Essay

Permissible Derogation: The Common Law and Agency Interpretations Under *Chevron*

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Abstract

The common law has undergirded American society since the founding. In recent decades, however, the law surrounding federal administrative agencies has grown massively in importance. Inevitably, instances of conflict between established common law and agency statutory interpretations have arisen and will continue to arise as the administrative state grows in size and importance. This Essay explores several recent cases in which common law principles and agency statutory interpretations have competed for prominence and assesses how to best move forward with those conflicts. Courts can best account for the wide range of considerations integral to this inevitable conflict by analyzing and deciding such cases at Chevron *Step Two whenever practical.*

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Introduction

Since the Supreme Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] courts have, to various degrees, afforded deference to statutory interpretations made by federal administrative agencies. Recently, many lower courts have been reluctant to apply that basic principle when agencies make interpretations that displace or contradict the established common law,[2] often declining to afford deference in such cases under a variety of rationales. But in *Baldwin v. United States*,[3] the Ninth Circuit bucked the tendency of courts to reject deference to interpretations in derogation of the common law, giving rise to an apparent circuit split over whether or not deference is due at all to such an agency interpretation.[4]

One might wonder why the Supreme Court declined to grant certiorari to resolve the new split, either for or against deference.[5] To that point, this Essay will argue that factual and legal differences between these cases should counsel against an all-or-nothing approach to deference to agency interpretations in derogation of the common law. But, upon closer inspection, it may not be so simple, because the circuit split is not truly between deference or nondeference. Rather,

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1 467 U.S. 837 (1984).

2 When using the term "common law," this Essay refers to state—i.e., not federal—common law.

3 921 F.3d 836 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 690 (2020).

4 *Id.* at 843.

5 *Baldwin*, 140 S. Ct. at 690 (2020). Only Justice Thomas dissented from the denial of certiorari. *Id.* at 690–95 (Thomas, J., dissenting).

these courts reached different conclusions by handling the cases before them under different steps of the *Chevron* framework. This Essay suggests that, in order to ensure a thorough and meaningful analysis of all of the potential factual and legal differences across cases, and in order to encourage consistent adjudication, courts should consider deference to agency interpretations in derogation of the common law as part of their *Chevron* Step Two reasonableness analysis. This approach would allow courts to afford appropriate weight to the common law, while at the same time not foreclosing consideration of the unique circumstances associated with any given matter.

Part I of this Essay will outline the core tenets of and the rationales for deference, specifically concerning agency statutory interpretations under *Chevron*. Part II will examine the current so-called circuit split concerning whether or not courts should defer to agency interpretations in derogation of the common law and outline the unique details of each of the relevant cases. Part III will explain why a black letter, one-size-fits-all rule to resolve the split is an ill-advised solution. Finally, Part IV will suggest that courts should, whenever practical, decide common law derogation cases under *Chevron* Step Two, rather than dispensing with a case under an earlier step. This Essay ultimately concludes that a broad categorical rule against deference to agency interpretations that contradict or attempt to supplant the common law is not a tenable course, and that courts can best perform their integral role in defining the law by fully taking account of the circumstances of each individual case under Step Two of the *Chevron* framework.

I. *CHEVRON* DEFERENCE AND ITS JUSTIFICATIONS

Under *Chevron*, federal courts defer to administrative agency actions taken pursuant to ambiguous statutes so long as the agency's interpretation of the statute is permissible.[6] But the term "ambiguous" is crucial to the analysis, because if Congress's intended meaning in drafting the statute is *not* ambiguous, then the agency must simply execute Congress's clear statutory commands.[7] This ambiguity determination is known as "Step One."[8] Only when the statute is ambigu-

6 *Chevron*, 467 U.S. at 842–43. Subsequent decisions have narrowed the application of *Chevron* deference to cases in which the agency acted pursuant to its authority to issue legislative, or legally binding, rules. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226–27 (2001). The initial determination of whether *Chevron* applies at all is commonly referred to as "Step Zero."

7 *Chevron*, 467 U.S. at 842–43.

8 *See, e.g.*, Arangure v. Whitaker, 911 F.3d 333, 338 (6th Cir. 2018).

ous is the agency permitted to act according to its own reasonable interpretation.[9] The reasonableness determination is known as "Step Two."[10]

Proponents of *Chevron* offer familiar justifications in support of deference. First, allowing administrative agencies to interpret statutes can lead to better policy outcomes because administrative agencies are subject matter experts in the areas of their jurisdiction.[11] Second, because the administrative agencies are ultimately held accountable by elected leaders, their policy decisions are more likely to represent the collective will of the people, or at least more likely to do so than unelected, life-term judges.[12] This consideration is especially germane when hot-button questions, i.e., those in which members of the general populace have strong personal or political interests, are involved.[13] Finally, *Chevron* deference is ultimately justified on the basis that ambiguity in an agency's organic statute constitutes an implicit congressional delegation of authority to the agency to interpret it.[14]

Acceptance of *Chevron* and its progeny, however, has certainly not been uniform among judges and academics. Among other arguments, opponents assert that the doctrine permits the executive branch apparatus to intrude into the constitutional role of the judiciary, violating separation of powers principles present in the Constitution and inherent to the American system of government.[15] Because the "province and duty" of the judiciary is "to say what the law is,"[16] permitting agencies to interpret the meaning of the law instead effectively allows the executive branch to encroach on the proper role of

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9 *Chevron*, 467 U.S. at 843–44.

