Whistling in *Chevron*land: Why Department of Labor Interpretations of the Sarbanes-Oxley Act Whistleblower Provisions Do Not Deserve Judicial Deference

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Other Views:

• Wiest v. Lynch, 710 F.3d 121 (3d Cir. 2013), https://casetext.com/case/wiest-v-lynch-3.

• Nielsen v. AECOM Tech. Corp., 762 F.3d 214 (2d Cir. 2014), https://law.justia.com/cases/federal/appellate-courts/ca2/13-235/13-235-2014-08-08.html.

• Rhinehimer v. U.S. Bancorp Investments, Inc., 787 F.3d 797 (6th Cir. 2015), https://caselaw.findlaw.com/us-6th-circuit/1702289.html.

Abstract:

As a rule, a federal court defers to an agency's reasonable resolution of ambiguities in a law administered by the agency. Courts nonetheless hesitate to defer if Congress did not intend the agency action in question to carry the force of law or when other markers signify that Congress did not grant authority to resolve ambiguities. Following the general deference rule, federal courts routinely defer to the Department of Labor's interpretation of whistleblower protection laws the DOL administers. Courts unhesitatingly defer even when those laws permit whistleblower claim adjudication by either the DOL or a court, as does the Sarbanes-Oxley Act. Because Congress assigned co-adjudicative authority under the Act's whistleblower provision to the DOL and the judiciary, and for pragmatic reasons, deference to the DOL in this context is inappropriate.

If *Chevron* walked into an ABA conference, everyone would know who it was; no name badge required, no need for let's-get-acquainted small talk ("What's your holding?").[1] Like Cher, *Chevron* circulates with mononymous renown, its reputation preceding it. Still, because this essay tackles *Chevron*'s application in a particular context, a short re-introduction is in order at the outset.

The question in *Chevron*[2] was whether the Environmental Protection Agency (EPA) permissibly interpreted "stationary source" in the Clean Air Act. The term could mean either a solitary pollution-emitting apparatus (say, a smokestack) or a single-sited cluster of them (say, a factory).[3] Which construction was "right" in the context of the EPA's pollution control programs was perhaps unresolvable.[4]

The Court deferred to the meaning the agency gave the law because Congress had entrusted the administration of the Clean Air Act to the EPA, "stationary source" was capable of more than one meaning, and the EPA's interpretation of the term was reasonable.[5] The muscle in *Chevron* was its holding that courts are to assume that statutory ambiguity exposes a congressional intent that an administering agency may resolve the ambiguity, so long as the agency's construction is reasonable.[6]

Chevron deference creates a dichotomy in judicial approaches to statutory interpretation. On one hand, in cases involving administrative law, courts defer to reasonable agency

1 Credit for the term *Chevron*land goes to Justice Gorsuch. TransAm Trucking v. Administrative Rev. Bd., 833 F.3d 1206, 1216 (10th Cir. 2016) (dissenting) (the so-called "frozen trucker" case).

2 Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

3 *Id.* at 840.

4 W. Eskridge & L. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1086 (2008) (The concept at issue in *Chevron* "was impossibly complicated for the Court.").

5 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

6 *E.g.*, Smiley v. Citibank (S. Dak.), N.A., 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

interpretations unless they conflict with the law's plain text.[7] On the other hand, in ordinary federal court disputes involving statutory claims, courts seek the correct or at least best meaning of ambiguous text.[8] A court will employ tools of construction and perhaps consider signposts such as congressional intent and legislative history. The construction on which the court settles maintains force as "the law" unless reversed on appeal, overruled, or abrogated.

This binary arrangement seems straightforward. The courts or the agency—one or the other—has the institutional authority to say what the law is.[9] *Chevron* has been described as "institutional law" in that it "assigns to the administration the conditionally authoritative task of interpreting ambiguous statutory law and accordingly orders courts to under-enforce it."[10]

This essay addresses a snag in this binary approach illustrated by (but not exclusive to) Section 806 of the Sarbanes-Oxley Act,[11] which is one of several federal whistleblower laws. Substantively, § 806 prohibits covered employers from retaliating against employees for reporting corporate fraud. Procedurally, § 806 offers twin resolution paths. The complainant may choose to litigate his or her claim before an agency—the U.S. Department of Labor (DOL)—or in federal court. The fact that complainants may choose between the "Agency Track" and the "Court Track" upsets our otherwise neat binary arrangement. The law is co-administered and two-headed; a Siamese statute, if you will.

This essay argues that courts do not owe deference to DOL constructions of this statute. Part I details the § 806 framework. Part II discusses the justifications for deferring to statutory interpretation by agencies and summarizes court decisions on deference in § 806 cases. Part III summarizes Supreme Court and appellate court decisions on deference in this context. Part IV argues that courts should not defer to DOL interpretations of § 806.[12]

I. Section 806's Dual Tracks

The complainant in each § 806 case must initially file any retaliation claim against the employer with the DOL.[13] He or she may then choose to litigate the claim entirely within the agency. If so, following discovery and a hearing, an administrative law judge (ALJ) will apply the statute to the claim, resolving statutory ambiguities as may be necessary, and issue a recommended order. The ALJ's decision is then subject to review by the DOL's Administrative Review Board (ARB),[14] which reviews questions of law de novo and issues the DOL's final order.[15] Lastly, either party may seek review of that order in the appropriate circuit court of appeals. At this stage, the Solicitor of Labor, defending the ARB's order, will solemnly apprise the court that it must defer to the ARB's construction of § 806.[16] *Chevron* will be cited.[17]

Alternatively, the complainant may refile his or her § 806 claim in federal district court after a waiting period; this refiling is known as "kicking out."[18] Kicking out the complaint terminates DOL involvement as the district court assumes the familiar role

7 *E.g.,* United States v. City of Fulton, 475 U.S. 657, 666 (1986) (saying the court "must uphold" agency interpretation "if the statute yields up no definitive contrary legislative command" and the agency's approach was reasonable); Rapanos v. United States, 547 U.S. 715, 739 (2006) (finding that an agency's interpretation was not a permissible construction of the statute); Grand Trunk W. R.R. Co. v. DOL, 875 F.3d 821, 831 (6th Cir. 2017) (whistleblower case).

8 "The judicial task, every day, consists of finding the *right* answer, no matter how closely balanced the question may *seem* to be." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 520 (emphasis in original).

9 David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 202 (*Chevron* represents an institutional choice "between agencies and courts in ultimately resolving statutory ambiguities.").

10 N. Papaspyrou, Constitutional Argument and the Institutional Structure in the United States 233 (2018).

11 18 U.S.C. § 1514A.

12 Other federal whistleblower laws present these same issues. *E.g.*, 15 U.S.C. § 2087(b)(4) (consumer product safety whistleblower protection); 42 U.S.C. § 5851(b)(4) (nuclear energy); 49 U.S.C. § 20109(d)(3) (rail safety); 49 U.S.C. § 31105(c) (surface transportation).

13 18 U.S.C. § 1514A(b)(2)(A). Section 806 incorporates most of the procedural requirements of another federal whistleblower protection provision, 49 U.S.C. § 42121, which applies to the aviation industry.

14 Secretary of Labor, Order 01-2019, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 84 Fed. Reg. 13072 (Apr. 3, 2019).

15 Administrative Procedure Act (APA), 5 U.S.C. § 557(b).

16 *E.g.*, Brief for the United States as Amicus Curiae, *Lawson v. FMR, LLC*, No. 12-3, p. 13 (Sup. Ct., filed Apr. 9, 2013) ("[T]he ARB's resolution of any ambiguity in the phrase 'an employee' is 'controlling' as long as it is reasonable.").

