employment discrimination charges for 180 days after a charge is filed or until it issues a right-to-sue notice to the charging individual.⁵ That means the aggrieved individual can bring a private civil action only after requesting and receiving a right-to-sue notice from the EEOC.⁶ The circuit split concerns whether the EEOC maintains the authority to investigate after it issues a right-to-sue notice.⁷

Only a few circuit courts have addressed this issue, but it has potentially serious implications for how the EEOC approaches charges of employment discrimination, what tools remain available to it, and how effective those tools are at policing discrimination. Indeed, it is not difficult to imagine a scenario in which preventing the EEOC from investigating claims after it issues a right-to-sue notice would allow employment discrimination to remain undiscovered and unaddressed.

Consider the following hypothetical scenario. After being denied a promotion in favor of a more junior and less qualified coworker, an employee files a charge of discrimination with the EEOC. Not only was the employer's decision, in fact, based on discriminatory animus, but its discriminatory practices have also impacted a number of other similarly situated employees. As required by statute, the EEOC notifies the employer of the charge and begins its investigation.⁸ But at the end of the statutorily mandated 180-day period of exclusive jurisdiction,⁹ the EEOC has not yet finished its investigation due to the complexity of the case and, more importantly, the employer's uncooperative and obstructive conduct. Typically, the charging individual in this situation does not immediately request a right-to-sue notice because she has an incentive to let the agency pursue the claim with its

³ Pub L No 88-352, § 705(a), 78 Stat 241 (1964), codified at 42 USC §§ 2000e–2000e-17.

⁴ See 42 USC § 2000e-2.

⁵ See 42 USC § 2000e-5(f)(1). See also note 35 and accompanying text.

⁶ See 42 USC § 2000e-5(f)(1).

⁷ See Part II.

⁸ See 42 USC § 2000e-5(b).

⁹ See 42 USC § 2000e-5(f)(1).

resources.¹⁰ But here, the employer understands that it could face serious liability if the EEOC investigation exposes the full breadth of its discriminatory practices. To avoid liability, the employer offers the charging individual a lucrative settlement if she agrees to demand a right-to-sue notice from the EEOC. In this scenario, if the right-to-sue notice strips the EEOC of its ability to continue investigating, the Commission will fail in its duty to protect the public interest against employment discrimination because it will be unable to uncover the systemic pattern of discrimination.¹¹

This Comment argues that the EEOC's authority to investigate claims of employment discrimination extends beyond, and is unaffected by, the issuance of a right-to-sue notice to the charging individual. Evaluating the EEOC's Title VII authority through the lens of judicial deference to administrative agencies under the framework established in *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*¹² confirms this position.¹³ Although the text of Title VII and its legislative history suggest no temporal restraint on the EEOC's investigatory power, Congress did not definitively speak to the question.¹⁴ Given this statutory ambiguity and the EEOC's regulatory interpretations, analysis of deference under *Chevron* is essential to resolving this question. Yet, surprisingly, the circuit courts involved in this debate have not considered whether deference is appropriate.¹⁵ By relocating the debate, this Comment demonstrates that the EEOC properly interpreted its investigatory authority under Title VII and that courts should defer to the EEOC's position.

¹⁰ Interview with Randall D. Schmidt, Clinical Professor of Law, The University of Chicago Law School (Nov 7, 2017) ("Schmidt Interview") (on file with author).

¹¹ See *General Telephone Co of the Northwest v Equal Employment Opportunity Commission*, 446 US 318, 326 (1980) (explaining that, "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination"). This concern is even more pressing because of restrictions that prevent the EEOC from releasing certain information from its charge files. See 5 USC § 552; 29 CFR § 1610.17(e) ("[N]othing said or done during and as a part of the Commission's endeavors to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion may be made public by the Commission without the written consent of the parties concerned."). For example, the details of "[a] charging party's file may not be disclosed to other charging parties, because they are members of the public with respect to that charge." 1 EEOC Compliance Manual ¶ 1785, § 83.5 (2017), available on Westlaw at 2015 WL 6879801.

¹² 467 US 837 (1984).

¹³ See *id.* at 866.

¹⁴ See Part III.A.5.

¹⁵ See Part II.

The remainder of this Comment proceeds as follows: Part I discusses the history and creation of the EEOC, the steady expansion of its authority over time through legislation and court opinions, the current state of the EEOC's authority under Title VII, and EEOC interpretations of that power. Part II examines the circuit split that has developed regarding the EEOC's authority to investigate claims after the issuance of a right-to-sue notice and identifies a key issue left unaddressed by the courts: judicial deference to administrative agencies. Finally, Part III relocates the debate and addresses the agency deference question to fill the analytical gaps left by the circuit split before examining the issue in light of the broad purpose of Title VII. This analysis concludes that the EEOC maintains the authority to investigate a claim of employment discrimination even after it issues a right-to-sue notice to the charging individual.

I. EEOC ENFORCEMENT POWER UNDER TITLE VII

Since the circuit split at the heart of this Comment centers on how to interpret the EEOC's enforcement authority under Title VII, this Part first provides an overview of the statutes and regulations that make up the legal background of the dispute. Compared with other agencies, the EEOC historically has been viewed as a "toothless, . . . poor, enfeebled thing."¹⁶ But while the EEOC lacks the same level of independent enforcement authority that other agencies enjoy, it nonetheless has great responsibility. History shows that Congress steadily expanded the scope of the EEOC's powers over time, and court decisions have consistently affirmed its important role as the preeminent enforcer of the federal government's antidiscrimination regime. Part I.A examines this history, tracing the expansion of the EEOC's power over time as Congress enacted legislation to increase its role in combating employment discrimination. Part I.B presents an overview of the EEOC's current enforcement process under Title VII. It highlights the ways in which Congress has both empowered and restricted the EEOC and discusses several key Supreme Court decisions that interpreted Title VII. Finally, Part I.C analyzes the EEOC's narrow rulemaking authority, and Part I.D examines the

¹⁶ 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, 56 (1995).

EEOC regulation—which lies at the heart of the circuit split—interpreting its investigatory power under Title VII.

A. Creation of the EEOC and Subsequent Expansions of Authority

Congress created the EEOC when it enacted Title VII of the Civil Rights Act of 1964. The new agency was tasked with addressing employment discrimination on the basis of race, color, national origin, sex, or religion.¹⁷ The scope of this mission included both individual claims of discrimination as well as more systemic patterns.¹⁸

But despite the lofty antidiscrimination goals that animated the creation of the EEOC, Congress initially gave it very little power to police discrimination.¹⁹ As originally enacted, Title VII placed severe substantive and procedural limitations on the EEOC. While it could investigate wrongdoing and engage in conciliation efforts, it had no independent authority to bring lawsuits.²⁰ In stark contrast, the bill that was originally introduced envisioned a version of the EEOC with broad adjudicatory and enforcement powers.²¹ But the need for political compromises to move the bill through the legislative process led to the removal of most of the EEOC's enforcement power.²² The only tools Congress left the EEOC were processing complaints, attempting to foster conciliation, and recommending civil action to the attorney general if it found evidence of a pattern or practice of employment discrimination.²³ Thus, Title VII's original statutory scheme left the power to resolve claims in the hands of courts via lawsuits brought by individuals and the Department of Justice.²⁴

¹⁷ See 42 USC §§ 2000e-2–2000e-5.

¹⁸ See Donald R. Livingston and Reed L. Russell, *EEOC Litigation and Charge Enforcement* 9–10 (Bloomberg BNA 2d ed 2014).

¹⁹ See *id.* at 10.

²⁰ *Id.*

²¹ See HR 7152, 88th Cong, 1st Sess, in 109 Cong Rec 11252 (June 20, 1963) (“It shall be the function of the [EEOC] to prevent discrimination against employees . . . because of race, color, religion, or national origin. . . . The [EEOC] shall have such powers to effectuate the purposes of this title.”).

²² Livingston and Russell, *EEOC Litigation and Charge Enforcement* at 6–9 (cited in note 18).

²³ *Id.* at 9–10.

²⁴ *Id.* at 10.

Congress substantially expanded the EEOC's powers with the Equal Employment Opportunity Act of 1972.²⁵ Most importantly, the 1972 amendments to Title VII vested independent enforcement power in the EEOC, allowing it to bring lawsuits on behalf of individuals harmed by employment discrimination.²⁶ The Act also extended Title VII to cover state and local employees, authorized appointment of an EEOC general counsel to conduct litigation under Title VII, and transferred authority to pursue pattern and practice litigation from the attorney general to the EEOC.²⁷

The EEOC's powers continued to expand gradually over the next several decades. Six years after Congress passed the Equal Employment Opportunity Act of 1972, President Jimmy Carter signed an executive order²⁸ making the EEOC responsible for enforcing the Age Discrimination in Employment Act²⁹ (ADEA). Then, in 1990, Congress passed legislation placing the EEOC in charge of enforcing Title I of the Americans with Disabilities Act³⁰ (ADA). This final expansion of power consolidated the EEOC's authority to police all forms of employment discrimination proscribed by federal law.³¹

B. Current EEOC Enforcement Procedure

The current enforcement process under Title VII consists of four stages: filing and notice of charge, investigation, conference and conciliation, and enforcement. Courts disagree over how to interpret the interaction between these stages, which has resulted in the circuit split at the heart of this Comment. While Parts II and III discuss this disagreement in more detail, this Section provides an overview of the EEOC's enforcement process as it is currently enumerated in Title VII.³²

²⁵ Pub L No 92-261, 86 Stat 103, codified in various sections of Titles 5 and 42.

²⁶ White, 1995 Utah L Rev at 66 (cited in note 16).

²⁷ Livingston and Russell, *EEOC Litigation and Charge Resolution* at 12 (cited in note 18).

²⁸ Executive Order 12144 (1979), 3 CFR 404.

²⁹ Pub L No 90-202, 81 Stat 602 (1967), codified at 29 USC §§ 621-633a.

³⁰ Pub L No 101-336, 104 Stat 327 (1990), codified at 42 USC §§ 12111-17.

³¹ See Hart, 74 Fordham L Rev at 1941 (cited in note 2).

³² Title VII envisions a role for state and local government agencies in combating employment discrimination. See 42 USC § 2000e-5(c)-(d). The provisions requiring cooperation between the EEOC and state and local agencies, though important to the statutory scheme, are beyond the scope of this Comment.

1. Filing and notice of charge.

EEOC involvement begins when an aggrieved individual, a person acting on behalf of an aggrieved individual, or an EEOC commissioner files a formal charge of unlawful employment discrimination with the agency.³³ This step triggers the EEOC's authority and is significant because aggrieved individuals cannot pursue private legal action until first exhausting the administrative procedures and receiving a right-to-sue notice from the EEOC.³⁴ The individual must file her charge with the EEOC within 180 days of the alleged unlawful employment practice.³⁵ Within ten days of the charge being filed, the EEOC is required to "serve a notice of the charge" on the employer or entity against whom the charge was filed.³⁶

Two aspects of the structure Congress established for triggering EEOC authority are worth emphasizing. First, the dual mechanism by which charges can be filed reflects the "dual role" of the EEOC, which "requires it to wear both the hat of the individual and that of the government."³⁷ In other words, the EEOC is tasked with acting as a clearinghouse to evaluate and vindicate individual claims of employment discrimination for individual victims, but it is also responsible for addressing more widespread and systemic patterns and practices of discrimination. Commissioner's

³³ See 42 USC §§ 2000e-5(b), 2000e-6(e). Commissioner's charges can originate as a recommendation from an EEOC field office or from a commissioner herself. For a discussion of the process by which a commissioner's charge is filed, see *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission* (Equal Employment Opportunity Commission, July 7, 2016), archived at <http://perma.cc/6288-MZDU>.