10 *See, e.g.*, Chamber of Com. of the U.S. v. U.S. Dep't of Lab., 885 F.3d 360, 379 (5th Cir. 2018).

11 *See Chevron*, 467 U.S. at 865; *see also* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453 (1989) ("[Q]uestions [of statutory meaning] are so bound up with successful administration of the regulatory scheme that it may seem only sensible to give principal interpretive responsibility to the 'expert' agency that lives with the statute constantly.").

12 *See Chevron*, 467 U.S. at 865.

13 *See infra* note 121.

14 *See Chevron*, 467 U.S. at 844; *see also* ABA v. FTC, 430 F.3d 457, 468–69 (D.C. Cir. 2005) (recognizing that, though "the existence of ambiguity is not enough per se to warrant deference to the agency's interpretation," Congress can explicitly or implicitly delegate such authority).

15 *E.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151–52 (10th Cir. 2016) (Gorsuch, J., concurring); CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting).

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

the judiciary.[17] Opponents also aptly point out that if the agency is successful in reaching Step Two, *Chevron* deference has historically served as little more than a rubber stamp to the agency's action.[18]

Despite some notable opposition, courts have applied the two-step framework and afforded deference to agency statutory interpretations across a variety of underlying substantive contexts since *Chevron* was decided. Though the future of the *Chevron* doctrine is murky at best,[19] it remains the law of the land at least for now, and it unsurprisingly has become the most frequently cited opinion in administrative law.[20]

II. The "Circuit Split"

Though the Ninth Circuit recently applied *Chevron* deference to an agency interpretation in derogation of the common law, the Fifth, Sixth, Eleventh, and District of Columbia Circuits, under various steps of the *Chevron* framework, have declined to do so. This Part will explore the notable cases on this issue in those circuits.

A. Chevron *Step Zero*

The D.C. Circuit rejected deference to an agency interpretation in derogation of the common law by entirely refusing to consider deference, holding that *Chevron* did not apply at all.[21] In *FedEx Home Delivery v. NLRB*,[22] the court addressed a dispute between the parties over whether certain workers are employees or independent contractors under National Labor Relations Act ("NLRA")[23] protections enforced by the National Labor Relations Board ("NLRB").[24]

Eight years earlier, the D.C. Circuit held that certain single-route FedEx drivers were independent contractors, rather than employees, under the NLRA.[25] In the instant case, the NLRB, "on a materially

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17 *See Gutierrez-Brizuela*, 834 F.3d at 1152.

18 *See infra* note 115 and accompanying text.

19 *See, e.g.*, Joshua A. Geltzer, Opinion, *Op-Ed: Trump's Supreme Court Might Overturn a Doctrine, but That Won't Destroy the 'Administrative State*,' L.A. Times (Aug. 5, 2018, 4:05 AM), https://www.latimes.com/opinion/op-ed/la-oe-geltzer-kavanaugh-administrative-state-20180805-story.html [https://perma.cc/8H4S-P9J2].

20 Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 Admin. L. Rev. 725, 726 n.2 (2007).

21 *See* FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1127–28 (D.C. Cir. 2017).

22 849 F.3d 1123 (D.C. Cir. 2017).

23 29 U.S.C. §§ 151–169.

24 *FedEx Home Delivery*, 849 F.3d at 1124.

25 *Id.* Of note, the transition between the Obama and Trump Administrations occurred in the meantime, potentially explaining the agency's desire to make a change.

indistinguishable factual record," held that single-route FedEx drivers in a different city were employees under the NLRA.[26] The D.C. Circuit followed the "law-of-the-circuit doctrine," repudiating the agency and straightforwardly declining to "apply the same law to the same material facts but give a different answer."[27] Likewise, the court declined to reweigh the common law factors that it had already considered in the previous case or consider any additional factors and therefore did not defer to the NLRB on that basis.[28]

The court also noted that, in any event, no deference would be due to the agency under *Chevron* because the distinction between an employee and an independent contractor under the NLRA "is a question of 'pure' common-law agency principles 'involv[ing] no special administrative expertise that a court does not possess.'"[29] The court refused to defer to the agency's interpretation on both grounds,[30] effectively resolving the deference issue at the initial *Chevron* Step Zero determination.