17 *Id.* Section 806 requires appellate courts to conform to the review provisions of the APA. 18 U.S.C. § 1514A(b)(2)(A) (incorporating 49 U.S.C. § 42121(b)(4)). The APA directs the judiciary to decide questions of law, a standard that may or not may be compatible with *Chevron*. *See* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning [the APA's] directive that the 'reviewing court . . . interpret . . . statutory provisions,' we have held that *agencies* may authoritatively resolve ambiguities in statutes.") (emphasis in original).

18 Section 806 complaints first go to the Occupational Safety and Health Administration (OSHA). OSHA will begin an investigation and (if efforts to settle the claim fail) will issue a preliminary determination. After that, either party may request a hearing. Wherever the DOL proceedings stand after the first 180 days—whether OSHA has completed its investigation or not—the complainant may move the case to federal court. The kickout provision, 18 U.S.C. § 1514A(b)(1)(B), states:

> A person who alleges discharge or other discrimination by any person . . . may seek relief . . . by—
>
> (A) filing a complaint with the Secretary of Labor; or
>
> (B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

of applying a statute in a dispute between private parties. If a jury is demanded, the jury will act as factfinder; the court will instruct the jury on the law. Per § 806, the district court proceeding is de novo. If the DOL issued any findings between the initial filing of the complaint and the refiling in federal court, those findings become moot.[19]

On appeal of a district court's judgment, the appellate court would ordinarily review questions of law de novo.[20] But that is not what happens in § 806 cases. Rather than exercise their right and duty to declare what the law means,[21] appellate courts consider how the ARB has construed § 806—not in the case before the court, since the complainant opted out of the agency proceedings, but in *any* prior ARB decision.[22] The appellate court will apply the ARB's construction, if reasonable, even if the district court reasonably interpreted the law otherwise.

II. Deference and Its Justifications

A. Chevron*'s Kin*

Chevron, of course, is "not the alpha and the omega of Supreme Court agency-deference jurisprudence."[23] The decision was not written on the proverbial blank slate.[24] Earlier cases had produced a common law of deference,[25] under which agencies were permitted to reasonably construe ambiguous statutory terms where Congress entrusted them to carry out federal programs.[26] However, the deference framework that developed was "never that simple" and "subject to override by a mélange of factors, with no clear metric for determining how much or when those factors weigh in the balance."[27]

Of note is *Skidmore v. Swift & Co*.[28] The question there was whether the Fair Labor Standards Act (FLSA) required the employer to pay wages for waiting time. The Court observed that whether time is compensable is a question of fact[29] and that Congress assigned this factfinding responsibility to the courts. Yet the Court also recognized that the FLSA established an agency Administrator who had considerable experience in ascertaining the compensability of waiting time. Accordingly, although the Administrator did not preside like a court over individual employer-employee wage disputes, his opinions were entitled to due consideration by the courts.[30] *Skidmore* famously concluded that the degree of deference owed an agency "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[31]

As some see it, *Chevron*'s unadorned formula, ambiguity (*A*) —> deference (*D*), freed courts from having to ascertain congressional intent on an agency-by-agency, statute-by-statute basis. But post-*Chevron* decisions altered the *A* —> *D* formula. Fifteen years on, *United States v. Mead Corp.*[32] held that *Chevron* deference is due only if Congress gave the agency the authority to make rules carrying the force of law and its determination was an exercise of that authority.[33] This added a prerequisite, an "*x*" factor, to the equation: *x* —> (*A* —> *D*).[34] Otherwise, the agency's interpretation is entitled to respect only to the extent it has the power to persuade.[35]

Later, *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.* (*Brand X*) presented the question whether, if a

19 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a).

20 Chad M. Oldfather, *Universal De Novo Review*, 77 Geo. Wash. L. Rev. 308, 308 (2009) (De novo review of questions of law "has become an accepted truth, one of those things that every lawyer knows and has known for so long that we regard it as an unalterable feature of the legal landscape.").

21 Here, the citation obligatory in any deference discussion to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

22 *Infra* notes 86-95.

23 Eskridge & Baer, *supra* note 4, at 1120.

24 *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 912-13, 920-22 (2017).

25 "[J]udicial control over administrative action has been based principally on the common-law doctrine of 'the supremacy of law,' the due process guaranty embodied in the Constitution, and court interpretations of the statutory authority of administrative agencies." B. Putney, *Judicial review of administrative action*, Cong. Q. 1938 (Vol. II). *See* E.F. Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court*, 35 Harv. L. Rev. 127 (1921).

26 *E.g.*, SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination. . . ."); Bates & Guild Co. v. Payne, 194 U.S. 106, 109–110 (1904) (action of agency head "whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this Court should be of opinion that his action was clearly wrong"); *cf.* Decatur v. Paulding, 39 U.S. 497, 515 (1840) ("If a suit should come before this Court which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment.").

27 Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1, 22 (2013).

28 323 U.S. 134 (1944).

29 *Id*. at 136-37.

30 *Id.* at 137-40.

31 *Id.* at 140.

32 533 U.S. 218 (2001).

33 *Id.* at 226-27; *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (agency interpretation in an opinion letter did not carry the force of law and did not merit deference).

34 Justice Scalia dissented. His chief disagreement was that the Court substituted a case-by-case approach for *A D* simplicity. *Mead*, 533 U.S. at 239. The majority opinion responded that Justice Scalia's attempts to "simplify ultimately run afoul of Congress's indications that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it." *Id.* at 237. *See also Christensen*, 529 U.S. at 590 (Scalia, J., dissenting) (arguing that if a law is deemed ambiguous, the Court should not then also consider "whether Congress intended the ambiguity to be resolved by" the agency).

35 *See* Gonzales v. Oregon, 546 U.S. 243, 255–56 (2006) (citing *Mead* and *Skidmore*). *Mead* made clear that *Chevron* had not interred *Skidmore*. *Mead*, 533 U.S. at 234. *See also* EEOC v. Arabian American Oil Co., 499 U.S. 244, 257-58 (1991); Jamie A. Yavelberg, *The Revival of* Skidmore v.

court had *already* settled on the meaning of a statutory term, an agency in an unrelated case down the road could embrace a different interpretation.[36] This might have seemed like a rhetorical question: once a court has spoken, how can a bureaucrat say the law means something else, unsettling precedent on which other courts and private parties may have relied? Yet *Brand X* held that *Chevron* deference was still owed to the agency's interpretation. "[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court's interpretation to override an agency's. *Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps."[37] The Court reasoned that deference should not depend on the happenstance of whether the court's or the agency's interpretation came first.[38] One commentator points out that "This is a 'WOW' moment. *Brand X* is arguably the capstone of the Court's *Chevron* evolution: it works a wholesale transfer of statutory interpretation authority from federal courts to agencies."[39]

Lastly, but significantly, the Court has made clear that deference is not owed if "there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation" from Congress to the agency to fill in statutory gaps.[40] This exception has been applied where the issues are particularly important.[41] Nonetheless, if *Chevron*'s premise is that Congress implicitly intended an agency to resolve statutory ambiguities, indications *refuting* such an intent should *always* be considered—even in cases important only to the litigants.

Chevron and its kin allow an agency to change the previously decided-upon meaning of a statute—to alter the law when a reason for alteration it finds.[42] In contrast, stare decisis and other principles normally preclude a court from doing so, even if everyone thinks a prior ruling has become obsolete.[43] What to a court is durable and controlling precedent is, in the polished-terrazzo halls of a federal agency, something like putty.