³⁴ See 42 USC § 2000e-5(f)(1). See also Livingston and Russell, *EEOC Litigation and Charge Enforcement* at 142 n 1 (cited in note 18) ("A charging party must obtain a notice of right to sue [from the EEOC] as a predicate to a Title VII . . . lawsuit."); Robert A. Kearney, *Who's "in Charge" at the EEOC?*, 50 Drake L Rev 1, 5 n 24 (2001) ("A number of Supreme Court decisions, in dicta, support the proposition that the 180-day timeline under § 2000e-5(f)(1) is a jurisdictional waiting period in which the EEOC has exclusive jurisdiction.").

³⁵ See 42 USC § 2000e-5(e)(1). The filing deadline varies depending on the existence of work-sharing agreements between the EEOC and state or local antidiscrimination agencies. See 42 USC § 2000e-5(e)(1). However, these distinctions are not relevant here.

³⁶ 42 USC § 2000e-5(b).

³⁷ Michelle Hartmann, Comment, *A Myriad of Contradiction with Title VII Arbitration Agreements—Duffield as the Past, Austin as the Future, and the EEOC as the Target of Restructuring*, 54 SMU L Rev 359, 390–91 (2001). See also Elizabeth Penn, Book Review, *Disability Civil Rights Law & Policy*, 75 Miss L J 1085, 1093 n 32 (2006) ("The EEOC has dual goals—to make the individual whole and to vindicate the wrong in the public interest.").

charges typically are used only to address systemic issues.³⁸ Individual claims, on the other hand, can—and often do—implicate both of these goals.³⁹ In such instances, the EEOC faces the difficult challenge of balancing the interests of the individual in vindicating her claim against the agency’s overriding interest in protecting society writ large by eradicating impermissible employment practices for good.⁴⁰

Second, the filing requirement under Title VII places a significant restriction on the EEOC’s power. Indeed, the Supreme Court has rejected EEOC attempts to address alleged discrimination prior to the filing of a charge, holding that the existence of a valid charge is “a jurisdictional prerequisite” to EEOC authority.⁴¹ Thus, unlike many other administrative agencies that enjoy broad power to investigate and enforce on their own initiative, the EEOC “does not possess plenary authority to demand information” from employers absent a charge.⁴² In theory, this limitation poses no more than a minor hurdle because the EEOC has the ability to issue a commissioner’s charge if it suspects unlawful employment practices may be occurring, thereby triggering its authority under Title VII.⁴³ But in practice, commissioner’s charges are rarely used.⁴⁴

³⁸ Livingston and Russell, *EEOC Litigation and Charge Enforcement* at 285 (cited in note 18).

³⁹ See *General Telephone*, 446 US at 326 (explaining that, “[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination”).

⁴⁰ There are many reasons an individual’s interest in speedy resolution of her dispute might conflict with the public’s interest in eliminating systemic discrimination. For example, in the class-action context, the EEOC “represents the public interest, not any particular private interest, when it sues in its own name. Potential conflicts within the group are addressed by allowing private parties to intervene, rather than by imposing a requirement of adequacy of representation.” Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 BU L Rev 1133, 1138–39 (2015) (citation omitted). The Supreme Court has long been sensitive to the difficulties the EEOC faces in trying to juggle these interests. See, for example, *General Telephone*, 446 US at 331 (noting that “[t]he EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choices where conflicts of interest exist”).

⁴¹ *Equal Employment Opportunity Commission v Shell Oil Co*, 466 US 54, 65 (1984).

⁴² *Equal Employment Opportunity Commission v Hearst Co*, 103 F3d 462, 464 (5th Cir 1997).

⁴³ See note 33 and accompanying text.

⁴⁴ See Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L Rev 1237, 1272 n 312 (2010) (noting that “[c]ommissioner’s charges are very rare” because authority to bring such charges lies solely with the most senior EEOC officials); Livingston and Russell, *EEOC Litigation and Charge Enforcement* at 281 (cited in note 18) (“Nearly all [EEOC] investigations start with a charge of discrimination filed by an individual charging

2. Investigation.

Once a charge is filed and the employer is notified, Title VII requires the EEOC to “make an investigation thereof” to determine whether the charge is supported by sufficient evidence.⁴⁵ The EEOC must complete its investigation “as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge.”⁴⁶ Although this language would seem to restrict the amount of time the EEOC can investigate, the Supreme Court refuses to interpret Title VII as placing a strict time limit on EEOC investigations.⁴⁷ Similarly, the Supreme Court has adopted a very broad reading of the EEOC’s subpoena powers under Title VII. Although the EEOC is entitled only to evidence that is “relevant to the charge under investigation,”⁴⁸ the Supreme Court has construed the term “relevant” very “generously,” allowing the EEOC to obtain “virtually any material that might cast light on the allegations against the employer.”⁴⁹

If the EEOC investigation does not find sufficient evidence of a violation to constitute reasonable cause, it must dismiss the charge and notify the parties of its determination.⁵⁰ After receiving notice of the EEOC’s determination, the aggrieved party retains the right to file a private civil action against the employer.⁵¹ In practice, the EEOC often will contact the individual before announcing that the investigation revealed insufficient evidence to find cause.⁵² This advance warning allows the individual to request a right-to-sue notice before the EEOC issues its determination, thereby preventing publication of the EEOC’s findings.

party.”). Between 2002 and 2015, the EEOC issued a total of 177 commissioner’s charges. *Advancing Opportunity* (cited in note 33). By contrast, the EEOC processed 1.2 million individual charges during that timeframe. *Charge Statistics (Charges Filed with EEOC): FY 1997 through FY 2016* (Equal Employment Opportunity Commission, Jan 18, 2017), archived at <http://perma.cc/32QB-97JG>.

⁴⁵ 42 USC § 2000e-5(b).

⁴⁶ 42 USC § 2000e-5(b).

⁴⁷ See *Occidental Life Insurance Co of California v Equal Employment Opportunity Commission*, 432 US 355, 361 (1977) (asserting that there is “little support” for the proposition that Title VII places a time limit on EEOC actions). See also Livingston and Russell, *EEOC Litigation and Charge Enforcement* at 223 (cited in note 18) (“[T]he courts have placed no restrictions on the duration of an EEOC investigation.”).

⁴⁸ 42 USC § 2000e-8(a).

⁴⁹ *McLane Co v Equal Employment Opportunity Commission*, 137 S Ct 1159, 1169 (2017), quoting *Shell Oil*, 466 US at 68–69.

⁵⁰ 42 USC § 2000e-5(b).

⁵¹ See 42 USC § 2000e-5(f)(1). See also *Shell Oil*, 466 US at 64 n 13.

⁵² Schmidt Interview (cited in note 10).

From the individual's perspective, this is desirable: since the investigation did not find cause, the employer could have interpreted the EEOC's determination as a sign that the employee's case is weak, which the employer could then use against the individual in subsequent litigation or settlement negotiations.⁵³

3. Conference and conciliation.

If the EEOC does find sufficient evidence to support the individual's claim, it must attempt "to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."⁵⁴ In fact, Title VII imposes a thirty-day period after the charge is filed during which legal action is prohibited, leaving informal methods of conciliation and persuasion as the only tools available during that time.⁵⁵

Conference and conciliation—an informal and confidential process in which the EEOC works with the parties to find a voluntary resolution⁵⁶—is the heart of the Title VII enforcement regime.⁵⁷ Courts have repeatedly noted that "Congress chose cooperation and voluntary compliance as its preferred means" to eliminate employment discrimination.⁵⁸ To encourage open and honest conciliation efforts from parties on both sides, Congress required that all informal proceedings remain confidential and imposed punishments for any violations.⁵⁹ It is only after informal

⁵³ *Id.*

⁵⁴ 42 USC § 2000e-5(b). See also 29 CFR §§ 1601.20, 1601.24(a).

⁵⁵ 42 USC § 2000e-5(f)(1).

⁵⁶ See *What You Should Know: The EEOC, Conciliation, and Litigation* (Equal Employment Opportunity Commission), archived at <http://perma.cc/7ST2-D93X>.

⁵⁷ See Elizabeth Dunn, Comment, *No Longer a Paper Tiger: The EEOC and Its Statutory Duty to Conciliate*, 63 Emory L.J. 455, 473 (2013) (noting that "Title VII imposes a framework that encourages conciliation in lieu of litigation"). Indeed, one circuit court has found the conciliation process to be of such primary importance that it banned the practice of early right-to-sue notices, by which the EEOC would issue a right-to-sue notice before conducting an investigation or attempting conciliation efforts. See *Martini v Federal National Mortgage Association*, 178 F.3d 1336, 1338 (DC Cir. 1999). Other circuits have adopted the opposite view, however, creating a circuit split. See *Bryant v California Brewers Association*, 585 F.2d 421, 425 (9th Cir. 1978) (holding that the EEOC can issue a right-to-sue notice before the expiration of the 180-day period); *Sims v Trus Joist MacMillan*, 22 F.3d 1059, 1061 (11th Cir. 1994) (agreeing with the Ninth Circuit's position). The circuit split over early right-to-sue notices lies beyond the scope of this Comment.

⁵⁸ *Mach Mining, LLC v Equal Employment Opportunity Commission*, 135 S.Ct. 1645, 1651 (2015), quoting *Ford Motor Co v Equal Employment Opportunity Commission*, 458 U.S. 219, 228 (1982) (quotation marks omitted).

⁵⁹ 42 USC § 2000e-5(b) ("Nothing said or done during and as a part of such informal endeavors may be made public. . . . Any person who makes public information in violation

means have failed that the EEOC can consider initiating legal action.⁶⁰ Still, the EEOC has “extensive discretion to determine the kind and amount” of conciliation efforts that are sufficient to satisfy the statutory mandate.⁶¹

4. Enforcement.

If the EEOC finds cause to support the claim and is unable to resolve the issue through conciliation, it has the option to bring a civil action against the employer or allow the aggrieved individual to do so on her own.⁶² If the EEOC initiates an individual lawsuit, it seeks redress on behalf of the charging individual.⁶³ But because charges often implicate broader systemic concerns, the EEOC also uses litigation based on individual charges to further the public interest in rooting out and eliminating discriminatory employment practices, which gives rise to potential conflicts between the EEOC’s dueling roles.⁶⁴ To alleviate this concern, Congress gave aggrieved individuals a statutory right to intervene in suits brought by the EEOC.⁶⁵ Congress also provided a mechanism for the aggrieved individual to sue on her own if the EEOC finds sufficient evidence but decides not to pursue legal action. When this situation arises, typically due to agency resource constraints, the charging individual can bring a private civil action after requesting and receiving a right-to-sue notice from the EEOC.⁶⁶ When an individual files a lawsuit pursuant to a right-to-sue notice, the EEOC can intervene only at the court’s discretion.⁶⁷

Title VII also allows the charging individual to demand a right-to-sue notice if the EEOC fails to complete its investigation

of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.”)

⁶⁰ Over the past decade, the EEOC has conducted an average of 944 conciliations per year. *All Statutes (Charges Filed with EEOC)* (cited in note 44). During that time, roughly 33 percent of conciliation efforts were successful, though the annual rate varied from a low of 26 percent in 2010 to a high of 41 percent in 2013. *Id.* By contrast, the success rate for conciliation efforts in systemic investigations over the past decade increased from just 21 percent in 2007 to a whopping 64 percent in 2015. See *Advancing Opportunity* (cited in note 33).

⁶¹ *Mach Mining*, 135 S Ct at 1649.

⁶² 42 USC § 2000e-5(f)(1).

⁶³ See *Equal Employment Opportunity Commission v Waffle House, Inc.*, 534 US 279, 307 n 9 (2002) (Thomas dissenting) (“The EEOC has consistently recognized that the Commission represents individual employees when it files an action in court.”).

⁶⁴ See notes 37–40 and accompanying text.