B. Chevron *Step One*

The Eleventh and Sixth Circuits have refused to defer to agency interpretations in derogation of the common law on the grounds that the common law presumption canon of statutory interpretation should be considered at *Chevron* Step One. This doctrine provides that statutory language incorporates existing common law principles unless there is a clear indication to the contrary.[31]

In *Arangure v. Whitaker*,[32] the Sixth Circuit considered an interpretation of the Immigration and Nationality Act ("INA"),[33] under which the Board of Immigration Appeals had concluded that the doctrine of res judicata did not apply in removal proceedings involving immigrants convicted of aggravated felonies.[34] Jasso Arangure was granted lawful permanent resident status in 2003 and then committed

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26 *Id.*

27 *Id.* at 1127.

28 *See id.* at 1128.

29 *Id.* (alteration in original) (quoting NLRB v. United Ins. Co. of Am., 390 U.S. 254, 260 (1968)). The court acknowledged that agencies may change their interpretation under certain circumstances, but declined to permit the agency to reverse judicial teachings on these purely legal principles. *See id.* at 1127–28.

30 *See id.* at 1127–28.

31 Arangure v. Whitaker, 911 F.3d 333, 342–43 (6th Cir. 2018).

32 911 F.3d 333 (6th Cir. 2018).

33 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

34 *Arangure*, 911 F.3d at 337.

first-degree home invasion over a decade later.[35] Soon after Arangure pled guilty, the U.S. Department of Homeland Security ("DHS") initiated a removal proceeding against him, arguing that his crime was a "crime of violence" under the INA, thereby making him removable.[36] The immigration judge agreed that home invasion was a crime of violence under the INA's residual clause, but while that decision was on appeal, the Sixth Circuit held the residual clause to be unconstitutionally vague in another case.[37] In light of that ruling, the immigration judge, on remand, terminated the proceeding without prejudice.[38] DHS then initiated a second removal proceeding, this time arguing that the conviction was a "burglary offense," which would likewise make Arangure removable.[39]

Arangure argued that res judicata should apply and bar the second removal proceeding.[40] Under res judicata, parties cannot recontest matters in which they were afforded a "full and fair opportunity to litigate."[41] The immigration judge and the Board of Immigration Appeals rejected Arangure's arguments, giving rise to his appeal to the Sixth Circuit.[42] After finding that the Board is entitled to *Chevron* deference when interpreting the INA, the court noted that "the INA's text is silent as to res judicata"[43] but cautioned that "[s]ilence . . . does not necessarily connote ambiguity."[44] Therefore, the court turned to the common law presumption canon, under which courts presume that, absent explicit indication to the contrary, Congress incorporates established common law principles into the statutory language it uses.[45] Under that rule, the court found that the common law principle of res judicata was incorporated into the INA, rendering it unambiguous in this case.[46] The Sixth Circuit therefore, held that res judicata governed Arangure's case and remanded to the Board to consider whether the first removal proceeding against Arangure was in fact litigated to a final judgment, as is a prerequisite to claim preclusion.[47]

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35 *Id.* at 336.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.* at 337 (quoting 8 U.S.C.§ 1101(a)(43)(G)).
40 *Id.*
41 *Id.* (quoting Montana v. United States, 440 U.S. 147, 153 (1979)).
42 *Id.*
43 *Id.* at 338.
44 *Id.*
45 *Id.* at 339.
46 *Id.* at 343.
47 *Id.* at 347–48.

In *Garcia-Celestino v. Ruiz Harvesting, Inc.*,[48] the Eleventh Circuit considered a Department of Labor standard for determining employer-employee status under the H-2A visa program set out in the INA and subsequent amendments.[49] Eight Mexican nationals, who were in the United States temporarily under the H-2A visa program to work as harvesters, filed suit on behalf of themselves and others similarly situated against defendant citrus producers and labor contractors, asserting statutory claims under the Fair Labor Standards Act ("FLSA")[50] and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"),[51] as well a common law breach of contract claim.[52] The central issue on appeal was whether defendant Consolidated Citrus, a large citrus producer, could be held liable as a joint employer with Ruiz Harvesting, Inc., a labor contractor who served as a liaison between Consolidated Citrus and the temporary workers.[53] The district court applied the FLSA's broad "suffer or permit to work" standard, as articulated in a Department of Labor rule,[54] rather than common law principles of agency, to determine whether Consolidated Citrus was an H-2A joint employer during the relevant periods for the purpose of the breach of contract claim.[55]

The Eleventh Circuit disagreed. When Congress amended the AWPA in 1983, it adopted the "suffer or permit to work" standard, which it incorporated by reference to the FLSA.[56] But when Congress amended the INA three years later, it instead chose not to define the term "employer" at all.[57] According to the Eleventh Circuit, this difference in approach indicated that Congress intended to rely on the established common law meaning of the term instead of the definition incorporated in related statutes.[58] Looking at the INA's place in the overall legislative scheme, the Eleventh Circuit concluded that Congress had spoken on the issue, and therefore, common law principles of agency governed the breach of contract claim.[59]

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48 843 F.3d 1276 (11th Cir. 2016).

49 *Id.* at 1289.

50 29 U.S.C. §§ 201–219.

51 29 U.S.C. §§ 1801–1872.

52 *Garcia-Celestino*, 843 F.3d at 1280–83.

53 *Id.* at 1280, 1284.

