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# COURTS AS GATEKEEPERS: THE CASE FOR MINIMAL DEFERENCE TO AGENCY INTERPRETATIONS OF THE COMMON LAW

Brent Droze\*

*Abstract:* In *Flytenow, Inc. v. FAA*, the D.C. Circuit encountered an important, yet unresolved, question: how much deference should a court give an agency for its interpretation of a common-law term used in a statute or regulation? Traditionally, the *Chevron* and *Auer* deference doctrines provide agencies significant freedom in clarifying and interpreting statutes and regulations. The use of these doctrines, though, becomes problematic when applied to fact patterns where agencies interpret the meaning of common-law terms. This Comment argues that courts should not apply either *Chevron* or *Auer* deference doctrines in cases where an agency interprets a term that already has a well-settled meaning in common law. *Chevron* deference is inappropriate in this scenario because *Chevron* is only applicable when a statute is ambiguous. By choosing to use a common-law term in a statute, Congress removed any possible ambiguity as to the meaning of the term. Congress intends for common-law terms in statutes to align with their common-law definitions. *Auer* deference is also inappropriate in this scenario. An agency cannot use a common-law term in a regulation, subsequently interpret that term to mean something other than its well-established definition in the common law, and then receive judicial deference for that interpretation. Courts, not agencies, are the appropriate arbiters of the meaning of a common-law term. This Comment argues that *Skidmore* deference is the most appropriate standard of review for agency interpretations of common-law terms. *Skidmore* appropriately balances an agency's right to interpret statutes and regulations and the judiciary's responsibility to create, maintain, and uphold the common law.

## INTRODUCTION

Imagine Jack and his partner want to travel from Seattle, Washington to Walla Walla, Washington for a quick, three-day weekend wine-tasting getaway. They can make the trip by car, but spending nine hours round-trip travelling during a short weekend does not seem appealing. Jack looks at airline tickets, but spending several hundred dollars and dealing with the hassle of airport parking, check-in, and baggage collection does not sound like fun either. Jack wishes that there was an easier way; he wishes that they could just ride along with a private pilot leaving Seattle and headed to Walla Walla this weekend. After all, if he can hail a taxi to the airport using Uber, and find a place to stay in Walla Walla using AirBnB,

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why is Jack's desire to use the "sharing economy" to book a flight for their weekend getaway unreasonable?

The short answer is, before the D.C. Circuit's *Flytenow, Inc. v. FAA*<sup>1</sup> opinion, Jack could use the "sharing economy" to reserve and share flights with private pilots. In *Flytenow*, the D.C. Circuit upheld a Federal Aviation Administration (FAA) determination that Flytenow, an internet-based flight-sharing service, violated FAA regulations because it permitted private pilots to advertise their itineraries to website members.<sup>2</sup> The FAA determined, and the court agreed, that private pilots that used Flytenow were "common carriers" that did not have the proper credentialing to conduct flights with paying passengers.<sup>3</sup> The FAA's definition of the common-law term "common carriage," and the D.C. Circuit's deference to the FAA's definition, played a vital role in the FAA's determination that Flytenow's business model was impermissible.<sup>4</sup>

Federal agencies like the FAA are given significant latitude to promulgate regulations and define ambiguous terms in order to implement and execute federal statutory regimes.<sup>5</sup> Title 49 of the United States Code charges the administrator of the FAA with maintaining safety of air commerce within the United States.<sup>6</sup> It provides the administrator with the power to promulgate rules, orders, and circulars to carry out the FAA's regulatory functions.<sup>7</sup> Flying is an inherently dangerous activity, and ensuring the safety of the flying public is inherent in the wide grant of power delegated to the FAA by Congress.<sup>8</sup> Between 1990 and 2003, general aviation (non-commercial aviation) accounted for eighty-two percent of flying accidents and eighty-three percent of aircraft fatalities in the United States.<sup>9</sup> Between 1983 and 1996, the National Transportation Safety Board (NTSB) assigned pilot error as the cause of eighty-five percent of general aviation crashes.<sup>10</sup> These bleak statistics for general aviation, coupled with the fact that the average general aviation pilot flies

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1. 808 F.3d 882 (D.C. Cir. 2015), *cert. denied*, \_\_ U.S. \_\_, 137 S. Ct. 618 (2017).

2. *Id.* at 885.

3. *Id.* at 892.

4. *Id.* at 889–90.

5. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

6. 49 U.S.C. § 40104(a) (2012).

7. *Id.* § 106(f)(2)(A)(iii).

8. Laurence E. Gesell & Robert Anderson, *Compliance and Enforcement: Aviation Safety in the Public Interest*, 2 J. AVIATION/AEROSPACE EDUC. & RES. 13, 13 (1991).

9. Massoud Bazargan & Vitaly S. Guzhva, *Impact of Gender, Age and Experience of Pilots on General Aviation Accidents*, 43 ACCIDENT ANALYSIS & PREVENTION 962, 962 (2011).

10. Gouhua Li, Susan P. Baker & Jurek G. Grabowski, *Factors Associated with Pilot Error in Aviation Crashes*, 72 AVIATION, SPACE, & ENVTL. MED. 52, 53 (2001).

fewer than 100 hours in a year,<sup>11</sup> could lead a reasonable observer to agree with the FAA's position that Flytenow's pilots must have more than private pilot licenses to transport paying passengers.

The D.C. Circuit based its decision in *Flytenow* on the reasonableness of the FAA's determination—that is, the reasonableness of its definition of the common-law term “common carriage.”<sup>12</sup> This Comment argues that the D.C. Circuit, while ultimately reaching the correct decision, missed an important opportunity to authoritatively speak to the proper level of deference that courts should extend to agency interpretations of common-law terms. Many scholars and judges have written about the various deference doctrines, but none clearly discuss the issue of when the common law is a part of an agency's regulatory decision-making process. This Comment is not solely about whether the FAA reasonably and correctly disallowed Flytenow's business. Instead, it uses *Flytenow* to analyze the decision-making process courts use when determining the correct level of deference to agency interpretations of common-law terms. This Comment argues that when agencies interpret the meaning of common-law terms (for example, when the FAA interpreted the meaning of “common carrier” in *Flytenow*), courts should, as a rule, only afford those interpretations a minimal level of judicial deference.

Part I of this Comment contains a broad overview of Flytenow's business, the statutory and regulatory landscape of the aviation industry, and the *Flytenow* case. Part II provides background on the use of common-law terms in statutes and regulations and how courts address issues regarding the meaning of those common-law terms in litigation. Part III argues that courts should not give agencies *Chevron*<sup>13</sup> or *Auer*<sup>14</sup> deference for their interpretations of common-law terms, but should instead conduct a review of the agency's interpretation, compare the agency interpretation of the term with the well-settled, judicially approved definition of the

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11. Matthew L. Wald, *To Pick a Private Pilot, Check Hours Logged in a Plane, Recent Flying and Personality*, N.Y. TIMES (July 25, 1999), <http://www.nytimes.com/1999/07/25/us/pick-private-pilot-check-hours-logged-plane-recent-flying-personality.html> [<http://perma.cc/JKT4-ZP9C>].

12. *Flytenow, Inc. v. FAA*, 808 F.3d 882, 890 (D.C. Cir. 2015), *cert. denied*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 618 (2017) (noting that, without resorting to “the familiar *Auer v. Robbins* framework . . . we have no difficulty upholding the FAA's interpretation of its regulations in this case”).

13. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

14. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

term, and give the agency deference only to the extent that the agency definition matches the common-law meaning of the term.

## I. THE *FLYTENOW* STORY

Part I of this Comment provides the basic background information needed to understand *Flytenow* and how it fits into the jurisprudence of judicial deference to federal agencies. First, this Part explains the reasons behind Flytenow's inception and development, and provides a basic overview of its services. Second, this Part provides an overview of the federal aviation statutes and regulations at play in *Flytenow*. Finally, this Part analyzes *Flytenow*, explaining the events that led to the litigation, the arguments for and against deference to agencies for their interpretations of common-law terms, and the D.C. Circuit's final disposition of the issue.

### A. *Flytenow Background Facts*

Flytenow was a web-based flight-sharing service that coordinated connections between pilots and "general aviation enthusiasts" who paid a share of the flight's expenses in exchange for the ability to ride along on a route predetermined by the pilot.<sup>15</sup> In its heyday, Flytenow claimed about 25,000 members, including casual travelers and several thousand private and commercial pilots.<sup>16</sup> Alan Guichard, an attorney, and Matt Voska, a private pilot,<sup>17</sup> founded Flytenow in 2014.<sup>18</sup> The pair started the website and service in an attempt to make general aviation flying more budget-friendly.<sup>19</sup> Despite comparisons to car ridesharing services like Uber and Lyft, Guichard and Voska preferred to characterize Flytenow as "carpooling for aviation" instead of an "Uber of the skies."<sup>20</sup> Similar to

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15. *Flytenow*, 808 F.3d at 885.

