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BE REASONABLE: THE APPLICABILITY OF *CHEVRON* TO AGENCY INTERPRETATIONS OF SPLIT-AUTHORITY STATUTES

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The well-known Chevron *doctrine is under siege as courts continue to carve out exceptions to its scope and some scholars and judges question whether it should be overruled entirely. One ongoing battle concerns whether the doctrine, which requires courts to defer to reasonable agency interpretations of ambiguous statutes, applies to certain "split-authority" statutes administered by multiple agencies, such as the Sarbanes-Oxley Act's whistleblower provisions (SOX) and similar employment statutes. Both the Department of Labor (DOL) and the Securities and Exchange Commission (SEC) administer SOX's whistleblower provisions, with the DOL having formal adjudicative authority and the SEC having rulemaking authority, leading to the risk of the agencies rendering conflicting interpretations. This risk has led some courts and scholars to conclude that* Chevron *should not apply to these statutes in any circumstance. This Article argues, as both a doctrinal and normative matter, that courts should accord* Chevron *deference to agency interpretations of SOX and similar statutes where no conflict exists (as opposed to courts constructing their own interpretations with no deference accorded to agency interpretations or applying some lesser form of deference to agency interpretations). This Article further contends that the risk of a conflict occurring is greatly overstated (and certainly does not justify the rejection of* Chevron *to a whole category of statutes), and if a conflict does arise, it can be easily resolved as set forth herein.*

Other administrative law scholars have generally conducted only a cursory analysis of whether the Chevron *doctrine is applicable to agency interpretations of statutes administered by multiple agencies, addressing this question in the abstract. This Article, however, analyzes the issue as to SOX in particular, and in doing so, is better able to examine the multiple practical and theoretical considerations involved in the inquiry as to whether* Chevron *should apply. In analyzing the* Chevron *doctrine's applicability to agency interpretations of SOX, this Article also seeks to contribute to the scholarship on whistleblowing more generally. Although the literature is rich with*

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discussion of the substantive standards applicable to whistleblowing claims, scholars generally overlook the initial question of whether agencies or courts have primary interpretative authority as to split-authority whistleblowing statutes, despite this question having a significant impact on the effectiveness of these statutes. As the administrative framework utilized by SOX is similar to that of other whistleblowing statutes, this Article seeks to provide insight on this foundational question of whether courts should apply Chevron *deference to agency interpretations of these statutes and seeks to resolve the uncertainty that currently exists.*

I. INTRODUCTION

The *Chevron*[1] deference doctrine is under siege, and although it has thus far avoided a fatal blow, it continues to be weakened by the courts carving out exceptions to the scope of its rule that courts should defer to agencies' reasonable interpretations of ambiguous statutes they administer.[2] This Article seeks to resolve one ongoing battle regarding whether *Chevron* should apply to an agency interpretation of a statute administered by more than one agency (such that the possibility of conflicting interpretations arises).[3] Specifically, this Article examines the applicability of *Chevron* as it applies to statutes utilizing a "split-authority" model, which involves Congress delegating rulemaking authority to one agency and formal adjudicative authority to another agency, as opposed to vesting both powers in one agency. Ultimately, this Article concludes that the *Chevron* framework should apply as a general rule to agency interpretations of split-authority statutes.

These split-authority statutes frequently arise in the context of employment law and include certain whistleblower statutes, like the Sarbanes-Oxley Act (SOX),[4] and worker's safety statutes, including the Occupational Safety and Health Act (OSH Act) and the Federal Mine Safety and Health Amendments Act (MSHA).[5] As to SOX, the DOL (Department of Labor) has formal

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1. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). The *Chevron* doctrine generally applies where it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." United States v. Mead Corp., 533 U.S. 218, 219 (2001). If *Chevron* applies, a court should defer to an agency's interpretation where: (1) the statute is ambiguous; and (2) the agency's "construction is 'a reasonable policy choice for the agency to make.'" Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (quoting *Chevron*, 467 U.S. at 845).

2. *See* Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1396 (2017) (discussing the decisions weakening the scope of the *Chevron* doctrine).

3. *See* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 208 (2006) (statutes administered by multiple agencies may now "be the norm, rather than an exception"); Thompson Med. Co. v. FTC, 791 F.2d 189, 192 (D.C. Cir. 1986) ("[O]urs is an age of overlapping and concurring regulatory jurisdiction.").

4. *See* 18 U.S.C. § 1514A.

5. *See* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 n.2 (1987). The OSH Act and MSHA—in addition to being split-authority statutes—are also split-enforcement statutes (meaning one agency issues citations and the other adjudicates those citations). *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 894 (2001) (recognizing the OSH Act and MSHA as two statutes involving split-enforcement schemes, as well as the Longshore and Harbor Workers' Compensation Act); Martin v. OSHRC, 499 U.S. 144, 151 (1991) (discussing the "unusual regulatory structure" established by the OSH Act whereby adjudicative powers were assigned to one agency and

adjudicative authority over whistleblower claims, and the SEC (Securities and Exchange Commission) has rulemaking authority to promulgate any rules and regulations that further the purposes of the statute.[6] Notably, unlike some split-authority statutes, SOX contains a unique "kick-out" provision, which, although initially requiring a complainant to file a SOX complaint with the DOL, allows an employee to refile in the appropriate federal district court for de novo review under certain circumstances even if the DOL has not yet issued a final decision.[7] SOX was the first whistleblower statute to contain this unique provision, although ten other whistleblower statutes administered by the DOL now contain such a kick-out provision (not all, however, are split-authority statutes).[8] SOX's inclusion of the kick-out provision complicates the inquiry as to when *Chevron* deference applies and creates questions as to whether Congress intended the courts, rather than an agency, to have primary interpretive authority as to SOX and similar whistleblower statutes.

Federal district and appellate courts have expressed an unwillingness to accord deference under the well-known *Chevron* doctrine to the DOL's interpretations of SOX, in part, due to the risk of the other agency issuing a conflicting interpretation.[9] The Supreme Court has thus far managed to avoid

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rulemaking powers were assigned to another agency). I use the term "split authority," rather than the more frequently used term "split enforcement," to describe statutes like SOX (which does not involve enforcement being split between two agencies) in addition to statutes like the OSH Act and MSHA.

6. 18 U.S.C. § 1514A(b)(2); 49 U.S.C. § 42121(b) (conferring the DOL with formal adjudicative authority as to SOX whistleblower complaints); 15 U.S.C. § 7202(a) (providing that the SEC "shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act"). Unlike the OSH Act and MSHA, where the agency with rulemaking authority also prosecutes OSH Act claims, the SEC does not play a prosecutorial role, but rather just has rulemaking authority, as the statutory scheme contemplates whistleblowers (rather than the SEC) independently pursuing their own claims. *See* 18 U.S.C. § 1514A(b)(2); 49 U.S.C. § 42121(b).

7. *See* 18 U.S.C. § 1514A(b)(1)(B).

8. Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, 69 Fed. Reg. 52104, 52190–10 (Aug. 24, 2004); *Whistleblower Statutes Summary Chart*, OSHA, U.S. DEP'T OF LABOR (Oct 7, 2019), https://www.whistleblowers.gov/sites/wb/files/2019-12/WB-Statute-Summary-Chart-10.8-Final.pdf [https://perma.cc/4LGZ-SGXM].

9. *See* Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 342–45 (2013) (describing the "traditional" approach of awarding no deference where more than one agency administers a statute). As Ryan Doerfler has noted, the question of which agency's interpretation of a statute that multiple agencies administer presents a "hard" case. *See* Ryan D. Doerfler, *Can a Statute Have More Than One Meaning?*, 94 N.Y.U. L. REV. 213, 260–61 (2019). However, that is not a basis for courts to continue to brush such questions off, as opposed to grappling with the issue directly. *Id.*

answering this *Chevron* deference question, and this question has failed to receive in-depth analysis by scholars.[10]

This Article contends that both the DOL and the SEC have the authority to act with the force of law as to SOX's whistleblower provisions and that courts should apply the *Chevron* doctrine to their interpretations of the statute so long as they do not conflict, which, as explained herein, will rarely be the case.[11] Thus, this Article argues that SOX's split-authority model and kick-out provision in no way precludes application of the *Chevron* doctrine to the DOL's and SEC's interpretations of the statute. The *Chevron* doctrine's applicability to SOX is consistent with current Supreme Court precedent and also is a normatively desirable outcome.[12] Moreover, when a conflict does occur, a court can easily resolve the conflict as set forth herein.

This Article's analysis of SOX's whistleblower provisions not only adds to the administrative law scholarship on the *Chevron* doctrine, but also contributes to the body of work on whistleblower laws, like SOX, generally. Articles on whistleblower protection frequently address the substantive standards applicable to whistleblower claims, but largely ignore the foundational question of whether the DOL, the SEC, or the courts have primary interpretative authority as to SOX and similar whistleblowing statutes.[13] This question as to whether *Chevron* applies may be outcome determinative in many cases, as agency standards are currently more whistleblower-friendly than those standards a court would adopt in the absence of *Chevron* deference.

In analyzing the question of *Chevron*'s applicability to SOX, it becomes clear, however, that the SEC has largely neglected its role in SOX's split-authority scheme and should take on a more significant role with respect to the

10. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1208–09 (2012) (observing that rulings declining to accord *Chevron* deference to an agency interpretation of a statute administered by multiple agencies arises in part due to the risk of inconsistent interpretations of the same statute); *see also* Doerfler, *supra* note 9, at 222 (explaining that the Supreme Court "has, for decades, failed to settle under what conditions 'deference is warranted for agency views of a statute that multiple agencies . . . administer'" and noting that this is "especially worrisome when shared enforcement authority 'can be found throughout the administrative state, in virtually every sphere of social and economic regulation'"). One scholar has described the question of deference in the context of a split-function scheme as "particularly nettlesome." *See* Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: The Case for a Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L.J. 389, 392 (1991).

11. *See infra* Section III (containing a discussion of the applicable analyses when they do conflict).

12. City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

13. Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 94 n.380 (2005) (arguing, in a footnote, that the DOL's interpretations of SOX are not entitled to *Chevron* deference).

statute, either by coordinating with the DOL to engage in joint rulemaking or by further providing technical expertise to the DOL. Such inter-agency cooperation would provide an even stronger basis for according *Chevron* deference to the agencies' interpretations of SOX.

This Article proceeds in four parts. Section I of this Article provides background on SOX's whistleblower provisions, including describing the relevant legislative history and administrative exhaustion requirements. It also explains the DOL's and SEC's current roles with respect to interpreting SOX. Section II of this Article provides background on the *Chevron* doctrine and models of shared regulatory jurisdiction. It argues that *Chevron* should apply to agency interpretations of split-authority statutes in the absence of express congressional intent to the contrary. This section also sets forth a new framework to be used in the event that agency interpretations conflict. Section III explores SOX's legislative history and relevant Supreme Court precedent to ultimately conclude that courts should defer to the DOL's and SEC's interpretation of SOX. Section IV argues that, as a normative matter, according *Chevron* deference to both the DOL's and SEC's interpretations of SOX is desirable, as it increases certainty and consistency in the law in addition to reducing agency waste and allowing for flexibility in interpreting SOX, which allows the agencies to account for changed circumstances and new information. This Article also urges for the SEC to take a greater role as to SOX's whistleblower provisions.

II. BACKGROUND ON SOX

A. SOX's Text and Legislative History

SOX provides that no publicly traded company or its contractor "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because the employee has engaged in protected activity.[14] An employee engages in protected activity where he or she provides information or otherwise assists in an investigation "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . ."[15] The information or

14. 18 U.S.C. § 1514A(a). The Supreme Court held in 2014 that SOX's protections extend to employees of contractors of publicly traded companies. *See generally* Lawson v. FMR LLC, 571 U.S. 429 (2014).

15. 18 U.S.C. § 1514A(a)(1).

assistance must be provided to: (1) a federal regulatory or law enforcement agency; (2) any member or committee of Congress; or (3) the employee's supervisor.[16]

The DOL and federal courts generally agree that, to establish a prima facie case of retaliation under SOX, an employee must prove: "(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action."[17] If the employee establishes by a preponderance of the evidence a prima facie case, "the employer may avoid liability if it can prove 'by clear and convincing evidence' that it 'would have taken the same unfavorable personnel action in the absence of that protected activity.'"[18]

An employee prevailing in a proceeding under SOX is entitled to reinstatement with the same seniority status that the employee would have had, but for the discrimination, back pay with interest, and "special damages sustained as a result of the discrimination," including compensation for litigation costs and reasonable attorney fees.[19]

As the Supreme Court has recognized, Congress enacted SOX to "safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation."[20] SOX's focus is primarily one of law enforcement, as it centers on "prevent[ing] and punish[ing] corporate and criminal fraud, protect[ing] the victims of such fraud, preserv[ing] evidence of such fraud, and hold[ing] wrongdoers accountable for their actions."[21]

To achieve this goal, Congress sought to "encourage" employees to report fraudulent activity by protecting employees who did report acts of fraud.[22] Congress found this necessary in light of "abundant evidence that Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a 'corporate code of silence'; that code, Congress found 'discouraged employees from reporting fraudulent behavior not only to the proper authorities, such as

16. § 1514A(a)(1)(A)–(C).

17. Fordham v. Fannie Mae, 12-061, ALJ's Recommended Decision (Dep't of Labor Oct. 9, 2014).

18. *Id.* at *48 (citing courts adopting the same standard).

19. 18 U.S.C. § 1514A(c).