B. The Justifications for Deference

An abundance of commentary addresses *why* courts owe (or don't owe) deference to agency constructions of ambiguous statutes.[44] While an in-depth exploration of justifications is not needed here, a synopsis aids in understanding whether deference in § 806 cases is appropriate.[45]

1. Agency Expertise

Not surprisingly, *Chevron* cited agency expertise as a justification for its holding.[46] Technical issues predominated in the litigation. The oral argument, heavy on statutory minutiae, was tedious, if not tranquilizing.[47] Three Justices recused themselves. One can easily imagine the shrunken contingent of the remaining Justices in post-argument conference conceding the limitations on their ability to rightly define "stationary source."[48]

Swift*: Judicial Deference to Agency Interpretations after* EEOC v. Aramco, 42 Duke L.J. 166 (1992).

36 545 U.S. 967 (2005). The FCC ruled that cable companies that sell broadband internet service do not provide telecommunications service as the Communications Act of 1934 defined the term. Previously, the Ninth Circuit had decided that cable modem service is a telecommunications service, and in light of this prior "binding" panel decision declined to uphold the FCC's ruling. The Supreme Court reversed.

37 *Id*. at 982. However, an agency may not depart from a court's interpretation if the court deemed the law unambiguous. *Id.* at 982-83. *Cf.* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.").

38 *Mead*, 545 U.S. at 983. In dissent, Justice Scalia called the Court's willingness to let the executive reverse judicial rulings a "breathtaking novelty," as well as "bizarre" and "probably unconstitutional." *Id*. at 1017.

39 Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 625 (2014). *See also Gutierrez-Brizuela*, 834 F.3d at 1143 (Gorsuch, J.) ("[J]udicial declarations of what the law *is* haven't often been thought subject to revision by the executive, let alone by an executive endowed with delegated legislative authority.") (emphasis in original).

40 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986)) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."); *Christensen*, 529 U.S. at 596-97 (Breyer, J., dissenting).

41 King v. Burwell, 135 S. Ct. 2480 (2015) (no deference to IRS on a question of deep economic and political significance central to the statutory scheme at issue).

42 Apologies to Shakespeare, Sonnet 116 ("Love is not love which alters when it alteration finds."). While all law is fluid, agency-made law certainly is even less "an ever-fixed mark" or a "star to every wandering bark." *Id.*

43 Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 274 (7th Cir. 1986) ("We do not believe that we have the power to declare a constitutional statute invalid merely because we, or for that matter everybody, think the statute has become obsolete.").

44 *See, e.g.*, Scenic Am., Inc. v. Dep't of Transp., 138 S. Ct. 2 (2017) (statement of Gorsuch, J., concerning denial of certiorari) (summarizing asserted *Chevron* justifications); Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review* 16 Geo. J.L. Pub. Policy 103 (2017).

45 Apart from these justifications are "legal reasons" for deference; the one given in *Chevron* was that Congress intended agencies to have the power to resolve ambiguities. In Justice Breyer's view, that is what *Chevron* was all about: "*Chevron* made no relevant change. It simply focused upon an additional, separate *legal reason* for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations. *Christensen*, 529 U.S. at 596 (Breyer, J., dissenting) (emphasis added).

46 "[A] full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron*, 367 U.S. at 844 (citing, *inter alia*, NBC v. United States*,* 319 U.S. 190 (1943)); *id.* at 865 ("[T]he regulatory scheme is technical and complex" and "[j]udges are not experts in the field.").

47 Audio recording available at www.oyez.org/cases/1983/82-1005.

48 Andrew M. Grossman, City of Arlington v. FCC*: Justice Scalia's Triumph*, 2013 Cato Sup. Ct. Rev. 331, 333-34 (2013) (referencing papers of Justice Stevens).

Agency expertise is a time-honored and pragmatic justification for deference.[49] An agency's "power to persuade" the courts, in the verbiage of *Skidmore*, surely correlates with its subject-matter proficiency and the complexity of the issue in dispute.[50] As a rule, the more technical the basis for an agency's decision,[51] the more likely courts will defer.[52] Subject matter and real world expertise also favor deference,[53] as does an agency's familiarity with the history and purpose of the legislation.[54] The Supreme Court has stated that "historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than the reviewing court."[55]

Brand X accorded deference in part because it permits an agency to save a statute from ossification by revising "unwise judicial constructions of ambiguous results."[56] Deference frees agencies to formulate, refine, and change policy unburdened by "static" judicial interpretations.[57] This may be less a justification for deference than an axiom—i.e., agencies receive latitude so that they have the leeway to modify the law. In any event, the save-from-ossification reasoning is also about agency expertise. On a forward-looking basis, as agencies confront scientific or technological changes, or new legislative or economic developments, they can incorporate the new information in implementing the statute Congress assigned them to administer.[58]

2. Separation of Powers

Separation of powers ideals and democratic principles also animated *Chevron*.[59] *Chevron* observed that, while agencies are not directly accountable to the people, the executive is.[60] Therefore, it is appropriate for the executive "to make policy choices and to resolve competing interests that Congress inadvertently or intentionally left to be resolved."[61] "[F]rom a separation-of-powers perspective, absent some strong indication to the contrary, questions of what a statute means and how it is best implemented are for the Executive, not the Judiciary."[62] *Chevron* deference thus imposes restraints on the judiciary that limit interference with the executive's advancement of public policy.[63]

3. Additional Justifications

Chevron did not promote additional justifications for deference, but others have. Some have argued that deference will promote uniformity among the courts as to the meaning of a law. Without deference, courts may reach multiple and perhaps conflicting views of the meaning of a law. With deference, on the other hand, the courts more likely will coalesce around the meaning chosen by the agency.[64] This rationale was summarized in the government's brief in *Brand X.* The brief urged the Supreme

49 *E.g.*, United States v. Moore, 95 U.S. 760, 763 (1877) (citations omitted) ("The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject.").

50 *Skidmore*, 323 U.S. at 139 (A DOL Administrator has "more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.").

51 *See Chevron*, 467 U.S. at 848 ("The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue.") The Court similarly relies on agency expertise as a reason to defer to agency interpretations of regulations: "Agencies (unlike courts) have 'unique expertise,' often of a scientific or technical nature, relevant to applying a regulation 'to complex or changing circumstances.'" Kisor v. Wilkie, 588 U.S. __, slip op. 17 (2019) (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991)).

52 "For the most part, when the Court perceives agency rulemaking as steeped in technical expertise . . ., [it] continues readily to defer." Seth Waxman, *The State of* Chevron*: 15 Years after* Mead, 68 Admin L. Rev. Accord 1, 12 (2016). *See also* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 428 (2011) ("The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order.") (citing *Chevron*).

53 United States v. Haggar Apparel Co., 526 U.S. 380, 394 (1999) ("The expertise of the Court of International Trade . . . guides it in making complex determinations in a specialized area of the law; it is well positioned to evaluate customs regulations and their operation in light of the statutory mandate to determine if the preconditions for *Chevron* deference are present."); Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 651 (1990) ("[T]he judgments about the way the real world works that have gone into the PBGC's anti-follow-on policy are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference.").

54 *Moore*, 95 U.S. at 763 (Administrators are "not unfrequently . . . the draftsmen of the laws they are afterwards called upon to interpret."); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986) ("An agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is 'reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes' of the Act the agency is charged with enforcing; the agency's position, in such circumstances, is therefore due substantial deference."); Eskridge & L. Baer, *supra* note 4, at 1109; Sarah Zeleznikow, *"Leaving the Fox in Charge of the Hen House": Of Agencies, Jurisdictional Determinations and the Separation of Powers*, 71 NYU Annual Survey of Am. L. 275 (2016).

55 *Martin*, 499 U.S. at 153.

56 545 U.S. at 983.

57 *Chevron*, 467 U.S. at 842 ("The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition.").

58 *Mead*, 533 U.S. at 247 (Scalia, J., dissenting) (Ambiguities "create a space . . . for the exercise of continuing agency discretion.").

59 *See, e.g.*, Zeleznikow, *supra* note 54, at 295-96.