16. Dan Weikel, *Flytenow, the Aviation Version of Uber and Lyft, Is Locked in Court Battle with Regulators*, L.A. TIMES (Oct. 27, 2015), <http://www.latimes.com/local/california/la-me-california-commute-20151027-story.html> [<https://perma.cc/3GL8-PU6G>].

17. *Id.*

18. Casey C. Sullivan, *'Uber of the Skies' Grounded After D.C. Cir. Ruling*, FINDLAW (Jan. 5, 2016), [http://blogs.findlaw.com/dc\\_circuit/2016/01/uber-of-the-skies-grounded-after-dc-cir-ruling.html](http://blogs.findlaw.com/dc_circuit/2016/01/uber-of-the-skies-grounded-after-dc-cir-ruling.html) [<https://perma.cc/KD6M-85UG>].

19. Sarah Buhr, *So I Flew in an "Uber for Tiny Planes,"* TECHCRUNCH (June 20, 2014), <https://techcrunch.com/2014/06/20/uber-for-x-in-a-tiny-plane/> [<https://perma.cc/4W9B-3TYT>].

20. Jared Meyer, *Uber for Planes?*, FORBES (May 31, 2016), <http://www.forbes.com/sites/jaredmeyer/2016/05/31/uber-for-planes/#3a03569b383f> [<https://perma.cc/2KAS-XQRF>].

European-based flight-sharing service Wingly,<sup>21</sup> and now-defunct American-based flight-sharing service AirPooler,<sup>22</sup> Flytenow was a web-based bulletin board where private pilots posted their flight plans to see if anyone was interested in sharing a flight to the pilot's destination.<sup>23</sup> The website allowed "a pilot to unilaterally post a planned flight, if . . . [the posting contained] (1) the specific date and time, (2) the points of operation, and (3) the purpose of the flight."<sup>24</sup> Flytenow's website prohibited passengers from requesting a specific destination,<sup>25</sup> but if a passenger found a suitable flight itinerary and a pilot accepted the passenger's request to ride along,<sup>26</sup> the website matched the parties and the passenger and pilot would fly to the destination. After completing the flight, the pilot calculated the actual operating expenses of the flight to receive reimbursement from Flytenow for the passenger's share of the flight's operating costs.<sup>27</sup> Flytenow monetized its role as a facilitator by collecting a ten-dollar surcharge from the passenger.<sup>28</sup>

On February 12, 2014, Flytenow submitted a request to the FAA for a legal opinion of the company's compliance with FAA regulations and directives.<sup>29</sup> Specifically, Flytenow requested a legal interpretation of the validity of its services with relation to the FAA's existing rules concerning common carriage.<sup>30</sup> The FAA responded on August 14, 2014, referring Flytenow to an Interpretative Letter sent to AirPooler<sup>31</sup> that discussed

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21. Andrew Meleta & Jared Meyer, *Uber in the Air*, NAT'L REV. (Aug. 8, 2016), <http://www.nationalreview.com/article/438735/faa-bans-non-commercial-aviation-wrongly-flytenow-goes-supreme-court> [<https://perma.cc/4LX2-4BF2>].

22. Alan Levin & Thomas Black, *FAA Ruling Grounds AirPooler's Uber-Style Sharing in Air Travel*, INS. J. (Aug. 15, 2014), <https://www.insurancejournal.com/news/national/2014/08/15/337657.htm> [<https://perma.cc/PN3L-LERL>].

23. Weikel, *supra* note 16.

24. Brief for Petitioner at 13, *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2015) (No. 14-01168).

25. *Id.*

26. *Id.* ("Flytenow allows pilots to accept or reject such member's request to join the planned flight, for any or no reason, and at any time.")

27. *Id.*

28. Lauren Gardner, *Uber, but for Planes*, POLITICO (Aug. 23, 2015, 7:48 AM), <http://www.politico.com/story/2015/08/the-faa-vs-uber-for-planes-121620> [<https://perma.cc/27BR-4T73>].

29. Alan Guichard, *The Legality of Ridesharing in Aviation*, FLYTENOW BLOG (July 11, 2014, 8:11 AM), <http://blog.flytenow.com/the-legality-of-ride-sharing-in-aviation> [<https://perma.cc/SAU9-RHAL>].

30. Letter from Gregory S. Winton to Mark W. Bury, Assistant Chief Counsel, Fed. Aviation Admin. (Feb. 12, 2014) (J.A. at 49, *Flytenow*, 808 F.3d 882 (No. 14-01168)) [hereinafter *Winton letter*]; see also *infra* section I.B.2.iv for a discussion of the term "common carriage."

31. See Legal Interpretation to Gregory S. Winton from Mark W. Bury, Assistant Chief Counsel, Fed. Aviation Admin. (Aug. 14, 2014) (J.A. at 61–62, *Flytenow*, 808 F.3d 882 (No. 14-01168)) [hereinafter *Winton Interpretation*].

several of the same issues raised by Flytenow.<sup>32</sup> In that letter, the FAA concluded that ridesharing services like Flytenow and AirPooler required a Part 119 certificate<sup>33</sup> because they were engaged in common carriage.<sup>34</sup> To support its finding that pilots utilizing Flytenow and AirPooler were engaged in common carriage, the FAA referenced FAA Advisory Circular 120-12A,<sup>35</sup> which defined “common carriage” as “(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation or hire.”<sup>36</sup> The FAA went on to say that “[h]olding out can be accomplished by any ‘means which communicates to the public that a transportation service is indiscriminately available’ to the members of that segment of the public it is designed to attract.”<sup>37</sup> Essentially, the FAA determined that any pilots using the Flytenow website held themselves out to the public as willing to transport persons from place to place for compensation.<sup>38</sup> This made the pilots “common carriers” subject to 14 C.F.R. Part 119.<sup>39</sup>

## B. *Relevant Regulations and Statutes in Flytenow*

Before embarking on a detailed review of the arguments presented by both parties, this section provides a basic understanding of the applicable statutes and agency regulations at play in *Flytenow, Inc. v. FAA*.

### 1. *Statutory Framework for the Decision in Flytenow*

The Federal Aviation Act of 1958<sup>40</sup> provides for the “safe and efficient” use of the national airspace by both general and commercial aviation aircraft.<sup>41</sup> The purpose of the Act is to “regulat[e]and promot[e] . . . civil

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32. See Legal Interpretation to Rebecca B. MacPherson from Mark W. Bury, Assistant Chief Counsel, Fed. Aviation Admin. (Aug. 13, 2014) (J.A. at 57–60, *Flytenow*, 808 F.3d 882 (No. 14-01168)) [hereinafter *MacPherson Interpretation*].

33. See *infra* section I.B.2.iii. for a deeper discussion of 14 C.F.R. Part 119.

34. See *MacPherson Interpretation*, *supra* note 32, at J.A. 60.

35. See FAA Advisory Circular 120-12A (Private Carriage Versus Common Carriage of Persons or Property) (J.A. at 30–32, *Flytenow*, 808 F.3d 882 (No. 14-01168)) [hereinafter *Advisory Circular*].

36. See *Winton Interpretation*, *supra* note 31, at J.A. 62.

37. *Id.* (quoting *Transocean Airlines, Enforcement Proceeding*, 11 C.A.B. 350 (1950)).

38. *Flytenow, Inc. v. FAA* 808 F.3d 882, 888 (D.C. Cir. 2015), *cert. denied*, \_\_ U.S. \_\_, 137 S. Ct. 618 (2017).