20. Lawson v. FMR LLC, 571 U.S. 429, 432 (2014) (citing S. REP. NO. 107-146, at 2–11 (2002)).

21. *Id.* at 434 (citing S. REP. NO. 107-146, at 2 (2002)).

22. S. REP. NO. 107-146, at 2, 4–5, 19 (2002). Indeed, the first paragraph of the Senate Report states that one of its purposes is to "protect whistleblowers against retaliation by their employers." *Id.* at 1.

the FBI and the SEC, but even internally.'"[23] Congress discovered Enron employees, as well as employees of Enron's accounting firm, Arthur Andersen, faced retaliation (including possible termination) if they attempted to report corporate misconduct.[24] Indeed, outside counsel for Enron had advised that its retaliatory actions were not prohibited under the law at the time.[25] Congress thus "identified the lack of whistleblower protection as 'a significant deficiency' in the law, for in complex securities fraud investigations, employees 'are often the only firsthand witnesses to the fraud.'"[26]

Congress noted that those who reported fraud were subject to the "patchwork and vagaries of current state laws," such that an employee in one state "may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions."[27] By enacting SOX, however, Congress sought to implement a consistent standard that would protect whistleblowers nationally.[28]

Immediately following its enactment, SOX was described as the "most important whistleblower protection law in the world" and the "gold standard" of anti-retaliation laws.[29] It led to an expansion of anti-retaliation laws generally, many modeled after SOX by providing for initial adjudication of the claim before an administrative agency with the ability to seek de novo review in federal district court in certain circumstances.[30] However, it soon became evident that SOX was not achieving its purpose of protecting whistleblowers from retaliation.[31] Further, the financial crisis of 2008 suggested SOX's anti-retaliation provisions did not do enough in encouraging whistleblowers to report wrongful conduct.[32]

Thus, in 2010, Congress enacted Dodd-Frank.[33] Dodd-Frank's primary purpose was to "promote the financial stability of the United States by improving accountability and transparency in the financial system."[34] Dodd-

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23. *Lawson*, 571 U.S. at 435 (brackets omitted).

24. *Id.*

25. *Id.*

26. *Id.* (brackets omitted).

27. S. REP. NO. 107-146, at 10.

28. *Id.*

29. Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 9–10 (2012) (citations omitted).

30. *Id.* at 11–13, 13 n.71; *see also infra* Section II.B.

31. *Id.* at 39.

32. *Id.* at 26–27, 35–38.

33. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, § 922(c)(1)(B), 124 Stat. 1376 (2010).

34. Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 773 (2018).

Frank sought to strengthen the SEC's ability to regulate the securities market, and to accomplish this goal, "established a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC."[35] Included in this program were anti-retaliation provisions to protect whistleblowers who disclose information to the SEC in "relation to a violation of the securities laws," as Congress recognized that "whistleblowers often face the difficult choice between telling the truth and . . . committing 'career suicide.'"[36]

Congress authorized the SEC to issue rules and regulations applicable to Dodd-Frank's whistleblower provisions and did not confer on the DOL any role with respect to Dodd-Frank.[37] In contrast to SOX, employees with a claim under Dodd-Frank have the right to sue directly in federal court, without first exhausting their remedies before an administrative agency.[38] Furthermore, the statute of limitations for bringing a claim under Dodd-Frank is significantly longer than under SOX (six years after the date of the violation) and there is the potential of a double back pay award.[39] Thus, the remedies available under Dodd-Frank are more employee-friendly than the remedies under SOX, which originally provided only for 90 days to file a complaint with the DOL (and now provides for 180 days, as noted below) and provides only for back pay (not double back pay).[40]

As part of Dodd-Frank's provisions, Congress also amended SOX to make its anti-retaliation provisions more robust.[41] Specifically, Congress broadened the class of covered employees under SOX to include employees of nationally recognized statistical rating organizations, expressly guaranteed the right to a jury trial (when the employee is able to proceed in district court pursuant to the

35. *Id.*

36. *Id.* at 773–74; *see* 15 U.S.C. § 78u–6. Dodd-Frank also created: (1) whistleblower protections for employees of consumer financial services entities, 12 U.S.C. § 5567; (2) a new system of bounty incentive rewards for whistleblowers who disclose to the SEC violations of a broad range of securities laws, when the SEC recovers more than $1 million from the violator, 15 U.S.C. § 78u–6; and (3) whistleblower protections under the Commodity Exchange Act, 7 U.S.C. § 26. It also amended the False Claims Act (FCA) to prohibit retaliation against individuals associated with whistleblowers under the FCA because of the whistleblower's protected activity. 31 U.S.C. § 3730(h); Dodd-Frank, § 3301(c).

37. 15 U.S.C. § 78u–6(j) (authorizing the SEC "to issue such rules and regulations as may be necessary or appropriate to implement the provisions of [§ 78u–6] consistent with the purposes of this section").

38. § 78u–6(h)(1)(B).

39. § 78u–6(h)(1)(B)(iii),(C)(ii).

40. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 803–804 (2010).

41. Dodd-Frank, § 922.

kick-out provision discussed below), precluded mandatory pre-dispute arbitration agreements, and lengthened the statute of limitations from 90 days to 180 days.[42]

For a period, it was unsettled as to whether Dodd-Frank's anti-retaliation provisions effectively supplanted those set forth in SOX. Specifically, the SEC promulgated a rule implementing Dodd-Frank's whistleblower provisions that provided an employee was entitled to protection under Dodd-Frank if they reported possible securities law violations to the SEC or reported one of the SOX enumerated offenses to the SEC or internally.[43] The circuit courts were split as to whether to defer to this rule.[44]

In *Digital Realty Trust, Inc. v. Somers*, the Supreme Court held that, the plain language of Dodd-Frank, which defined a whistleblower as someone who reports violations of the securities laws to the SEC, meant that, to qualify for whistleblower protection under Dodd-Frank, the individual must report the securities law violation to the SEC.[45] Thus, an employee subject to an adverse action following a report to a supervisor of a violation of one of the § 1514A enumerated offenses is only protected to the extent they are entitled to relief under SOX and does not qualify for protection under Dodd-Frank.[46]

SOX's provisions thus remain essential to encouraging internal whistleblowing, which is not protected by Dodd-Frank. Out of the twenty-two whistleblower statutes the DOL administers, SOX is ranked fourth in terms of number of complaints received by the DOL.[47] Many employees will only raise their complaint internally, perhaps out of a sense of loyalty, and may be subject to an adverse action before having an opportunity to report it to the SEC.[48] Further, internal reporting by employees is important, benefiting shareholders, employees, and the public.[49] For example, it allows companies to learn about

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42. *Id.*

43. Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 775 (2018) (quoting 17 C.F.R. § 240.21F–2(b)(1)(i)–(ii) (2018)).

44. *Id.* at 776.

45. *Id.* at 777–78.

46. *Id.* at 778.

47. *See Data and Statistics: Top 4 Complaints by Statute*, OSHA., U.S. DEP'T OF LABOR, https://www.whistleblowers.gov/factsheets_page/statistics [https://perma.cc/VP2Z-ZSZY].

48. Cynthia Cooper of WorldCom is one such example. After reporting her discovery of fraud to the board of directors' audit committee, the board terminated the chief financial officer who was responsible for the fraud and disclosed the fraud to the public. Richard Moberly, *Sarbanes-Oxley's Structural Model to Encourage Whistleblowers*, 2006 BYU L. REV. 1107, 1117–18 (2006).

49. *Id.* at 1161; *see* United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 742 (D.C. Cir. 1998) ("Nor would it be in the interest of law-abiding employers for the statute to force employees

"mistaken employee views and perspectives before these mistaken views are made public, at which point they are harder to correct."[50] Further, it allows companies "to avoid costs related to the negative publicity and government intervention that follows external whistleblowing," including the possibility of a drop in share value.[51] And, it provides companies with the "opportunity to correct misconduct earlier and thereby save costs related to future litigation."[52] Thus, as SOX protects internal complaints, unlike Dodd-Frank, it "correct[s] the wrongdoing as quickly and efficiently as possible."[53]

B. The Administrative Framework for Adjudicating SOX Whistleblower Claims

Congress conferred formal adjudicative authority as to SOX's whistleblower provisions with the DOL.[54] However, it delegated rulemaking authority to the SEC.[55] Thus, as to SOX's whistleblower provisions, rather than vest one agency with both adjudicative and rulemaking authority, Congress split authority between two agencies, utilizing a split-authority model.

The DOL has initial responsibility for investigating and adjudicating claims filed under SOX.[56] The Secretary of Labor has delegated responsibility to

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to report their concerns outside the corporation in order to gain whistleblower protection. Such a requirement would bypass internal controls and hotlines, damage corporate efforts at self-policing, and make it difficult for corporations and boards of directors to discover and correct on their own false claims made by rogue employees or managers."); *see also* Passaic Valley Sewerage Comm'rs v. DOL, 992 F.2d 474, 478–479 (3d Cir. 1993) (concluding "it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, as to facilitate prompt voluntary remediation and compliance with the Clean Water Act").

50. Moberly, *supra* note 48, at 1151.

51. *Id.*

52. *Id.*

53. *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 285 (1991) (discussing generally the primary goals of whistleblower laws).

54. 18 U.S.C. § 1514A(b)(2); 49 U.S.C. § 42121(b) (conferring the DOL with formal adjudicative authority as to SOX whistleblower complaints). A formal adjudication is one "required by statute to be determined on the record after opportunity for an agency hearing . . . ." *See* 5 U.S.C. § 554(a). "[I]nformal adjudication [by contrast] occurs when an agency determines the rights or liabilities of a party in a proceeding to which [a formal adjudication under the APA] does not apply." Movimiento Democracia, Inc. v. Johnson, 193 F. Supp. 3d 1353, 1365 (S.D. Fla. 2016) (internal quotation marks omitted).

55. 15 U.S.C. § 7202(a) (providing that the SEC "shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act").

56. *See* 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(A).

investigate such claims to the Occupational Safety and Health Administration (OSHA).[57] An employee must file a complaint with the Department of Labor (DOL) within 180 days of the date the employee became aware of the violation.[58] OSHA then investigates the complaint and determines whether it has merit.[59]

If a party fails to prevail at the OSHA level, that party can appeal to the DOL's Office of Administrative Law Judges (OALJ) for a formal adjudication of the complaint.[60] This stage generally includes discovery and a hearing before an administrative law judge (ALJ).[61] The non-prevailing party before the ALJ can, in turn, appeal the ALJ's findings to the Administrative Review Board (ARB).[62] The ARB's determination on a SOX claim constitutes the agency's final decision and is reviewable by a federal court of appeal under the standards set forth in the Administrative Procedure Act (APA).[63] Both the ALJ and ARB, in issuing decisions, are often called upon to interpret SOX's whistleblower provisions.[64]

SOX has a unique provision not previously included in whistleblower laws that allows an employee to file their complaint in the district court prior to exhausting the administrative process in certain circumstances.[65] Specifically,

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57. *See* Secretary's Order 5-2002, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 67 Fed. Reg. 65,008 (Oct. 22, 2002).

58. 18 U.S.C. § 1514A(b)(2)(D). The OSHA rules provide for filing a written or verbal complaint. 29 C.F.R. § 1980.103(b).

59. *See* 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(2)(A).

60. 49 U.S.C. § 42121(b)(2)(A).

61. 29 C.F.R. §§ 1980.106, 1980.107(b). Although OSHA generally issues a preliminary finding on a SOX complaint and complainants are provided the opportunity to file "objections" to the findings to the ALJ, no deference is given to OSHA finding's—rather the ALJ's review is de novo. 29 C.F.R. § 1980.107(b).

62. 29 C.F.R. § 1980.110.

63. 5 U.S.C. § 706; *see* 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4); 29 C.F.R. § 1980.110(b). "The administrative scheme underlying [SOX] has been described as 'judicial in nature' and designed to resolve the controversy on its merits." Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1373 (N.D. Ga. 2004).

64. *See generally, e.g.*, Sylvester v. Parexel Int'l LLC, No. 07–123, 2011 WL 2165854 (May 25, 2011).

65. *See* 18 U.S.C. § 1514A(b)(1)(B) (providing that an individual may bring "an action at law or equity for de novo review in the appropriate district court of the United States" if a final decision has not been issued by the Secretary of Labor within 180 days after the filing); *see also* Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, 69 Fed. Reg. 52104, 52111 (Aug. 24, 2004) ("This provision authorizing a Federal court complaint is unique among the whistleblower statutes administered by the Secretary. This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending on review by the Board.").

under this kick-out provision, if the ARB does not issue a final decision within 180 days of the filing of the complaint, and the delay is not due to bad faith on the complainant's part, the complainant may proceed to federal district court for de novo review.[66] Although SOX was the first statute to include this provision, now ten more statutes administered by the DOL contain such provisions.[67]

Once an employee removes his case to federal court under a kick-out provision, the court does not accord any level of deference to the facts found in the administrative proceedings below, even if the ALJ held a bench trial on the employee's claims.[68] For context, this means an employee could: (1) have his complaint investigated and dismissed by OSHA; (2) appeal to the ALJ, complete discovery and a bench trial before the ALJ, and have his claim dismissed by the ALJ; (3) appeal to the ARB and present arguments to the ARB; and (4) prior to a final decision being issued by the ARB, refile the claim in the district court so long as 180 days since the initial filing of the complaint have passed. The employee could then obtain additional discovery in the district court, proceed to a jury trial in the district court where the facts would be reviewed de novo, obtain an unfavorable verdict, and then appeal to an appellate court.