⁶⁵ 42 USC § 2000e-5(f)(1).

⁶⁶ 42 USC § 2000e-5(f)(1).

⁶⁷ 42 USC § 2000e-5(f)(1).

within 180 days of the filing of the charge.⁶⁸ This mechanism arose out of Congress's concern that "the heavy caseload of the EEOC could result in delays unacceptable to aggrieved persons."⁶⁹ The 180-day limitation prevents unreasonable delays by allowing an aggrieved individual to bypass the agency's backlog by taking the information from the EEOC's investigation and pursuing legal action on her own.

But this private action mechanism does not supplant the EEOC's authority to bring a suit. The Supreme Court established this point firmly in *Occidental Life Insurance Co of California v Equal Employment Opportunity Commission*,⁷⁰ a leading case interpreting the EEOC's enforcement authority. The dispute in *Occidental* arose when the EEOC brought a lawsuit three years after the charge was filed and five months after conciliation efforts broke down.⁷¹ The employer challenged the EEOC's authority to bring a lawsuit after such long delays, arguing that Title VII should be read to impose a 180-day limitation on the EEOC's power to bring a suit. The Court rejected this interpretation, noting that "neither [§] 706(f) nor any other section of the Act explicitly requires the EEOC to conclude its conciliation efforts and bring an enforcement suit within any maximum period of time."⁷² The Court has continued to build on *Occidental's* broad view of EEOC enforcement powers in subsequent cases.⁷³

C. EEOC Rulemaking Authority

Under Title VII, the EEOC can only "issue, amend, or rescind suitable procedural regulations" necessary to carry out the statute.⁷⁴ The Supreme Court has interpreted Congress's restrictive

⁶⁸ 42 USC § 2000e-5(f)(1).

⁶⁹ *Occidental*, 432 US at 364. See also S Rep No 92-415, 92d Cong, 1st Sess 23 (1971):

[W]here the Commission is not able to pursue a complaint with satisfactory speed, or enters into an agreement which is not acceptable to the aggrieved party, the bill provides that the individual shall have an opportunity to seek his own remedy, even though he may have originally submitted his charge to the Commission.

⁷⁰ 432 US 355 (1977).

⁷¹ *Id* at 357–58.

⁷² *Id* at 360.

⁷³ See, for example, *Waffle House*, 534 US at 288 (holding that the EEOC retains the authority to sue despite the existence of an arbitration agreement between the employer and the aggrieved individual).

⁷⁴ 42 USC § 2000e-12(a). Other statutes the EEOC is charged with enforcing provide broader rulemaking authority. See Hart, 74 Fordham L Rev at 1941–42 (cited in note 2).

delegation of rulemaking authority to mean that the EEOC lacks power to issue substantive rules and has struck down the EEOC's attempts to interpret Title VII's substantive provisions.⁷⁵ By contrast, the Supreme Court has been willing to uphold the EEOC's procedural regulations in several cases.⁷⁶

This distinction is centrally important to this Comment because it raises questions about what constitutes procedure as opposed to substance in the Title VII context⁷⁷ and how much deference courts should give to the EEOC's rules concerning the former. As Part III.A discusses, courts will defer to an administrative agency's interpretation of an ambiguous statute under *Chevron* if the agency's interpretation is reasonable and adopted through a valid regulation carrying the force of law.

D. The EEOC's Interpretation of Its Investigatory Powers

In 1974, the EEOC promulgated a final regulation following notice-and-comment rulemaking, 29 CFR § 1601.28(a)(3), authorizing it to continue investigating a charge even after issuing a right-to-sue notice to the aggrieved individual. Although continued investigations after the issuance of a right-to-sue notice are not meant to be the norm, § 1601.28(a)(3) reflects the EEOC's view that investigations should remain open when it serves the purposes of Title VII. The regulation states:

Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless . . . [specified EEOC officials] determine[] at that time or

But since the circuit split addressed in Part II deals only with enforcement of Title VII, those statutes fall beyond the scope of this Comment.

⁷⁵ See *General Electric Co v Gilbert*, 429 US 125, 141 (1976) (noting that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title"); *Equal Employment Opportunity Commission v Arabian American Oil Co*, 499 US 244, 257 (1991) (applying the *General Electric* framework to reject the EEOC's substantive interpretation of Title VII).

⁷⁶ See, for example, *Edelman v Lynchburg College*, 535 US 106, 113 (2002) (holding that the EEOC's regulation did not impermissibly address "a substantive issue over which the EEOC has no rulemaking power" but rather fell within "its authority to adopt suitable procedural regulations"); *Equal Employment Opportunity Commission v Commercial Office Products Co*, 486 US 107, 125 (1988) (O'Connor concurring) ("[D]eference is particularly appropriate on this type of technical issue of agency procedure.").

⁷⁷ The discussion of procedure and substance in this Comment is confined narrowly to the Title VII context. The Administrative Procedure Act (APA) similarly distinguishes between procedure and substance. See, for example, 5 USC § 553(b)(3)(A). But the APA understanding of these terms is distinct from the Title VII understanding. This Comment concerns only the Title VII understanding and does not implicate the APA notions of procedure and substance.

at a later time that it would effectuate the purpose of title VII, the ADA, or GINA [Genetic Information Nondiscrimination Act] to further process the charge. Issuance of a notice of right to sue shall not terminate the processing of a Commissioner charge.⁷⁸

The EEOC's interpretation of Title VII, as embodied in § 1601.28(a)(3), is the lynchpin to the issues raised in this Comment. If the regulation is entitled to *Chevron* deference, that resolves the circuit split discussed in Part II. And given that the EEOC is permitted to engage in rulemaking only on procedural issues,⁷⁹ the EEOC's position deserves *Chevron* deference only if § 1601.28(a)(3) is procedural. But curiously, the courts that have considered whether the issuance of a right-to-sue notice terminates the EEOC's investigatory powers have not directly discussed these questions. The next Part explores why.

II. CONTROVERSY OVER POST-RIGHT-TO-SUE NOTICE INVESTIGATIONS: EEOC TREATMENT IN THE COURTS OF APPEALS

Several circuit courts have come to different conclusions regarding whether the EEOC can continue to investigate a charge of discrimination after it issues a right-to-sue notice to the aggrieved individual. This Part analyzes each of the three cases that form this circuit split and begins to relocate the debate to address the important administrative law question that the courts so far have neglected: whether the EEOC's interpretation of Title VII, as expressed in § 1601.28(a)(3), is entitled to *Chevron* deference.

A. The Fifth Circuit and *Hearst*

In *Equal Employment Opportunity Commission v Hearst Corp.*,⁸⁰ the Fifth Circuit held that the EEOC's authority to investigate terminates when it issues a right-to-sue letter. The issue in *Hearst* arose after two employees of the Houston Chronicle filed a charge with the EEOC against the company's vice president of

⁷⁸ 29 CFR § 1601.28(a)(3). The EEOC reiterates this position in its compliance manual. See 1 EEOC Compliance Manual ¶ 324, § 6.4(e) (2017), available on Westlaw at 2015 WL 6878602 (stating that investigations can continue “when the [district director] otherwise determines that continued action would effectuate the purposes of Title VII/ADA”).

⁷⁹ See Part I.C.

⁸⁰ 103 F3d 462 (5th Cir 1997).

sales and marketing alleging sexual harassment and discrimination.⁸¹ The EEOC began to investigate the claims, but the aggrieved individuals requested a right-to-sue notice before the investigation concluded.⁸² The EEOC granted the plaintiffs' right-to-sue notices but refused to withdraw subpoenas it had previously issued demanding documents from the company.⁸³ The Chronicle's parent company, the Hearst Corporation, refused to comply with the subpoenas, and the EEOC sued in federal district court to have them enforced.⁸⁴ The district court enforced the subpoenas and ordered Hearst to turn over its documents, but the Fifth Circuit reversed on appeal.⁸⁵

The Fifth Circuit's analysis drew heavily on the language from the Supreme Court's decision in *Occidental*. After lamenting the fact that *Occidental* rendered Title VII's "180-day period . . . practically meaningless,"⁸⁶ the court went on to emphasize that, in *Occidental*, the Supreme Court described the enforcement procedure under Title VII as a "multistage scheme" involving "a sequential series of steps"⁸⁷ that fall "into four distinct stages: filing and notice of charge, investigation, conference and conciliation, and finally, enforcement."⁸⁸ The Fifth Circuit took this to mean that Congress "deliberately divided [Title VII's enforcement procedure] into distinct stages" that should be completed one after the other in a nonoverlapping series.⁸⁹ And although the court acknowledged that "Congress granted the EEOC broad investigatory authority,"⁹⁰ it held that such power was strictly confined within the investigation stage. In other words, the court said that once the EEOC issues a right-to-sue notice, "the time for investigation has passed."⁹¹ At that point, the EEOC can only "intervene [in the individual's lawsuit] and pursue discovery through the courts" or "file a Commissioner's charge."⁹²

In addition to the Supreme Court's language from *Occidental*, the Fifth Circuit claimed that its position was "confirmed by the

⁸¹ Id at 463.

⁸² Id.

⁸³ Id at 463–64.

⁸⁴ *Hearst*, 103 F3d at 464.

⁸⁵ Id at 469–70.

⁸⁶ Id at 468.

⁸⁷ Id at 469, quoting *Occidental*, 432 US at 372.

⁸⁸ *Hearst*, 103 F3d at 468.

⁸⁹ Id at 469.

⁹⁰ Id.

⁹¹ Id (emphasis omitted).

⁹² *Hearst*, 103 F3d at 469.

legislative history of the 1972 amendments” to Title VII.⁹³ Quoting snippets from the Congressional Record, the court stated that:

A Senate Conference Report indicates that the amendments retained the previous structure that “enable[d] the EEOC to process a charge of employment discrimination through the investigation and conciliation stages,” but additionally authorized the EEOC to go further and file a civil action “if it has been unable to eliminate an alleged unlawful employment practice by informal methods.”⁹⁴

The court did not cite any other legislative history to support its interpretation. And although the court did parse the statutory text earlier in its opinion, that analysis focused on Title VII’s 180-day limit rather than on how a right-to-sue notice impacts the EEOC’s investigatory authority.⁹⁵ The court’s misplaced focus—and the fact that the Fifth Circuit’s interpretation directly contradicted established Supreme Court precedent⁹⁶—undercuts the force of its statutory analysis.

Curiously, the *Hearst* court did not cite § 1601.28(a)(3) and failed to discuss whether the EEOC’s interpretation merits any level of deference.⁹⁷ As Part III discusses, the only justification for this omission would be if the text of Title VII were unambiguous, thereby leaving no room for agency interpretation.⁹⁸ But the Fifth Circuit did not explicitly make that ruling. Instead, the court seems to have implicitly held that the text of Title VII unambiguously prohibits the EEOC from continuing its investigation after issuing a right-to-sue notice. Without more textual support, the conclusion that Congress intended “distinct” stages of Title VII enforcement is not obvious.

⁹³ *Id.*

⁹⁴ *Id.*, quoting *Equal Employment Opportunity Act of 1972—Conference Report*, 92d Cong, 2d Sess, in 118 Cong Rec 7167 (Mar 6, 1972).

⁹⁵ *Hearst*, 103 F3d at 467 (explaining that Title VII’s 180-day language should be interpreted as a strict outer limit to EEOC involvement).

⁹⁶ The Fifth Circuit recognized that the Supreme Court’s decision in *Occidental* preempted its preferred interpretation of Title VII. See *Hearst*, 103 F3d at 467–68. Yet rather than reengage with the statutory text in light of the Supreme Court’s interpretation, the Fifth Circuit claimed *Occidental* was distinguishable and advanced the same logic underlying its preferred interpretation.