39. *Id.*

40. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

41. *Federal Aviation Agency Act: Hearings Before the Subcommittee on Aviation of the Committee on Interstate and Foreign Commerce United States Senate on S. 3880*, 85th Cong. 1 (1958) (statement of Sen. A. S. Mike Monroney, Chairman, S. Comm. on Interstate and Foreign Commerce).

aviation . . . [and to] foster its development and safety.”<sup>42</sup> The Federal Aviation Act created the Federal Aviation Agency<sup>43</sup> and gave the new agency the power to make and enforce air safety rules.<sup>44</sup> The Federal Aviation Act of 1958 is currently codified in Subtitle VII of Title 49 of the United States Code.<sup>45</sup>

Title 49 makes the Administrator of the FAA responsible for ensuring the safety of air commerce within the United States.<sup>46</sup> It also empowers the Administrator to promulgate regulations necessary for the safety of air transportation.<sup>47</sup> The statutory definition of interstate air transportation found in Title 49 is important for understanding the arguments set forth in this Comment. “Interstate air transportation” is defined as “the transportation of passengers or property by aircraft as a *common carrier* for compensation.”<sup>48</sup> Notably, neither the Federal Aviation Act of 1958, nor its codified version within Subtitle VII of Title 49, define the common-law term “common carrier.”<sup>49</sup> The lack of a definition for the common-law term “common carrier” is central to the dispute in *Flytenow*.<sup>50</sup> With no statutory definition provided for the term “common carrier,” the FAA promulgated its own definition of the term “common carrier” in a subsequent regulation.<sup>51</sup> The definition promulgated by the FAA is the same definition the D.C. Circuit grappled with, and ultimately agreed with, when it decided *Flytenow*.<sup>52</sup>

## 2. *Regulatory Framework for the Decision in Flytenow*

FAA regulations, and the agency’s guidance interpreting those regulations, played an important role in the court’s decision in *Flytenow*. Title 14, Chapter 1 of the Code of Federal Regulations houses the

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42. *Id.*

43. The Federal Aviation Agency was renamed the Federal Aviation Administration in the Department of Transportation Act of 1966, Pub. L. No. 89f670, § 3(e)(i), 80 Stat. 931, 932.

44. *See supra* note 41, at 2.

45. Jol A. Silversmith, “*It, Being Dead, Yet Speaketh*”: *The Recodification of the Federal Aviation Act of 1958*, 29 AIR & SPACE LAWYER 8, 8 (2016).

46. 49 U.S.C. § 40104(a) (2012).

47. *Id.* § 44701(a)(5).

48. *Id.* § 40102(a)(25) (emphasis added) (the common-law term, “common carrier,” is the term at issue in *Flytenow*).

49. *See id.* § 40102 (2015); Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

50. *Infra* section I.D.

51. *Infra* section I.B.2.iv.

52. *Infra* section I.D.3.



regulations promulgated by the FAA.<sup>53</sup> This section highlights important elements of the regulatory framework necessary to understand the D.C. Circuit's decision in *Flytenow*.

*i. Regulatory Language Mirrors Statutory Language Regarding Definitions Critical to Analyzing Flytenow*

The definition of “interstate air transportation” in Title 14 of the Code of Federal Regulations mirrors the definition found in Title 49 of the United States Code.<sup>54</sup> Again, it is important to note that 14 C.F.R. § 1.1 does not define the common-law term, “common carrier.”<sup>55</sup>

*ii. Commercial Pilots Require a Higher Level of Certification than Private Pilots*

Section 61 of C.F.R. Title 14 (Part 61) contains several important provisions delineating the differences in the licensing of, and the privileges afforded to, private and commercial pilots. These provisions are significant because they dictate the required licensing for pilots engaged in “common carriage.” For instance, the FAA issues varying levels of certifications to pilots based on the pilot's training and experience level. These certifications include, among others, student pilot, private pilot, commercial pilot, and airline transport pilot.<sup>56</sup> For the purposes of this Comment, only the differences between private pilots and commercial pilots matter because only pilots with a commercial pilot certificate are allowed to engage in “common carriage.”

Generally, “no person who holds a private pilot certificate may act as pilot in command of an aircraft that is carrying passengers or property *for compensation or hire*.”<sup>57</sup> Essentially, carrying passengers for compensation, the touchstone of “common carriage,” is not permissible for private pilots. Although private pilots are not authorized to engage in “common carriage,” they are authorized to seek repayment from fellow passengers to offset the costs of a flight.<sup>58</sup> This “expense-sharing” carve-out was crucial to *Flytenow*'s business model and to its argument before

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53. See 14 C.F.R. §§ 1–198.17 (2017).

54. See *id.* § 1.1.

55. See *id.*

56. *Id.* § 61.5(a).

57. *Id.* § 61.113(a) (emphasis added).

58. *Id.* § 61.113(c) (a private pilot seeking reimbursement, though, cannot pay less than his pro-rata share of the expenses).

the D.C. Circuit.<sup>59</sup> The regulatory carve-out stated that a “private pilot may . . . [seek compensation for] the pro rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees.”<sup>60</sup> Essentially, Flytenow asserted that its pilots were merely utilizing the “expense-sharing”<sup>61</sup> carve-out provided for by regulation. Flytenow argued that expense-sharing was distinct from engaging in “common carriage” as defined by the FAA.<sup>62</sup>

Commercial pilots, on the other hand, enjoy all of the privileges of private pilots, with the additional ability to carry “persons or property for compensation or hire”<sup>63</sup> without the strictures of the “expense-sharing rule.”<sup>64</sup> The distinction between private pilots and commercial pilots is critical because the FAA, in its response to Flytenow’s request for a legal interpretation regarding the legality of its business,<sup>65</sup> determined that Flytenow needed pilots with *commercial pilot certificates* operating under a *commercial air carrier certificate*. The FAA based this determination on its assessment that Flytenow’s pilots were engaged in “common carriage.”<sup>66</sup> The FAA ruled that Flytenow’s private pilots could not avail themselves of the “expense-sharing” exception.<sup>67</sup>

*iii. The FAA Requires Enhanced Certification Standards for Commercial Aviation Operations*

General aviation and commercial aviation, like private and commercial pilots, have critical differences that play an important role in *Flytenow*’s outcome. General aviation and commercial aviation are governed by separate regulations.<sup>68</sup> These differences are important in *Flytenow* because a pilot flying as a “common carrier” engages in commercial

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59. See *infra* section I.D.1.

60. 14 C.F.R. § 61.113(c).

61. See *Winton letter*, *supra* note 32, at J.A. 49.

62. See *supra* section I.D.2.

63. 14 C.F.R. § 61.133(a)(1).

64. See *id.* §§ 61.121–61.133 (for regulations governing commercial pilots).

65. See *Winton Interpretation*, *supra* note 31.

66. *Id.*; see also *MacPherson Interpretation*, *supra* note 32.

67. See *Winton Interpretation*, *supra* note 31; *MacPherson Interpretation*, *supra* note 32.

68. See 14 C.F.R. § 91 (for rules governing general aviation); *id.* § 119 (for rules governing commercial aviation).

aviation and is governed by specific regulations targeted at commercial aviation.

Section 91 of C.F.R. Title 14 (Part 91) lays out the foundational rules for operating aircraft in the national airspace.<sup>69</sup> These rules, commonly referred to as general aviation flight rules, apply to every pilot—whether private, commercial, or otherwise—in the United States.<sup>70</sup> In addition to Part 91, § 119 of C.F.R. Title 14 (Part 119) adds additional requirements for commercial carriers (those engaged in “common carriage”). Part 119 applies to any pilot transporting passengers for compensation (“common carriage”). It requires that anyone engaging in commercial air operations have both a commercial pilot certificate and authorization from the FAA as an air carrier. After reviewing a request from Flytenow for a legal interpretation regarding the legality of its business, the FAA concluded that each pilot participating in Flytenow’s flight-sharing service required a Part 119 certificate.<sup>71</sup> In other words, for the FAA to consider Flytenow a legal operation, its pilots needed to be commercial pilots in possession of a commercial air carrier certificate because they were engaged in what the FAA deemed to be “common carriage.”<sup>72</sup>

iv. *The FAA Defined “Common Carriage” in an Informal Advisory Circular*

The definition of “common carriage” is the final regulatory issue key to understanding *Flytenow*. “Common carriage” is a common-law concept<sup>73</sup> codified in Title 49 of the United States Code.<sup>74</sup> The Federal Aviation Act of 1958 uses the term “common carriage” but does not define it.<sup>75</sup> In 1986, the FAA determined that it would be helpful to promulgate an advisory circular with “guidelines giving general explanations of the term ‘common carriage’ and its opposite, ‘private

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69. *Id.* § 91.1(b) (“[T]his part prescribes rules governing the operation of aircraft . . . within the United States, including the waters within 3 nautical miles of the U.S. coast.”).

70. *See id.* § 91.1(c).

71. *See Winton Interpretation, supra* note 31.

72. *See id.*

73. The term “common carriage” has historically been used in the context of railroads, maritime, and communications. *See, e.g.,* *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (communications); *Ellis v. Interstate Commerce Comm’n*, 237 U.S. 434 (1915) (railroads); *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889) (maritime).

74. *See* 49 U.S.C. § 40102(a)(25) (2012) (defining “interstate air transportation” as the “transportation of passengers or property by aircraft as a common carrier for compensation”).