The Fourth Circuit has concluded that application of SOX's kick-out provision, found in section 1514A(b)(1)(B), in this way does not lead to an absurd result.[69] Specifically, where a SOX claim has been filed in district court pursuant to the kick-out provision, a court should not "give any deference to prior administrative findings," even if deferring to the administrative agency would be more efficient.[70] Although Congress had "unquestionably chose an aggressive timetable for resolving whistleblower claims," it had "reasonably created a cause of action in an alternative forum" if the DOL was unable to meet the 180-day timetable.[71] "A natural result of the aggressive timeframe is that efforts will be duplicated when the DOL engages in a thorough, yet

66. 18 U.S.C. § 1514A(b).

67. *See Whistleblower Statutes Summary Chart*, *supra* note 8.

68. *See* 29 C.F.R. § 1980.114(a); *see* Stone v. Instrumentation Lab'y Co., 591 F.3d 239, 246, 249 (4th Cir. 2009).

69. *Stone*, 591 F.3d at 249.

70. *Id.* at 246.

71. *Id.* at 248.

administratively non-final process that fails to resolve the administrative case within the prescribed timeframe."[72]

C. Conflicting Interpretations of SOX

Although courts generally agree district courts owe no deference to the DOL's findings of fact where SOX's kick-out provision is utilized, the question of the level of deference afforded interpretations of SOX is unsettled.[73] Thus far, federal district courts and appellate courts have issued interpretations of SOX that conflict with those interpretations rendered by the DOL, including disagreeing with the DOL as to the meaning of the reasonable belief requirement of a SOX whistleblower claim.[74] Other potential areas of disagreement include whether the Title VII retaliation adverse action standard also applies to SOX;[75] whether a report about fraud generally is sufficient to qualify as protected activity under SOX;[76] and what laws are included in the phrase "any provision of federal law relating to fraud against shareholders."[77]

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72. *Id.*; *see* Candler v. URS Corp., No. 3:13-CV-1306-B, 2013 WL 5353433 (N.D. Tex. Sep. 25, 2013) (concluding that allowing the complainant to exercise her statutory right to de novo review in federal court after completing two levels of administrative review is not "the sort of result that is 'so bizarre that Congress could not have intended it'" and summarizing cases in accord).

73. *See* discussion *infra* Section IV.

74. *Compare* Sylvester v. Parexel Int'l LLC, No. 07–123, 2011 WL 2165854, at 10–13 (May 25, 2011) (interpreting the reasonable belief requirement broadly), *with* Northrop Grumman Sys. Corp. v. DOL, 927 F.3d 226, 235 n. 9 (4th Cir. 2019), *and* Rocheleau v. Microsemi Corp., Inc., 680 F. App'x 533, 536 (9th Cir. 2017), *and* Dietz v. Cypress Semiconductor Corp., 711 F. App'x 478, 484 (10th Cir. 2017) (all narrowly construing the reasonable belief requirement).

75. *Compare* Menedez v. Halliburton, Inc., 2007-SOX-005, ARB's Decision and Order of Remand (Dep't of Labor Sept. 13, 2011) (concluding that section 1514A's language was broader than Title VII's retaliation language, and thus, "adverse action" under SOX "must be more expansively construed than that under Title VII," such that "adverse actions" refer to "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged"), *with* Kshetrapal v. Dish Network, LLC, Case No. 14-cv-3527, 2018 WL 1474375, at *29 (S.D.N.Y. Mar. 23, 2018) (concluding that a standard less expansive than that applicable to Title VII retaliation claims applies to SOX retaliation actions, and thus, "Section 1514A, like the substantive antidiscrimination provision of Title VII, is limited to discriminatory actions that affect 'the terms and conditions of employment'").

76. The Fourth Circuit has determined that the phrase "any rule or regulation of the [SEC]" only applies to rules or regulations of the SEC that relate to fraud. Livingston v. Wyeth, Inc., 520 F.3d 344, 351–52 n.1 (4th Cir. 2008). The Court found that, "[t]o conclude otherwise would absurdly allow a retaliation suit for an employee's complaints about administrative missteps or inadvertent omissions from filing statements" and the legislative history indicates whistleblowing is only protected by § 1514A when it relates to fraud. *Id.*

77. As to laws "relating to shareholder fraud," courts have thus far expressed a reluctance to extend it to laws other than securities fraud actions under Rule 10b-5. Thus, it is unclear whether

The lack of clarity as to these questions results in uncertainty for potential whistleblowers as to whether they would be protected against retaliation if they were to report potentially fraudulent conduct, which, in turn, discourages them from making such reports. As the purpose of SOX is to encourage potential whistleblowers to report conduct that they suspect may be fraud, this uncertainty undermines SOX.

By contrast, the DOL and SEC have not rendered conflicting interpretations of SOX. In fact, the SEC has not issued any regulations interpreting SOX's whistleblower provisions, despite having general rulemaking authority as to SOX, suggesting it agrees with the DOL's interpretations of SOX thus far.[78]

III. THE APPLICABILITY OF *CHEVRON* TO SPLIT-AUTHORITY STATUTES

Whether the federal courts defer to the DOL's interpretations of SOX issued in the course of formal adjudications of SOX whistleblower claims turns, in large part, on whether the *Chevron* doctrine applies to those interpretations. It is currently an open question, however, as to whether the *Chevron* doctrine applies to a statute, like SOX, that multiple agencies administer.

A. The Chevron *Doctrine: A Primer*

The *Chevron* doctrine—which is central to administrative law—provides a two-step framework for evaluating an agency's construction of a statute that it administers.[79] First, the court asks (1) whether the statute is clear or ambiguous;

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reports concerning violations of the Foreign Corrupt Practices Act's (FCPA) books-and-records statute, Section 13(b)(2)(A) of the Securities Exchange Act, 15 U.S.C. § 78m(b)(2)(A), (5)(A), fall into the "shareholder fraud" catchall. *See In re* Gupta, 2010-SOX-54, Order and Summary Dismissing Complaint (Dep't of Labor Jan. 7, 2011) (concluding SOX's protections did not extend to reports regarding FCPA violations); *cf.* Wadler v. Bio-Rad Lab'ys, Inc., 916 F.3d 1176, 1186, 1187 (9th Cir. 2019) (holding that the FCPA does not constitute a "rule or regulation of the SEC," but not deciding whether it fell into the "shareholder fraud" catchall). *But see* Vaughn, *supra* note 13, at 22–23 (arguing that, by protecting "any" law "relating to" fraud against shareholders, the Act protects disclosures about not only securities laws, but also "any other federal law that relates to the ability of shareholders to protect themselves against fraud, such as the Foreign Corrupt Practices Act").

78. *See* Lawson v. FMR LLC, 571 U.S. 429, 439 n.6 (2014). The fact that the SEC has not issued any such rules should not be construed to mean the SEC does not have this authority, as this would mean no agency had rulemaking authority as to SOX's whistleblower provisions, despite certainty as to those provisions being particularly important, as certainty of standards encourages employees to report suspected misconduct.

79. *See* City of Arlington v. FCC, 569 U.S. 290, 296 (2013) (discussing *Chevron's* two-step framework). Although the doctrine's two-step framework, at first glance, appears straightforward, debate abounds as to what the inquiry under step one versus step two entails. *See* Bednar & Hickman, *supra* note 2, at 1423–25 (summarizing the debate as to the inquiry at steps one and two, including whether legislative history can be examined at step one in the search for ambiguity). Indeed, some

and (2) if the statute is ambiguous, whether the agency's construction "is a reasonable policy choice for the agency to make."[80] If the construction is reasonable, courts should defer to that construction, as opposed to imposing the court's own construction on the statute.[81] The doctrine has recently been subjected to criticism both in the scholarship and by the courts. Further, despite the apparent simplicity of the doctrine, open questions regarding its scope remain.

i. Criticism of *Chevron*

Chevron has been the subject of significant criticism, with many calling for the replacement of *Chevron* with a new doctrine for review of agency interpretations.[82] This criticism arises, in part, from the confusion as to when *Chevron* applies (due to the Justices' failure to apply *Chevron* consistently) and the time and resources dedicated to attempting to determine when *Chevron* applies, as opposed to focusing on questions of statutory interpretation and the reasonableness of agency action.[83]

The more existential threats to the continued existence of *Chevron* arise from attacks on its constitutionality and whether it contravenes the APA. Most recently, in the Supreme Court's 2019 decision in *Kisor v. Wilkie*, which significantly restricted the applicability of the *Auer* deference doctrine (concerning whether to defer to agency interpretations of ambiguous agency regulations),[84] Justices Gorsuch and Thomas agreed in a concurrence that "there

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scholars have argued that *Chevron*, in fact, has only one step—"whether the agency's construction is permissible as a matter of statutory interpretation." *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009). This Article does not wade into this debate, but merely notes that, even where it is clear that the *Chevron* doctrine applies, the exact inquiry that must be undertaken is not always clear.

80. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43, 845 (1984).

81. *Id.* at 843–44.

82. Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 3 (2017) (concluding that the *Chevron* doctrine should be abandoned because "there is little reason to think" application of *Chevron* over *Skidmore* is frequently outcome determinative).

83. *Id.* at 4 (summarizing criticism of the *Chevron* doctrine, including noting the House's passage of the Separation of Powers Restoration Act of 2016, which commands courts to conduct de novo review of agency statutory constructions and describing *Chevron* and its progeny as "this ever-expanding doctrinal maze [that] has generated controversy and confusion, benefiting administrative law professors but burdening most everyone else"); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 836 (2010) (noting that there is "extensive litigation, especially in the Supreme Court and court of appeals, concerning the various issues that arise under *Chevron*" and describing the *Chevron* doctrine as likely being a "net waste of resources for parties, lawyers, and judges").

84. *See generally* Kisor v. Wilkie, 139 S. Ct. 2400, 2408–24 (2019).

are serious questions, too, about whether [the *Chevron*] doctrine comports with the APA and the Constitution," but the other justices either found *Kisor* had no impact on *Chevron* or declined to weigh in on this question.[85]

Other serious concerns regarding *Chevron* relate to the expansion of the administrative state, and policy agendas (that lack support in Congress) being implemented by agencies by way of exploiting potential ambiguities in statutes. Although largely outside of the scope of this Article, I find persuasive Cass Sunstein's recent argument that these concerns should not be addressed through abolishment of the doctrine altogether, as that would result in unelected judges, rather than democratically accountable executive branch officials, interpreting all ambiguities.[86] Rather, to address such concerns, both steps of *Chevron* should be "taken seriously," meaning that judges only proceed to step two if the statute truly is ambiguous and, as to step two, ensure that the agency's interpretation of a statutory term is reasonable.[87] Further, application of nondelegation canons further ensures that agency discretion is limited.[88]

Setting aside this criticism, until *Chevron* is judicially (or legislatively) overruled, it continues to remain the primary deference doctrine applicable to review of agency interpretations of statutes made in the course of formal adjudications or rulemaking. Moreover, as set forth by Nicholas Bednar and Kristin Hickman, *Chevron*, or some version of it, will continue to exist so long as Congress continues to delegate policymaking discretion to agencies.[89] Thus, this Article assumes the continued existence of the *Chevron*/*Mead* framework in arguing that courts should defer to the DOL's and SEC's interpretations of SOX, as opposed to proposing any new framework for review of agency interpretations of statutes.

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85. *Id.*at 2446 n.114. By contrast, Justice Roberts expressly stated that *Kisor* does not bear on the question of *Chevron* deference because "[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress." *Id.* at 2425. In a separate concurrence, Justices Kavanaugh and Alito agreed with Justice Roberts. *Id.* at 2249. Justices Kagan, Ginsburg, Breyer, and Sotomayor did not weigh in on the impact of *Kisor* on *Chevron*. As to the question of constitutionality and the APA, as Cass Sunstein recently argued, no constitutional problem exists "[s]o long as *Chevron* is understood as a response to congressional instructions." *See* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1679 (2019). A full discussion on the constitutionality of *Chevron* and whether it contravenes the APA is beyond the scope of this Article.

86. Sunstein, *supra* note 85, at 1669–72.

87. *Id.* at 1672–73.

88. *Id.* at 1674–78.

89. *See* Bednar & Hickman, *supra* note 2, at 1454.

ii. *Chevron*, *Mead*, and Congressional Intent

> Current Supreme Court jurisprudence frames the *Chevron* doctrine as being rooted in a background presumption of congressional intent: namely, that Congress, when it left ambiguity in a statute administered 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.[90]

Thus, the purpose of the doctrine, in part, is to "provide[] a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[91] The Court has recognized that "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[92]

The rationale that agencies, not courts, should resolve statutory ambiguities, rests in part on the recognition in *Chevron* that agencies "maintain a comparative institutional advantage over the judiciary in interpreting ambiguous legislation that the agencies are charged with applying."[93] That is because, where there are statutory ambiguities, whoever interprets the statute will generally have to choose between two or more plausible interpretations.[94] That type of choice generally implicates policymaking, and the agencies "have superior political standing to the life-tenured federal judiciary in performing that policy making function."[95] Other bases for the *Chevron* presumption of implied delegation include "specialized agency expertise and the greater

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90. City of Arlington v. FCC, 569 U.S. 290, 296 (2013) (internal quotation marks omitted).

91. *Id.*

92. *Id.*

93. Laurence H. Silberman, Chevron–*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990); *see* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (setting forth advantages of agencies interpreting ambiguous statutes rather than courts); William N. Eskridge Jr., *Expanding* Chevron's *Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 414 (arguing that the advantages held by agencies to interpret statutes is so superior to that of courts that the *Chevron* doctrine should be applied even more liberally than the Supreme Court has held).