⁹⁷ This is curious because § 1601.28(a)(3) had been on the books for more than twenty years, *Chevron* was decided thirteen years earlier, and the question of deference arose during briefing. See Reply Brief of Appellant, *Equal Employment Opportunity Commission v Hearst Corp*, No 96-20042, *13 (5th Cir filed July 3, 1996).

⁹⁸ See text accompanying notes 149–50.

B. The Ninth Circuit and *Federal Express*

More than a decade later, the Ninth Circuit rejected the Fifth Circuit's conclusion and created a circuit split when it decided *Equal Employment Opportunity Commission v Federal Express Corp.*⁹⁹ In *Federal Express*, a FedEx employee filed a claim on behalf of himself and similarly situated minority employees alleging racial discrimination in the company's promotion and career advancement practices.¹⁰⁰ Like in *Hearst*, the EEOC granted the plaintiff a right-to-sue notice but continued its investigation.¹⁰¹ As part of its investigation, the EEOC issued subpoenas to FedEx and tried to have them enforced in federal district court after FedEx refused to comply.¹⁰² The district court sided with the EEOC, just as the district court did in *Hearst*.¹⁰³ But this time, the court of appeals affirmed the decision.¹⁰⁴

In affirming the lower court, the Ninth Circuit adopted a different approach to judicial review in EEOC subpoena enforcement cases than the Fifth Circuit. The court held that judicial inquiry in such cases should be "quite narrow" and consider "(1) whether Congress has granted the authority to investigate" and "(2) whether procedural requirements have been followed."¹⁰⁵ Given the "strictly limited role" for courts in reviewing agency subpoena requests,¹⁰⁶ the Ninth Circuit said that the first factor is satisfied as long as the EEOC has "a plausible basis for jurisdiction."¹⁰⁷ Turning to the second factor, the court discussed the enforcement procedures laid out in Title VII and emphasized that the EEOC's interpretation of § 1601.28(a)(3) allowed it to continue investigating after issuing a right-to-sue notice.¹⁰⁸ This interpretation controlled, the court said, because it was not "plainly erroneous or inconsistent with the regulation."¹⁰⁹ Note, however, that the court considered

⁹⁹ 558 F3d 842 (9th Cir 2009).

¹⁰⁰ Id at 845.

¹⁰¹ Id at 845–46.

¹⁰² Id at 846.

¹⁰³ *Federal Express*, 558 F3d at 846.

¹⁰⁴ Id at 856.

¹⁰⁵ Id at 848, quoting *Equal Employment Opportunity Commission v Karuk Tribe Housing Authority*, 260 F3d 1071, 1076 (9th Cir 2001).

¹⁰⁶ *Federal Express*, 558 F3d at 848, quoting *Equal Employment Opportunity Commission v Children's Hospital Medical Center of Northern California*, 719 F2d 1426, 1430 (9th Cir 1983) (quotation marks omitted).

¹⁰⁷ *Federal Express*, 558 F3d at 849.

¹⁰⁸ Id at 850 (discussing 29 CFR § 1601.28(a)(3) and the EEOC's Compliance Manual).

¹⁰⁹ Id at 850 n 2, quoting *Auer v Robbins*, 519 US 452, 461 (1997). Courts routinely defer to an agency's interpretation of its own regulations. See, for example, *Perez v Mortgage*

only the permissibility of the agency's interpretation of § 1601.28(a)(3) and not its interpretation of Title VII.

The Ninth Circuit then addressed and explicitly rejected the Fifth Circuit's reading of Title VII on several different grounds. First, the court rejected the rigid boundaries the Fifth Circuit erected between the various stages of enforcement. Rather than a series of "distinct" stages, the Ninth Circuit said they were "integrated" such that "[t]he fact that one stage of the enforcement procedure is going on does not mean that another stage has ceased."¹¹⁰ In support, the court cited the Supreme Court's holding that Title VII gives the EEOC "a broad right of access to relevant evidence" to enable it "to make informed decisions at each stage of the enforcement process."¹¹¹ Second, the Ninth Circuit chafed at the notion that "the charging party can, through his or her actions (that is, by filing suit), divest the EEOC of authority."¹¹² Instead, the court noted that the Supreme Court had declared the EEOC the "master of its own case," meaning the EEOC controls the enforcement process regardless of what the aggrieved individual does.¹¹³ Finally, the court countered the Fifth Circuit's contention that EEOC investigations no longer serve the purpose of Title VII after the charging individual files suit. This view, the Ninth Circuit held, ignores the fact that EEOC investigations serve a purpose beyond redressing individual harms: "The EEOC is not merely a proxy for victims of discrimination, but acts also to vindicate the public interest in preventing employment discrimination."¹¹⁴ The Ninth Circuit held that this broader purpose could, under certain circumstances, necessitate that the EEOC continue an investigation even after the charging party files suit.¹¹⁵

Bankers Association, 135 S Ct 1199, 1207 (2015) ("[C]ourts lack authority to impose upon [an] agency its own notion of which procedures are best or most likely to further some vague, undefined public good.") (quotation marks and citation omitted). This doctrine, known as *Auer* deference, does bear on the topic addressed in this Comment but does not affect its conclusion. Given courts' highly deferential approach under *Auer* and their consistent adherence to the doctrine, it would be an extraordinary surprise if a court refused to defer to the EEOC's interpretation that "further process[ing]" under 29 CFR § 1601.28(a)(3) includes continued investigations after the issuance of a right-to-sue notice.

¹¹⁰ *Federal Express*, 558 F3d at 851 (quotation marks and citations omitted).

¹¹¹ *Id.* at 851–52, quoting *University of Pennsylvania v Equal Employment Opportunity Commission*, 493 US 182, 191 (1990) (emphasis omitted).

¹¹² *Federal Express*, 558 F3d at 852.

¹¹³ *Id.* at 852, quoting *Equal Employment Opportunity Commission v Waffle House, Inc.*, 534 US 279, 291–92 (2002).

¹¹⁴ *Federal Express*, 558 F3d at 852, quoting *Equal Employment Opportunity Commission v Goodyear Aerospace Corp.*, 813 F2d 1539, 1542 (9th Cir 1987).

¹¹⁵ *Federal Express*, 558 F3d at 852–53.

While the Ninth Circuit's opinion addressed some of the gaps left by *Hearst*, it still suffers from a major omission. The court correctly noted that courts should defer to an agency's interpretation of its own regulation,¹¹⁶ but that question has no bearing on whether courts should defer to the agency's interpretation of the statute. By failing to address the latter question, the Ninth Circuit in *Federal Express* did not adequately address the issue of deference to administrative agencies, just like the Fifth Circuit in *Hearst*.¹¹⁷

C. The Seventh Circuit and *Union Pacific*

The Seventh Circuit recently adopted the Ninth Circuit's approach in *Equal Employment Opportunity Commission v Union Pacific Railroad Co.*¹¹⁸ This case arose from allegations of racial discrimination that two employees filed against Union Pacific after they were denied the opportunity to take tests required for promotion.¹¹⁹ After various procedural maneuverings, the EEOC issued right-to-sue notices to the aggrieved individuals who then brought a private suit.¹²⁰ The EEOC meanwhile continued its own investigation to determine whether other individuals had been affected by Union Pacific's alleged discriminatory practices.¹²¹ Eventually, the district court dismissed the individuals' claims, and Union Pacific challenged the EEOC's ongoing efforts to enforce its subpoenas.¹²² The district court rejected Union Pacific's motion to dismiss, and the Seventh Circuit affirmed.¹²³

The Seventh Circuit began its analysis with the text of Title VII. Parsing the relevant language, the court first noted that “[t]he requirements of the statute itself are minimal.”¹²⁴ It then echoed the Ninth Circuit in holding that, “while a valid charge is a requirement for beginning an EEOC investigation, nothing in

¹¹⁶ Id at 850 n 2, quoting *Auer*, 519 US 452, 461 (1997).

¹¹⁷ As in *Hearst*, the parties in *Federal Express* addressed the deference issue in their briefing. See Brief of Plaintiff-Appellee, *Equal Employment Opportunity Commission v Federal Express Corp.*, No 06-16864, *28–29 (9th Cir filed Mar 9, 2007).

¹¹⁸ 867 F3d 843 (7th Cir 2017).

¹¹⁹ Id at 845.

¹²⁰ Id at 846.

¹²¹ Id. See also Reply Brief of the Equal Employment Opportunity Commission as Appellee, *Equal Employment Opportunity Commission v Union Pacific*, No 15-3452, *22–23 (7th Cir filed Nov 22, 2016).

¹²² *Union Pacific*, 867 F3d at 846.

¹²³ Id at 846, 852.

¹²⁴ Id at 849.

Title VII supports a ruling that the EEOC's authority is then limited by the actions of the charging individual."¹²⁵

Like the Ninth Circuit, the Seventh Circuit emphasized precedent suggesting that the EEOC's enforcement authority exists wholly separate from whether individuals pursue private lawsuits. In particular, the court focused on the Supreme Court's decision in *Equal Employment Opportunity Commission v Waffle House, Inc.*,¹²⁶ which held that "[t]he statute clearly makes the EEOC the master of its case and confers on the agency the authority to evaluate the strength of the public interest at stake."¹²⁷ The court also discussed a Seventh Circuit decision, *Equal Employment Opportunity Commission v Watkins Motor Lines, Inc.*,¹²⁸ in which the court held that the EEOC can continue its investigation even after the aggrieved individual withdraws the charge she filed with the EEOC.¹²⁹ To hold otherwise, the court said, would be "to limit the EEOC's investigation to the decisions made by the charging individuals . . . [and] needlessly inhibit its ability to conduct 'a pattern-or-practice investigation that might lead to relief for many persons in addition to [the charging individual].'"¹³⁰

Like the courts in *Hearst* and *Federal Express*, the Seventh Circuit in *Union Pacific* did not fully address the question of agency deference. But the Seventh Circuit did mention the deference issue in a footnote acknowledging that Union Pacific had "challenge[d] whether [§ 1601.28(a)(3)] is entitled to *Chevron* deference based on its contrary construction of Title VII."¹³¹ But rather than analyze the issue fully, the court quickly dismissed it. Like the Ninth Circuit, the Seventh Circuit held that "[t]he EEOC's interpretation of its own rules is entitled to deference,"¹³² and at

¹²⁵ Id (emphasis omitted).

¹²⁶ 534 US 279 (2002).

¹²⁷ *Union Pacific*, 867 F3d at 849, quoting *Waffle House*, 534 US at 291.

¹²⁸ 553 F3d 593 (7th Cir 2009).

¹²⁹ Id at 596 ("Once [a valid charge] has been filed, the EEOC rather than the employee determines how the investigation proceeds.").

¹³⁰ *Union Pacific*, 867 F3d at 850, quoting *Watkins Motor Lines*, 553 F3d at 597. The Seventh Circuit acknowledged that the EEOC would have alternative avenues to enforcement—namely commissioner's charges and intervening in individual lawsuits. *Union Pacific*, 867 F3d at 850. But it held that "the availability of alternate investigatory avenues hardly supports limiting the EEOC's use of its most effective avenue, especially given that both alternatives could undermine the full investigatory authority of the EEOC." Id.

¹³¹ Id at 850 n 5.

¹³² Id, quoting *Equal Employment Opportunity Commission v Shell Oil Co*, 466 US 54, 74 n 28 (1984).

any rate, “since the court has already rejected Union Pacific’s construction, this challenge completely fails to get off the ground.”¹³³ Thus, the Seventh Circuit also implicitly accepted the validity of § 1601.28(a)(3) without further examination.

* * *

All three courts in this circuit split seem to think the text of Title VII unambiguously supports the decisions they reach. While there are colorable arguments to be made on both sides of the debate, the better interpretation is that the conflict between *Federal Express* and *Union Pacific* on the one hand and *Hearst* on the other indicates statutory ambiguity.¹³⁴ To resolve this ambiguity, and thus the circuit split, Part III analyzes what the Fifth, Seventh, and Ninth Circuits ignored: the doctrine of judicial deference to administrative agencies.