60 467 U.S. at 865-66; *Kisor*, slip op. 10.

61 467 U.S. at 866.

62 Waxman, *supra* note 52, at 12.

63 City of Arlington v. FCC, 133 S. Ct. 1863, 1881 (2013); Written Statement of Jonathan Turley to the U.S. Senate Comm. on the Judiciary on the Nomination of Judge Neil M. Gorsuch, p.12 (Mar. 21, 2017) ("The doctrine on its face is unremarkable and even commendable for a Court seeking to limit the ability of unelected judges to make arguably political decisions over governmental policy.").

64 *City of Arlington*, 133 S. Ct. at 1874 ("Thirteen Courts of Appeals applying a totality-of-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron.*").

Court to overturn the Ninth Circuit's decision (to not defer to the agency) because it would "subject a single agency decision to differing standards of review, thereby producing unseemly races to the courthouse, unnecessary conflicts in the circuits, and unfortunate situations in which (absent this Court's review) the meaning of federal statutes would be dispositively determined for the entire Nation by lone three-judge panels."[65]

Another justification is that deference might prod Congress to draft legislation more precisely. The fewer ambiguities a law contains, the less opportunity the executive branch will have to alter its meaning.[66] There appears to be a lack of empirical evidence that deference improves Congress's drafting skills. In any event, legislative drafters may prefer ambiguous terms in the hope of producing a bill bland enough to pass.[67]

III. Deference and § 806

Why is the DOL involved in § 806 at all? Did Congress have a particular reason related to the prevention of securities fraud—the objective of the Sarbanes-Oxley Act—for assigning the DOL to handle claims of retaliation for reporting fraud? The short answer is no. The DOL lacks fluency in federal securities laws and regulations. The agency is not conversant in the types of fraudulent conduct (e.g., wire fraud) covered by § 806.[68] Nothing about the substance of the Sarbanes-Oxley Act would have led Congress to hand § 806 cases to the DOL.

Rather, historically, when Congress included a discrete anti-retaliation provision within a larger regulatory program, it assigned the DOL to handle retaliation claims. For example, when drafting the Clean Air Act, Congress preferred a DOL forum for whistleblower claim resolution over the EPA. By the time Congress drafted the Sarbanes-Oxley Act in 2002, the DOL already had jurisdiction over many similar whistleblower protection provisions.[69] While the type of *whistleblowing* § 806 protects is distinctive (i.e., reporting shareholder fraud), Congress followed its common practice of tasking the DOL to handle whistleblower claims.[70] There is no evidence that Congress considered the DOL uniquely capable to handle securities fraud whistleblower retaliation claims.

A. Supreme Court Decisions

The Supreme Court has twice considered federal financial whistleblower laws, although deference did not feature prominently in either case. The question in *Lawson v. FMR, LLC* was one of statutory interpretation: whether § 806 narrowly protects only employees of publicly traded companies or more broadly extends to workers of private companies that contract with publicly traded companies.[71] A Court majority favored the more expansive reading.[72] Because the *Lawson* plaintiffs chose the Court Track, the DOL had not issued its own decision on whether they qualified as covered employees.[73] Deference therefore was not an issue for the majority.

Not so with the dissent. The dissent found § 806 ambiguous but concluded that the DOL's interpretation of the statute (in other cases) did not deserve *Chevron* deference.[74] The dissent reasoned that the DOL's authority to investigate and adjudicate § 806 claims did not justify deference because the Sarbanes-Oxley Act did not delegate to the DOL any authority to make rules carrying the force of law.[75] Instead, the Act gave the SEC the power to make rules necessary to protect investigators. "[I]f any agency has the authority to resolve ambiguities in § [806] with the force of law, it is the SEC, not the [DOL]."[76]

The dissent approached the nub of the issue addressed in this essay:

> That Congress did not intend for the Secretary [of Labor] to resolve ambiguities in the law is confirmed by § [806]'s mechanism for judicial review. The statute does not merely permit courts to review the Secretary's final adjudicatory rulings under the Administrative Procedure Act's deferential standard. It instead allows a claimant to bring an action in a federal district court, and allows district courts to adjudicate such actions *de novo*.[77]

The dissent concluded that "the muscular scheme of judicial review suggests that Congress would have wanted federal courts,

65 Brief for the Federal Petitioners, Nos. 04-277 and 04-281, pp. 17-18 (Jan. 2005).

66 Zeleznikow, *supra* note 54, at 298. The *Chevron* opinion did not have this goal; the Court seemed indifferent to whether Congress's failure to be specific was intentional or inadvertent. 467 U.S. at 865-66.

67 *City of Arlington*, 133 S. Ct. at 1868 (Under *Chevron*, "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."). Moreover, Congress may explicitly authorize the DOL to delimit statutory terms. *E.g.*, 29 U.S.C. § 213(a)(1), (7), (15).

68 18 U.S.C. § 1514A(a)(1). Employees are protected in reporting violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348 (respectively, mail fraud, wire fraud, bank fraud, and securities fraud); any SEC rule or regulation; or any federal law relating to fraud against shareholders.

69 The employee protections of the Federal Water Pollution Control Act of 1972 were among the earliest. Pub. L. 92-500, § 507 (codified at 33 U.S.C. § 1367).

70 Congress sometimes chooses not to involve the DOL in the resolution of whistleblower claims. For example, federal courts have jurisdiction over whistleblower claims in the banking industry. *E.g.*, 12 U.S.C. § 1790b. *See also infra* at notes 138-142.

71 571 U.S. 429 (2014).

72 The majority held that § 806 protects employees of private contracting companies "based on the text of §1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon." *Id.* at 432.

73 The Court of Appeals nonetheless found that no deference was due because "Congress chose not to give authority to the SEC or the DOL to interpret the term 'employee' in § [806]." Lawson v. FMR LLC, 670 F.3d 61, 81–82 (1st Cir. 2012), *rev'd,* 571 U.S. 429 (2014).

74 571 U.S. at 476-79 (Sotomayor, J., dissenting). While the DOL had not issued a ruling as to the *Lawson* plaintiffs, other ARB decisions had held that § 806 covers contractors. The Court majority and dissent noted the harmony between the Court and agency views. 571 U.S. at 457-58, 464.

75 571 U.S at 477 (citing *Mead*).

76 *Id.* This suggestion—that deference is owed to the SEC in the construal of § 806—is highly debatable. The SEC plays no role in § 806 cases and, just as the DOL has no securities fraud expertise, the SEC lacks employment law expertise.

77 *Id.*

and not the Secretary of Labor," to have the ultimate power to resolve ambiguities in 806.[78] So far, no court has picked up on the dissent's argument.

In *Digital Realty & Trust, Inc. v. Somers*[79] the Supreme Court resolved a circuit split on the meaning of "whistleblower" under the Dodd-Frank Act.[80] The Act defines a whistleblower as an employee who has reported wrongdoing to the SEC,[81] but some appellate courts had construed the law to cover employees who had not done so. *Somers* considered deference, albeit not to the DOL.[82] Pursuant to its rulemaking authority,[83] the SEC had issued a rule that the Dodd-Frank Act protects employees even if they did not report wrongdoing to the SEC.[84] The Court concluded, however, that the law means what it says: an individual is only protected if he or she reported wrongdoing to the SEC. Because the Court found that the statute was "clear and conclusive," not ambiguous, the Court did not defer to the SEC's conflicting construction.[85]

B. Appellate Court Decisions

Federal courts, as a general matter, unhesitatingly defer to DOL interpretations of § 806.[86] When plaintiffs kick out their cases to federal court, they metaphorically bring along a crate containing all DOL precedent for the court to sift through and apply in the (supposedly de novo) proceedings.