94. Eskridge, *supra* note 93, at 414.

95. Silberman, *supra* note 93, at 823; *see* Eskridge, *supra* note 93, at 426 ("[C]ompared with courts, one reason agencies are more competent to make big 'political' decisions (legally debatable decisions with important policy consequences) is that agencies are accountable to democratic institutions and popular participation in ways that unelected, life-tenured federal judges are not.").

likelihood of achieving a unified view through the agency than through review in multiple courts."[96]

Prior to the Supreme Court's 2001 decision in *United States v. Mead Corp.*, confusion existed as to the circumstances under which the *Chevron* doctrine applied—the so-called "*Chevron* Step Zero" question.[97] In *Mead*,[98] the Supreme Court held that *Chevron* deference is available only for those agency interpretations issued in the exercise of congressionally delegated authority to act with the force of law.[99] The Court concluded that congressional authorization to act with legal force exists where Congress expressly conferred on an agency: (1) rulemaking authority or (2) the authority to engage in formal adjudications.[100] Thus, following *Mead*, it became clear that the *Chevron* inquiry generally applies to agency interpretations promulgated in the course of rulemaking or issued as part of formal adjudications (so long as only one agency administers the statute at issue).[101] Where *Chevron* does not apply, an agency interpretation may still qualify for lesser *Skidmore* deference.[102]

Although *Mead* brought some clarity to the question of when the *Chevron* doctrine applies, it did not answer all questions relevant to *Chevron* Step Zero, including leaving unanswered the question of whether the *Chevron* doctrine applies to an agency interpretation of a statute administered by multiple agencies where there is the potential for conflicting interpretations of the same statutory provision.[103] Thus, whether the *Chevron* doctrine applies to the

96. *See* Collins v. NTSB, 351 F.3d 1246, 1253 (D.C. Cir. 2003); *see* Eskridge, *supra* note 93, at 421–22 (arguing that agencies have greater expertise than courts in interpreting statutes to carry out their purpose).

97. *See* Merrill & Hickman, *supra* note 5, at 836, 848–52 (defining Step Zero as "the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo" and summarizing the open questions related to Step Zero); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

98. 533 U.S. 218 (2001).

99. *Id.* at 226–27.

100. *Id.* at 230.

101. Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron's *Domain*, 70 DUKE L.J. 931, 957 (2021) ("Per *Mead*, if the agency's interpretation is the product of notice-and-comment rulemaking or formal adjudication, the case for *Chevron* is very strong; otherwise, an agency seeking deference has a much more difficult task."). *But see id.* at 964–82 (arguing for the overruling of *Mead* in part, such that it would apply only to rulemaking—not formal adjudications).

102. "An agency's position that does not qualify for *Chevron* treatment nonetheless deserves some deference [under *Skidmore*] to the extent that it has the 'power to persuade' based on, *inter alia*, the 'thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.'" Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 219 (2d Cir. 2014) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

103. Merrill & Hickman, *supra* note 5, at 849.

DOL's and the SEC's interpretation of SOX's whistleblower provisions remains unanswered by the Supreme Court, and no consensus has yet been reached by the lower courts.[104]

Whether *Chevron* applies to an agency interpretation of a statute is significant. Although the *Chevron* doctrine is a standard of review, not a rule of decision,[105] a recent study conducted by Kent Barnett and Christopher J. Walker demonstrates an appellate court is more likely to affirm the agency interpretation if *Chevron* deference is applied, rather than lesser *Skidmore* deference.[106] The study showed that, at the appellate level, an agency interpretation was more likely to prevail when *Chevron* deference was applied (with a 77.4% prevailing rate), as opposed to lesser *Skidmore* deference (with a 56.0% prevailing rate) or de novo review (with a 38.5% prevailing rate).[107] Others have similarly argued that such standards matter and may serve as a significant constraint on courts interpreting ambiguous statutes.[108]

B. Existing Scholarship on Shared Regulatory Jurisdiction

The question of whether *Chevron* deference applies to an agency interpretation of a statute administered by multiple agencies remains unclear,

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104. *See* Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 442 (2019) ("Courts faced with the question of how *Chevron* applies to multi-agency statutes have not reached consensus."); Joshua S. Sellers, *"Major Questions" Moderation*, 87 GEO. WASH. L. REV. 930, 967–68 (2019) ("A recurrent concern among both courts and administrative law scholars is whether *Chevron* deference should be given to agencies when implementing a statute that is jointly enforced by multiple agencies.").

105. Bednar & Hickman, *supra* note 2, at 1444. Although the *Chevron* doctrine is a standard of review (not a rule of decision), it still "serves important doctrinal functions in facilitating the organization of legal arguments and helping judges to think about their role vis-à-vis agencies." *Id.*

106. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6, 30 (2017); *see also* Murphy, *supra* note 82, at 43–47 (summarizing various empirical studies examining the impact standards of review have on whether a court ultimately affirms an agency's interpretation of a statute).

107. *See* Barnett & Walker, *supra* note 106, at 6, 30. These rates may be lower with respect to employment discrimination statutes, as the Court has been reluctant to defer to the EEOC's statutory interpretations of Title VII and similar employment discrimination statutes. James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 521 (2014). Further, it is important to note that other studies show application of *Chevron* is not as significant with respect to outcome, but it is unclear as to what causes this result, such as whether it is due to improper application of the test or other factors. *See* Yoav Dotan, *Deference and Disagreement in Administrative Law*, 71 ADMIN. L. REV. 761, 797 n.122 (2019) (summarizing different empirical studies as to the impact of application of the *Chevron* doctrine in the Supreme Court and at the appellate courts).

108. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard,* 107 COLUM. L. REV. 1235, 1250 (2007) (arguing that "deference standards matter" because "courts feel constrained by deference standards and speak sincerely when they discuss the application of those standards").

despite these multi-agency statutory schemes becoming increasingly common.[109] These statutes administered by multiple agencies do not, however, follow one model. Rather, multiple variations of these statutes exist, but only certain administrative structures create the risk of conflicting interpretations and pose the question left open following *Mead*. This section summarizes the different models and clarifies when the potential for conflict arises. It further examines the reasons why Congress may create such statutory schemes, and whether those reasons are consistent with according *Chevron* deference to agency interpretations of statutes where the potential for conflict exists.

i. Models of Shared Regulatory Jurisdiction

Jacob Gersen has set forth four theoretical models involving legislation authorizing two or more agencies to regulate a policy space.[110] The four models hinge on two factors: (1) exclusivity, which concerns whether Congress has granted authority to one agency or both; and (2) completeness, which concerns whether Congress has delegated authority to an agency to act over the entire policy space or only a subset of the space.[111] Where two agencies (or more) both have interpretative authority to regulate the same field, there is jurisdictional overlap, but where neither regulates a particular field, there is jurisdictional underlap.[112]

The first model involves Congress delegating complete and exclusive jurisdiction to each agency.[113] For example, this would occur if, in enacting SOX, Congress had delegated the DOL sole and complete authority to administer the whistleblower provisions and had delegated to the SEC sole and complete authority to administer all other provisions of SOX (except for the whistleblower provisions). This model does not implicate the question left open by *Mead*, as no potential for conflict exists (and neither jurisdictional overlap or underlap exists).

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109. City of Arlington v. FCC, 569 U.S. 290, 323 (2013) (quoting Gersen, *supra* note 3, at 208); *see* Thompson Med. Co. v. FTC, 791 F.2d 189, 192 (D.C. Cir. 1986). As scholars have noted, multiple reasons for Congress delegating to agencies (or to courts), as opposed to addressing such details itself, exist. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 368 (2010) (summarizing reasons why Congress may choose to delegate authority to agencies or to courts, including avoiding fighting over specific details where agreement has been reached on general policy matters; lack of congressional expertise; and where delegation is to agencies, flexibility with respect to interpretations).

110. Gersen, *supra* note 3, at 208.

111. *Id.*

112. *Id.*

113. *Id.*

The next model involves Congress delegating incomplete and exclusive jurisdiction.[114] This would occur if, in enacting SOX, Congress conferred on the DOL authority as to SOX's whistleblower provisions and conferred on the SEC authority as to SOX's financial disclosure provisions, but did not confer on any agency authority as to SOX's internal control provisions. This model also does not implicate the question left open by *Mead*, as again, no potential for conflicting interpretations exists, although jurisdictional underlap would exist, as neither agency was given authority as to SOX's internal control provisions.

The third model is what this Article refers to as the "split-authority" model and involves Congress delegating complete authority to two (or more) agencies, but giving nonexclusive jurisdictional assignments.[115] SOX as enacted utilizes this model. Specifically, the SEC has rulemaking authority as to SOX generally, whereas the DOL has formal adjudicative authority only as to SOX's whistleblower provisions.[116] Because the SEC and DOL both have authority as to the whistleblower provisions, the potential for conflicting interpretations of SOX whistleblower provisions exists. This is the question left open by *Mead* and involves jurisdictional overlap.[117]

The final model is a variation of the third, as it involves a nonexclusive shared jurisdiction scheme in which the grant of authority is incomplete.[118] This would occur if, for example, the SEC had rulemaking authority as to SOX generally (including its whistleblower provisions) except as to its internal control provisions, and the DOL had authority as to SOX's whistleblower provisions. As to the whistleblower provisions, the potential for conflicting interpretations exists, and jurisdiction is both overlapping and underlapping (as both agencies have authority as to the whistleblower provisions, but no agency has authority as to the internal control provisions).

Examples of legislation involving split-authority statutory schemes (and, thus, jurisdictional overlap) are becoming more common in the employment law context. These split-authority schemes involve Congress dividing regulatory activity between two separate agencies—giving one rulemaking authority and the second adjudicative authority. Aside from SOX[119] and other

114. *Id.* at 208–09.

115. *Id.* at 209.

116. 18 U.S.C. § 1514A(b)(2); 49 U.S.C. § 42121(b) (conferring the DOL with formal adjudicative authority as to SOX whistleblower complaints); 15 U.S.C. § 7202(a) (providing that the SEC "shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act").

117. Gersen, *supra* note 3, at 209.

118. *Id.*

119. 18 U.S.C. § 1514A(b)(2); 49 U.S.C. § 42121(b); 15 U.S.C. § 7202(a).

whistleblower statutes that use this model, such as the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), a law that protects employees of air carriers from retaliation for reporting violations of law relating to air carrier safety,[120] and the Federal Railroad Safety Act, a law that protects employees of railroads from retaliation for reports relating to railroad safety,[121] the OSH Act, the MSHA, and the Longshore & Harbor Workers' Compensation Act also involve this type of scheme.[122]

Importantly, this Article distinguishes these statutes with split-authority schemes from generic statutes like the APA and the Freedom of Information Act (FOIA). These statutes apply to numerous agencies, such that no agency can truly be said to administer them, and courts should therefore review any agency interpretation of these statutes de novo.[123] Further, this Article does not directly address other statutes, like the Rehabilitation Act (which twenty-seven agencies administer),[124] that do not have split-authority schemes.

ii. Differing Views on Whether *Chevron* Applies

Courts and scholars differ as to whether *Chevron* should apply to agency interpretations of statutes that multiple agencies administer. The "traditional" view is that, where more than one agency has interpretative authority as to a particular statute, the *Chevron* doctrine does not apply to either agency's interpretations of that statute.[125] Some courts, however, appear to rely upon a

120. The Federal Aviation Administration (FAA) has general rulemaking authority as to provisions relating to air safety whereas the DOL has formal adjudicative authority as to whistleblower claims involving air safety. 49 U.S.C. § 42121(b) (conferring the DOL with formal adjudicative authority as to whistleblower complaints relating to air safety); 49 U.S.C. § 44701(a)(5) (conferring the FAA with the authority to promulgate regulations "necessary for safety in air commerce and national security").

121. The Department of Transportation has authority to promulgate regulations concerning railroad safety. 49 U.S.C. § 20103. Whereas the DOL has formal adjudicative authority as to whistleblower complaints related to railroad safety. 49 U.S.C. § 20109.

122. *See* Merrill & Hickman, *supra* note 5, at 894 n.290.

123. *See*, *e.g.,* Collins v. NTSB, 351 F.3d 1246, 1253 (D.C. Cir. 2003); Gersen, *supra* note 3, at 220–21 (arguing that *Chevron* should not apply to "statutes that apply to all agencies but are not truly 'administered' by any agency," such as the APA and FOIA, because "Congress should not be taken to have implicitly delegated law-interpreting authority to any agency").

124. *See* Doerfler, *supra* note 9, at 251; Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (declining to decide whether the fact that the Rehabilitation Act was not delegated to a single agency "cause[d] us to withhold deference to agency interpretations under *Chevron*" because deference to the multiple agencies was warranted under *Skidmore*, as every agency to consider the issue had acted consistently).

125. *See* Sharkey, *supra* note 9, at 342–45 (describing the "traditional" approach of awarding no deference where more than one agency administers a statute); *see also Collins*, 351 F.3d at 1253; Salleh v. Christopher, 85 F.3d 689, 692 (D.C. Cir. 1996) (summarizing cases concluding that no deference is warranted where more than one agency is granted authority to interpret the same statute).