III. JUSTIFYING THE EEOC’S AUTHORITY TO INVESTIGATE AFTER ISSUING A RIGHT-TO-SUE NOTICE

The Seventh and Ninth Circuits split from the Fifth Circuit over whether the EEOC can continue to investigate a charge of discrimination after it issues a right-to-sue notice. Despite their varied holdings, one commonality is their consistent failure to address whether § 1601.28(a)(3) is entitled to *Chevron* deference. While the Fifth Circuit ignored the regulation’s existence altogether, the Seventh and Ninth Circuits tacitly accepted its validity without much analysis. This puzzling result deserves examination.

One likely explanation for the circuit courts’ consistent failure to apply a formal deference regime is that Supreme Court precedent regarding judicial deference to the EEOC is uncertain.¹³⁵ Although the Supreme Court has employed *Chevron*-like reasoning in several cases involving EEOC procedural regulations, it has never stated that full *Chevron* analysis is required.¹³⁶ Given the lack of a clear pronouncement, it is perhaps unsurprising that a circuit split has emerged.

But this uncertainty does not by any means prove that *Chevron* deference is inappropriate in cases involving the EEOC.

¹³³ *Union Pacific*, 857 F3d at 850 n 5, citing *Shell Oil*, 466 US at 74 n 28.

¹³⁴ See Part III.A.5.

¹³⁵ See Part III.A.2.

¹³⁶ See Part III.A.2.

The Supreme Court's inconsistent application of deference analysis is well-documented and, as Professor William Eskridge Jr and Lauren Baer show, it is widespread.¹³⁷ Far from being unique to the EEOC, the Supreme Court more often than not eschews formal deference regimes in favor of ad hoc reasoning in the vein of traditional statutory interpretation.¹³⁸ Eskridge and Baer posit several reasons why this might be the case, but ultimately, their empirical results do not “offer guidance as to why named deference regimes are applied to some cases and not others.”¹³⁹ The authors nonetheless argue that the deference regimes have continued value and should not be abandoned.¹⁴⁰ Whatever the reason for the courts' failure to address the deference question, this Comment establishes that applying a formal deference regime is appropriate here.

This Part addresses the unresolved questions and fills the analytical gaps left by the circuit courts to resolve the circuit split. The analysis in Part III.A shows that § 1601.28(a)(3) is a valid and reasonable procedural rule that merits deference under the *Chevron* framework.¹⁴¹ Part III.B then shows that the EEOC's practice of investigating after issuing a right-to-sue notice promotes the purpose and goals of Title VII and conforms with Supreme Court precedent on closely related topics of EEOC enforcement power.

A. The EEOC's Interpretation of Title VII in 29 CFR § 1601.28(a)(3) Deserves Deference

The Supreme Court's jurisprudence has not definitively answered the question of how much deference courts should afford the EEOC's interpretations of Title VII.¹⁴² Indeed, the Court often has avoided this question, opting instead to decide cases without addressing deference.¹⁴³ When the Court has tackled the defer-

¹³⁷ See generally William N. Eskridge Jr and Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Georgetown L J 1083 (2008).

¹³⁸ See *id.* at 1099–1100.

¹³⁹ *Id.* at 1141.

¹⁴⁰ See *id.* at 1091–92.

¹⁴¹ See *Chevron*, 467 US at 842–43. Again, the understanding of “procedural” here is confined to the Title VII context. See note 77.

¹⁴² Hart, 74 Fordham L Rev at 1941–49 (cited in note 2).

¹⁴³ *Id.* at 1942.

ence question in the EEOC context, it has applied the less deferential standard laid out in *Skidmore v Swift & Co*¹⁴⁴ more often than the more deferential regime described in *Chevron*.¹⁴⁵ Despite this trend in past cases, the following analysis shows that courts should give § 1601.28(a)(3) deference under *Chevron*.

This Section proceeds as follows: First, Part III.A.1 provides an overview of the doctrine of judicial deference. Part III.A.2 and Part III.A.3 then argue from a macro perspective that, in general, there is no categorical bar to applying *Chevron* deference to EEOC regulations. Finally, Part III.A.4 and Part III.A.5 shift to a micro perspective to show that *Chevron* deference is appropriate with regard to § 1601.28(a)(3) in particular.

1. Judicial deference to administrative agencies: a theoretical overview.

Which deference regime courts apply can have a profound impact on the outcome of a case because the two standards—referred to as *Skidmore* deference and *Chevron* deference—differ considerably.¹⁴⁶ Under the *Skidmore* standard, courts are less deferential to agency interpretations. While the agency’s “rulings, interpretations and opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,” they are not binding.¹⁴⁷ Courts are free to substitute their own interpretation for the agency’s after considering “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹⁴⁸

By contrast, the higher level of deference under *Chevron* requires courts to engage in a two-step analysis. In Step One, courts ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.”¹⁴⁹ However, “if the statute is silent or ambiguous with respect to the specific issue,” then courts move on to Step Two,

¹⁴⁴ 323 US 134 (1944).

¹⁴⁵ See Hart, 74 Fordham L Rev at 1942 (cited in note 2).

¹⁴⁶ Note, however, that some scholars question whether the different deference regimes lead to different outcomes in practice. See David Zaring, *Reasonable Agencies*, 96 Va L Rev 135, 153–55 (2010).

¹⁴⁷ *Skidmore*, 323 US at 140.

¹⁴⁸ *Id.*

¹⁴⁹ *Chevron*, 467 US at 842.

which asks “whether the agency’s answer is based on a permissible construction of the statute.”¹⁵⁰ In other words, Step Two asks whether the agency’s interpretation is reasonable. As long as it is, courts defer to the agency’s view even if they think a different interpretation might be better.¹⁵¹

Determining which standard to apply is a complicated matter that has sparked rigorous debate between Supreme Court justices.¹⁵² In answering this question, courts now commonly apply what is known as *Chevron* Step Zero. This analysis asks whether Congress intended to give the agency authority to interpret the statute in question. If the answer is yes, the court moves on to the two-step *Chevron* analysis. If the answer is no, the court instead applies the less deferential *Skidmore* standard.¹⁵³ *Chevron* Step Zero thus provides a gatekeeping function to determine whether courts reach the *Chevron* analysis at all.

The Supreme Court has developed two sets of factors to consider at the Step Zero inquiry. The first set comes from *United States v Mead Corp.*¹⁵⁴ Under *Mead*, the key inquiry is whether “Congress delegated authority to the agency generally to make rules carrying the force of law” and whether the agency acted pursuant to that authority.¹⁵⁵ The most important factor in this analysis is whether Congress authorized the agency to engage in formal rulemaking or adjudication, or informal rulemaking pursuant to notice-and-comment procedures.¹⁵⁶ But the *Mead*

¹⁵⁰ *Id.* at 843.

¹⁵¹ See, for example, *Entergy Corp v Riverkeeper, Inc.*, 556 US 208, 218 (2009) (“[The agency’s] view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts.”) (emphasis omitted). See also Stephen G. Breyer, et al, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 256 (Wolters Kluwer 8th ed 2017) (noting that courts “almost never” invalidate an agency decision at Step Two).

¹⁵² See Cass R. Sunstein, *Chevron Step Zero*, 92 Va L Rev 187, 198–205 (2006) (describing the back-and-forth debate between Justice Stephen Breyer and Justice Antonin Scalia in a string of cases).

¹⁵³ See *Christensen v Harris County*, 529 US 576, 587 (2000) (holding that, in the absence of *Chevron* deference, agency interpretations still merit *Skidmore* deference to the extent that they “have the power to persuade”), quoting *Skidmore*, 323 US at 140.

¹⁵⁴ 533 US 218 (2001).

¹⁵⁵ *Id.* at 226–27. As Professor Cass Sunstein summarizes the Step Zero analysis under *Mead*, “if agencies have been given power to use relatively formal procedures, and if they have exercised that power, they are entitled to *Chevron* deference.” Sunstein, 92 Va L Rev at 214 (cited in note 152).

¹⁵⁶ *Mead*, 533 US at 229 (noting that the ability to engage in notice-and-comment rulemaking or formal adjudication is “a very good indicator of [congressional] delegation meriting *Chevron* treatment”).

Court made clear that formal agency action and notice-and-comment procedures are not prerequisites for *Chevron* deference.¹⁵⁷ Other factors like the language of the statute, how many parties are bound by the agency interpretation, the precedential value of the interpretation, and the number of interpretations the agency issues also can indicate congressional intent.¹⁵⁸

The second set of factors comes from *Barnhart v Walton*.¹⁵⁹ In upholding an agency regulation that had been issued through informal means, the *Barnhart* Court said that Step Zero turned in large part on “the interpretive method used and the nature of the question at issue.”¹⁶⁰ The factors in this inquiry, the Court said, include “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration,” how carefully the agency has considered the question, and for how long a period.¹⁶¹

2. Judicial deference to EEOC procedural regulations: the experience in practice.

The Supreme Court has not articulated a clear theory of deference to EEOC regulations under Title VII.¹⁶² It is well established that EEOC regulations that interpret the substance of Title VII never merit *Chevron* deference because, under Title VII, the EEOC has authority only to issue procedural regulations.¹⁶³ But despite the

¹⁵⁷ *Id.* at 230–31.

¹⁵⁸ *Id.* at 232–34.

¹⁵⁹ 535 US 212 (2002).

¹⁶⁰ *Id.* at 222.

¹⁶¹ *Id.*

¹⁶² See Hart, 74 *Fordham L Rev* at 1945 (cited in note 2) (“Despite the fact that Title VII, the ADA, and the ADEA all explicitly grant some rulemaking authority to the EEOC, the Court has applied *Chevron* deference in only two antidiscrimination cases, one under the ADA and one under the ADEA.”). See also Tessa M. Register, Note, *The Case for Deferring to the EEOC’s Interpretations in Macy and Foxx to Classify LGBT Discrimination As Sex Discrimination under Title VII*, 102 *Iowa L Rev* 1397, 1419 (2017) (“When interpreting workplace discrimination statutes, the Supreme Court has historically opted to ‘chart its own course’ rather than defer to the EEOC’s expertise.”); Sam DePrimio, *Special Delivery: Young v. United Parcel Service Revives the Pregnancy Discrimination Act while Denying Life to EEOC Guidance*, 67 *Admin L Rev* 389, 406 (2015) (noting that current Supreme Court precedent “leaves an open question as to the deference the Court will grant to [the] EEOC”).

¹⁶³ See notes 74–76 and accompanying text. In theory, the EEOC’s substantive regulations could merit *Skidmore* deference. But in practice, courts almost always strike them down. See Hart, 74 *Fordham L Rev* at 1948 (cited in note 2) (noting that the Supreme Court has applied *Skidmore* and upheld an EEOC regulation in only two cases). See also *General*

Court's hostility to EEOC regulations interpreting the substance of Title VII, the Court has shown willingness to defer to the EEOC's procedural regulations. In *Equal Employment Opportunity Commission v Commercial Office Products Co*¹⁶⁴ and *Edelman v Lynchburg College*,¹⁶⁵ for example, majorities of the Court applied logic resembling that of *Chevron* to uphold EEOC interpretations of Title VII, and concurring opinions in both cases advocated explicitly for *Chevron* deference.¹⁶⁶

The Court's analysis in *Commercial Office* closely mirrored that of *Chevron*. The dispute in *Commercial Office* concerned the EEOC's interpretation that, under Title VII, a state antidiscrimination agency "terminated" its proceedings when it waived its right to initially process a charge of discrimination.¹⁶⁷ After finding that the language of Title VII was ambiguous, the Court held that the EEOC's interpretation was not only reasonable, but also "more than amply supported by the legislative history of the deferral provisions of Title VII, the purposes of those provisions, and the language of other sections of the Act."¹⁶⁸

The Court also upheld a procedural regulation in *Edelman*. At issue was an EEOC regulation allowing individuals to amend their charge to add the required verification by oath or affirmation after the filing period had expired.¹⁶⁹ As long as the initial charge was timely filed, the EEOC regulation provided that the verification would relate back to the time of the original filing.¹⁷⁰ Writing for the *Edelman* Court, Justice David Souter rejected the employer's argument that the EEOC's regulation unlawfully altered the substantive requirements Congress laid out in Title VII. Drawing a distinction between procedure and substance,¹⁷¹ the

Electric Co v Gilbert, 429 US 125, 141 (1976) (noting that the EEOC lacks authority to promulgate substantive regulations and applying *Skidmore* deference to strike down the EEOC's substantive guideline); *Equal Employment Opportunity Commission v Arabian American Oil Co*, 499 US 244, 257 (1991) (rejecting the EEOC's substantive interpretation of Title VII).