54 20 C.F.R. § 655.100(b) (1987). The standard enunciated in that regulation is the same as the statutory definition used in the FLSA. *Garcia-Celestino*, 843 F.3d at 1287.

55 *Garcia-Celestino*, 843 F.3d at 1283–84.

56 *Id.* at 1289.

57 *Id.*

58 *Id.*

59 *Id.* at 1290.

Thus, both the Sixth and Eleventh Circuits applied the common law presumption canon as a "traditional tool[] of statutory construction"[60] at *Chevron* Step One, held that the statutes in question were unambiguous when that canon was considered, and ended their analyses there, thereby avoiding deference to agency interpretations in derogation of the common law.[61]

C. Chevron *Step Two*

In contrast to the Sixth, Eleventh, and D.C. Circuits, the Fifth and Ninth Circuits have reached *Chevron* Step Two when analyzing common law derogation cases. Though they both reached the same point in the *Chevron* framework, these two courts reached opposite results on the matter of deference.

The Fifth Circuit recently refused to defer to agency interpretations in derogation of the common law on the grounds that such an interpretation is unreasonable under *Chevron* Step Two.[62] In *Chamber of Commerce of the U.S. v. U.S. Department of Labor*,[63] the Fifth Circuit addressed a challenge by various business groups to the Department of Labor's "Fiduciary Rule," which reinterpreted the term "investment advice fiduciary" and redefined exemptions to Employee Retirement Income Security Act of 1974 ("ERISA")[64] provisions related to fiduciaries.[65] The primary question was "whether the new definition of an investment advice fiduciary comports with ERISA."[66]

Instead of accepting NLRB's definition of the term "fiduciary," the Fifth Circuit relied on the proposition that, "absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'"[67] Given that Congress did not define the term "fiduciary" in ERISA, or indicate expressly its intention as to that definition, the court applied the common law definition of the term.[68] Going even one step further, the court held that the agency's interpretation contrary to the common law was unreasonable because,

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60 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

61 Arangure v. Whitaker, 911 F.3d 333, 343 (6th Cir. 2018); *Garcia-Celestino*, 843 F.3d at 1290.

62 *See* Chamber of Com. of the U.S. v. U.S. Dep't of Lab., 885 F.3d 360, 380 (5th Cir. 2018).

63 885 F.3d 360 (5th Cir. 2018).

64 Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 and in scattered sections of 26 U.S.C.).

65 Chamber of Com. of the U.S. v. U.S. Dep't of Lab., 885 F.3d at 363.

66 *Id.* at 368.

67 *See id.* at 369–70 (quoting United States v. Castleman, 572 U.S. 157, 162 (2014)).

68 *See id.* at 370–71.

among other deficiencies, the Department of Labor "disregard[ed] the essential common law . . . standard" when Congress had not explicitly compelled it to do so.[69] The Fifth Circuit accordingly rejected an agency interpretation in derogation of the common law under *Chevron* Step Two.

On the other hand, the Ninth Circuit upheld an agency interpretation in derogation of the common law in *Baldwin v. United States*.[70] Taxpayers Howard and Karen Baldwin claimed entitlement to a refund of approximately $167,000 based on a net loss incurred in their business.[71] The Baldwins were required to file an amended return for the 2005 tax year by October 15, 2011 in order to receive a refund.[72] Though the Baldwins claim they mailed their amended tax return in June 2011, the Internal Revenue Service ("IRS") did not receive that or any other return postmarked by the deadline.[73] An amended 2005 return did ultimately reach the IRS in July 2013, but it was not postmarked before the October 15, 2011 deadline, and the IRS therefore rejected the Baldwins' refund claim as "untimely."[74]

Prior to 1954, tax law required documents to be physically delivered to the IRS by the applicable deadline for them to be considered timely filed.[75] In 1954, Congress sought to remedy some of the problems caused by the physical delivery requirement and enacted I.R.C. § 7502(a)(1), which "carves out an exception to the physical-delivery rule for tax documents sent and delivered by U.S. mail" by "provid[ing] that if a document is received by the IRS after the applicable deadline, it will nonetheless be deemed to have been delivered on the date that the document is postmarked."[76] Given that the Baldwins' original amended return was never delivered to the IRS, and their eventual return was postmarked after the applicable deadline, this exception provided them no relief.[77] Accordingly, the Baldwins fell back on the common law mailbox rule.[78] Circuits had previously split as to whether or not § 7502 was meant to entirely displace the mailbox rule, or if it was merely a safe harbor meant to

69 *See id.* at 380.

70 921 F.3d 836 (9th Cir. 2019).

71 *Id.* at 839.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* at 839–40.

76 *Id.* at 840.

77 *See id.* at 839–40.

78 *Id.* at 842.

supplement alternative exceptions to physical delivery.[79] In August 2011, the Treasury Department amended Treasury Regulation section 301.7502-1(e) to interpret § 7502 as "creating the exclusive exceptions to the physical-delivery rule,"[80] thereby attempting to supplant the common law mailbox rule and any other preexisting exceptions to physical delivery.