"presumption of exclusive jurisdiction," assuming that, "when Congress delegates power to the executive, it gives law-interpretating authority only to a single agency."[126] When agencies have overlapping jurisdiction, courts often presume that Congress delegated law-interpreting authority to the more expert agency as opposed to the less expert agency and examine other indicators of legislative intent.[127] This Article rejects both of those approaches and instead argues that both agencies should be accorded *Chevron* deference as to their interpretations in the absence of conflict.

First, that Congress has enacted a split-authority scheme says nothing about whether Congress intended neither agency or only one agency to have the authority to act with the force of law.[128] Scholars have argued that Congress may create split-authority statutory schemes for multiple reasons, many of which relate to improving administrative outcomes.[129] I do not seek to re-argue these points, but hope to build off of this scholarship. For example, some have suggested that such frameworks create competition between agencies, thus making it more likely that the congressional purposes underlying such statutes will be effectuated.[130] Indeed, "[g]iving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent."[131]

Such frameworks also "leverage broader agency expertise, hedge against failure or [agency] capture, and facilitate congressional monitoring of agency behavior . . . [in addition to] stimulat[ing] creativity, because agencies learn from one another, or because they can correct one another's mistakes."[132] Congress may also seek "fragmentation of policy authority to prevent the dominance of a single perspective within the bureaucracy."[133] Thus, both expertise and accountability may, in fact, be enhanced with respect to split-authority statutory schemes, and this may even warrant application of a

126. *See* Gersen, *supra* note 3, at 224.

127. *Id.* at 225. *Martin v. OSHRC* is an example of a case applying the exclusive jurisdiction presumption and engages in an analysis calculated to determine legislative intent as to which agency has exclusive interpretative authority. Martin v. OSHRC, 499 U.S. 144, 151 (1991).

128. Gersen, *supra* note 3, at 227.

129. Sellers, *supra* note 104, at 968.

130. *See* Jacobs, *supra* note 104, at 387–88 (summarizing the scholarship addressing overlapping jurisdictional statutory schemes).

131. Gersen, *supra* note 3, at 212.

132. *See* Jacobs, *supra* note 104, at 387–88.

133. *Id.* at 388.

presumption that *Chevron* applies to such schemes.[134] However, application of an exclusive jurisdiction presumption may actually undermine the goal of the statutory scheme, as it, in effect, destroys the competition between the two agencies and weakens the incentives for the agencies to work together to achieve congressional goals.[135]

Next, an exclusive jurisdiction presumption rejects the theoretical understanding of *Chevron* as being rooted in congressional intent and operating as a background rule of law against which Congress can legislate.[136] The exclusive jurisdiction presumption is instead consistent with pre-*Chevron* practice, where courts decided whether to defer on a case-by-case basis, examining factors such as the agency's expertise, the existence of rulemaking authority within the agency, and the complexity of the question.[137]

Application of a case-by-case approach to split-authority statutes would lead to reduced certainty as to outcomes and increase judicial policymaking without promoting other values.[138] Thus, the argument as to which approach to apply to split-authority statutes may, in part, be viewed as the ongoing debate of rules versus standards.[139] Justice Sotomayor's dissenting opinion in *Lawson v. FMR LLC*, is an example of the exclusive jurisdiction rationale and demonstrates how legislative history as to which agency Congress intended to have law-making authority is often unclear.[140] The search for genuine legislative intent in such cases may very well result in a "wild-goose chase," as "[i]n the vast majority of cases[,] . . . Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all."[141]

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134. *See* Sellers, *supra* note 104, at 968 (arguing that, "[b]ecause expertise and accountability are potentially enhanced when multiple agencies administer a statute, one might even think that a default rule favoring *Chevron* deference is warranted").

135. Gersen, *supra* note 3, at 225.

136. City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

137. This approach was urged by Justice Breyer, but the Court, however, has yet to adopt this approach. *See* Sunstein, *supra* note 97, at 218.

138. *Cf. id.* at 193 (arguing that cases suggesting a case-by-case analysis of multiple factors to determine whether *Chevron* provides the governing framework with respect to interpretations by agencies that have not exercised delegated power to act with the force of law or interpretations by agencies as to so-called "major questions" "increase uncertainty and judicial policymaking without promoting countervailing values").

139. *See generally* Kathleen M. Sullivan, *Foreward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

140. *See* discussion *infra* Section IV.A.

141. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

Chevron (coupled with *Mead*) replaced that case-by-case approach with a largely across-the-board presumption that Congress intended court deference to agencies where those agencies had formal adjudicative authority or rulemaking authority and the interpretation was issued by way of that authority.[142] Thus, a literal application of *Mead* would seem to mean that, where Congress gave multiple agencies authority to act with the force of law, *Chevron* should apply to both agencies' interpretations of the ambiguous statute at issue. This is consistent with *City of Arlington v. FCC*, where the Court observed that not a single case exists "in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field."[143]

Once the idea of exclusive jurisdiction is rejected, however, the remaining issue is the possibility of conflicting interpretations of a statute administered by two agencies.[144] Yet, whether conflicting interpretations will be rendered is a mere possibility. And, where two agencies are in agreement that would seem an even stronger reason for applying *Chevron*. This is consistent with the Ninth Circuit's approach, which has found that the "theoretical possibility" that two agencies may interpret the statute in different and conflicting matters is insufficient "to jettison *Chevron* deference in the many situations where only one of the agencies has weighed in on a particular question of statutory interpretation" or "where all of the agencies weigh in on a question in the same way."[145] Some scholars have adopted this approach as well, concluding that deference can be given to both agencies absent a conflict between the two.[146] It should be noted that, as to SOX and similar whistleblowing laws, the risk of conflicting interpretations is low.[147]

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142. Sunstein, *supra* note 97, at 218 (arguing that, where *Chevron* is found to apply at Step Zero, no case-by-case inquiry is required); Scalia, *supra* note 141, at 516–17; United States v. Mead Corp., 533 U.S. 218, 229–30 (2001).

143. City of Arlington v. F.C.C., 569 U.S. 290, 306 (2013).

144. *Id.*

145. Navajo Nation v. HHS, 285 F.3d 864, 875 (9th Cir. 2002).

146. Merrill & Hickman, *supra* note 5, at 894 (finding "no necessary reason why more than one agency cannot qualify for *Chevron* deference under a statute" and that, "[c]onceivably, Congress could give two or more agencies the power to issue binding regulations or adjudication," and "[i]f so, then each of the agencies given the appropriate powers should be entitled to mandatory deference"); Gersen, *supra* note 3, at 227 ("The mere fact that Congress has distributed lawmaking authority to several agencies does not imply that Congress would not want courts to defer to agency interpretations of statutory ambiguity . . . .").

147. Merrill & Hickman, *supra* note 5, at 895–96 ("Of course, any system of multiple or split enforcement will create some positive risk of conflict in statutory interpretation between the affected agencies. In these circumstances (which should be rare), a reviewing court should shift to common-

C. Proposed Framework in the Event of a Conflict

The DOL and SEC have not yet issued any conflicting interpretations of SOX. And, the risk of any such conflicting interpretations being rendered remains low, if not nonexistent, as the SEC has not yet promulgated any regulations related to SOX's whistleblower provisions (as contrasted with those regulations the SEC has issued as to Dodd-Frank's whistleblower provisions). Thus, what to do in the event of conflicting agency interpretations remains a purely hypothetical question.

Nevertheless, the possibility of a conflict occurring exists, and courts, of course, cannot defer under *Chevron* to both agency interpretations. However, the addition of an additional step to the traditional two-step *Chevron* framework can easily resolve any conflict that arises. Under this framework, a court would first apply step one of the traditional *Chevron* framework and examine whether the statute is clear as to the precise question at issue. If so, the inquiry is over, and the court must interpret the statute in accordance with the clear intent of Congress. If, however, the statute is ambiguous, the court would then proceed to the second traditional *Chevron* step and ask if both agencies' interpretations are permissible. If only one is a permissible interpretation of the statute, the court would defer only to that interpretation and reject the other agency interpretation.

If, and only if, both agency interpretations are permissible, the court would then proceed to a new, third step and evaluate the two interpretations to determine which is the most persuasive. This question can be resolved with resort to the lesser *Skidmore* deference factors, involving, inter alia, "thoroughness, formality, validity, consistency, and agency expertise."[148]

Importantly, in applying this modified framework, the fact that two conflicting interpretations exist would not justify the court departing from *Chevron* and then constructing the statute a third way or, in other words, adopting its own interpretation shared by neither agency. Rather, the *Skidmore* factors would be used only to determine which agency interpretation is more persuasive and *Chevron* would otherwise continue to apply with full force.

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law deference of the *Skidmore* variety, and enforce the interpretation that has the greatest power to persuade."). Where a conflict exists, before applying *Skidmore*, the court could solicit amicus views from agencies at issue. Sharkey, *supra* note 9, at 354. *See* discussion *infra* Section IV.A.

148. Hickman & Krueger, *supra* note 108, at 1259. I observe that how these factors should be applied is subject to debate, but a discussion regarding the application of these factors to specific questions is outside the scope of this Article. *See id.* (setting forth how courts generally apply these factors); *see* United States v. Mead Corp., 533 U.S. 218, 228 (2001) (*citing* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

This Article rejects the argument that, where a conflict exists, inquiry should be focused on which agency Congress intended to have primary interpretative authority, instead of evaluating the *Skidmore* factors, which focus on the persuasiveness of the agency's interpretation. This Article's conclusion is contrary to the reasoning of Emily Hammond,[149] as well as of *Martin v. OSHRC*.[150] First, searching for congressional intent once a conflict is found raises the same issues that arise with respect to searching for congressional intent on a case-by-case basis in determining whether *Chevron* applies on a general level to agency interpretations of split-authority statutes. As noted above, congressional intent is often going to be difficult, if not impossible, to discern and may lead to increased judicial policy making. As the congressional history of SOX demonstrates, congressional intent is often far from clear.[151] Congress may not have given thought to the *Chevron* question, much less determined which agency would have primary interpretative authority in the event of a conflict. A case-by-case approach also ignores the full import of *Mead* and *City of Arlington,*[152] providing the background rule that Congress intends an agency interpretation to qualify for *Chevron* deference where it has conferred either formal adjudicative authority or rulemaking authority on an agency.

Thus, rather than having conflict be resolve based on legislative history, this Article instead urges for conflict to be resolved based on the *Skidmore* factors relating to the persuasiveness of the interpretation. This ensures that courts defer to the interpretation most in line with Congress's goals and the statutory framework, as opposed to the court relying upon an ambiguous legislative history to try to determine to which agency to defer. Rejection of a case-by-case approach recognizes the reality that Congress does not always intend for one agency to have primary interpretative authority or for one

149. *See* Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1805–06 (2012) (arguing that, where multiple agencies have rendered conflicting interpretations, "a true deference dilemma" exists, which requires a court to determine congressional intent to see which "agency's position should trump another's"); *see also* Amanda Shami, Note, *Three Steps Forward: Shared Regulatory Space, Deference, and the Role of the Court*, 83 FORDHAM L. REV. 1577, 1613–18 (2014) (proposing resolving a conflict between two agencies as to an ambiguous statute's interpretation by examining, inter alia, the congressional intent and legislative history as to which agency should have primary interpretative authority, the history of the statute and the history of the agency's authority, political accountability concerns, and whether the executive branch has weighed in on the matter).

150. *See generally* Martin v. OSHRC, 499 U.S. 144, 151 (1991); *see* discussion *infra* Section IV.C.

151. *See* discussion *infra* Section IV.B.

152. *Mead*, 533 U.S. at 218; City of Arlington v. F.C.C., 569 U.S. 290 (2013).

agency's interpretation to "trump" another with respect to split-authority statutes.

IV. WHETHER THE DOL HAS INTERPRETIVE AUTHORITY AS TO SOX

In *Lawson v. FMR, LLC*, Justice Sotomayor argued in dissent that Congress did not intend *Chevron* to apply to DOL interpretations of SOX, notwithstanding the fact that Congress had conferred formal adjudicative authority on the DOL.[153] Contrary to the arguments set forth in the *Lawson* dissent, the legislative history and SOX's statutory framework is far from clear (as will often be the case), as evidence exists that Congress did intend for *Chevron* to apply to the DOL's interpretations of SOX. This illustrates the primary issue of determining the applicability of *Chevron* based on legislative intent, thereby providing support for an overarching rule applying *Chevron* deference to all agencies administering split-authority statutes should instead apply (provided that Step Zero is otherwise satisfied).

A. The Supreme Court's Lawson *Decision*

In *Lawson*, Justice Sotomayor argued in dissent that the Court should not accord *Chevron* deference to the DOL's interpretations of SOX issued in the course of formal adjudications.[154] The majority opinion, however, was able to sidestep this *Chevron* deference question.[155] Justice Sotomayor's dissent is nevertheless significant, as prior to the dissent, lower courts largely assumed that the *Chevron* doctrine applied to the DOL's interpretations of SOX (in part, because courts failed to recognize SOX's whistleblower provisions used a split-authority model),[156] but courts have since expressed confusion and doubt as to whether that is still the case.[157] Notably, this question of deference has received little attention in the scholarship, with Robert Vaughn asserting, without

153. *See* Lawson v. FMR LLC, 571 U.S. 429, 476–79 (2014) (Sotomayor, J., dissenting).

154. *Id.*

155. *Id.* at 439 n.6 (majority opinion).

156. *See*, *e.g.*, Welch v. Chao, 536 F.3d 269, 276 (4th Cir. 2008) (stating that the court would give deference to the ARB's interpretation of SOX under *Chevron*); Day v. Staples, 555 F.3d 42, 54 n.7 (1st Cir. 2009) (stating the same).