Consider how courts accommodate the DOL's vacillating characterization of protected "whistleblowing." The ARB held in 2008 that § 806 requires an employee's report to "definitively and specifically" identify wrongdoing—not any old gripe will do. That construction of the law became known as the *Platone* standard.[87] After the 2008 elections brought a new administration (and new ARB members), the ARB changed course; its conclusion that § 806 does *not* require definitive and specific reports is known as the *Sylvester* standard.[88] Appellate courts by and large deferred to the *Platone* standard while it was "the law," and they then accorded the same deference to the new *Sylvester* standard. This was true even if, in a Court Track case, the court was reviewing a federal district court's judgment as opposed to (in an Agency Track case) a final order of the ARB.

Take *Wiest v. Lynch*.[89] The complainant pursued the Court Track, but the district court dismissed his claim because his evidence did not meet the requirements of *Platone*. However, in unrelated litigation, the ARB had just recently embraced the new *Sylvester* standard. The Third Circuit held that the district court should have opened the metaphorical crate of ARB precedent and applied the new standard.[90]

Nielsen v. AECOM Tech. Corp.[91] considered the same issue but justified deference under *Skidmore*. The district court had dismissed a § 806 claim based on circuit precedent adopting *Platone*. The Second Circuit reversed because the DOL in the meantime had repudiated that standard. The court declined to address whether *Chevron* deference was due, in part because the dissenting opinion in the Supreme Court's *Lawson* case questioned whether the DOL has interpretive authority under § 806. Nonetheless, the court found the DOL's new *Sylvester* standard persuasive.[92]

Rhinehimer v. U.S. Bancorp Investments, Inc. took yet another approach.[93] As had the Second Circuit in *Nielsen*, the Sixth Circuit rejected its own earlier embrace of the *Platone* standard while adopting *Sylvester* as persuasive.[94] The court went on to find the *correct* interpretation of § 806 based on the "text and design" of the law and the "well-established intent of Congress" for "a broad reading of the statute's protections."[95] These cases illustrate courts' readiness to defer to the DOL in § 806 whistleblower cases without considering the fact that the district court had de novo jurisdiction to adjudicate the claim.

78 *Id.* at 478. "[M]uscular scheme of judicial review" is perhaps not the best phrasing. Section 806 does not suggest a heightened standard of review; it authorizes federal district courts to adjudicate claims ab initio once the DOL waiting period ends.

79 138 S. Ct. 767 (2018).

80 15 U.S.C. § 78u-6(h).

81 15 U.S.C. § 78u-6(a)(6).

82 Dodd-Frank whistleblower cases are adjudicated only in federal courts so the DOL was not involved in the dispute. 18 U.S.C. § 15 U.S.C. § 78u-6(h)(1)(B)(1).

83 15 U.S.C. § 78u-6(j).

84 Rule 21F-2; 17 C.F.R. § 240.21F-2(a)-(b).

85 *Somers*, 138 S. Ct. at 781-82.

86 *E.g.*, Deltek, Inc. v. DOL, 649 Fed. App'x 320, 327–28 (4th Cir. 2016) ("We defer to the Board's interpretation of § 1514A.").

87 Platone v. DOL, 548 F.3d 322, 326 (4th Cir. 2008) (reasoning that "due deference" is to be accorded to the ARB's interpretation of § 806); *see also* Welch v. Chao, 536 F.3d 269, 276 (4th Cir. 2008) (same); Getman v. ARB, 265 Fed. App'x 317, 320 n.7 (5th Cir. 2008) ("It appears that *Chevron* deference is due, as the ARB is an adjudicative body, but we leave that question for another day.").

88 Sylvester v. Parexel Int'l LLC, ARB No. 07–123 (May 25, 2011).

89 710 F.3d 121 (3d Cir. 2013).

90 *See also* Genberg v. Porter, 882 F.3d 1249, 1255-56 (10th Cir. 2018) (giving *Chevron* deference to the "ARB's interpretation of the statutory standard" and reversing district court for applying the "obsolete" *Platone* standard).

91 762 F.3d 214, 219–20 (2d Cir. 2014).

92 *Id.* at 220-21; *Cf.* Northrop Grumman Sys. Corp. v. ARB, 927 F.3d 226, 233 n.8 (4th Cir. 2019) (declining to defer to DOL assessment of protected activity where neither the ALJ nor the ARB "explicitly articulated" an agency interpretation); Rocheleau v. Microsemi Corp., 680 Fed. App'x 533, 55 n.2 (9th Cir. 2017) (declining to decide whether to defer to *Sylvester*, after court had previously deferred to ARB's *Platone* interpretation, where claim failed under either standard).

93 787 F.3d 797, 805 (6th Cir. 2015).

94 *Id.* at 811.

95 *Id.* at 810.

IV. Courts Do Not Owe Deference to DOL Interpretations of § 806

Deference is not due to DOL interpretations of § 806 or comparable whistleblower protection provisions.[96] The justifications for deference do not apply in this context, and pragmatic considerations make deference inappropriate.

A. The Dual-Headed Supervision of § 806 Refutes Any Fiction that Congress Delegated DOL Lawmaking Power

1. Who "Administers" § 806?

Chevron requires deference to an agency's construction of a "statute which it administers."[97] Does the DOL administer § 806 in the *Chevron* sense?[98]

On the one hand, a case can be made that it does. Since the early 1970s, Congress has used whistleblower protections as a means to accomplish the objectives of expansive regulatory programs, particularly in the environmental protection arena.[99] Congress began the tradition of assigning the DOL to handle these claims; courts became involved only on petitions for review of final DOL orders.

On the other hand, with its enactment in 2002, § 806 departed from tradition by including the kickout provision.[100] Congress empowered federal courts to hear and resolve § 806 cases de novo.[101] This overt *alternative* to agency adjudication undercuts a conclusion that the DOL is "the administrator" of § 806.[102]

Assume, for example, that Employer lays off two employees at the same time, purportedly for the same reason. They each file factually similar and legally identical claims, the validity of which hinges on the meaning of a term in § 806. Employee A keeps the case in the DOL process; practically speaking, it will take years before the ARB issues a final order on the claim. Employee B opts for the Court Track, and Employer soon files a dispositive motion, the outcome of which hinges on the resolution of the ambiguous text.

If deference to the DOL were required, a reasonable course for the federal court would be to stay Employee B's case until the ARB chooses its construction of the ambiguous term in Employee A's case. After all, assuming it is reasonable, that construction must govern the courts—*if*, of course, deference is due. Yet the very reason Congress provided the kickout provision was to permit complainants to escape the laggardly DOL process for resolving § 806 claims and obtain speedier justice,[103] so postponing federal court proceedings until the ARB gets around to interpreting the law would frustrate that goal. Instead, the federal district judge should review, interpret, and apply § 806 on a de novo basis. In short, it cannot be said that the DOL is "the administrator" of § 806 insofar as federal courts have equal authority to apply and interpret the law.

2. The Missing Mead *"X Factor"*

Section 806's dual-headed structure also suggests that the statute lacks the *Mead*-required force-of-law "oomph." Standing alone, the fact that the DOL adjudicates § 806 cases could indicate that Congress intended the DOL to issue determinations that carry the force of law.[104] Moreover, the proceedings are relatively elaborate and formal. *Mead* "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of . . . adjudication that produces . . . rulings for which deference is claimed."[105] The DOL gives "concrete meaning" to the provisions of § 806 "through a process of case-by-case adjudication."[106]

But so do federal courts. If relatively formal agency proceedings aid the DOL in giving concrete meaning to § 806, even more formal federal court proceedings serve that function. For this reason, the establishment of dual adjudication tracks in § 806 indicates that Congress did not intend for the DOL to have plenary, or even primary, authority to resolve statutory ambiguities and, in turn, did not intend courts to defer to DOL interpretations.[107]

96 *See supra* note 12.