At *Chevron* Step One, the court determined that "§ 7502 is silent as to whether the statute displaces the common-law mailbox rule" concerning documents sent to the IRS by a taxpayer via regular mail.[81] At Step Two, the court concluded that Treasury Regulation section 301.7502-1(e) was a permissible interpretation of § 7502, given that the Treasury Department chose one of the two reasonable constructions of the statute that had been considered by the circuits that split over the mailbox rule issue.[82] In so doing, the Ninth Circuit rejected the Baldwins' argument that, under a different principle of statutory interpretation, "the common law . . . ought not to be deemed [to be] repealed, unless the language of a statute be clear and explicit for this purpose."[83] Considering this argument to be merely a competing principle of statutory interpretation, the court still found the agency's interpretation permissible, ostensibly based on alternative principles of statutory interpretation.[84] Thus, the Ninth Circuit has signaled its willingness to defer under *Chevron* to agency interpretations in derogation of the established common law.

III. An Uncommon Answer

Courts have been somewhat inconsistent not only in the results reached concerning agency interpretations in derogation of the common law, but also in their analytical approaches toward such interpretations. This Part argues that a one-size-fits-all rule would not be a tenable solution.

The provisions of existing common law can vary significantly. Much of the common law in the United States traces its origins back hundreds of years to the common law in the European nations that

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79 *See id.* at 841.

80 *Id.*

81 *Id.* at 842.

82 *Id.* at 843.

83 *Id.* (quoting Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35 (1983)).

84 *See id.*

colonized the Americas, with England as the primary source.[85] But competing Spanish, French, Indigenous, and other influences, combined with the varying status and treatment of the preexisting British common law in each colony both before and after independence, have caused significant differences in the development of the common law in each state.[86] Thus, today, the specific contours of the common law vary around the country, sometimes considerably.[87]

Statutory laws and regulations at the state and local levels also vary widely, as do the jurisdictions and mandates of the agencies charged with enforcing many of the statutory schemes that Congress enacts.[88] A wide variety of policy considerations may also underlie each legislative or regulatory enactment. Consequently, analysis of any given statute or regulation's interaction with a particular area of the common law is bound to present different issues and concerns depending on the nature and purpose of the statute, the principles and history of the common law in the relevant jurisdiction, the policy rationales underlying both the statute and the common law, and any additional relevant facts of the attendant case.

The breadth of these differences is made evident in the aforementioned "circuit split" cases. The relevant statutes in those cases cover topics ranging from labor and employment classifications[89] to immigration status[90] to income tax.[91] The underlying common law issues include the mailbox rule,[92] principles of agency,[93] res judicata,[94] and the definition of the term "fiduciary."[95] And one could easily imagine, given the seemingly boundless growth in the size and functions of the

85 Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 LAW LIBR. J. 13, 20 (1989).

86 *Id.*

87 *See id.*

88 *See* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 1 (2016) ("Congress has created numerous federal agencies charged with carrying out a broad array of delegated statutory responsibilities."); *see also* Lee P. Loevinger, *The Administrative Agency as a Paradigm of Government: A Survey of the Administrative Process*, 40 IND. L.J. 287, 289–92 (1965) (describing the diverse roles and jurisdictions of several notable federal administrative agencies).

89 Chamber of Com. of the U.S. v. U.S. Dep't of Lab., 885 F.3d 360 (5th Cir. 2018); FedEx Home Delivery v. NLRB, 849 F.3d 1123 (D.C. Cir. 2017); Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 1276 (11th Cir. 2016).

90 Arangure v. Whitaker, 911 F.3d 333 (6th Cir. 2018); *Garcia-Celestino*, 843 F.3d 1276.

91 Baldwin v. United States, 921 F.3d 836 (9th Cir. 2019).

92 *Id.* at 842.

93 *FedEx Home Delivery*, 849 F.3d at 1128; *Garcia-Celestino*, 843 F.3d at 1289.

94 *Arangure*, 911 F.3d at 337.

95 Chamber of Com. of the U.S. v. U.S. Dep't of Lab., 885 F.3d 360, 364 (5th Cir. 2018).

federal administrative apparatus,[96] that there are likely to be plenty more conflicts between agency interpretations and established common law in the future.

Such extensive substantive differences among the cases implicating the common law render blanket judicial deference or nondeference to agency interpretations that seek or purport to supplant or modify the common law an untenable course. Either of these rigid approaches would fail to take into account the meaningful differences in circumstances attendant to each potential instance of conflict between an agency and the common law. Indeed, the underlying factual and legal differences make it clear that the "split" between these circuits is not really as to whether the applicable rule should be deference or nondeference. That split exists only at a high level of generality, and there is not much more than a purely theoretical analysis to be had on that score because of the significant differences in facts and relevant statutes among the cases. Rather, the real difference among these circuits is under which step of the *Chevron* framework the circuits handled the interpretative question presented to them.