¹⁶⁴ 486 US 107 (1988).

¹⁶⁵ 535 US 106 (2002).

¹⁶⁶ See *Commercial Office*, 486 US at 125–26 (O'Connor concurring); *Edelman*, 535 US at 120–24 (O'Connor concurring).

¹⁶⁷ *Commercial Office*, 486 US at 112–13.

¹⁶⁸ *Id* at 115–16.

¹⁶⁹ *Edelman*, 535 US at 109.

¹⁷⁰ *Id* at 109–10.

¹⁷¹ *Id* at 113. The Court addressed the procedure-substance distinction in both *Commercial Office* and *Edelman*, but the justices did not discuss where the dividing line fell. Instead, they simply accepted that the regulations at issue were sufficiently procedural to fall within 42 USC § 2000e-12(a). See *Edelman*, 535 US at 114, 117–18; *Edelman*, 535

Court held that the relevant statutory provision was ambiguous and “open to interpretation”¹⁷² and that the EEOC did not exceed “its authority to adopt ‘suitable procedural regulations’” under 42 USC § 2000e-12(a).¹⁷³ The Court then moved to the second issue: what level of deference to give to the EEOC regulation. The Court initially invoked *Mead*’s principle that *Chevron* does not always require formal agency action or notice-and-comment procedures.¹⁷⁴ But rather than pursue the inquiry further, the Court abruptly announced that there was “no need to resolve any question of deference” because it found “the EEOC rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch.”¹⁷⁵

While the majorities in *Commercial Office* and *Edelman* implicitly support the view that the EEOC’s procedural regulations merit high deference from courts, Justice Sandra Day O’Connor’s concurrences in both cases make the case explicitly. In *Commercial Office*, O’Connor agreed with the majority that, “in light of the statute’s language, structure, and legislative history, sufficient ambiguity exists to warrant deference to the agency’s construction of the word ‘terminated’ in § 706(c) [of Title VII]. Indeed, deference is particularly appropriate on this type of technical issue of agency procedure.”¹⁷⁶ O’Connor was even more explicit in *Edelman*: “I do not agree that the EEOC has adopted the most natural interpretation of Title VII’s provisions regarding the filing with the EEOC of charges of discrimination. . . . But, because the statute is at least somewhat ambiguous, I would defer to the agency’s interpretation.”¹⁷⁷ In support, O’Connor cited *Chevron* as well as her concurrence in *Commercial Office*.¹⁷⁸

US at 119 (Thomas concurring); *Edelman*, 535 US at 120 (O’Connor concurring); *Commercial Office*, 486 US at 125 (O’Connor concurring).

¹⁷² *Edelman*, 535 US at 113.

¹⁷³ *Id.* at 113, citing *Arabian American Oil*, 499 US at 257 and *General Electric*, 429 US at 141.

¹⁷⁴ *Edelman*, 535 US at 114, citing *Mead*, 533 US at 230–31.

¹⁷⁵ *Edelman*, 535 US at 114. Like the circuit court decisions described in Part II, one possible reading of this holding is that the Court found the statute unambiguous, thus resolving the question at Step One. But because the Court emphasized the reasonableness of the EEOC’s interpretation rather than the absolute textual clarity of Title VII, the better reading is that the Court implicitly found statutory ambiguity at Step One and upheld the regulation at Step Two. Regardless, either reading supports the view that *Chevron* analysis is the proper lens for EEOC procedural regulations.

¹⁷⁶ *Commercial Office*, 486 US at 125 (O’Connor concurring).

¹⁷⁷ *Edelman*, 535 US at 120 (O’Connor concurring).

¹⁷⁸ *Id.*

3. EEOC procedural regulations can merit *Chevron* deference.

The structure of Title VII and relevant precedent show that, in the abstract, EEOC procedural regulations that interpret Title VII merit *Chevron* deference. As Part III.A.1 discusses, an agency interpretation merits *Chevron* deference only if it satisfies Step Zero,¹⁷⁹ which asks whether Congress delegated authority to the agency to make rules carrying the force of law and whether the agency interpretation claiming deference was issued as an exercise of that authority.¹⁸⁰ It is an open question whether the EEOC has such authority under Title VII, as the previous Section demonstrates, but several Supreme Court cases suggest that it does with regard to its procedural rules.¹⁸¹ Likewise, several scholars and lower courts have provided convincing analyses demonstrating that EEOC procedural regulations can carry the force of law.¹⁸²

Professor Rebecca Hanner White argues persuasively that, although the EEOC's lack of substantive rulemaking or adjudicatory authority is "dispositive" as to whether the EEOC can interpret substantive rules, it is not so with regard to its procedural ones.¹⁸³ Channeling the logic of the *Barnhart* factors, White argues that properly answering whether Congress meant to delegate the power to create rules with the force of law requires a consideration of the full weight of evidence, including the legislative record and "other factors generally regarded as useful,"¹⁸⁴ to determine whether it "makes sense" within the overall statutory scheme for

¹⁷⁹ See notes 152–61 and accompanying text.

¹⁸⁰ *Mead*, 533 US at 226–27.

¹⁸¹ See Part III.A.2.

¹⁸² See White, 1995 Utah L Rev at 92–99 (cited in note 16); *Sims v Trus Joist MacMillan*, 22 F3d 1059, 1062 (11th Cir 1994).

¹⁸³ See White, 1995 Utah L Rev at 58, 95 (cited in note 16). White advocates for a broader view of EEOC deference than the position this Comment takes. Her view would afford deference to all EEOC pronouncements, including interpretive guidelines. See id at 102–07. However, the Supreme Court rejected such a broad view in a series of cases known as the Step Zero Trilogy. See Sunstein, 92 Va L Rev at 211–19 (cited in note 152). For example, in *Christensen*, the first Trilogy case, the Court held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen*, 529 US at 587. This Comment adopts a much narrower position, advocating only that the EEOC's procedural rules issued pursuant to 42 USC § 2000e-12 merit deference.

¹⁸⁴ White, 1995 Utah L Rev at 97 (cited in note 16). White's argument closely mirrors the factors the Court later adopted in *Barnhart*, like uniformity of the law, agency expertise, and the nature of the question at issue. Id at 97–99.

the EEOC to have such power.¹⁸⁵ These factors cut strongly in favor of judicial deference to the EEOC's procedural rules. First, White traces Title VII's legislative history to show that, unlike other elements of the statute that were more contentious, the question of EEOC rulemaking authority "has never been the object of sustained congressional debate."¹⁸⁶ The debates on those other issues—for example, the EEOC's ability to initiate a lawsuit—resulted in the various restrictions Congress placed on the EEOC's enforcement powers.¹⁸⁷ By comparison, White argues that "one would have expected some debate" if Congress had intended to limit the EEOC's interpretative powers as well.¹⁸⁸ Deferring to the EEOC's interpretation also satisfies the *Barnhart* factor favoring a uniform system in an important area of law and incorporates EEOC expertise that is "unmatched by the courts."¹⁸⁹

Moreover, the enforcement powers Congress enumerated in Title VII "necessarily envisioned the need for agency interpretation."¹⁹⁰ Title VII essentially consists of three major elements: (1) Congress's substantive notions about what constitutes employment discrimination,¹⁹¹ (2) a broad framework for how the enforcement procedure should operate,¹⁹² and (3) a residual clause allowing the EEOC to issue procedural rules necessary to carry out the broad purposes of the statute.¹⁹³ In other words, Congress specifically dictated the *what* of employment discrimination, but it largely left the *how* up to the EEOC, provided the agency stays within Title VII's broad framework. By vesting the EEOC with broad investigatory power, a duty to attempt conciliation, and, finally, a direct prosecutorial role in antidiscrimination lawsuits, Congress impliedly granted the EEOC the authority to interpret the statute and determine how best to fulfill each role. Otherwise, "the EEOC's views of what the statute means are without force," and its enforcement efforts "become[] perfunctory until the courts resolve the statutory issue."¹⁹⁴ The interpretations embodied in

¹⁸⁵ *Id.* at 97. In making this assertion, White drew on the scholarship of then-Professor Stephen Breyer. See also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin L Rev* 363, 370 (1986).

¹⁸⁶ White, 1995 *Utah L Rev* at 95 (cited in note 16).

¹⁸⁷ See Part I.A.

¹⁸⁸ White, 1995 *Utah L Rev* at 95–96 (cited in note 16) (emphasis omitted).

¹⁸⁹ *Id.* at 97–98.

¹⁹⁰ *Id.* at 97.

¹⁹¹ See 42 USC §§ 2000e-2–2000e-3.

¹⁹² See 42 USC §§ 2000e-4–2000e-6, 2000e-8.

¹⁹³ See 42 USC § 2000e-12(a).

¹⁹⁴ White, 1995 *Utah L Rev* at 96 (cited in note 16).

the EEOC's procedural regulations therefore further satisfy Step Zero under *Barnhart* because they are necessary to answer the interstitial questions that arise in the daily administration of the statute.¹⁹⁵

Arguments that the EEOC's regulations *always* fail Step Zero are unpersuasive. Authors taking this position sometimes argue that courts historically have shown less deference to the EEOC than to other agencies.¹⁹⁶ From this premise, they assert that because courts typically apply *Skidmore* deference to EEOC regulations, that must be the proper standard.¹⁹⁷ But this argument is conclusory and ignores the endogeneity of the procedure-substance issue within those cases. Indeed, in *General Electric Co v Gilbert*¹⁹⁸ and *Equal Employment Opportunity Commission v Arabian American Oil Co*¹⁹⁹—two cases that proponents of this argument often cite—the Court struck down EEOC interpretations because they reached the substance of Title VII. These cases therefore shed little light on how courts should treat the EEOC's procedural rules.²⁰⁰

Professor Nancy Modesitt falls into a similar trap. She claims that “even the EEOC's interpretations of Title VII created using formal procedures are entitled to, at most, *Skidmore* deference, not *Chevron* deference,”²⁰¹ because “Congress did not ‘give[] rulemaking authority to interpret the substantive provisions of Title VII.’”²⁰² Puzzlingly, Modesitt cites *Edelman* to support this claim. But as the previous Section analyzed,²⁰³ rather than condemning all EEOC interpretations, the Court in *Edelman* distinguished “suitable procedural regulations” from “substantive issue[s] over which the EEOC has no rulemaking power.”²⁰⁴ In drawing this distinction, the Court strongly implied its favorable view of the former category.

¹⁹⁵ See notes 159–61 and accompanying text. See also Breyer, 38 Admin L Rev at 370 (cited in note 185).

¹⁹⁶ See, for example, Dunn, Comment, 63 Emory L J at 482–83 (cited in note 57).

¹⁹⁷ Id at 483–84.

¹⁹⁸ 429 US 125 (1976).

¹⁹⁹ 499 US 244 (1991).