75. *See Advisory Circular, supra* note 35, at J.A. 30.

carriage.”<sup>76</sup> FAA Advisory Circular 120-12A states that an air carrier becomes a “common carrier,” or engages in “common carriage,” when it “‘holds itself out’ to the public . . . as willing to furnish transportation . . . to any person who wants it.”<sup>77</sup> The Advisory Circular then goes on to define the phrase “holding out.” An air carrier holds itself out through the actions of agents that seek out passengers from the general public.<sup>78</sup> In later interpretative decisions, the FAA concluded that “signs and advertising are the most direct means [of holding out], but not the only methods.”<sup>79</sup> The FAA went on to state that “advertising is not confined to print media, such as magazines or newspapers, and advancing technology allows one to quickly reach a large audience through the electronic communications and internet posts.”<sup>80</sup> Notably, the “holding out” that makes a pilot “a common carrier *can be done in many ways and it does not matter how it is done.*”<sup>81</sup> The FAA relied on the Advisory Circular definition of “common carriage” in its interpretative letter disallowing Flytenow’s business, and the D.C. Circuit affirmed FAA’s definition of “common carriage” when it upheld the FAA’s decision. The FAA’s definition of “common carriage” is instrumental to understanding Part III’s analysis.<sup>82</sup>

### C. *A Brief Overview of Judicial Deference Doctrines*

Administrative law judicial deference doctrines play a key role in the D.C. Circuit’s opinion in *Flytenow*. These doctrines explain how much a court is willing to defer to a federal agency’s decision-making process and rationale when the court conducts a review of the agency’s decision. This Comment discusses three major judicial deference doctrines used to

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76. *See id.*

77. *Id.*

78. *Id.* at J.A. 31.

79. *See* Legal Interpretation to Mark Haberkorn from Rebecca MacPherson, Assistant Chief Counsel, Fed. Aviation Admin. (Oct. 3, 2011) (J.A. at 42, *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2015) (No. 14-01168)).

80. *Id.*

81. *See* Advisory Circular, *supra* note 35, at J.A. 30 (emphasis added).

82. In section III.A, this Comment discusses three potential judicial deference doctrines available to the D.C. Circuit when deciding *Flytenow*. Section III.B.3 ultimately concludes that the FAA’s decision on how to define the common law term “common carriage” should receive *Skidmore* deference.

review agency decision-making: *Chevron* deference, *Auer* deference, and *Skidmore*<sup>83</sup> deference.

### 1. *Chevron Deference*

Courts can apply *Chevron* deference when ruling on agency interpretations of statutes.<sup>84</sup> Courts utilize a two-part test to determine if *Chevron* deference applies.<sup>85</sup>

First, . . . [courts ask] whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the . . . [courts then ask if] the agency's answer is based on a permissible construction of the statute.<sup>86</sup>

Before conducting a *Chevron* analysis though, the court will determine whether:

administrative implementation of a particular statutory provision qualifies for *Chevron* deference . . . [by asking whether 1)] it appears that Congress delegated authority to the agency generally to make rules carrying the force of law . . . and [2) whether] . . . the agency interpretation claiming deference was promulgated in the exercise of that authority.<sup>87</sup>

This preliminary inquiry, known as *Chevron* “step zero,”<sup>88</sup> is used by courts to determine whether it should proceed with the *Chevron* “two-step” test.<sup>89</sup> *Chevron* “step zero,” as first applied in *Christensen v. Harris*

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83. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

84. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

85. *Id.*

86. *Id.* at 842–43.

87. VALERIE C. BRANNON & JARED P. COLE, CONG. RESEARCH SERV., R44954, *CHEVRON DEFERENCE: A PRIMER* 6 (2017).

88. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

89. *See supra* section I.C.1 (explaining the two-part *Chevron* test); *see, e.g.*, Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 457 n.53 (2013).

*County*<sup>90</sup> and later refined in *United States v. Mead*,<sup>91</sup> notes that *Chevron* deference only applies “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>92</sup> Agencies meet *Chevron* “step zero” for interpretations and regulations that are the “fruits of notice-and-comment rulemaking or formal adjudication.”<sup>93</sup>

## 2. Auer Deference

Courts can apply *Auer* deference when ruling on agency interpretations of agency regulations.<sup>94</sup> The Court first espoused this doctrine in *Bowles v. Seminole Rock & Sand Co.*,<sup>95</sup> when it held that an administrative interpretation has “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”<sup>96</sup> In *Auer v. Robbins*,<sup>97</sup> the Supreme Court expanded *Seminole Rock* deference to include agency interpretations articulated in amicus curiae briefs, holding that there is “simply no reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.”<sup>98</sup> In *Auer*, the Court deferred to the Secretary of Labor’s interpretation of a provision within a Department of Labor regulation.<sup>99</sup> The Department promulgated the regulation in question, a salary level test used to define

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90. 529 U.S. 576, 587 (2000) (holding that “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference”).

91. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

92. *Id.* at 226–27.

93. *Id.* at 230.

94. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); Derek A. Woodman, *Rethinking Auer Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721, 1723 n.10 (2014).

95. 325 U.S. 410 (1945).

96. *Id.* at 414.

97. 519 U.S. 452 (1997).

98. *Id.* at 462.

99. *See id.* at 461.

“executive, administrative, or professional” workers, because the Fair Labor Standards Act did not explicitly define those terms.<sup>100</sup>

*Auer* deference is extremely deferential to agency decision making,<sup>101</sup> but this standard of review has several important limitations. In *Christopher v. SmithKline Beechum Corp.*,<sup>102</sup> the Supreme Court held that agency interpretations of regulations that imposed liability for actions taken before the agency publicly announced its interpretation would constitute an “unfair surprise” and would thus not be subject to *Auer* deference.<sup>103</sup> In *Gonzales v. Oregon*,<sup>104</sup> the Supreme Court articulated another exception to *Auer* deference. This exception, known as the anti-parroting canon, gives no deference to agency regulatory interpretation when the interpreted regulation “merely repeats the words of the statute without elaboration on a particular point.”<sup>105</sup> *Auer*’s high level of deference is not extended in this situation because by simply repeating statutory language in its own regulation, the agency is actually interpreting the statute, not the regulation.<sup>106</sup> If the statute and the regulation use the same language, courts conclude that the statute and the regulation must have identical meanings.<sup>107</sup> When a court finds that *Auer* deference does not apply because of the anti-parroting exception, the court will look to apply either *Skidmore*<sup>108</sup> or *Chevron*<sup>109</sup> deference, depending on the facts of the case.<sup>110</sup>

### 3. *Skidmore Deference*

Finally, when a court decides that neither *Chevron* nor *Auer* deference applies to a case, it has a third option of giving an agency’s decision *Skidmore* deference. A judicial grant of *Skidmore* deference depends on the following: whether 1) the agency was thorough in its consideration of the issue; 2) the agency used valid reasoning in coming to its decision; 3)

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100. *See id.* at 454.

101. Hanah Metchis Volokh, *The Anti-Parroting Canon*, 6 N.Y.U. J.L. & LIBERTY 290, 292 (2011) (describing “*Auer* deference as being even stronger than the level of deference given in *Chevron* cases”).

102. 567 U.S. 142 (2012).

103. *Id.* at 156.

104. 546 U.S. 243 (2006).

105. Volokh, *supra* note 101, at 292.

106. *Id.*

107. *See id.* at 295.

108. *See infra* section I.C.3 (discussing *Skidmore* deference).

109. *See supra* section I.C.1 (discussing *Chevron* deference).

110. *See* Volokh, *supra* note 101, at 292.

the decision was consistent with earlier and later decisions made with similar circumstances; and 4) any other factor which has the “power to persuade” the court.<sup>111</sup> Essentially, if the agency provides a convincing argument to the court for why its decision is correct, the court will defer to the agency’s decision.