IV. Deference at *Chevron* Step Two

This Part will establish first that the common law and agency interpretations each merit some meaningful degree of deference. Then, it will explain how courts may properly account for the unique nature of the common law and the wide variety of underlying facts and substantive law that could be involved in derogation of the common law interpretation cases under *Chevron*.

A. The Common Law and Agency Interpretations Each Deserve Meaningful Weight

Though broad nondeference is not a satisfactory solution, the common law still warrants meaningful weight and consideration based on the guiding principles of federalism and separation of powers, as well as other practical benefits.

First, there are federalism concerns. Under this founding principle, sovereign state governments share authority with a federal gov-

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96 *See* Robert J. Samuelson, Opinion, *The Administrative State is Huge, and It's Only Getting Bigger*, Wash. Post (Mar. 5, 2017), https://www.washingtonpost.com/opinions/the-administrative-state-is-huge-and-its-only-getting-bigger/2017/03/05/bb388e28-003a-11e7-99b4-9e613afeb09f_story.html [https://perma.cc/JV2E-X7KM].

ernment of limited powers.[97] Consequently, each state maintains its own courts and its own body of common law, permitting the state to promote and preserve its own particular local values and customs,[98] distinct from the dictates of any other state and largely those of the federal government. Indeed, the diversity of the several states and their unique individual interests is a core facet of American governance, and variations in state common law are outgrowths of those interests. Surely nobody doubts that Congress can supersede, or empower an agency to supersede, even the most entrenched state common law if it does so pursuant to one or more of its enumerated powers.[99] But permitting federal administrative agencies, which have no inherent authority in the absence of such statutory authorization,[100] to alter the established standing of state common law principles without an explicit directive to do so may allow the federal government to intrude further than the Constitution permits into the rightful role of the states.

Second, agency derogation of the common law raises separation of powers issues. The common law is traditionally a creature of the judiciary, not of the political branches. Judges glean principles from their collective experience in previous cases, which they then apply to the facts of the case before them.[101] This practice has always been recognized as the province of the courts, and the Framers surely did not intend for the executive branch to usurp this role.[102] To be sure, plenty of judges and scholars, to various degrees of persuasiveness, have argued that the administrative behemoth has already appropriated the roles of the other branches.[103] Permitting agencies to tread on the

97 THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

98 *See* Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 486 (2003) ("The common law . . . embodies the 'experience' and 'custom' of the surrounding community.").

99 U.S. CONST. art. VI, cl. 2; *see also* Hillsborough County v. Automated Med. Lab'ys., Inc., 471 U.S. 707, 713 (1985) (explaining the various ways in which a federal law might preempt state law).

100 *See* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1938 (2020) ("Federal administrative agencies have no inherent power to issue regulations, administer programs, or enforce federal law. Rather, through legislation, Congress grants agencies that power to act.").

101 *See* Roscoe Pound, *What Is the Common Law*, 4 U. CHI. L. REV. 176, 181 (1937) (The common law is "a traditional technique of finding the grounds of deciding controversies by applying to them principles drawn from recorded judicial experience.").

102 *See* THE FEDERALIST NO. 47, at 373–74 (James Madison) (John C. Hamilton ed., 1864) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.").

103 *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2212 (2020)

common law could serve to further exacerbate these looming separation of powers problems.

Third, there are additional practical reasons to afford weight to the common law. The common law fosters a unique combination of consistency and flexibility,[104] as judges can adapt existing rules and doctrines to the cases before them by applying and distinguishing precedent to achieve the best possible result.[105] This combination allows courts to respond to changing circumstances quickly, yet incrementally, in a way that legislatures practically cannot. Accordingly, principles developed this way are also more flexible and adaptable to innovation in society, technology, and law.[106] At the same time, the common law in most cases yields a recognized legal rule that affected parties may confidently rely upon in deciding a legally appropriate course of action.[107] Further, given the deep roots of the common law, there are likely to be standing reliance interests in many circumstances that counsel against derogation of the common law, particularly when agencies pursue a complete reversal of a common law position. Thus, these additional practical considerations favor affording the common law meaningful weight.

On the other side of the coin, though total deference is likewise problematic, agencies arguably deserve at least some deference when

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(Thomas, J., concurring in part and dissenting in part) ("Despite the defined structural limitations of the Constitution and the clear vesting of executive power in the President, Congress has increasingly shifted executive power to a *de facto* fourth branch of Government—independent agencies."); PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) ("[I]ndependent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."); Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & Liberty 491, 495 (2008) ("[T]he strong structural protections found in the original Constitution should not have been swapped out for a mess of administrative porridge."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248 (1994) ("Administrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body.").

104 *See* Robin Kundis Craig et al., *Balancing Stability and Flexibility in Adaptive Governance: An Analysis of Tools Available in U.S. Environmental Law*, 22 Ecology & Soc'y, no. 2, 2017, at 1, 16–17; *see also* Luca Anderlini, Leonardo Felli & Alessandro Riboni, *Legal Efficiency and Consistency* 26 (Oct. 2019) (unpublished working paper) (on file with the European Center for Advanced Research in Economics and Statistics), http://econ.lse.ac.uk/staff/lfelli/papers/courts_consistency.pdf [https://perma.cc/L39Y-5ZD9] (concluding that "common law is generally more consistent and predictable than civil law").