²⁰⁰ See DePrimio, 67 Admin L Rev at 406 (cited in note 162) (questioning the precedential value of *Arabian American Oil and Gilbert*).

²⁰¹ Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle between Courts and Agencies over the Right to Interpret Federal Law*, 74 Mo L Rev 949, 976 (2009).

²⁰² Id at 977, quoting *Edelman*, 535 US at 122 (O'Connor concurring) (emphasis omitted).

²⁰³ See notes 165–78 and accompanying text.

²⁰⁴ *Edelman*, 535 US at 113.

The great weight of evidence shows that the EEOC's procedural rules issued pursuant to 42 USC § 2000e-12 can be entitled to deference. Although the rulemaking power Congress granted the EEOC falls decidedly short of conventional substantive legislative rules, the EEOC's procedural rules nonetheless are "rule[s] within the agency's special ken and competence, as recognized by Congress in its organic statute."²⁰⁵ Analyzing the Step Zero factors demonstrates that Congress impliedly delegated interpretative authority to the EEOC to facilitate its broad enforcement powers under Title VII.

4. Applying *Chevron* Step Zero to 29 CFR § 1601.28(a)(3).

While the previous Sections establish that, in general, EEOC procedural regulations can merit *Chevron* deference, this Section shows that § 1601.28(a)(3) in particular satisfies Step Zero because it is a procedural regulation that carries the force of law.²⁰⁶

Several factors from *Mead* and *Barnhart* show that § 1601.28(a)(3) carries the force of law. First, and most importantly, § 1601.28(a)(3) was adopted via notice-and-comment procedures pursuant to its explicit authority to adopt procedural rules.²⁰⁷ On its face, this fact alone may satisfy Step Zero under *Mead* because such rulemaking shows that Congress delegated the authority to make rules carrying the force of law, and the EEOC acted on this authority.²⁰⁸ Looking to *Barnhart*, § 1601.28(a)(3) also represents a longstanding interpretation that has remained in place since the EEOC promulgated the regulation in 1974,²⁰⁹ and the determination of when a continued investigation serves the purposes of Title VII draws considerably on the EEOC's particularized expertise.²¹⁰ These factors suggest that this question is well suited for *Chevron* analysis.²¹¹ Moreover, the regulation simply states that the EEOC can continue investigating

²⁰⁵ Barry Sullivan, *On the Borderlands of Chevron's Empire: An Essay on Title VII, Agency Procedures and Priorities, and the Power of Judicial Review*, 62 La L Rev 317, 325 (2002).

²⁰⁶ One article has explicitly, but briefly, addressed whether 29 CFR § 1601.28(a)(3) is procedural. See Shawn D. Twing and Travis Odom, *Invoking Agency Jurisdiction in Employment Law Cases*, 10 Tex Tech Admin L J 369, 400 (2009). The extent of the article's analysis argues that "this particular regulation is probably entitled to *Chevron* deference" because Congress gave the EEOC power to issue "suitable procedural regulations to carry out the provisions of Title VII." *Id.* (citations and emphasis omitted).

²⁰⁷ See Part I.D.

²⁰⁸ See notes 154–58 and accompanying text.

²⁰⁹ See generally Issuance of Notices of Right-to-sue, 39 Fed Reg 10178 (1974).

²¹⁰ See notes 159–61 and accompanying text.

²¹¹ See Part III.A.1.

a charge of employment discrimination as long as it “effectuate[s] the purpose of title VII.”²¹² It does not purport to interpret what constitutes an unlawful employment practice, nor does it attempt to change the substantive obligations imposed by Title VII. Instead, it addresses interstitial questions regarding the EEOC’s internal functioning.²¹³

Courts’ treatment of other EEOC interpretations confirms the procedural nature of § 1601.28(a)(3). In *General Electric*, the Supreme Court rejected EEOC guidelines that sought to bring discrimination on the basis of pregnancy and childbirth within the purview of sex discrimination under Title VII.²¹⁴ Similarly, in *Arabian American Oil*, the Court rebuffed the EEOC’s interpretation that Title VII’s jurisdiction extended to employers outside the United States.²¹⁵ Both of these cases dealt with EEOC interpretations that went to the substance of Title VII. In sharp contrast, the Court upheld the EEOC’s procedural interpretations in *Commercial Office* and *Edelman*, which respectively addressed when a state antidiscrimination agency “terminated” its proceedings and whether an aggrieved individual’s amended charge could relate back to the date the initial charge was filed.²¹⁶ These two pairs of cases highlight a key distinction that runs through the Court’s jurisprudence: EEOC interpretations regarding *what* it can enforce are impermissibly substantive, while interpretations of *how* it can enforce are procedural. Section 1601.28(a)(3) falls in the latter category and is far more similar to the procedural regulations upheld in *Commercial Office* and *Edelman*.²¹⁷

Opponents of this view might counter that § 1601.28(a)(3) is not actually procedural because the EEOC’s decision to investigate can significantly impact rights and obligations under Title VII. This argument is as incorrect as it is unconvincing. Legal scholarship firmly recognizes that procedural rules inherently impact substantive outcomes.²¹⁸ The EEOC’s decisions to continue an investigation pursuant to § 1601.28(a)(3) are no exception. But the

²¹² 29 CFR § 1601.28(a)(3).

²¹³ See notes 159–61 and accompanying text.

²¹⁴ *General Electric*, 429 US at 140–41, 145–46.

²¹⁵ *Arabian American Oil*, 499 US at 257–59.

²¹⁶ See Part III.A.2. See also *Commercial Office*, 486 US at 112–13; *Edelman*, 535 US at 109.

²¹⁷ See Part III.A.2.

²¹⁸ See Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 Wash U L Rev 801, 803 (2010) (discussing “the familiar narrative about how procedure is inherently substantive” and how “procedure affects the outcome of cases”).

mere existence of a downstream impact on substance is not sufficient to invalidate an otherwise permissible procedural rule.²¹⁹ Rather, the question should be one of degree: Does the procedural rule impact substance *too much*? Drawing this line can be difficult, especially when, as in the EEOC context, courts have not discussed the question at length.²²⁰ In this situation, comparison and analogy emerge as highly effective tools. And again, comparing § 1601.28(a)(3) with the decidedly procedural regulations upheld in *Commercial Office* and *Edelman* and the decidedly substantive regulations struck down in *General Electric* and *Arabian American Oil* confirms that § 1601.28(a)(3) falls on the procedural side of the line.

5. Applying *Chevron* analysis to 29 CFR § 1601.28(a)(3).

Since § 1601.28(a)(3) is procedural and satisfies Step Zero, it should be analyzed under the *Chevron* framework rather than the less deferential *Skidmore* regime.²²¹ The inquiry thus moves to *Chevron*'s two-step analysis, which asks (1) whether the statute at issue clearly expresses Congress's intent and (2) whether the regulation is a reasonable interpretation of the statute. If the regulation fails at either step, it does not merit deference.

At Step One, courts draw on all tools of statutory interpretation, examining the statute's text, structure, and purpose; the legislative history; and subsequent legislative enactments.²²² Starting with the text, nothing in Title VII explicitly answers whether the EEOC loses its authority to investigate once it issues a right-to-sue notice. One might interpret this silence to imply affirmative authorization since Title VII does restrict other aspects of EEOC enforcement.²²³ Indeed, both the Seventh and Ninth Circuits seem to have adopted the view that Title VII unambiguously empowered the EEOC to continue investigation after issuing a right-to-

²¹⁹ See *Edelman*, 535 US at 113 (rejecting the employer's argument that the EEOC's procedural rule was invalid because it altered "a substantive requirement included by Congress in the statute").

²²⁰ See note 171.

²²¹ See Part III.A.1.

²²² See, for example, *Food and Drug Administration v Brown & Williamson Tobacco Corp.*, 529 US 120, 133 (2000).

²²³ The *expressio unius* canon of interpretation dictates that the inclusion of one item implies the exclusion of other items not mentioned. See, for example, William N. Eskridge, et al, *Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy* 668 (West 5th ed 2014).

sue notice.²²⁴ But the better reading is that this silence reflects ambiguity, as demonstrated by the conflict between *Federal Express* and *Union Pacific* on the one hand and *Hearst* on the other. In *Hearst*, the Fifth Circuit correctly identified that Title VII contains time restrictions and jurisdictional triggers that collectively could suggest congressional desire to limit the EEOC's power. Yet neither the structure nor purpose of the statute suggest congressional intent to restrain the EEOC's investigations.²²⁵ To the contrary, the structure of Title VII's enforcement mechanism emphasizes that the EEOC's investigatory authority is broad in order to foster conciliation and avoid litigation.²²⁶

The legislative history is similarly indeterminate regarding the impact of right-to-sue notices. The legislative record does show that Congress intentionally restrained the EEOC's independent enforcement power by limiting its ability to bring civil actions and making an individual charge of discrimination a jurisdictional prerequisite to EEOC action.²²⁷ But there is no indication that Congress intended similar restraints on the EEOC's investigatory powers, and no provision speaks extensively about right-to-sue notices. Here, as in *Chevron*, "the legislative history as a whole is silent on the precise issue," but it is "consistent with the view that the [agency] should have broad discretion."²²⁸ The fact that Congress steadily increased the EEOC's authority over time further supports this view.²²⁹ Ultimately, these arguments and counterarguments underscore Title VII's ambiguity.

Because the statute is ambiguous, satisfying Step One, the analysis finally turns to Step Two. Applying Step Two, the EEOC's interpretation is entitled to *Chevron* deference because § 1601.28(a)(3) is reasonable. *Chevron's* reasonableness standard is similar to the substantive component of traditional arbitrary and capricious review.²³⁰ Here, the regulation is reasonable because it draws on agency expertise and falls within the broad discretion that Title VII and the Supreme Court have afforded the EEOC to investigate systemic employment discrimination.²³¹

²²⁴ See Part II.B and Part II.C.

²²⁵ See Part III.B.

²²⁶ See Part III.B.

²²⁷ See Parts I.A and I.B.

²²⁸ *Chevron*, 467 US at 862.

²²⁹ See Part I.A.

²³⁰ *Chevron*, 467 US at 844.

²³¹ See notes 45–49 and accompanying text.

Given the text of Title VII and the EEOC's broad discretion to determine what serves the public interest, there is no blanket prohibition on post-right-to-sue notice investigations.²³² Even if a court believes that a different interpretation is better than the EEOC's, that does not undermine the reasonableness of § 1601.28(a)(3).²³³

The sole other article that explicitly discusses this circuit split argues that § 1601.28(a)(3) fails at Step Two because it is arbitrary and capricious on two grounds. First, the authors—Shawn Twing and Travis Odom—claim that Congress “did not intend for the [EEOC’s] investigation to go on indefinitely.”²³⁴ Second, the authors argue that “the primary purpose of Title VII is to trigger the investigatory and conciliatory procedures . . . to achieve non-judicial resolution of employment discrimination claims” and that “[t]his purpose is not served at all by allowing the EEOC to continue investigating an employer on the basis of a charge already being litigated.”²³⁵

Neither of these arguments is convincing. As to the first, the authors’ concerns about a wholly unrestrained EEOC conducting never-ending investigations would be justified if those fears were realistic. But they are not. Section 1601.28(a)(3) allows the EEOC to investigate only so long as it “effectuate[s] the purpose” of Title VII.²³⁶ This key qualification provides employers with a ground to challenge—and courts with a means to police—an EEOC investigation that improperly extends beyond the issuance of a right-to-sue notice. Thus, even in the world this Comment envisions, employers retain meaningful checks to prevent overzealous EEOC officials from running amok.

Moreover, the Supreme Court has already made clear that there is no strict temporal limit on the EEOC’s enforcement authority, despite the 180-day period described in the statute.²³⁷

²³² See *General Telephone*, 446 US at 331.