*D. Flytenow’s Legal Challenge to the FAA’s Interpretative Letter*

After receiving the FAA’s legal interpretation on August 14, 2014, Flytenow filed a petition for review with the D.C. Circuit on September 5, 2014, challenging the FAA’s decision.<sup>112</sup> After oral arguments, the court upheld the FAA’s determination.<sup>113</sup> Flytenow’s request for an en banc hearing at the D.C. Circuit<sup>114</sup> and its petition for a writ of certiorari from the U.S. Supreme Court<sup>115</sup> were both denied. This Comment will only discuss the issues in *Flytenow* pertinent for an analysis of the proper level of deference afforded to federal agencies for their interpretations of common-law terms in statutes and regulations.<sup>116</sup>

*1. Flytenow Alleged the FAA Interpretation Was “Arbitrary and Capricious” and Not Worthy of Deference*

Flytenow’s main argument was that in the legal interpretations issued to AirPooler and Flytenow, collectively referred to as the *MacPherson-Winton Interpretation*,<sup>117</sup> the FAA exceeded its regulatory authority.<sup>118</sup> Flytenow argued that “[s]ince the FAA has interpreted only common law terms . . . and because the FAA . . . radically departed from previous interpretations and precedent, the *MacPherson-Winton Interpretation* is entitled to no deference . . . .”<sup>119</sup> In addition to arguing that the FAA’s decision was arbitrary and capricious because it diverged from statutorily permissible expense-sharing, Flytenow argued that the FAA’s interpretation warranted no deference because the *MacPherson-Winton Interpretation* relied upon the FAA’s own definitions for the common-law

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111. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

112. Petition for Review, *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2015) (No. 14-01168).

113. See *Flytenow*, 808 F.3d at 890.

114. *Flytenow*, 808 F.3d 882, *petition for en banc hearing denied*, No. 14-01168, 2016 BL 54722 (D.C. Cir. Feb. 24, 2016).

115. *Flytenow*, 808 F.3d 882, *cert. denied*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 618 (2017).

116. Discussed extensively in section III.B *infra*.

117. See *supra* notes 31–32.

118. Brief for Petitioner at 16, *Flytenow*, 808 F.3d 882 (No. 14-01168).

119. *Id.*



terms “holding out,” “common carriage,” and “common purpose.”<sup>120</sup> Flytenow argued that because the FAA used common-law concepts instead of rules reflecting its administrative expertise,<sup>121</sup> the court should review the FAA’s interpretation de novo, or at most give the FAA only *Skidmore*<sup>122</sup> deference.<sup>123</sup> Additionally, Flytenow argued that *Chevron* deference<sup>124</sup> did not apply in this case. Flytenow cited *International Longshoremen’s Assoc. v. National Labor Relations Board*,<sup>125</sup> asserting that when the court is “confronted with a question regarding the meaning of [a statutory] provision incorporating common law . . . principles, [it] need not defer to the agency’s judgment as [it] normally might under the doctrine of *Chevron*.”<sup>126</sup>

## 2. *The FAA Cited Auer, Claiming Its Interpretation Was Reasonable and Should Be Upheld*

The FAA opened its argument by asserting that its finding that Flytenow’s pilots were common carriers was not arbitrary, capricious, or otherwise not in accordance with the law.<sup>127</sup> It argued that *Auer* deference<sup>128</sup> was the appropriate standard of review for its legal interpretation, asserting that, at a minimum, the agency’s interpretation of its own regulations was not “plainly erroneous or inconsistent with the regulation[s].”<sup>129</sup>

The FAA argued that the “only dispute in this case centers around whether Flytenow pilots are ‘common carriers’ within the meaning of the agency’s definition.”<sup>130</sup> To buttress its argument, the FAA noted that any person with internet access can view flights on Flytenow’s website simply by applying for membership to the website. The FAA indicated that open viewing, combined with the lack of evidence Flytenow ever denied

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120. *Id.* at 29.

121. *Id.* at 30 (citing *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 260 (1968) (“A determination of pure [common] law involve[s] no special administrative expertise that a court does not possess.”)).

122. *See supra* section I.C.3.

123. Brief for Petitioner, *supra* note 118, at 29.

124. *See supra* section I.C.1.

125. 56 F.3d 205 (D.C. Cir. 1995).

126. Brief for Petitioner, *supra* note 118, at 29–30 (citing *Int’l Longshoremen’s Ass’n v. NLRB*, 56 F.3d 205, 212 (D.C. Cir. 1995)).

127. Brief for Respondent at 15, *Flytenow*, 808 F.3d 882 (No. 14-1168).

128. *See supra* section I.C.2 for a brief overview of *Auer* deference.

129. Brief for Respondent, *supra* note 127, at 21 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

130. *Id.* at 17. This is the main point of dispute that this Comment will address in Part III *infra*.

membership to a prospective passenger, made Flytenow a common carrier.<sup>131</sup> Additionally, the FAA argued that in “1985 . . . the FAA concluded that pilots participating in a service to match them with passengers willing to share expenses under the predecessor to § 61.113(c) were ‘probably engaged in common carriage’ and thus subject to the certification rules that preceded Part 119.”<sup>132</sup>

### 3. *The D.C. Circuit Ruled in Favor of the FAA*

The D.C. Circuit Court of Appeals denied Flytenow’s challenge of the FAA’s *MacPherson-Winton Interpretation*, holding that the FAA’s interpretation was consistent with the statute and the FAA’s regulations.<sup>133</sup> The court held that when it considers challenges to an agency’s interpretation of its regulations, *Auer* deference applies unless the agency’s interpretation is “plainly erroneous or inconsistent with the regulation.”<sup>134</sup> The court went on to say that even if it did not apply *Auer* deference to the *MacPherson-Winton Interpretation*, it would still have no problem affirming the FAA’s interpretations of its own regulations in *Flytenow*.<sup>135</sup>

The court explicitly referenced the FAA’s regulations—regulations that interpreted the common-law—in its opinion. It pointed to the language of FAA Advisory Circular 120-12A,<sup>136</sup> stating that “[u]nder the definition of ‘holding out’ the FAA articulated in the 1986 circular . . . we have no trouble finding that Flytenow’s pilots would be doing so.”<sup>137</sup> The court also agreed with the FAA’s position that “no ‘conclusive proof’ that a pilot is not a common carrier can be gleaned from the absence of rate schedules, *or pilots occasionally refusing service* or offering it only pursuant to separately negotiated contracts.”<sup>138</sup> Finally, and of greatest importance for the purposes of this Comment, the D.C. Circuit refused to engage in any discussion of the FAA’s definition of the common-law term

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131. *See id.* at 18.

132. *Id.* at 20 (citations omitted).

133. *Flytenow, Inc. v. FAA*, 808 F.3d 882, 885 (D.C. Cir. 2015), *cert. denied*, \_\_ U.S. \_\_, 137 S. Ct. 618 (2017).

134. *Id.* at 890.

135. *Id.*

136. *See* Advisory Circular, *supra* note 35.

137. *Flytenow*, 808 F.3d at 892.

138. *Id.* (emphasis added).

“common carriage.”<sup>139</sup> The D.C. Circuit simply avoided the issue by holding that any argument made over the FAA’s definition of common carriage was forfeited because Flytenow did not contest the definition in its opening brief to the court.<sup>140</sup> This sidestep by the court left open a question that this Comment will attempt to answer in Parts II and III: what is the proper level of deference a court should give an agency for its definition of a common-law term?

## II. WHEN THREE WORLDS COLLIDE: THE ROLES OF CONGRESS, COURTS, AND AGENCIES IN USING AND INTERPRETING THE COMMON LAW

Part II provides the legal framework for analyzing whether the D.C. Circuit gave the FAA an appropriate level of deference in *Flytenow*. Congress, the judiciary, and federal agencies all have a role to play in the use and interpretation of common-law terms in statutes and regulations. First, this Part provides a brief overview of Congress’s use of common-law terms within federal statutes and the principles that guide courts when issues regarding the meaning of those common-law terms arise in litigation. Second, this Part explains that courts commonly give deference to agency interpretations of common-law terms within their respective areas of expertise, but give little or no deference to interpretations of common-law terms outside the agency’s field of expertise. Finally, Part II concludes with an analysis of how courts generally approach agency interpretations of common-law terms in the aviation context.

### A. *When Congress Uses a Common-Law Term in a Statute, It Intends for That Term to Assume Its Common-Law Meaning*

In the United States, the common law serves two roles: 1) it is an independent source of authority, and 2) in some cases, it influences and informs the development of statutory law.<sup>141</sup> Black’s Law Dictionary defines the term “common law” as the “body of law derived from judicial decisions.”<sup>142</sup> Several venerable rules of statutory interpretation govern how courts deal with disputes involving the meaning of common-law

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139. *Id.* at 893 (internal citations omitted); see *infra* section III.A for analysis of whether the D.C. Circuit erred in its willingness to afford the FAA Advisory Circular *Auer* deference and how Flytenow should have attacked the FAA’s definition of common carriage.