105 *See* Jack G. Day, *Why Judges Must Make Law*, 26 Case W. Rsrv. L. Rev. 563, 566 (1976).

106 *See* Cohen, *supra* note 85, at 27–28.

107 *Cf.* Brandon J. Murrill, Cong. Rsch. Serv., R45319, The Supreme Court's Overruling of Constitutional Precedent 23 (2018) (noting that judges generally seek to "maintain[] a stable jurisprudence on which parties can rely").

they interpret statutory provisions, even when they alter the status of preexisting common law. As the Court recognized in *Chevron* itself, agencies are subject matter experts and are, at least at some level, democratically accountable.[108] These core justifications for affording deference to agencies in the first place largely hold true in the common law context. Additionally, agencies are generally recognized to be empowered by Congress via broad grants of authority, within which there are a range of permissible actions from which to choose.[109] In many cases, it is arguably sensible to view such a grant of authority as authorizing an agency to make interpretative choices that affect preexisting state common law.[110] Of course, when Congress's intention in that regard is not explicit on the face of the text, the degree to which Congress intended to permit agencies to derogate the common law is uncertain. But in any event, some degree of deference may well be warranted even in common law cases.

B. Analysis at Chevron *Step Two*

The aforementioned grounds to afford weight to either the common law or an agency's statutory interpretation demonstrate that there should not be an absolute bar on, or unbridled acceptance of, agency interpretations in derogation of the common law. Indeed, such a sweeping prohibition in either direction would fail to take into account meaningful differences in the circumstances of the wide variety of cases that could present the issue. Such overbreadth is problematic and easily avoidable.

At bottom, Congress may legislate either to supersede state common law itself or to empower federal agencies to do so.[111] But if Congress intends to permit agencies to supersede established common law, it should be as explicit as possible in its authorization.[112] A high level of statutory clarity would diminish or resolve many of the above concerns and would allow courts to straightforwardly consider agency derogation of the common law at Step One. But in the many cases

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108 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); *see also supra* Part I.

109 *Chevron*, 467 U.S. at 844. The theory is that such broad grants of authority to speak with the force of law imply a delegation to the agency by Congress to make interpretative choices to clarify any ambiguities within the broad statutory framework. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001).

110 *See, e.g.*, Lynnbrook Farms v. Smithkline Beecham Corp., 79 F.3d 620, 627 (7th Cir. 1996).

111 *See* U.S. CONST. art. VI, cl. 2.

112 *See supra* note 83 and accompanying text.

where the statutory text does not clearly and unambiguously address the common law on its face—that is, without delving into interpretive tools untethered to the text itself[113]—judicial review at Step One fails to consider the unique circumstances of each case that might factor into the reasonableness of the agency's interpretation. Instead, appropriate weight can be given to the common law and to agency interpretations by analyzing derogation of the common law cases at *Chevron* Step Two, determining whether the agency's interpretation is "permissible."[114]

But if courts adopt this framework, they should also lend Step Two some teeth to permit meaningful examination of the agency's interpretation instead of effectively operating it as a rubber stamp for the agency.[115] To do so, courts may consider a plethora of factors and weigh them as appropriate. When assessing reasonableness, courts typically ask whether the agency's interpretation is "arbitrary or capricious in substance, or manifestly contrary to the statute,"[116] examining factors including the fit within the statutory language, the legislative history, and conformity to the overall purpose of the statutory scheme.[117] To account for the uniqueness of derogation of the common law cases, courts should give particular consideration to factors such as the history, custom, and culture surrounding the common law tenet in question,[118] the unique historical role of the courts in crafting the common law,[119] the relative expertise of the agency and the court

113 *See* Eagle Pharms., Inc. v. Azar, 952 F.3d 323, 330–31 (D.C. Cir. 2020) ("Of the tools of statutory interpretation, '[t]he most traditional tool, of course, is to read the text.'" (quoting Engine Mfrs. Ass'n v. EPA, 88 F.3d 1075, 1088 (D.C. Cir. 1996))). Some courts have questioned whether canons of interpretation that look to evidence other than the text itself should apply at Step One. *See* Olmos v. Holder, 780 F.3d 1313, 1321 (10th Cir. 2015) (declining to apply the canon of constitutional avoidance and the rule of lenity at Step One); *see also* Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 618–19 (2014) ("[T]he federal courts are generally inconsistent in their use of such canons at Step One . . . . [T]he Court cannot agree on what the traditional tools of construction are, or in what order they should be applied . . . .").

114 *Chevron*, 467 U.S. at 843.

115 *See* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1462 fig.3 (2018) (finding that agencies won at *Chevron* Step Two 93.8% of the time); *see also* Christopher H. Schroeder & Robert L. Glicksman, Chevron*,* State Farm*, and EPA in the Courts of Appeals During the 1990s*, 31 ENV'T L. REP. 10371, 10389 (2001) (noting that EPA had an "over 92% success rate [at *Chevron* Step Two] in the 1990s.").