97 467 U.S. at 842-43.

98 *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1629 (2018) ("[O]n no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a . . . statute it does not administer. One of *Chevron*'s essential premises is simply missing here."); Price v. Stevedoring Servs. of Am., 697 F.3d 820, 833 (9th Cir. 2012) ("*Skidmore* strongly suggests that it is an administrative entity's statutorily delegated authority to *administer* a statute that qualifies it for any kind of deference in the first place.") (emphasis in original).

99 *E.g.*, 33 U.S.C. § 1367 (enacted as part of the Water Pollution Control Act of 1972).

100 Pub. L. 107-204, 116 Stat. 745 (2002); *cf. Lawson*, 571 U.S. at 436 ("Congress has assigned whistleblower protection largely to the [DOL.]").

101 Specifying de novo review may be an unambiguous command that federal courts *not* defer to DOL constructions of the statute, or it may more narrowly require courts to discount any prior findings of fact. *Cf.* Stone v. Instrumentation Lab. Co., 591 F.3d 239, 246-47 (4th Cir. 2009) ("[T]he statute expressly requires the district court to consider the merits anew . . . [D]eferring to the administrative agency, even if more efficient, is in direct conflict with the unambiguous language of the Sarbanes-Oxley Act.").

102 *See Lawson*, 571 U.S. at 477 (Sotomayer, J., dissenting).

103 "[T]he Secretary believes that access to district courts under this provision is intended to provide the complainant with a speedy adjudication of his complaint." Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, 80 Fed. Reg. 11865, 11877 (Mar. 5, 2015).

104 *Mead*, 533 U.S. at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."); *Nielsen*, 762 F.3d at 219-20.

105 533 U.S. at 229.

106 INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987). The Third Circuit in *Wiest* deferred to the DOL for this reason. 710 F.3d at 130-31 (quoting *Mead*, 533 U.S. at 229); *see also* Dietz v. Cypress Semiconductor Corp., 711 Fed. App'x 478, 482 (10th Cir. 2017) ("As for legal determinations, this Court affords administrative deference to the [ARB]'s statutory interpretations, as expressed in formal adjudications).

107 "[C]ourts should only provide such deference when the relevant power has been delegated by Congress (even if such delegation is only implicit). Correspondingly, such deference should be withheld when such

True, other federal laws assign responsibilities to agencies *and* courts. In the employment context, *Skidmore* provides a ready example. That case centered on the FLSA, which permits federal courts to resolve disputes between employees and employers; in those cases, *judges* say what the FLSA means,[108] while the DOL Wage and Hour Administrator also interprets the law,[109] not least in deciding whether the agency should seek to enjoin employers from violating the statute.[110] *Brand X* also involved a statute capable of federal court and agency (FCC) interpretation, depending on the context of the claim.

However, the provisions at issue in *Skidmore* and *Brand X* did not grant an agency and the courts de novo authority to adjudicate the very same claims. Section 806 assigns *exactly the same* roles in resolving retaliation claims to the DOL and the courts.[111] Unlike the FLSA, the statute does not divide authority; it grants coequal authority.

Finally, the DOL does not have substantive rulemaking authority under § 806 (or similar federal whistleblower laws), which further suggests that deference to the DOL is not warranted. The only DOL regulations relating to § 806 are procedural.[112] As the dissent in *Lawson* noted, the Sarbanes-Oxley Act empowered the SEC, not the DOL, to promulgate substantive rules.[113]

B. The DOL Lacks Deference-Worthy Expertise

As discussed, agency expertise generally favors deference. But the DOL does not have expertise that would warrant deference to its interpretations of § 806.[114]

As an overarching point, the core issue in retaliation cases—whether the employee was punished for reporting wrongdoing—is not a technical or esoteric one. It is a question of fact. Applying the law to the facts is the DOL's bread and butter in Agency Track whistleblower cases. The ARB's final, factual determinations whether retaliation occurred are reviewed on appeal under the substantial evidence standard. The same thing happens in a federal court proceeding. It does not take an expert to resolve § 806 claims.

Nor does it take DOL expertise to tease out the meaning of ambiguous statutory text. For example, a complainant must establish that he suffered an adverse action.[115] Section 806 makes it unlawful to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" for his protected conduct.[116] These are not terms of art. They pop up throughout the federal code, including in laws that do not involve the DOL. If these commonplace terms seem hazy, a federal district judge is as able as the ARB to resolve ambiguities.

Technical expertise is also not a basis for deference to the DOL. True, technical issues may arise in determining whether a wrongdoing report constitutes a protected form of whistleblowing. Whistleblower provisions often are embedded in regulatory programs that have technical components. Among them are several environmental laws,[117] as well as programs that regulate commercial atomic power,[118] aviation,[119] and surface[120] and rail[121] transportation. The federal agencies with relevant expertise in these areas are, in turn, the EPA, the Nuclear Regulatory Commission, the Federal Aviation Administration, and federal transportation agencies. The DOL does not develop technical know-how in these fields.[122]

Thus, while the Sarbanes-Oxley Act was designed to prevent shareholder fraud, and while § 806 protects employee reports of fraud, the DOL is not a storehouse of understanding on corporate fraud and has no insight in that field beyond that of a federal court. As the dissent in *Lawson* noted, corporate fraud is the SEC's territory,[123] not the DOL's—just as aviation safety is the FAA's domain even though the DOL administers the aviation

delegation is absent or cannot be presumed to have occurred." Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 Mo. L. Rev. 983, 985 (2016).

108 29 U.S.C. § 216(b) (providing private right of action).

109 The DOL has also issued regulations and interpretive guidance on wage and hour law, strengthening its claim to FLSA deference. *Skidmore*, 323 U.S. at 139-40.

110 29 U.S.C. § 217.

111 The DOL has a function the courts do not: OSHA conducts a preliminary investigation when the complaint is filed. That difference does not alter the comparative responsibilities and capabilities of the courts to adjudicate claims. First, in some cases OSHA fails to complete an investigation before the complaint moves the case to federal court—in which case the DOL has not served an additional function. Second, even if OSHA issues a determination, it plays no role in the later ALJ hearing or federal court trial, either of which is de novo.

112 Procedures for the Handling of Discrimination Complaints, 69 FR 52104, 52104 (2004) ("The purpose of this rule is to provide procedures for the handling of Sarbanes-Oxley discrimination complaints; this rule is not intended to provide statutory interpretations.").

113 571 U.S. at 477 (Sotomayor, J., dissenting).

114 At least to an extent, expertise is a prerequisite for deference to statutory interpretations. *See* Dantran, Inc. v. DOL, 246 F.3d 36, 48 (1st Cir. 2001) ("Agency regulations interpreting a statute that relates to matters outside the agency's area of expertise are entitled to no special deference.") (citing Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–50 (1990)).

115 18 U.S.C. § 1514A(a).

116 *Id.*

117 *E.g.*, 42 U.S.C. § 7622 (Clean Air Act).

118 42 U.S.C. § 5851. *See* Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1510 (10th Cir. 1985) (saying the court is "troubled" by DOL involvement in nuclear regulatory matters but noting that if "substantial questions involving competence in nuclear energy are involved, the NRC may provide technical assistance" in whistleblower cases to the DOL).

119 49 U.S.C. § 42121.

120 49 U.S.C. § 31105.

121 49 U.S.C. § 20109.

122 Brown & Root, Inc. v. Donovan, 747 F.2d 1029, 1033 (5th Cir. 1984) ("Nuclear energy involves questions of great scientific and engineering sophistication well beyond that required in ordinary industrial relations. The Department of Energy (in particular, the Nuclear Regulatory Commission) has special competence in this area, not the Department of Labor.").