157. *Compare* Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 220 (2d Cir. 2014) (noting Justice Sotomayor's dissent in *Lawson* and applying *Skidmore* deference to the DOL's interpretation of SOX), *and* Rhinehimer v. U.S. Bancorp Invs., Inc., 787 F.3d 797, 809–10 (6th Cir. 2015) (stating the same), *with* Rocheleau v. Microsemi Corp., 680 F. App'x 533, 535–36 n.2 (9th Cir. 2017) (declining to decide what level of deference to afford the ARB, but nevertheless requiring the employee to approximate the elements of fraud to show a reasonable belief, contrary to the interpretation set forth in *Sylvester*). *See also* Lozada-Leoni v. Moneygram Int'l, No. 4:20CV68-RWS-CMC, WL 7000874, at *121 (E.D. Tex. Oct. 19, 2020) (observing that the Fifth Circuit has not decided whether the ARB's reasonable interpretations of section 1514A are entitled to deference under *Chevron*).

significant analysis, that *Chevron* deference should not be accorded to the DOL's interpretations of SOX's whistleblower provisions.[158]

In *Lawson*, the Supreme Court was faced with whether SOX "extend[ed] whistleblower protection to employees of privately held contractors who perform work for public companies."[159] The First Circuit had determined the term "employee" in SOX extended only to employees of public companies.[160] Shortly after, the ARB issued a decision disagreeing with the First Circuit's interpretation of SOX and finding the statute did extend "whistleblower protection to employees of privately held contractors that render services to public companies."[161] The majority declined to "decide what weight [the ARB's] conclusion should carry" because it agreed with the ARB's decision that SOX extended its protection to employees of privately held contractors of public companies, as shown by the statute's plain language and the legislative history.[162]

In dissent, Justice Sotomayor, with Justices Kennedy and Alito joining, asserted SOX should be limited to employees of publicly-traded companies and did not extend to the contractors of publicly-traded companies.[163] Justice Sotomayor found the statute ambiguous, but determined clear indicators of congressional intent demonstrated that the statute did not extend to employees of contractors.[164] Justice Sotomayor acknowledged that, because the statute was ambiguous, the question arose as to whether the ARB's decision to the contrary was entitled to deference under *Chevron*.[165] Quoting *United States v. Mead Corporation*, she recognized "an agency may claim *Chevron* deference 'when it appears (1) that Congress delegated authority to the agency generally to make rules carrying the force of law, and (2) that the agency interpretation claiming deference was promulgated in the exercise of that authority.'"[166]

The dissent noted that, although Congress had delegated authority to the Secretary of Labor to "investigate and adjudicate" SOX claims, Congress "did not delegate authority to the Secretary to 'make rules carrying the force of

158. Vaughn, *supra* note 13, at 94 n.380.

159. Lawson v. FMR LLC, 571 U.S. 429, 440 (2014).

160. *Id.* at 439.

161. *Id.*

162. *Id.* at 439 n.6. The majority noted, in passing, the SEC had signed on to the United States' amicus curiae brief providing that Congress charged the Secretary of Labor with interpreting section 1514A. *Id.* at 440 n.6.

163. *Id.* at 461–62 (Sotomayor, J., dissenting).

164. *Id.* at 462–63.

165. *Id.* at 476.

166. *Id.* (quoting United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

law.'"[167] The dissent reached this conclusion because: (1) Congress had delegated to the SEC, not the DOL, rule-making authority under SOX;[168] and (2) SOX includes a kickout provision, providing for district courts to adjudicate actions de novo whenever the Secretary failed to issue a final decision within 180 days, demonstrating that Congress would have wanted federal courts, and not the Secretary of Labor, to have the power to resolve any ambiguities.[169]

In the absence of *Chevron* deference, the ARB's decision could only claim "respect according to its persuasiveness," but Justice Sotomayor found the decision unpersuasive as it failed to account for clear indicators of congressional intent demonstrating the term "employee" should be interpreted narrowly, to only employees of publicly-traded companies and not their contractors.[170]

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167. *Id.* at 477 (citation omitted).

168. "Congress instead delegated that power to the SEC," as section 7202(a) provided the SEC with the authority to promulgate rules and regulations as necessary to further the purpose of SOX. *Id.* at 477. The dissent observed the majority had noted the SEC had signed on to the United States' amicus curiae brief providing that Congress charged the Secretary of Labor with interpreting section 1514A. *Id.* at 477. The dissent dismissed this, as "the majority cites nothing to suggest that one agency may transfer authority unambiguously delegated to it by Congress to a different agency simply by signing onto an *amicus* brief." *Id.*

169. *Id.* at 477–78. The dissent also found the requirements set forth in Mead not to be satisfied because the Secretary had "explicitly vested any policymaking authority he may have with respect to § 1514 in the Occupational Safety and Health Administration (OSHA) instead of the ARB." *Id.* However, this is not accurate. The DOL has delegated to OSHA the authority to administer the whistleblower provisions, Secretary's Order 5-2002; Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 67 Fed. Reg. 65008, 65008–09 (2002), in addition to delegating to the ARB the authority to act for the Secretary of Labor in review or on appeal of decisions by ALJs issued under SOX, Secretary's Order 01-2019—Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 84 Fed. Reg. 13072, 13072-73 (2019). The DOL has noted that nothing in the order delegating authority to OSHA limits or modifies the delegation of authority and assignment to the ARB. *See* Secretary's Order 5-2002, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 67 Fed. Reg. 65,008 (Oct. 22, 2002). Further, although the Secretary had "expressly withdrawn from the ARB any power to deviate from the rules OSHA issues on the Department of Labor's behalf," these rules are procedural in nature (not substantive), as the DOL lacks substantive rulemaking authority as to SOX, and this does not mean that the ARB lacks the power to deviate on any matter not covered by a regulation. *See* Secretary's Order 01-2010, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 84 Fed. Reg. 13073 (Apr. 3, 2019).

170. *Lawson,* 571 U.S. at 479 (Sotomayor, J., dissenting).

B. SOX's Legislative History Shows Congress Intended the DOL to Have Interpretative Authority as to SOX

The *Lawson* dissent assumed that, because Congress conferred general rulemaking authority as to the SEC, not to the DOL, Congress intended only the SEC to have authority to act with the force of law as to SOX, such that no jurisdictional overlap exists.[171] The SEC, by contrast, has indicated that it understands the DOL has interpretative authority as to SOX's whistleblower provisions.[172] Further, and more importantly, the legislative history of SOX is not as clear as Justice Sotomayor suggested. Rather, evidence also exists that Congress intended the DOL to have interpretative authority as to SOX (as opposed to just the SEC or the courts).

First, the SOX Senate Report cites to *Passaic Valley Sewerage Commissioners v. DOL*, involving the Third Circuit deferring under *Chevron* to the DOL's interpretation of a whistleblower statute (the Energy Reorganization Act).[173] This demonstrates Congress's awareness at the time of SOX's enactment that courts were reviewing the DOL's interpretations of whistleblower laws pursuant to the *Chevron* doctrine, and Congress did not suggest a different standard should apply to SOX.

Second, Congress intended for SOX's whistleblower provisions to be largely identical in terms of the procedural framework and substantive standards set forth in AIR21, which protects employees of air carriers from retaliation for reporting violations of law relating to air carrier safety.[174] AIR21, however, does not have a kick-out provision,[175] which is one of the primary reasons Justice Sotomayor argues that the judiciary (as opposed to the DOL) has interpretative authority as to SOX.[176] The legislative history gives no indication Congress intended the DOL to have the authority to interpret ambiguities in AIR21, but not SOX, merely by including the kick-out provision.[177] And, if the courts had interpretative authority over SOX but the DOL retained interpretative authority over AIR21, this would result in a divergence of how the two statutes were interpreted, contrary to congressional intent.

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171. *Id.* at 476–77.

172. *Id.* at 439 n.6 (majority opinion).

173. S. REP. NO. 107-146, at 19 (2002) (citing Passaic Valley Sewerage Comm'rs v. DOL, 992 F.2d 474, 478–80 (3d Cir. 1993)).

174. *Id.* at 26 ("We believe that protections for corporate whistleblowers should track those already existing for airline employees."); *see also* 18 U.S.C. § 1514A(b)(2); 49 U.S.C. § 42121(b).

175. *See generally* 49 U.S.C. § 42121.

176. *See Lawson*, 571 U.S. at 477–78 (Sotomayor, J., dissenting).

177. *See generally* S. REP. NO. 107-146 (2002).

In addition, an earlier version of the statute provided that a SOX whistleblower claim could be filed directly in federal court, without first filing the claim with the DOL.[178] However, that provision was later modified to provide an employee could only file in federal court where he had first filed with the DOL and 180 days had elapsed from the date of the filing, but no final decision had yet been issued.[179] This rejection of the direct right to file in federal court (without first filing with the DOL) further demonstrates Congress's intent that the DOL—not the federal courts—have the authority to interpret ambiguities as to SOX. Indeed, according to the plain language of SOX, all SOX complaints must be filed with the DOL, meaning the DOL will always have the opportunity to adjudicate the claim raised in the complaint, whereas the federal district courts, in many instances will not have that opportunity, such as where the employee declines to file in federal court after 180 days have expired and instead continues proceedings in the DOL.[180]

The legislative history largely does not contain any evidence that Congress intended the SEC to also have the authority to act with the force of law or, in other words, for its interpretations to qualify for *Chevron* deference. However, the fact that Congress expressly conferred general rulemaking authority on the SEC, by itself, is sufficient evidence to show that Congress also intended the SEC to have interpretative authority as to SOX under the rationale set forth in *Mead*.[181]

C. Martin v. OSHRC

Justice Sotomayor also relied heavily upon *Martin v. OSHRC* for support that the SEC, not the DOL, has interpretative authority as to SOX's whistleblower provisions.[182] In that case, the Supreme Court examined the split-authority scheme Congress created under the OSH Act.[183] The OSH Act entrusted the Secretary of Labor with "responsibility for setting and enforcing workplace health and safety standards," but delegated the authority to adjudicate disputes (including employer challenges to the Secretary's enforcement actions) to the Occupational Safety and Health Review Commission (OSHRC).[184] The Secretary and OSHRC issued conflicting

178. *Id.* at 26, 30.

179. *Id.*

180. *See* 18 U.S.C. § 1514A(b).

181. *See supra* Section III.B.ii.

182. *See Lawson*, 571 U.S. 429, 477 (2014) (Sotomayor, J., dissenting) (citing Martin v. OSHRC, 499 U.S. 144, 154 (1991)).

183. *Martin*, 499 U.S. at 146.

184. *See id.* at 147.

interpretations of an OSH Act regulation, and the Court was faced with determining which interpretation controlled.[185] The Court determined that the Secretary should enjoy primary interpretive authority due to the agency's "historical familiarity and policymaking expertise."[186] The Court stressed that the Secretary was also in a "better position than . . . the Commission to reconstruct the purpose of the regulations in question."[187]

Martin does not require that the SEC, rather than the DOL, have sole authority to interpret ambiguities in SOX. First, in *Martin*, the Court "emphasize[d] the narrowness" of its holding, noting that it held only that, based on "the available indicia of legislative intent," Congress "did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them."[188] The reasoning in *Martin* therefore does not necessarily transfer to questions of interpretations of statutes (*Chevron* deference), as opposed to regulations (*Auer* deference). Next, the specific portion of the *Martin* opinion that Justice Sotomayor relied upon concerned the Supreme Court suggesting that agency adjudication is only a "permissible mode of lawmaking and policymaking" where the agency had also been delegated the power to make law and policy through rulemaking.[189] As discussed above, however, *Mead* holds that either "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed" warrant *Chevron* deference.[190] Prior to *Mead*, the lower courts were split on whether agencies with no grant of rulemaking authority were entitled to *Chevron* deference.[191] However, *Mead* is largely viewed as resolving this question.[192]

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185. *Id.* at 152.

186. *Id.* at 153.

187. *Id.* at 152.

188. *Id.* at 157–58.

189. United States v. Mead Corp., 533 U.S. 218, 230–31 (2001); *see Lawson*, 571 U.S. at 477 (Sotomayor, J., dissenting) (citing Martin v. OSHRC, 499 U.S. 144, 154 (1991)).

190. *Mead*, 533 U.S. at 229.

191. *Compare* Merck & Co. v. Kessler, 80 F.3d 1543, 1549–50 (Fed. Cir. 1996), *and* Atchison, Topeka & Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 441–43 (7th Cir. 1996) (en banc), *aff'd on other grounds*, 516 U.S. 152 (1996) (refusing to accord *Chevron* deference in both cases to agencies that lacked rulemaking authority), *with* OSG Bulk Ships, Inc. v. United States, 132 F.3d 808, 812 n.7 (D.C. Cir. 1998), *and* Estiverne v. Sak's Fifth Ave., 9 F.3d 1171, 1173 (5th Cir. 1993) (deferring under *Chevron* to agency interpretation despite agencies not having rulemaking authority in both cases).

192. *See* Melissa F. Wasserman, *The Changing Guard of Patent Law:* Chevron *Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1998–2000 (concluding *Mead* effectively resolves the circuit split as to whether an agency must have both rulemaking authority and the authority to engage in formal adjudications to be entitled to *Chevron* deference); *see also* Hickman & Nielson, *supra* note 101, at 957–58.