²³³ See notes 150–51 and accompanying text. More pragmatically, arguments to the contrary suffer from the fact that “[c]ourts almost never invalidate an agency decision in step two.” Breyer, et al, *Administrative Law and Regulatory Policy* at 256 (cited in note 151). Instead, when courts strike down an agency interpretation under *Chevron*, it is at Step Zero or Step One. If an agency decision is robust enough to survive the rigorous inquiry of those steps, it is almost never unreasonable. This logic certainly holds true here.

²³⁴ Twing and Odom, 10 Tex Tech Admin L J at 400 (cited in note 206).

²³⁵ *Id.* at 401.

²³⁶ 29 CFR § 1601.

²³⁷ *Occidental*, 432 US at 360–61.

Just as Title VII imposes no requirement that the EEOC “conclude its conciliation efforts and bring an enforcement suit within any maximum period of time,”²³⁸ it also should not be read to impose an arbitrary temporal cap on the EEOC’s investigatory powers. This view is supported further by the fact that there is no time limit for commissioner’s charges.

The second argument, that allowing the EEOC to continue investigating fails to promote extrajudicial resolution of disputes, also fails because it underestimates the EEOC’s duty under Title VII to “vindicate the public interest in preventing employment discrimination.”²³⁹ When an aggrieved individual brings a private civil action, she pursues her narrow self-interest, which is likely to diverge from that of the greater public. Despite Twing and Odom’s assertion to the contrary,²⁴⁰ the EEOC still has a strong interest in completing its investigation to determine whether the employer has engaged in systemic or widespread patterns or practices of employment discrimination. Given its broader mission, the EEOC is better positioned to address such patterns or practices than an individual’s lawsuit, which has a narrow scope limited to the parties involved. And in the long term, allowing EEOC investigations to continue could lead to less litigation overall—thereby satisfying the purpose of Title VII—because the EEOC could address the widespread discriminatory practices in one fell swoop, eliminating the need for redundant, time-consuming individual lawsuits filed by each affected employee.

Twing and Odom also fail to distinguish controlling Supreme Court precedent.²⁴¹ They try to mitigate the force of the Court’s holding in *Waffle House* that Title VII “makes the EEOC the master of its own case.”²⁴² But that decision should be read in conjunction with the Court’s earlier statement in *Occidental* that nothing in Title VII requires the EEOC to conclude its enforcement efforts “within any maximum period of time.”²⁴³ Together, these holdings confirm the vast control the EEOC exercises over its enforcement procedures.

²³⁸ Id at 360.

²³⁹ *General Telephone*, 446 US at 326.

²⁴⁰ See Twing and Odom, 10 Tex Tech Admin L J at 401 (cited in note 206).

²⁴¹ See id at 401.

²⁴² *Waffle House*, 534 US at 291.

²⁴³ *Occidental*, 432 US at 360.

* * *

On balance, the Step Zero factors and the *Chevron* analysis indicate that § 1601.28(a)(3) deserves *Chevron* deference. Congress explicitly gave the EEOC power to issue procedural rules and implicitly authorized those rules to fill the gaps and ambiguities left in Title VII's enforcement procedure. The EEOC did just that when it enacted § 1601.28(a)(3) via notice and comment. The EEOC's interpretation of Title VII does not conflict with the statute's text, it is a reasonable interpretation of Congress's intent, and it accomplishes the broad antidiscrimination goals enshrined in Title VII. As such, courts should defer to § 1601.28(a)(3) under *Chevron*.

B. Continued EEOC Investigations Further the Purpose of Title VII

Restricting the EEOC's ability to investigate is antithetical to the goals of Title VII because it would stifle conciliation efforts. The legislative history demonstrates Congress's intent that conciliation be the first and preferred tool used to rectify employment discrimination. And courts have repeatedly affirmed its centrality to the Title VII scheme.²⁴⁴

The Supreme Court recently reiterated the importance of conciliation in *Mach Mining, LLC v Equal Employment Opportunity Commission*.²⁴⁵ In *Mach Mining*, the Court considered whether the conciliation efforts the EEOC conducted before bringing a civil action against the employer were sufficient to satisfy the requirements under Title VII.²⁴⁶ In response, the EEOC argued that its conciliation efforts should not be subject to judicial review.²⁴⁷ Although the Court recognized the "expansive discretion that Title VII gives to the EEOC" in pursuing conciliation efforts, it rejected the notion that courts could not review the EEOC's actions to ensure compliance with the requirements of Title VII.²⁴⁸ In so

²⁴⁴ See Part I.B.3.

²⁴⁵ 135 S Ct 1645 (2015).

²⁴⁶ *Id.* at 1650–51.

²⁴⁷ *Id.* at 1650.

²⁴⁸ *Id.* at 1653.

holding, the Court emphasized that conciliation is “a key component of the statutory scheme”²⁴⁹ and that “Congress chose ‘[c]ooperation and voluntary compliance’ as its ‘preferred means’” to eliminate employment discrimination.²⁵⁰

Because conciliation flows from the EEOC’s investigation, limiting the EEOC’s investigative power would cause practical difficulties that would undermine its antidiscrimination efforts. If the issuance of a right-to-sue notice terminates the EEOC’s investigatory authority and a charging individual requests a right-to-sue notice before the EEOC finishes its investigation, the EEOC is left with few options, all of which are inadequate. Absent the results from a rich and full investigation, the EEOC would find it difficult to persuade a recalcitrant employer to accept satisfactory terms of conciliation. Terminating the EEOC’s ability to investigate is therefore likely to push the EEOC prematurely toward more litigation. Worse, such a rule might compel the EEOC to drop enforcement on those charges altogether, greatly increasing the threat that discriminatory practices will go undiscovered and unchallenged. Either of these outcomes undermines the purpose of Title VII and should be avoided.

The alternative enforcement options the Fifth Circuit suggests in *Hearst* are not suitable replacements for the ability to conduct an investigation. In *Hearst*, the Fifth Circuit suggested that without the ability to investigate, the EEOC still would be able to file a commissioner’s charge or intervene in the aggrieved individual’s lawsuit.²⁵¹ But as the Seventh Circuit noted in *Union Pacific*, these alternatives present additional procedural hurdles that complicate enforcement. For example, “a Commissioner’s charge filed after issuance of a notice of right-to-sue may be deemed untimely,”²⁵² especially if the investigation has been in progress for a substantial period of time. More significantly, commissioner’s charges are rarely used and often wrapped up in politics.²⁵³ EEOC commissioners are political appointees, nominated by the president and confirmed by the Senate to five-year

²⁴⁹ *Mach Mining*, 135 S Ct at 1651.

²⁵⁰ *Id* at 1651, quoting *Ford Motor Co v Equal Employment Opportunity Commission*, 458 US 219, 228 (1982).

²⁵¹ *Hearst*, 103 F3d at 469.

²⁵² *Union Pacific*, 867 F3d at 850, citing *Watkins Motor Lines*, 553 F3d at 598.

²⁵³ See Part I.B.1. See also Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement after 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 Dickinson L Rev 305, 353–54 (2001) (discussing how the political branches can “intervene to limit the power of the EEOC”).

terms.²⁵⁴ And while Title VII guarantees rough partisan balance—of the five commissioners, no more than three may be affiliated with the same political party²⁵⁵—that does not insulate commissioners from political influence. History shows that Congress has been willing to pull the purse strings closed or refuse to confirm a nominee when it disapproves of the agency’s activities.²⁵⁶ The fact that the composition of Congress and the White House, and therefore the EEOC commissioners, changes from election to election exacerbates these problems of “money and politics.”²⁵⁷ The EEOC field offices, however, typically are staffed by career civil servants.²⁵⁸ This dynamic presents the possibility, and often the reality, that the EEOC field offices would choose to pursue cases that the EEOC commissioners in Washington, DC would drop.²⁵⁹ The realization that the commissioner’s charge process may be tainted by politics underscores the Seventh Circuit’s concern that they are not a viable replacement for regular charge processing in the field offices, which are more insulated from such influences.

The possibility of intervening in an individual lawsuit is similarly constraining. The EEOC does not have a right to intervene; it can do so only at the discretion of the court.²⁶⁰ In addition to undermining Title VII’s goal of resolving employment discrimination suits out of court, requiring the EEOC to intervene, rather than allowing it to continue its investigation, inserts the judiciary in the middle of antidiscrimination efforts that Title VII meant to place within the responsibility of the EEOC.²⁶¹ Even when courts allow the EEOC to intervene, its ability to gather information likely would be restrained by limitations on discovery not present when the EEOC conducts an investigation outside of court.²⁶²

²⁵⁴ 42 USC § 2000e-4(a).

²⁵⁵ 42 USC § 2000e-4(a).

²⁵⁶ Green, 105 Dickinson L Rev at 346–47 (cited in note 253) (noting efforts in the late 1990s to “bring the EEOC to a standstill” due to a “perception that the Commission [was] overly sympathetic to plaintiffs”) (citation omitted).

²⁵⁷ Id at 349 (cited in note 253) (discussing how the “shifting sands of political will” impact the EEOC’s enforcement efforts), quoting Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 Colum L Rev 1384, 1409 (2000).

²⁵⁸ Schmidt Interview (cited in note 10).

²⁵⁹ Id.

²⁶⁰ 42 USC § 2000e-5(f)(1).

²⁶¹ See *Waffle House*, 534 US at 291–92 (“[I]t is the [EEOC’s] province—not that of the court—to determine whether public resources should be committed.”).

²⁶² See *Union Pacific*, 867 F3d at 850 (noting that “limitations on discovery may be imposed in the charging individual’s lawsuit”).

Eliminating the EEOC's authority to investigate after it issues a right-to-sue notice risks placing a serious restraint on the agency's ability to police discriminatory employment practices. The issue explored in this Comment appears to have emerged infrequently, but that could simply reflect a lack of reporting or a lack of appeals. More concerning, the frequency could increase dramatically if the Fifth Circuit's approach became the law of the land. If that were to happen, it would force the EEOC to rely on the alternatives touted in *Hearst* and would insert politics and procedural speedbumps into the process, placing additional hurdles in the way of an already resource-strapped agency.²⁶³ As the Seventh Circuit held, "[T]he availability of alternate investigatory avenues hardly supports limiting the EEOC's use of its most effective avenue."²⁶⁴ This statement is especially true here because the alternatives "could undermine the full investigatory authority of the EEOC."²⁶⁵

CONCLUSION

The EEOC's ability to investigate claims of discrimination is fundamental to the federal government's scheme to eliminate employment discrimination. Although concerns about ensuring swift resolution of charges and preventing a mountainous backlog of cases are legitimate, placing more limits on an already restricted agency seems a curious, and likely ineffective, solution. The better route, and the one adopted by the EEOC, is to maximize the EEOC's investigatory authority within the bounds of Title VII.

The EEOC's interpretation of its investigatory powers, as enshrined in § 1601.28(a)(3), is a valid exercise of the procedural rulemaking authority Congress granted. Therefore, the EEOC is entitled to deference from the judiciary. Although courts often have been skeptical of EEOC regulations, their hostility largely has been confined to the EEOC's attempts to issue substantive regulations. By contrast, the Supreme Court has upheld the legality of EEOC procedural regulations in several cases. Recognizing the validity of § 1601.28(a)(3)—indeed, awarding it the full measure of *Chevron* deference that it deserves—is neither a major

²⁶³ Green, 105 Dickinson L Rev at 311 (cited in note 253) (noting the EEOC's "limited resources and growing responsibilities").

²⁶⁴ *Union Pacific*, 867 F3d at 850.

²⁶⁵ *Id.*

shift in precedent nor policy. Rather, the result this Comment advocates affirms decades of practice, comports with the courts' generally broad view of EEOC enforcement powers, and enables the agency to carry out the vital antidiscrimination mission it has been tasked to accomplish.