123 *Cf.* Murray v. UBS Securities, LLC, 2013 WL 2190084 *7 (S.D.N.Y. 2013) (asserting that an SEC rule broadly interpreting § 806 reflects the "considerable experience and expertise that the agency has acquired over time with respect to the interpretation and enforcement of the securities laws"), *abrog'd by Somers*, 138 S. Ct. 767.

whistleblower protection provision.[124] In any event, corporate fraud aptitude is not required to resolve § 806 claims.[125]

Additional factors indicate that § 806 simply does not require agency expertise. First, the whistleblower laws assigned to the DOL are concise—usually contained in a single statutory subsection and covering no more than two or three pages. They are not intricate national programs requiring specialized agency knowhow.[126] Second, whistleblower claims are a minor aspect of the DOL's affairs. Sometimes, Congress establishes an agency for the very purpose of overseeing a federal program, as with the Social Security Administration.[127] In that case, the overseeing agency will develop subject matter expertise. Congress did not establish the DOL to handle a complex, national, retaliation-prevention program.

The DOL's familiarity with labor markets and statistics does not lend it mastery to resolve ambiguities in whistleblower laws.[128] Section 806 is unlike the complex laws the DOL does administer, such as the FLSA, which established a Wage and Hour Administrator.[129] Nor can a claim be made that the DOL is *the* right forum to resolve federal labor disputes; Congress long ago dispersed that authority.[130] Not surprisingly, federal appellate decisions do not cite expertise as a reason to accord *Chevron* deference to DOL interpretations of § 806.[131]

It is true that bureaucratic pockets within the DOL develop a specialized level of "whistleblower law" comprehension. OSHA investigates § 806 claims and claims under about two dozen similar federal laws, under the supervision of a national director of whistleblower programs and regional whistleblower staff.[132] DOL ALJs, too, may over time become proficient in applying whistleblower statutes in concrete cases, given that retaliation claims make up a sizeable portion of their dockets. Repetition nonetheless does not make ALJs relatively more competent than federal judges to resolve statutory ambiguities.[133]

In fact, the DOL does not hold itself out as possessing an inherent capability to interpret whistleblower laws. ALJs and the ARB often look to court interpretations of terms commonly used in anti-discrimination and labor laws, such as Title VII of the Civil Rights Act[134] and the National Labor Relations Act.[135] Also, the DOL cannot claim to be better qualified than courts to construe general law terms, such as punitive damages and limitations provisions, simply because those terms appear in whistleblower laws.[136]

124 "The DOL has been charged with administering whistleblower complaints in a variety of employment contexts, even where another agency, having the technical expertise in the subject area of the complaints (such as the SEC here), has overall control." Carnero v. Boston Sci. Corp., 433 F.3d 1, 16 n.13 (1st Cir. 2006).

125 Day v. Staples, Inc., 555 F.3d 42, 55 (1st Cir. 2009) ("'Fraud' itself has defined legal meanings and is not, in the context of [§ 806], a colloquial term.").

126 Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981) (discussing complexity of Social Security Act and concomitant justification for agency deference); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697 (1991) ("The Benefits Act has produced a complex and highly technical regulatory program. The identification and classification of medical eligibility criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations.").

127 *See Perez*, 135 S. Ct. at 1222 (Thomas, J., concurring) (citing *Marbury*, 5 U.S. 137); Beck v. CNO Fin. Grp., Inc., 2018 WL 2984854 *4 (E.D. Pa. June 14, 2018) (nuclear whistleblower statute did not create a special administrative body to handle claims but simply assigned DOL to do so, and DOL lacks any "special expertise" in resolving retaliation claims).

128 "The purpose of the [DOL] shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." 29 U.S.C. § 551.

129 *Cf.* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165 (2007) (FLSA case; "The subject matter of the regulation in question concerns a matter in respect to which the [DOL] is expert, and it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which, as we said, Congress entrusted the agency to work out."); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 14 (2011) (giving *Skidmore* deference to DOL in its interpretation of anti-retaliation provision of FLSA, 29 U.S.C. § 215(a)(3)); *id.* at 23 (Scalia, J., dissenting) (deference inappropriate because DOL has "no general authority to issue regulations interpreting the Act, and no specific authority to issue regulations interpreting" the provision in issue).

130 In contrast, the Supreme Court has recognized the special function of the National Labor Relations Board and Federal Labor Relations Authority to apply federal labor law to the complexities of industrial and federal labor relations. NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); National Fed. of Fed'l Employees, Local 1309 v. Department of the Interior, 526 U.S. 86, 99 (1999).

131 *Cf. Rhinehimer*, 787 F.3d at 809-10 (noting in passing that, under *Mead*, agency expertise may warrant deference). Decisions under other federal whistleblower laws sometimes credit DOL expertise. They do so, however, in perfunctory manner, as if taking judicial notice of an inarguable truth, without exploring whether the claimed expertise is fact or fiction. *E.g.*, United States v. Constr. Prod. Research, Inc., 73 F.3d 464, 472 (2d Cir. 1996) (nuclear whistleblower case; asserting that retaliation claims "are within the DOL's particular area of expertise"); Bechtel Const. Co. v. Sec'y of Labor, 50 F.3d 926, 933 (11th Cir. 1995) (nuclear whistleblower case; "[T]he Secretary's expertise in employee protection entitles his view to deference.").

132 *See supra* note 18.

133 ALJs may, however, become adept with experience in making factual determinations. Pan Am Rys. v. DOL, 855 F.3d 29, 39-40 (1st Cir. 2017).

134 42 U.S.C. §§ 2000e-2000e-17; Youngerman v. UPS, ARB No. 11-056, slip op. at 4 (ARB, Feb. 27, 2013) ("[W]e often look to Title VII precedent for guidance given the similarities in the anti-discrimination statutes."). A court may refuse to enforce ARB determinations that depart from Title VII precedent. *E.g.*, Stone & Webster Constr. v. DOL, 684 F.3d 1127, 1134-35 (11th Cir. 2012) ("The ARB failed to correctly identify and follow our circuit's Title VII precedent…. [which] may not be binding, but the Secretary does not deny that her agency 'routinely' follows it.").

135 29 U.S.C. §§ 151–169.

136 Worcester v. Springfield Terminal Ry. Co., 827 F.3d 179, 182 (1st Cir. 2016) (according *Skidmore* deference to ARB's application of punitive damages provision in rail safety whistleblower decision where the ARB had followed the reasoning of a Supreme Court case); *see also City of Arlington*, 133 S. Ct. at 1881 (Roberts, C.J., dissenting) (contending that deference is due only if Congress charged an agency to administer the specific statutory provision at issue).

"Some interpretive issues may fall more naturally into a judge's bailiwick."[137]

Moreover, Congress has not given the DOL authority over all federal whistleblower laws. Federal courts have jurisdiction over whistleblower claims under the Dodd-Frank Act[138] and False Claims Act.[139] And thDOL has a limited role in adjudicating claims under the whistleblower provision of the Occupational Safety and Health Act, Section 11(c),[140] which are by far the most common type of whistleblower claim that the DOL receives.[141] Section 11(c) does not create a private right of action, and there are no administrative claims for the DOL to adjudicate.[142] For all these reasons, the DOL cannot claim any § 806 expertise.

C. No Separation of Powers Concerns

Some judges, including those on the *Chevron* Court, and scholars posit that deference to the executive honors the Constitution's separation of powers framework. One scholar argues that deference is a "soft constitutional norm" that encourages the judiciary to exercise restraint and to avoid dictating outcomes in policy-laden areas.[143]

These significant, if lofty, ideals do not justify deference to the DOL in construing § 806. Congress explicitly gave the DOL *and* the courts the authority independently to adjudicate claims. Opting for the Court Track *excludes* the DOL from further considering a claim. Section 806 grants equal power to two branches, so courts have no reason to restrain themselves from deciding what the law means.