D. United States v. Haggar Apparel Co.

Justice Sotomayor also argued that SOX's kick-out provision, providing for de novo review by the federal district court where the DOL had not issued a final decision within 180 days, meant that Congress intended the federal courts rather than the DOL (or the SEC) to have the authority to interpret any ambiguities.[193] However, that argument is significantly weakened by *United States v. Haggar Apparel Co.*[194] In that case, the Supreme Court was required to determine whether, during a proceeding before the Court of International Trade (CIT) for refunds of customs duties, the CIT should afford *Chevron* deference to regulations issued by the United States Customs Service (USCS) that interpreted the Harmonized Tariff Schedule statute.[195] The CIT was required to conduct a de novo trial to determine the refund at issue.[196] The Supreme Court held that *Chevron* deference should still be entitled to the USCS's regulations in the CIT proceedings even where the interpretations were questioned during the proceedings.[197] The CIT could defer to the agency's interpretations of law while still conducting a de novo trial to determine the facts.[198] Congress had the power "to direct the court not to pay deference to the agency's views" by unambiguously stating that questions of law and fact were to be decided de novo, but had not done so in the statute at issue.[199]

Because Congress has not clearly indicated that federal courts should decide questions of law and fact de novo in the SOX context or otherwise indicated that courts should not defer to the DOL's interpretation of SOX, pursuant to *Haggar*, courts should conclude the kick-out provision does not

193. *Lawson*, 571 U.S. at 477–78 (Sotomayor, J., dissenting). In support of this argument, the dissent cited to *Mead*, 533 U.S. at 232, for the proposition that the Court declined "to defer to Customs Service classifications where, among other things, the statute authorized 'independent review of Customs classifications by the [Court of International Trade].'" Crucial to the Court's ruling in *Mead*, however, was not that the Court of International Trade could review those classifications, but rather that the classifications were not issued pursuant to notice-and-comment rulemaking or formal adjudication.

194. 526 U.S. 380 (1999).

195. *Id.*

196. *Id.*

197. *Id.* at 391–92.

198. *Id.* at 391.

199. *Id.*; Merrill & Hickman, *supra* note 5, at 841 (noting that the *Haggar Apparel* decision thus can be viewed as demonstrating the presumption in favor of *Chevron* "is quite strong," as "the Court seemed to say that Congress must speak explicitly if it wishes to turn off the *Chevron* doctrine; any doubts and ambiguities, at least as manifested in the statement of the standard of review, will be construed in favor of continued application of *Chevron*," but warning that the decision should not be read "as a definitive statement about the strength of the presumption in favor of *Chevron* deference in all circumstances," as the decision "could be readily distinguished in other circumstances").

somehow mean that the *Chevron* doctrine is inapplicable to the DOL's interpretations of SOX.[200]

SOX's legislative history demonstrates that support for application of *Chevron* exists. Yet, Justice Sotomayor claimed just the opposite in her dissent in *Lawson*. What this demonstrates is that congressional intent as to *Chevron* deference will rarely be clear, and in most cases, evidence of intent will be nonexistent, as Congress likely did not even contemplate the question of whether *Chevron* should apply.[201] Thus, rather than engage in a case-by-case inquiry with respect to split-authority statutes, courts should instead presume that *Chevron* applies to split-authority statutes absent some express evidence to the contrary, consistent with *Haggar*. Thus, with respect to SOX in particular, in the absence of any express evidence to the contrary, courts should apply the *Chevron* doctrine to both the DOL's and the SEC's interpretations of SOX. In the event of conflict, courts should evaluate the two interpretations to determine which is the most persuasive.[202]

V. THE NORMATIVE CASE FOR *CHEVRON* DEFERENCE FOR DOL AND SEC INTERPRETATIONS OF SOX

Often, the scholarship on *Chevron* analyzes the rationale for the doctrine's application purely in the abstract, citing generally to agency expertise, interpretative uniformity, and similar bases as support for *Chevron*. By analyzing the impact *Chevron* has as to SOX in particular, it becomes clear that uniform application of the doctrine furthers the objectives of having claims adjudicated in an administrative forum. Further, the below discussion reveals that, although often overlooked in discussions over what substantive standards best achieve whistleblower protection, whether *Chevron* applies to the DOL's interpretations is a necessary preliminary question, as its application may influence (if not dictate) what those standards ultimately are and the efficacy of the law itself. Application of *Chevron* as to nonconflicting regulations issued by the SEC interpreting SOX's whistleblower provisions also furthers important objectives, and a greater role by the SEC as to these provisions would serve to bolster—rather than weaken—the rationale for application of *Chevron*.

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200. It is also noteworthy that *Martin* also holds that courts should generally assume that Congress delegates interpretative lawmaking power to an agency, rather than to a reviewing court, in light of "historical familiarity and policymaking expertise." *See* Martin v. OSHRC, 499 U.S. 144, 200 (1991).

201. *See* Sellers, *supra* note 104, at 968 ("Although the language and legislative history of a statute may provide some guidance about Congress's intent, clarity of intention is often difficult to discern.").

202. *See supra* Section III.C.

A. The Impact of Chevron *on the DOL Adjudication Process*

Application of the *Chevron* doctrine to the DOL's interpretations of SOX directly impacts the DOL adjudication process, as it results in greater certainty and consistency as to the standards applicable to SOX whistleblower claims and greater efficiency with respect to the resources utilized to resolve these claims. It also results in the ability of the DOL to modify its interpretations of SOX where the law has been found to be ineffective.

i. Greater Certainty and Consistency

Application of *Chevron* to the DOL's interpretations of ambiguous provisions of SOX will result in greater certainty and consistency as to SOX's standards. Multiple ambiguities are presented by SOX's statutory language, including the meaning of what it means to hold a "reasonable belief" of corporate fraud.[203] Because the DOL is first tasked with adjudicating these claims (as a complainant can only utilize the kickout provision if the DOL has not rendered a final decision within 180 days or seek review in appellate court after the DOL has rendered a final decision), it necessarily must interpret these ambiguities to adjudicate the claim. A federal court, when faced with reviewing a final DOL decision, can either: (1) accord some level of deference to that interpretation or, alternatively, (2) accord no deference and adopt its own interpretation. If the court accords *Chevron* deference to the DOL's interpretation of an ambiguity, it will adopt that interpretation if reasonable and even if it would have adopted a different interpretation if faced with the issue in the first instance. According *Chevron* deference to agency interpretations should, on a purely analytical level, result in the agency interpretation governing more frequently.

At least one recent empirical study demonstrates that appellate courts (as opposed to the Supreme Court) are more likely to affirm an agency's interpretation where *Chevron* is applied.[204] Application of *Chevron* also may make it less likely that the non-prevailing party before the DOL seeks review of the final agency decision in federal court. Specifically, if the dispute before the DOL involved questions as to how to interpret SOX, the non-prevailing party would have a greater chance of overturning the DOL's interpretation before the appellate court in the absence of *Chevron*. Empirical studies generally focus on how the application of *Chevron* impacts appellate courts review of agency interpretations—not the impact it may have on the parties in deciding whether to appeal at all. More study is needed as to whether the

203. *See* discussion *supra* Section II.C.

204. *See* discussion *supra* Section III.A.ii; Barnett & Walker, *supra* note 106, at 6, 30.

existence of *Chevron*, even with its many complexities, results in some challenges not being brought.

Because a court is less likely to overturn the DOL's interpretations of SOX if *Chevron* applies, *Chevron* ultimately results in more certainty and consistency as to SOX's standards. First, as to certainty, once the DOL has reasonably interpreted an ambiguous provision of SOX, an expectation arises that a court will not overturn that interpretation (provided the court properly applies *Chevron*). This may encourage early settlement in addition to reducing the likelihood of an appeal, making these claims more cost effective and expedient to resolve. Lowering the cost of adjudicating these claims is important because these claims often do not involve high damages, which as to compensatory damages, are tied to the complainant's former compensation.[205]

Second, nonapplication of *Chevron* increases the risk of inconsistent court interpretations of SOX, as without *Chevron* deference, courts will generally substitute their own judgements for that of the DOL's interpretations (and those judgements may differ). Consistency is particularly important as to SOX, as the legislative history shows Congress was concerned with avoiding inconsistency from state to state (or from circuit to circuit) and sought to implement a uniform, national standard of whistleblower protection.[206]

Relatedly, application of *Chevron* results in a focus on agency precedent, rather than circuit precedent. If *Chevron* did not apply, this would result in the parties, ALJs, and the ARB to become familiar with each circuit's interpretations of SOX and similar whistleblower laws and to move away from citing agency decisions. This increases the complexity of the proceedings, including increasing the ease with which a complainant proceeding pro se is able to effectively represent himself or herself.

Of course, the goals of increased certainty and consistency that arise from the application of *Chevron* are not unique to the whistleblower context but can also arise from application of *Chevron* to other statutes as well. In the whistleblower setting, however, these goals are particularly important. SOX is premised on encouraging whistleblowing by corporate employees and that encouragement rests on protecting employees who disclose specified illegal misconduct. For whistleblowers to be protected, the process used for obtaining that protection must not only function, but also be accessible and affordable to complainants proceeding pro se.

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205. 18 U.S.C. § 1514A(c)(2).

206. *See* S. REP. NO. 107-146, at 10 (2002).

The impact *Chevron* (when properly applied) can have on a case is illustrated by *Dietz v. Cypress Semiconductor Corp.*,[207] and more broadly, by the current circuit split related to the DOL's interpretation of the reasonable belief requirement.[208] In *Dietz*, following a hearing, the ALJ found an employer violated SOX, awarding the employee $654,906 in front pay, $220,105.85 in back pay, back benefits, attorney's fees, and the immediate vesting of thousands of shares of stock and stock options.[209] The ARB affirmed the ALJ's decision.[210] The employer then sought review of the ARB's decision before the Tenth Circuit.[211] The Tenth Circuit concluded that, despite evidence that the employer "concealed a material fact in order to lure [certain] employees to work under false pretenses," the employee had to show a "scheme designed to *deprive* the victims of their property," not just fraudulent inducement.[212] The court did not address the DOL's interpretation of SOX (in a different case)—that an employee need not show actual fraud, but rather only a reasonable belief of fraud—that conflicted with the court's decision and that was relied upon by the ALJ and ARB in rendering their decisions, much less address whether to defer to this interpretation under *Chevron*.[213]

Dietz demonstrates that, without *Chevron* deference, the DOL may complete the multi-layered process reasonably interpreting SOX one way (and awarding relief based on that interpretation), and the appellate court will then interpret SOX differently, affording no deference to the DOL.[214] This limits

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207. 711 F. App'x 478 (10th Cir. 2017).

208. *Compare* Sylvester v. Parexel Int'l LLC, No. 07–123, 2011 WL 2165854, at 10–13 (May 25, 2011) (interpreting the reasonable belief requirement broadly), *and* Wiest v. Lynch, 710 F.3d 121, 131 (3d Cir. 2013) (adopting Sylvester's interpretation of the reasonable belief requirement), *and* Rhinehimer v. U.S. Bancorp Invs., Inc., 787 F.3d 797, 808 (6th Cir. 2015) (adopting *Sylvester's* interpretation of the reasonable belief requirement), *with* Northrop Grumman Sys. Corp. v. DOL, 927 F.3d 226, 235 n.9 (4th Cir. 2019); Lum Rocheleau v. Microsemi Corp., 680 F. App'x 533, 536 (9th Cir. 2017); *and* Dietz v. Cypress Semiconductor Corp., 711 F. App'x 478, 484 (10th Cir. 2017) (all narrowly construing the reasonable belief requirement).

209. *Dietz*, 711 F. App'x at 482.

210. *Id.*

211. *Id.*

212. *Id.* at 484.

213. *Id.* The waste noted herein compounds the waste that already occurs in relation to the kick-out provision. *See supra* Section II.B. Allowing employees to proceed to a hearing before the ALJ and then re-file in federal court for a trial de novo already imposes an unnecessary cost on both the DOL and the courts and provides little increased procedural protection.

214. It is notable that, in *Dietz*, the Tenth Circuit noted, in passing, that the *Chevron* doctrine generally applied to the DOL's interpretations of SOX, yet it did not further address the doctrine's applicability in the decision. *See Dietz*, 711 F. App'x at 482. The Tenth Circuit clearly did not interpret the term "reasonable belief" broadly, however, rejecting the DOL's interpretation of that term. The

the value of the administrative process (including the benefits of it being more expeditious and cost effective), as even if a complainant prevails before the DOL, a party need only seek appellate review of the DOL's final order (which is costly and a lengthy process) and may obtain reversal due to the application of a different standard. In short, decisions like *Dietz* incentivize challenges to DOL final decisions (by both complainants and employers), which undermines the purposes of SOX.

ii. Greater Efficiency

Typically, an argument in favor of the application of *Chevron* focuses on the agency's superior expertise as compared to a court. The DOL, however, likely does not have superior expertise with respect to corporate fraud and a court is likely just as competent as the DOL to interpret the language of SOX.[215]

The DOL, however, does not just administer SOX, but also administers twenty-two whistleblower statutes similar to SOX.[216] Congress could have decided, for each of those twenty-two whistleblowing statutes, the agency with the most expertise as to the underlying subject matter would have exclusive jurisdiction over these statutes. Thus, for example, the FAA alone would have the authority to engage in formal adjudications and rulemaking as to AIR21 (concerning whistleblowing related to air safety) and the Environmental Protection Agency (EPA) would have the sole authority to engage in formal adjudications and rulemaking as to the Clean Water Act's whistleblower provisions. Rather than create mini-whistleblowing programs in multiple agencies (including the FAA and the EPA), Congress decided to have one whistleblowing program in the DOL, as this would result in only one formal adjudicatory structure for whistleblower claims being needed (with ALJs and an ARB). Consolidation of these whistleblower programs increases agency efficiency and avoids agency duplication. Many of the whistleblower statutes are similar if not identical to SOX and are often interpreted consistently by the DOL.[217] Giving no deference to the DOL as to SOX and similar statutes

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reasoning in the *Dietz* decision is thus somewhat opaque. Regardless, the impact of not applying *Chevron* (or not applying it properly) with respect to the DOL's interpretation of the term "reasonable belief" demonstrates the uncertainty and inconsistencies circuits can create for complainants.