140. *Id.*

141. See Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 549 (2007).

142. *Common law*, BLACK’S LAW DICTIONARY (10th ed. 2014).

terms. First, when Congress uses a common-law term in a statute, “Congress intends to incorporate the well-settled meaning of the common law terms it uses.”<sup>143</sup> Further, “where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.”<sup>144</sup> Put another way, “if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”<sup>145</sup> Finally, when interpreting statutes that integrate common-law concepts, courts must remember that Congress did not write the statute on “a clean slate.”<sup>146</sup> Generally, “[i]n order [for Congress] to abrogate a common law principle, the statute must ‘speak directly’ to the question addressed by the common law.”<sup>147</sup>

*United States v. Shabani*<sup>148</sup> is a clear example of the notion that when Congress uses a common-law term in a statute, it intends for that term to take on its common-law meaning. In *Shabani*, a criminal defendant was charged and convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846.<sup>149</sup> Section 846 of Title 21 discusses liability for conspiracy in drug-related offenses.<sup>150</sup> The defendant wanted a jury instruction that would define conspiracy as requiring “an overt act in furtherance of the conspiracy.”<sup>151</sup> Section 846 does not define conspiracy, so the court refused this jury instruction, noting that “precedent did not require the allegation of an overt act in the indictment.”<sup>152</sup> After granting certiorari, the U.S. Supreme Court remarked that “absent contrary indications, Congress intends to adopt the common law definition of statutory terms.”<sup>153</sup> To bolster this statement, the Court looked to the general conspiracy statute<sup>154</sup> and found “an explicit requirement that a

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143. *Neder v. United States*, 527 U.S. 1, 23 (1999).

144. *Morissette v. United States*, 342 U.S. 246, 263 (1952); see also LARRY M. EIG, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 7 (2011).

145. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

146. *United States v. Texas*, 507 U.S. 529, 534 (1993) (citations omitted).

147. *Id.* (citations omitted).

148. 513 U.S. 10 (1994).

149. *Id.* at 11.

150. See 21 U.S.C. § 846 (2012).

151. *Shabani*, 513 U.S. at 11.

152. *Id.*

153. *Id.* at 13.

154. The general conspiracy statute referenced by the court is 18 U.S.C. § 371 (2012).

conspirator ‘do any act to effect the object of the conspiracy.’”<sup>155</sup> Based on this finding, it reasoned that Congress had the chance to include an overt act in the conspiracy definition found in 21 U.S.C. § 846, but its choice not to include this spoke “volumes” as to its intent.<sup>156</sup> Congress, by not defining conspiracy in 21 U.S.C. § 846, intended the term to take on its common-law meaning. *Shabani* clearly illustrates the basic statutory interpretation principle that if Congress does not provide a specific definition for a common-law term in a statute, it intends for that term to assume its common-law meaning.

Only in very limited and narrow circumstances will courts allow a common-law term to assume a meaning different than its meaning at common law. Despite the Court’s language in *United States v. Texas*<sup>157</sup> requiring Congress to speak directly to abrogate common-law principles, courts can choose to give common-law terms a different meaning without a direct decree from Congress. In *Taylor v. United States*,<sup>158</sup> the Court declined to give the term “burglary,” as used in 18 U.S.C. § 924(e), its common-law definition.<sup>159</sup> The Court noted that it had previously “declined to follow any rule that a statutory term is to be given its common-law meaning, *when that meaning is obsolete or inconsistent with the statute’s purpose.*”<sup>160</sup> The Court acknowledged that Congress likely had a derivation of the common-law definition of burglary in mind when crafting the statute. However, the Court held that it would be erroneous to apply the common-law conception of burglary to the statutory language because the “contemporary understanding of ‘burglary’ has diverged a long way from its common law roots.”<sup>161</sup> Essentially, a common-law term

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155. *Shabani*, 513 U.S. at 14 (citing 18 U.S.C. § 371).

156. *Id.*

157. *See* 507 U.S. 529, 534 (1993).

158. 495 U.S. 575 (1990).

159. *See id.* at 598.

160. *Id.* at 594–95 (emphasis added).

161. *Id.* at 593.

used in a statute will be given its common-law meaning unless that meaning diverges from the purpose of the statute itself.<sup>162</sup>

*B. Courts Do Not Always Give Deference to Agency Interpretations Involving the Common Law*

Courts give agencies varying levels of deference for their interpretations of statutes and regulations.<sup>163</sup> These deference doctrines are based on the notion that agencies have more “expertise [than courts] in the area they regulate.”<sup>164</sup> Despite courts’ willingness to defer to reasonable agency interpretations of the law, “[w]hen the administrative interpretation is not based on expertise in the particular field, . . . but is based on general common law principles, great deference is not required.”<sup>165</sup> In *Jicarilla Apache Tribe v. Federal Energy Regulatory Commission*,<sup>166</sup> the Jicarilla Apache Tribe challenged an order from the Federal Energy Regulatory Commission (FERC) denying it a “small producer” certificate because it “purchased” its gas from a larger producer.<sup>167</sup> The FERC “relied primarily on property concepts developed and enunciated by the common law” when interpreting the term “purchase.”<sup>168</sup> The court disagreed with the FERC’s interpretation of the term “purchase,” and remanded the case to the FERC for further proceedings.<sup>169</sup> In remanding the case, the court explained that because “the decision of the Commission was explicitly based upon the applicability of principles of law announced by courts, its validity [or invalidity] must likewise be judged on that basis.”<sup>170</sup> *Jicarilla* stands for

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162. *See Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991).

163. *See supra* section I.C for a brief discussion of *Skidmore*, *Chevron*, and *Auer* deference doctrines.

164. *Jicarilla Apache Tribe v. Fed. Energy Regulatory Comm’n*, 578 F.2d 289, 292 (10th Cir. 1978).

165. *Id.* at 292–93 (citing *Texas Gas Transmission Corp. v. Shell Oil Corp.*, 363 U.S. 263, 270 (1960)). In *Texas Gas*, the court refused to give deference to Federal Power Commission decision that professed to use “canons of contract construction employed by the courts” because the Commission “did not in any wise rely on matters within its *special competence*.” 363 U.S. at 270 (emphasis added).

166. 578 F.2d 289 (10th Cir. 1978).

167. *See id.* at 292.

168. *Id.* at 293.

169. *Id.*

170. *Id.* (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

the notion that agencies receive minimal deference when they interpret common-law terms outside of their areas of expertise.

Even if an agency interprets a common-law term within its area of expertise, agencies sometimes may still receive no deference from the court. In *International Longshoremen's Assoc. v. National Labor Relations Board*, the D.C. Circuit tackled the issue of judicial deference to agency interpretations of common-law terms within its area of expertise.<sup>171</sup> In *International Longshoremen's*, the International Longshoremen's Association (ILA) challenged a National Labor Relations Board (NLRB) determination that it violated the National Labor Relations Act "by establishing a secondary boycott through the actions of its putative agents."<sup>172</sup> The ILA, through discussions with its counterparts in Japan, asked Japanese stevedores to refuse to unload produce not loaded by ILA stevedores in Florida.<sup>173</sup> The NLRB held that this coordination on the part of the ILA made the Japanese stevedores an agent for the ILA.<sup>174</sup>

On review, the D.C. Circuit disagreed, giving only "limited deference to the Board's agency law analysis."<sup>175</sup> The court noted that "when confronted with a question regarding the meaning of an NLRB provision incorporating common law agency principles, we need not defer to the agency's judgment as we normally might under the doctrine of" *Chevron*.<sup>176</sup> Instead, the court stated that "in a situation of this sort, we must give due weight to the Board's judgment to the extent that 'it made a choice between two fairly conflicting views.'"<sup>177</sup> In *International Longshoremen's*, the court gave no deference to the NLRB's determination that the Japanese stevedores were the ILA's agents, noting that the NLRB's decision was not "'a choice between two fairly conflicting views,' . . . [because] the Japanese unions were in no sense the agents of the ILA."<sup>178</sup> In sum, *International Longshoremen's* shows that an agency will not necessarily receive deference for its interpretation of common-law issues that are arguably within its area of expertise. An agency's interpretation will only receive deference if the agency chooses between one of two (or more) reasonable interpretations. If the agency's

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171. 56 F.3d 205 (D.C. Cir. 1995).

172. *Id.* at 206-07.

173. *See id.* at 207.

174. *See id.*

175. *Id.* at 212.

176. *Id.*

177. *Id.* (quoting *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968)).

178. *Id.* at 213.

interpretation fails to make a choice between two or more reasonable options, its interpretation will receive no deference.