116 *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 53 (2011) (quoting Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004)); *see also* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (applying another formulation of the *Chevron* Step Two test).

117 *See* Good Fortune Shipping SA v. Comm'r, 897 F.3d 256, 262 (D.C. Cir. 2018).

118 *See* Post, *supra* note 98, at 486.

119 *See* Pound, *supra* note 101, at 181.

on the subject matter in question,[120] the interest of national uniformity on the particular issue,[121] the potential for conflicting interpretations,[122] and the popular interest in having democratic input on the question at hand and ultimately holding the decisionmakers to democratic account.[123] Consideration of a wide variety of inputs at the reasonableness stage encourages the most comprehensive analysis possible and should lead to results that not only protect the structure of government and the foundation of the common law, but also promote superior policy outcomes.

Consideration at Step Two, following the example of the Fifth and Ninth Circuits,[124] is preferable to resolving cases at Step One based solely on the common law presumption canon, as the Sixth and Eleventh Circuits did in *Garcia-Celestino v. Ruiz Harvesting, Inc.*[125] and *Arangure v. Whitaker*.[126] Rulings on that basis tend to foreclose any meaningful analysis of unique circumstances of the case and the underlying law. To avoid that deficiency, Step One should only be applied when the intent of Congress to supplant or modify the common law is clear from the text itself. Step Zero, however, would still oper-

120 *See* Irving R. Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U. L. REV. 201, 201 (1970) ("[A]ppellate judges cannot possibly be as familiar as the administrative agency with the factual controversies or the specialized knowledge involved in many agency decisions.").

121 *See* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1481–82 (2018).

122 *See* Betsy C. Cox & Gary Shmerling, Note, *Interagency Conflict: A Model for Analysis*, 9 GA. J. INT'L & COMPAR. L. 241, 275 (1979).

123 For example, the issues involved in *Garcia-Celestino*, *Arangure*, and *FedEx Home Delivery* concerned matters of significant public import. *See* Jess Bravin, *Supreme Court Expands Conditions for Deporting Lawful Immigrants with Criminal Records*, WALL ST. J. (Apr. 23, 2020, 3:41 PM), https://www.wsj.com/articles/supreme-court-expands-conditions-for-deporting-lawful-immigrants-with-criminal-records-11587670912 [https://perma.cc/96U6-HUDN] (explaining the controversy surrounding deportation of lawful immigrants with criminal records); Liz Crampton, *Farm Workers to Be Exempt from Trump's Immigration Ban*, POLITICO (Apr. 21, 2020, 11:21 AM), https://www.politico.com/news/2020/04/21/farm-workers-exempt-trumps-immigration-ban-198039 [https://perma.cc/4Y2F-Q99Y] (describing the Trump Administration's position regarding H-2A visas in relation to the President's controversial immigration policy); *cf.* Aaron Holmes, *A California Judge Ruled that Uber and Lyft Have to Classify Their Drivers as Employees, Not Contractors*, BUS. INSIDER (Aug. 10, 2020, 4:49 PM), https://www.businessinsider.com/uber-lyft-california-lawsuit-ruling-classify-drivers-employees-gig-workers-2020-8 [https://perma.cc/VJS5-57KM] (discussing the ongoing saga over the employment classification of rideshare drivers). Contrast those newsworthy topics with the relatively more mundane and technical mailbox rule issue presented in *Baldwin*.

124 Chamber of Com. of the U.S. v. U.S. Dep't of Lab., 885 F.3d 360, 387–88 (5th Cir. 2018); Baldwin v. United States, 921 F.3d 836, 842–43 (9th Cir. 2019).

125 *See* 843 F.3d 1276, 1289 (11th Cir. 2016); *supra* Section II.B.

126 *See* 911 F.3d 333, 343–44 (6th Cir. 2018); *supra* Section II.B.

ate as it currently does.[127] No special analysis can be required in cases when *Chevron* does not apply at all and no deference is owed from the outset.[128]

Conclusion

As this Essay has suggested, courts should continue to afford meaningful weight to the common law when analyzing its interaction with administrative agency interpretations. That core principle, however, should not result in a categorical rule for or against deference to agency interpretations that contradict or attempt to supplant the common law. Rather, in order to balance the weight owed to the common law against the level of deference afforded to an agency interpretation, a court should, in the absence of an explicit textual command to the contrary, consider all of the attendant facts and circumstances under *Chevron* Step Two's reasonableness framework. In the end, this approach would lead to a more appropriate balance of interests, while at the same time still permitting meaningful analysis of unique legal and factual circumstances on a case-by-case basis.

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127 *See supra* note 6.

128 For example, the NLRB in *FedEx Home Delivery* contradicted a recent prior court ruling in the same circuit on a purely legal question and, accordingly, was not entitled to consideration under *Chevron* at all. *See* FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1127–28 (D.C. Cir. 2017); *supra* Section II.A.