D. Pragmatic Concerns Counsel Against Deference to DOL Interpretations of § 806

Pragmatic justifications are relevant to the role of judicial deference. When an agency pursues policies based on "judgments about the way the real world works," deference is owed for the very practical reason that the agency is "better equipped" to make such judgments.[144] But as demonstrated above, the DOL cannot claim that it is better equipped than a federal court to interpret and apply § 806. In fact, pragmatic concerns counsel *against* deference.

1. Impracticality in Federal Litigation

Requiring a federal district court to scour the corpus of DOL caselaw before settling on the meaning of § 806's terms seems a peculiar imposition. It is one thing to expect a court to weigh an agency's interpretation of a statutory term on a petition for review, as is the case when a court of appeals reviews an ARB's final order at the conclusion of an Agency Track case. In that setting, the reviewing court considers the ARB's explicit interpretation of a particular term, with the benefit of the agency's reasoning, in the fact-specific context of the case at hand.

In a de novo federal court proceeding, however, if DOL precedent governs, the court (and counsel) would need to master ARB precedent in case an ARB decision, at some point in the past, defined an ambiguous term relevant to the litigation. Jury instructions about the law might need to be rewritten each time the ARB resolves equivocal statutory language. A trial court's failure to apply (or even notice) a statutory gloss the ARB adopted could be ground for reversal.[145] Because federal courts are at least as equipped at the DOL to properly read § 806, they should not be regarded as lesser, secondary authorities on the meaning of the law.

2. Inconsistent Application of § 806

Skidmore accorded deference to the DOL in part because it believed agency and court interpretations of the FLSA should be uniform.[146] Some posit that agency interpretations should prevail over a court's (rather than vice versa) because deference will produce the happy result of court coalescence around the agency's single interpretation. Without deference, different federal circuit courts might read § 806 in conflicting ways.

Flaws in the coalescence hypothesis are apparent. Deference will *not* promote uniformity when courts disagree about whether 1) a provision is ambiguous, 2) the agency's determination has the "effect of law" per *Mead*, or 3) the agency's interpretation is reasonable. The one way to assure uniformity—aside from Congress clarifying the law by amendment—is to percolate conflicts up to the Supreme Court. *Lawson* made the Court's interpretation of § 806 the uniform "law of the land." Deference had nothing to do with it.

Another barrier to coalescence is that the ARB has no commitment to stare decisis. Whatever courts decide, the ARB may change its mind. Political change in the executive branch leads to new, sometimes partisan ARB membership. Newly formed ARBs may be prone to quickly jettisoning "politically incorrect" decisions of the previous administration. Courts may coalesce around an interpretation, only then to coalesce around a different one. For example, perhaps the DOL's current *Sylvester* interpretation of § 806 is correct. Maybe *Platone* better respects the statute. Or perhaps the ARB has not yet found the best interpretation of the law on this point. A new interpretation

137 *Kisor*, slip op. 17 (addressing deference to an agency's interpretation of its regulations).

138 15 U.S.C. § 78u-6(a)(6).

139 31 U.S.C. § 3730(h). *E.g.*, Halliburton, Inc. v. ARB, 771 F.3d 254, 267 (5th Cir. 2014) (finding § 806 language plain and essentially identical to statutory text in the False Claims Act).

140 29 U.S.C. § 660(c).

141 *See* whistleblowers.gov/factsheets_page/statistics.

142 The DOL may bring Section 11(c) actions in federal court, in which case the courts will resolve statutory ambiguities, although some courts have deferred to the DOL's views. In addition, in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980), the Court accorded *Skidmore* deference to a DOL regulation that interpreted Section 11(c).

143 Mark Seidenfeld, Chevron*'s Foundation*, 86 Notre Dame L. Rev. 273, 275 (2011).

144 *LTV Corp.*, 496 U.S. at 652.

145 Courts would need broad knowledge not only of the ARB's interpretations of § 806 but also interpretations under analogous laws that track the terms of § 806. *See supra* note 12; *Lawson*, 571 U.S. at 431 (quoting S. Rep. No. 107-146) (Congress designed § 806 to track "as closely as possible" the aviation whistleblower law, 49 U.S.C. § 42121).

146 *Skidmore,* 323 U.S. at 140*; Mead*, 533 U.S. at 234 (noting the "value of uniformity in [the] administrative and judicial understandings of what a national law requires").

may surface as the DOL reshapes the living, breathing law.[147] Coalescence, if any, will always be temporary and comes at the expense of finality.

3. Inconsistency with Other Employment Laws

In applying whistleblower statutes, the ARB may determine for any number of reasons to depart from the accepted meaning of terms routinely used in employment statutes. In *United Turbines v. DOL*, for example, the Second Circuit reviewed the ARB's interpretation of the term "discharge."[148] That word is not a term of art and in fact appears in many federal statutes (rather unlike the term "stationary source"). The ARB decided that a "discharge" can include situations where the employer did not actually discharge the worker but erroneously believed the worker resigned. Positing (without any illumination of the point) that the ARB "has a significant expertise in handling whistleblower claims," the Second Circuit deferred to this outlier interpretation, even as the court observed that the ARB's "reading does not mirror the definition that we have applied to similar terms in other employment laws."[149]

In that instance, deference did not bring uniformity to the law. Deference by each of the other circuits to this odd interpretation might achieve uniformity within the narrow arena of § 806 cases (at least until the ARB changes its mind), but surely that is too modest a judicial goal. Uniformity in the broader arena of federal employment laws would benefit employers and employees alike. If the courts commonly believe discharge carries its usual meaning, allowing the DOL to part ways with the commonly accepted usage brings divergence.[150] Except where the specific language in a statute calls for another interpretation, discharge should mean roughly the same thing for all employment laws.[151]

Finally, courts may foster uniformity by *refusing* to defer to the ARB. For example, the ARB once took it upon itself to apply a novel test for determining the liability of employers in harassment cases. This effort met a quick demise in the Fifth Circuit, which held that the DOL had no business—even in administering a law assigned to the agency—departing from the national understanding of workplace harassment liability.[152]

V. Conclusion

Perhaps statute-by-statute analysis of *Chevron*'s application is unwieldy. Yet the Supreme Court has made clear that there is more to the deference analysis than *Chevron* suggested. The Court sometimes finds reasons not to defer to agency interpretations of ambiguous statutory provisions, including where the matter at hand is simply too weighty to allow the agency to have the final word or where other factors counsel against deference. For the reasons outlined above, DOL interpretations of § 806 do not deserve deference. Federal courts should discontinue their habit of routinely affording deference and reclaim their authority to say what the law is.

147 The Supreme Court has required the DOL to explain new interpretations of the law where the change affects "serious reliance interests." Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2127 (2016).

148 581 Fed. App'x 16 (2d Cir. 2014).

149 *Id.* at 18. The court made no attempt to apply canons of construction to first determine that "discharge" is ambiguous.

150 The DOL also must "color within the common-law lines" when applying terms that have a common-law meaning, such as "employer." Browning-Ferris Indus. of Calif. v. NLRB, 911 F.3d 1195, 1208 (D.C. Cir. 2018).

151 "It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" Sandifer v. U.S. Steel Corp., 571 U.S. 220, 227 (2014) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).

152 Williams v. ARB. 376 F.3d 471 (5th Cir. 2004); AKM LLC dba Volks Constructors v. Sec'y of Labor, 675 F.3d 752, 757 (D.C. Cir. 2012) (declining to accord deference to the DOL's interpretation of a limitations provision in part because it "runs afoul of our precedents"); *cf. Worcester*, 827 F.3d at 182 (according deference to DOL application of punitive damages standards because it conformed with broader Supreme Court precedent on punitive damages).