C. *Courts Generally Defer to Agency Interpretations of the Term “Common Carrier” in the Aviation Context*

The term, “common carrier,” is used in a variety of industries.<sup>179</sup> This section will examine how courts deal with the common-law term, “common carrier,” in the aviation context. “Common carrier” is a well-known term with its origins in the common law.<sup>180</sup> The determination of whether an air carrier is a common carrier is made using “the same principles as are applied in the cases of carriers by other means.”<sup>181</sup> In the air carrier context, the term maintains its common-law meaning because it is essentially the same action: transportation of passengers, regardless of the mode of travel.<sup>182</sup>

In *Las Vegas Hacienda, Inc. v. Civil Aeronautics Board*,<sup>183</sup> Las Vegas Hacienda (Hacienda) challenged a Civil Aeronautics Board (CAB) order to cease and desist from offering free airplane rides from Los Angeles, California, to its resort in Las Vegas, Nevada.<sup>184</sup> The CAB claimed Hacienda was engaged in common carriage without proper certification.<sup>185</sup> Before conducting its analysis, the court noted that “[w]hether the Board has chosen correctly” in determining that Hacienda is a common carrier and needed certification “is, of course, subject to review by this court, for an agency may not finally decide the limits of its statutory power. That is a judicial function.”<sup>186</sup> It went on to state, though, that “the Board’s decisions in these cases [determining if companies are common carriers] involve the application of technical knowledge which the Board, and not the court, is presumed to have.”<sup>187</sup> The court then went on to examine the CAB’s finding that Hacienda operated as a common carrier<sup>188</sup> and the sufficiency of the test used by the CAB to make that

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179. *See supra* note 73.

180. *CSI Aviation Servs., Inc. v. U.S. Dep’t of Transp.*, 637 F.3d 408, 415 (D.C. Cir. 2011).

181. *Arrow Aviation, Inc. v. Moore*, 266 F.2d 488, 490 (8th Cir. 1959).

182. *See Curtiss Wright Flying Serv. v. Glose*, 66 F.2d 710, 712 (3rd Cir. 1933).

183. 298 F.2d 430 (9th Cir. 1962).

184. *See id.* at 432.

185. *See id.*

186. *Id.* at 433 (internal quotation marks omitted).

187. *Id.* at 433–34.

188. *Id.* at 434–35. Evidence included the following facts: Hacienda “conducted regularly scheduled passenger flights”; in planes it owned; the planes were staffed with its own employees; the



determination.<sup>189</sup> The court ultimately determined that “the record contained substantial support for the Board’s conclusion that Hacienda was a common carrier for compensation or hire.”<sup>190</sup> *Hacienda* demonstrates the idea that, at least in the aviation context, courts reserve for themselves an important role in assessing the validity of agency interpretations of common-law terms. Courts must play an important reviewing role of agency interpretations, even if those interpretations are within the agency’s unique area of technical expertise.

In *Woolsey v. National Transportation Safety Board*,<sup>191</sup> Woolsey challenged an FAA order revoking his commercial pilot’s certification for “failure to comply with the safety requirements for pilots operating aircraft for a common carrier” under 14 C.F.R. § 135 (Part 135).<sup>192</sup> Woolsey was the president of Prestige Touring, Inc. (PTI), a small air carrier dedicated to transporting musicians.<sup>193</sup> He argued that PTI was not engaged in common carriage and thus should be subject to the provisions of Part 91 (General Aviation), not Part 135 (Commercial Aviation).<sup>194</sup> The Fifth Circuit disagreed with Woolsey, upholding the FAA’s determination that he was, in fact, engaged in common carriage.<sup>195</sup> The court remarked that because the term common carrier was not defined in statute or regulations, it had to consult other sources.<sup>196</sup> Of the other sources the court considered to determine whether PTI was a common carrier, the court focused most on the common law relating to air carriers.<sup>197</sup> The court did not address the legal sufficiency of FAA Advisory Circular 120-12A, holding that its definition of common carrier was “in relevant respect the

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flights “departed from regular commercial airports”; and “[p]assengers received the usual air terminal services: a check-in counter, boarding passes, flight calls, and the assistance of ground attendants” *Id.*

189. *Id.* at 434.

The [common carrier] test which the Board applies is an objective one, relying upon what the carrier actually does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it. So long as the air carrier is competing commercially in the market for the patronage of the general public, the Board holds that it is immaterial that the service offered will be attractive only to a limited group; or that it may be performed pursuant to special contract. And it is also immaterial that in terms of the carrier’s own bookkeeping the transportation may be furnished at cost, at a loss, or even without charge.

190. *Id.* at 435 (internal quotation marks omitted).

191. 993 F.2d 516 (5th Cir. 1993).

192. *Id.* at 517.

193. *Id.*

194. *Id.*

195. *Id.* at 525.

196. *Id.* at 522.

197. *Id.*

same as that found at common law.”<sup>198</sup> The court also noted that in the Advisory Circular, the FAA did not seek “to broaden the definition of common carriage.”<sup>199</sup> Ultimately, the court found that the National Transportation Safety Board was justified in classifying PTI as a common carrier because it 1) “held itself out as being willing to serve all members of the music industry who were able to pay for its services,” and 2) never turned away a musician that could pay for its services.<sup>200</sup>

*Woolsey* is an excellent guide for courts analyzing issues that concern agency interpretations of the common-law terms in the aviation context. The *Woolsey* court took notice of the agency’s interpretation of a common-law term, determined that the interpretation aligned with the common law, and subsequently allowed the agency’s determination to stand.<sup>201</sup>

### III. COURTS SHOULD RELY ON *SKIDMORE* DEFERENCE WHEN ANALYZING AN AGENCY’S INTERPRETATION OF A COMMON-LAW TERM

As a general matter, the FAA exists to ensure the safety of air commerce and transportation in the United States.<sup>202</sup> Requiring Flytenow’s pilots to obtain commercial pilot certificates and to register as air carriers under Part 119<sup>203</sup> is a common-sense policy position for an agency tasked with ensuring the safety of the flying public. Ensuring that Flytenow used more experienced pilots and that the FAA would subject those pilots, as individual air carriers, to greater scrutiny seemingly dovetails with the stated purposes of statutory and regulatory schemes governing the FAA—the safety of the general public.

The D.C. Circuit’s opinion upholding the FAA’s *MacPherson-Winton Interpretation* because the interpretation was “consistent with the relevant statutory and regulatory provisions”<sup>204</sup> raises no obvious issues. Using its interpretation of the term “common carrier” as defined in FAA Advisory Circular 120-12A, the FAA correctly applied its interpretation to the *Flytenow* matter. The D.C. Circuit’s opinion in *Flytenow*, though, masks an important issue in administrative law jurisprudence: should courts give

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198. *Id.* at 523.

199. *Id.*

200. *Id.* at 524.

201. *See id.* at 525.

202. *See supra* note 41.

203. *Winton Interpretation*, *supra* note 31, at J.A. 61.

204. *Flytenow, Inc. v. FAA*, 808 F.3d 882, 885 (D.C. Cir. 2015), *cert. denied*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 618 (2017).

agencies either *Chevron* or *Auer* deference for their interpretations of common-law terms? Part II showed that courts will generally give deference to an agency's reasonable interpretation of a common-law term within its sole area of expertise, but will usually give little or no deference to an agency's interpretation of common-law terms outside its area of expertise. Part III aims to show how *Chevron* and *Auer* deference have the potential to upend this concept by allowing courts to bypass a principled review of an agency's use of a common-law term. A court's grant of either *Chevron* or *Auer* deference to an agency for its interpretation of common-law terms robs the court of its historical role in making, maintaining, and protecting the common law.

Using the D.C. Circuit's opinion in *Flytenow* as a guide for analyzing this issue, this Part ultimately argues that courts should review agency interpretations of common-law terms de novo, only giving *Skidmore* deference to the agency interpretation to the extent that the interpretation is aligned with the term's traditional common-law meaning. This ensures that the judiciary maintains its role as the gatekeeper to the common law. First, this Part argues that the D.C. Circuit erred in mentioning *Auer* deference while coming to its decision in *Flytenow*. Second, this Part will examine the level of deference the D.C. Circuit actually afforded the FAA in *Flytenow* and whether that level of deference was appropriate. Finally, and most importantly, this Part will analyze the proper level of deference courts should give to agency interpretations of common-law terms to ensure that the judiciary remains the keeper of the common law.