215. The DOL's ALJs and ARB, however, regularly adjudicate claims under these statutes and have more frequent exposure to whistleblowing issues than courts or the SEC.

216. *See Statutes*, OSHA, U.S. DEP'T OF LABOR, https://www.whistleblowers.gov/statutes [https://perma.cc/A6NQ-K8XE].

217. *See*, *e.g.*, Harte v. MTA/NYCTA, 2015-NTS-00002, ALJ's Decision and Order (Dep't of Labor Sept. 27, 2016) (noting interpretation of term "adverse action" is consistent as to AIR21, SOX, and FRSA); Powers v. Union Pac. R.R. Co., 2010-FRS-030, ALJ's Decision and Order (Dep't of Labor

because of the nature of the split-authority will not only result in uncertainty and inconsistencies as to SOX, but also to other whistleblower statutes, diminishing the benefits of consolidating the whistleblower program with the DOL in the first place.

iii. Interpretative Flexibility

According *Chevron* deference allows for whistleblower statutes to be interpreted more broadly than other employment retaliation statutes, such as Title VII. Flexibility is frequently recognized as an argument in favor of agency, versus judicial, decision-making, as agency interpretations can evolve in response to new information or changed circumstances, whereas judicial decision-making is less flexible due to the doctrine of stare decisis and due to courts' political isolation, resulting in their decisions remaining unchanged by new political administrations.[218]

At first glance, the greater interpretative flexibility *Chevron* provides may seem to be at odds with the above discussion concerning greater certainty and consistency. However, an examination of those DOL interpretations of SOX that have changed demonstrate such changes were necessary for the statute to achieve its goals of whistleblower protection and could not have been effectuated by the federal courts. Following SOX's enactment, both courts and the DOL interpreted SOX's provisions narrowly.[219] As shown by an empirical study conducted by Richard Moberly, this resulted in win rates that were significantly lower than the win rates for other employment statutes, including Title VII, leading him to conclude SOX's whistleblower provisions were not achieving their goals.[220]

Since that study, the DOL has expanded its interpretation of SOX's whistleblower provisions, interpreting them more broadly than courts interpret Title VII's and similar statutes' retaliation provisions.[221] By contrast, in the last decade, the Supreme Court has issued multiple decisions interpreting Title VII and similar retaliation statutes narrowly.[222] More study is necessary to determine the impact these changes have had on whistleblower win rates, but it is clear that the original interpretation of SOX was not achieving its goals.[223]

Apr. 21, 2015) (discussing the burden of proof provisions applicable to FRSA, SOX, AIR21, and the ERA).

218. *See* Lemos, *supra* note 109, at 378–80.

219. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 109–20 (2007).

220. *Id.* at 93.

221. Moberly, *supra* note 29, at 43 n.27.

222. Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 726–42 (2018).

223. Moberly, *supra* note 29, at 21–38.

According *Chevron* deference to the DOL's interpretations of SOX allows it to use its policymaking expertise to interpret these whistleblowing statutes more broadly and to better achieve congressional goals when statistics (or current events) show that the statute is failing at protecting whistleblowers.[224] If courts have primary interpretative authority as to SOX, once an interpretation is decided upon, it generally cannot be modified due to principles of stare decisis. Further according lesser *Skidmore* deference to the agencies' interpretations of SOX does not address this issue, as the Supreme Court has indicated an agency may not be entitled to *Skidmore* deference where it recently changed its interpretation.[225] By contrast, if the *Chevron* inquiry applied to the agencies' interpretations of SOX, then the fact that they have changed their interpretations over time would not preclude deference to those interpretations. As the Supreme Court has held, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework" because "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'"[226]

The rationale for change not being invalidating was further explained by Justice Scalia, who recognized interpretative flexibility as a "major advantage"

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224. See, *e.g.*, Murphy, *supra* note 82, at 6, 49 (recognizing as an important function of the *Chevron* doctrine the fact that it allows agencies to alter their interpretations of ambiguous statutes due to changed policymaking). Further, the DOL maintains statistics regarding these cases so it can easily determine whether its interpretations are impeding or furthering the goals of these whistleblowing statutes—to protect employees from retaliation. The DOL is also able to hold public meetings and seek comments related to its investigative and adjudicatory role as to SOX and other whistleblower laws, allowing it to directly gather information from the public.

225. Most recently, in *Young v. UPS*, the Supreme Court found that it should give little weight under *Skidmore* to the EEOC's compliance manual interpreting an ambiguity in the Pregnancy Discrimination Act because the EEOC had promulgated its guidelines only recently, after the Court had granted certiorari in the case, and its prior guidelines were silent on this issue. 135 S. Ct. 1338, 1351 (2015). The Court also found that the EEOC's position was counter to the position that the Department of Justice had taken in federal employment cases. *Id.* The Court thus declined to "rely significantly on the EEOC's determination." *Id.* Despite declining to defer to the EEOC's interpretation, it ultimately adopted the interpretation of the statute set forth in the EEOC's guidelines. *Id.* at 1355. Some have argued that the Supreme Court's willingness to modify interpretations of statutes based on changed agency interpretations should extend beyond the *Chevron* doctrine. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1199–1201 (2008). The Court's recent precedent, however, demonstrates an unwillingness to modify prior interpretations in contexts outside of *Chevron*.

226. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005); *see* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) ("We find no basis . . . for a requirement that all agency change be subjected to more searching review.").

of *Chevron*.[227] As he observed, "[o]ne of the major disadvantages of having the courts resolve ambiguities is that they resolve them for ever and ever; only statutory amendment can produce a change."[228] According to Scalia:

> If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegee be able to suit its actions to the times, and that continuing political accountability be assured, through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight. All this is lost if "new" or "changing" agency interpretations are somehow suspect.[229]

Scalia found that *Chevron* "permits recognition" of the reality that, when an agency changes its interpretation of a statute, it was not admitting it had "got the law wrong," but rather was "simply changing the law in light of new information or even new social attitudes impressed upon it through the political process."[230]

B. The Rationale for Chevron *Applying to SEC Interpretations*

Chevron should not just apply to the DOL's interpretations rendered during the formal adjudication process, but also should apply to any regulations issued by the SEC through notice and comment rulemaking. The SEC has not yet engaged in any rulemaking as to SOX's whistleblower provisions. Although it has not yet issued any regulations as to SOX's whistleblower provisions, the ability of it to do so allows it to serve as a check on the DOL. As Gersen has argued, "a statute that allocates authority to multiple government entities relies on competing agents as a mechanism for managing agency problems," as "[g]iving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent."[231]

In the context of SOX, the DOL is tasked with just the whistleblower provisions and is largely focused on employee protection. By contrast, the SEC is tasked with overall rulemaking authority as to SOX, including the whistleblowing provisions, and thus is focused on preventing shareholder fraud generally. As these goals generally align, it would be relatively rare that the two agencies' interpretations would conflict (and, to date, no conflict has yet arisen, as the SEC has not promulgated any regulations as to SOX). Where the

227. Scalia, *supra* note 141, at 517.

228. *Id.*

229. *Id.* at 518.

230. *Id.* at 518–19 (internal quotation marks omitted).

231. Gersen, *supra* note 3, at 212 (italics omitted).

SEC has not issued an interpretation contrary to the DOL, it can be assumed the SEC agrees with the DOL's interpretation. If any doubts existed, a court could seek an amicus brief from the SEC as to whether it agrees with a particular interpretation before deciding the question. Ultimately, where there is agreement between the two agencies—either presumed or otherwise—the basis for *Chevron* deference is strong.[232]

To the extent the DOL and SEC issue conflicting interpretations, a court could then evaluate those conflicting interpretations by way of application of the *Skidmore* factors.[233] The risk of conflict occurring, however, could be largely eliminated if the two were to enter into a Memorandum of Understanding (MOU) that contemplated joint rulemaking and other inter-agency cooperation. The DOL has entered similar MOUs with other agencies on a wide array of subject matter,[234] including an MOU with the FAA relating to AIR21, which protects airline employees who report violations of statutes relating to air safety,[235] and an MOU with the independent Mine Safety and Health Administration (MSH Administration).[236] Notably, the MOU between the DOL and MSH Administration provides that both agencies "will endeavor to develop compatible safety and health standards, regulations, and policies with respect to the mutual goals of two organizations including joint rulemaking, where appropriate."[237] The MOU further provides that the

232. *See* Freeman & Rossi, *supra* note 10, at 1208 (calling into question "any rule against granting *Chevron* deference when more than one agency has been charged by Congress with administering the same statute" and noting that "it seems appropriate for courts to presumptively favor an interpretation of [a] statute shared by both agencies" that administer it).

233. *See* discussion *supra* Section III.C.

234. *Memorandums of Understanding*, OSHA, U.S. DEP'T OF LABOR, https://www.osha.gov/laws-regs/mou/agency [https://perma.cc/PN9Q-FK2Z].

235. *Memorandum of Understanding Between the Federal Aviation Administration U.S. Department of Transportation and the Occupational Safety and Health Administration U.S. Department of Labor concerning Wendell H. Ford Aviation Investment and Reform Act for the 21st Century Coordination*, OHSA, U.S. DEP'T OF LABOR, https://www.osha.gov/laws-regs/mou/2015-12-01 [https://perma.cc/5UR3-6YJP]. The purpose of the MOU is to facilitate coordination and cooperation concerning the protection of employees who provide air safety information under AIR21. *Id.* The agencies have agreed to cooperate to the "fullest extent possible" with respect to all AIR21 cases. *Id.* Each agency agrees to forward all relevant information regarding an AIR21 complaint to the other agency. *Id.*

236. *Interagency Agreement Between the Mine Safety and Health Administration, U.S. Department of Labor and The Occupational Safety and Health Administration, U.S. Department of Labor*, OSHA, U.S. DEP'T OF LABOR, https://www.osha.gov/laws-regs/mou/1979-03-29 [https://perma.cc/D7Y6-GAME].

237. *Id.*

"interagency coordination may also include cooperative training, shared use of facilities, and technical assistance."[238]

In addition to largely eliminating the concern about conflicting interpretations being issued,[239] this joint cooperation also would remedy one of the most significant criticisms of the DOL's authority to adjudicate SOX whistleblower claims: its lack of expertise as to matters of shareholder fraud. Indeed, a common criticism of the DOL as it pertains to SOX is its lack of expertise in this area and how this negatively impacts whistleblowers.[240] Sharing resources and technical expertise would strengthen the DOL's investigative process, and more active participation of the SEC, through the use of amicus briefs, at the ALJ and ARB level could lead to clearer reasoning that better accounts for SEC enforcement policy.

If the DOL were to enter into an MOU with the SEC, the agencies should explore the possibility of issuing joint regulations, using those the SEC promulgated as to Dodd-Frank as a model.[241] The Dodd-Frank regulations are inapplicable to SOX, in light of the Supreme Court's *Digital Realty* decision.[242] Such joint rulemaking could be particularly beneficial in the context of whistleblower protection, as clear rules, set in advance through the notice-and-comment process, may provide greater certainty to potential whistleblowers that they will be protected if they report suspected misconduct and, thus, encourage them to come forward.[243] The SEC could be particularly helpful in clarifying what types of fraud or other violations an employee must report in order to have engaged in protected activity (for example, addressing whether an employee engages in protected activity when she reports a violation of any SEC rule or regulation or only certain SEC rules or regulations).

VI. CONCLUSION

This Article has exhaustively explored the applicability of the *Chevron* doctrine to the DOL's and SEC's interpretations of SOX's whistleblower

238. *Id.*

239. *See* Freeman & Rossi, *supra* note 10, at 1208–09 (observing that agency coordination would eliminate the risk of inconsistent interpretations of the same statute).

240. *See* OSHA, U.S. DEP'T OF LABOR, COMMENTS OF NATIONAL EMPLOYMENT LAW PROJECT: ON WHISTLEBLOWER PROTECTION IN THE FINANCE INDUSTRY DOCKET NO. OSHA-2018-0015 (2018) (noting that OSHA must increase its training of whistleblower investigators).

241. Implementation of the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, 17 C.F.R. §§ 240, 249 (Aug. 12, 2011).

242. *See* discussion *supra* Section II.A.

243. In some cases, interpretations issued by rulemaking, as opposed to formal adjudications may be preferred. Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and* Chevron *Deference*, 70 ALA. L. REV. 733, 753–754 (2019).

provisions and, in doing so, brings additional clarity and focus of the applicability of the *Chevron* doctrine to interpretations by agencies who derive their authority from a split-authority scheme. Rather than evaluate whether *Chevron* applies on a case-by-case approach, a uniform rule applying *Chevron* to split-authority statutes should instead apply, which can only be overcome by express congressional intent to the contrary. As to SOX in particular, according *Chevron* deference to the DOL's and SEC's interpretations, is normatively desirable, leading to increased uniformity and certainty and furthering SOX's underlying goal of whistleblower protection.