A. *The D.C. Circuit Erred When It Discussed Auer Deference in Flytenow*

1. *Auer Deference Is Inapposite for Discussion in Flytenow*

When beginning its discussion of *Flytenow*'s claim that its pilots did not engage in "common carriage," the D.C. Circuit remarked that "[w]hen we consider a challenge to the FAA's interpretation of its own regulations, the familiar *Auer v. Robbins* framework requires us to treat the agency's interpretation as controlling unless 'plainly erroneous or inconsistent with the regulation.'"<sup>205</sup> This seemingly innocuous recitation of the fundamentals of *Auer* deference is unwarranted and unnecessary based on the facts of the case. The facts of *Flytenow* do not support a reference to *Auer* deference because of *Gonzales*'s anti-parroting exception to *Auer* deference. In *Flytenow*, the common-law term "common carrier" used in the statutory and regulatory definition of "interstate air transportation"

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205. *Id.* at 889–90.

was at the center of the dispute between Flytenow and the FAA. Recall that both the governing statute and the regulation use the exact same definition for “interstate air transportation,” and neither the statute, nor the regulation, define “common carrier.”<sup>206</sup> The FAA instead chose to define the term “common carrier” in an informal Advisory Circular.<sup>207</sup> Because the definition of “interstate air transportation” in 14 C.F.R. § 1.1 mirrors the definition found in 49 U.S.C. § 40102, when the FAA defined “common carrier” in the Advisory Circular, it was actually interpreting a statute (49 U.S.C. § 40102), not its own regulation (14 C.F.R. § 1.1). Per *Gonzales*, discussed above, *Auer* deference does not apply when an agency interprets a regulation that parrots a statute.

2. *The D.C. Circuit Should Have Discussed and Relied Upon Either Chevron or Skidmore Deference, Instead of Auer*

Instead of mentioning *Auer* deference in its opinion, the D.C. Circuit would have been more aligned with modern understandings of judicial deference to discuss the applicability of *Chevron* and *Skidmore* deference. When agencies interpret statutes, as is the case in *Flytenow*, courts look to whether *Chevron* or *Skidmore* deference applies to those interpretations.<sup>208</sup>

i. *Chevron Is Not Applicable to Flytenow*

Had the D.C. Circuit completed a *Chevron* deference analysis in *Flytenow*, it would have ultimately determined that *Chevron* deference did not apply to the FAA’s interpretation of the common-law term “common carriage.”

The D.C. Circuit would not have afforded the FAA *Chevron* deference for its definition of “common carriage” because that definition was promulgated in an informal Advisory Circular, not through an Administrative Procedure Act (APA) approved rulemaking process. This means that the *Chevron* deference analysis would have failed *Chevron* “step zero.”<sup>209</sup> Advisory Circular 120-12A was not developed and published pursuant to informal (notice-and-comment) or formal rulemaking procedures outlined in the APA.<sup>210</sup> The Advisory Circular was

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206. See *supra* notes 49 and 54.

207. See *supra* section I.B.2.iv.

208. See Volokh, *supra* note 101, at 292.

209. See *supra* section I.C.1 for a discussion of *Chevron* “step zero.”

210. See 5 U.S.C. §§ 553, 556–557 (2012) (providing a description of the Administrative Procedure Act’s formal and informal rulemaking procedures).

not the fruit of notice-and-comment rulemaking as is required by *Mead*. It is more akin to an interpretative memo, as it gives “guidelines”<sup>211</sup> for determining what constitutes a common carrier. In this respect, the Advisory Circular lacks the “force of law” and would does not warrant *Chevron* deference.

With *Auer* and *Chevron* deference inapplicable in *Flytenow*, if the D.C. Circuit wanted to defer to the FAA’s definition of “common carriage,” it could only rely upon *Skidmore* deference to justify its decision.

ii. *The D.C. Circuit, Without Explicit Reference, Seemingly Decided Flytenow Using Skidmore Deference*

The D.C. Circuit likely used *Skidmore* deference<sup>212</sup> when making its decision in *Flytenow* to uphold both the FAA’s interpretation of the term “common carrier” and the agency’s decision to shut down Flytenow’s business. While the term “*Skidmore*” does not appear in the court’s opinion,<sup>213</sup> its reliance on *Skidmore* deference is clear. Courts may afford *Skidmore* deference if: 1) the court thinks that the agency’s course of action was *persuasive* and that the agency was thorough in its consideration of the issue; 2) the agency used valid reasoning in coming to its decision; and 3) the decision was consistent with earlier and later decisions made in similar circumstances.<sup>214</sup>

The court explicitly noted that Flytenow’s objection to the “holding out” component of common carriage was “*unpersuasive*.”<sup>215</sup> Additionally, because Flytenow did not challenge the FAA’s definition of common carriage in its opening brief,<sup>216</sup> the court simply regarded the FAA’s definition articulated in the Advisory Circular as thoroughly considered and valid.<sup>217</sup> The court even went as far as stating that Flytenow’s interpretation of the FAA’s definition of “common carriage” was “question-begging and incorrect.”<sup>218</sup> Ultimately, even though the FAA’s Advisory Circular did not have the power to control the outcome of *Flytenow* as the product of the APA-approved rulemaking process, the

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211. See Advisory Circular Part 4, *supra* note 35, at J.A. 30.

212. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (deference to an agency’s judgement is appropriate if the agency’s decision is thorough, valid, and persuasive).

213. See *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2015), *cert. denied*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 618 (2017).

214. See *Skidmore*, 323 U.S. at 140.

215. *Flytenow*, 808 F.3d at 890 (emphasis added).

216. *Id.* at 893.

217. See *id.* at 892.

218. *Id.* at 891.

court found the Advisory Circular definition of common carrier persuasive and, applying *Skidmore*, relied on it to resolve the case.<sup>219</sup> By agreeing to the FAA's definition of "common carriage," the D.C. Circuit also ratified the FAA's decision that Flytenow's pilots were engaging in "common carriage" and needed to be licensed as such. The D.C. Circuit's decision aligned with how courts have previously decided issues involving the FAA's definition of "common carriage." In *Woolsey*, the Fifth Circuit deferred to the FAA's definition of "common carrier," holding that the FAA's definition was nearly the same as that found at common law and that the FAA did not try to seek expand the definition beyond its common-law bounds.<sup>220</sup> The courts, both in *Woolsey*<sup>221</sup> and *Flytenow*,<sup>222</sup> deferred to the FAA's interpretation of the common law only after examining the interpretation in question, consulting the common law, and becoming convinced that the two coincided.

*B. Courts Should Review Agency Interpretations of Common-Law Terms De Novo and, at Most, Afford These Interpretations Skidmore Deference*

Section III.A discussed why *Auer* and *Chevron* deference were inapplicable in *Flytenow*, and how the court ultimately decided *Flytenow* using *Skidmore* deference to uphold the FAA's determination. Section III.B builds on that critique, laying out a reasoned analysis for the correct level of deference a court should give an agency for its interpretation of common-law terms. Although the D.C. Circuit reached the correct decision in *Flytenow*, its published opinion missed a significant opportunity, as the leading administrative law court in the country, to authoritatively answer the question of the correct level of deference to give to agencies for their interpretations of common-law concepts. Remember the Ninth Circuit's sage guidance in *Hacienda*: only a court may determine whether an agency correctly applies the common law—an agency may not decide the outer limits of its statutory power.<sup>223</sup>

A court must use care not to abdicate its crucial role as the developer and guardian of the common law<sup>224</sup> by blindly granting deference to an

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219. See *supra* notes 214–13215. *Skidmore* allows for courts to defer to agency decisions when the agency makes a persuasive argument. In *Flytenow*, the D.C. Circuit found the FAA's arguments more persuasive than Flytenow's.

220. See *Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516, 523 (5th Cir. 1993).

221. *Id.*

222. *Flytenow*, 808 F.3d at 890.

223. *Las Vegas Hacienda v. Civil Aeronautics Bd.*, 298 F.2d 430, 433 (9th Cir. 1962).

224. See Jack G. Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563, 568–69 (1976).

agency for its interpretation of the common law. Without careful analysis, courts risk allowing agencies to take a more active role in shaping the common law—a task that is reserved solely for courts. Say, for instance, that an agency issues an interpretation of a common-law term used in a regulation promulgated pursuant to notice-and-comment rulemaking. Interpretations of administrative rules promulgated pursuant to the notice-and-comment process are generally granted *Auer* deference because courts are willing to defer to an agency's judgment on topics within its area of specialized expertise. This level of deference does not necessarily make sense when an agency defines a common-law term in a regulation because courts, not agencies, are the experts in defining common-law terms. An agency's interpretation of a common-law term might be the result of the agency's considered judgment, yet it still might not fully align with the court's broader understanding of the common law.

Section III.B aims to answer these outstanding questions regarding the applicability of *Auer* and *Chevron* deference to agency interpretations of common-law terms. The question of whether courts should defer to agency interpretations of common-law terms comes up in two situations: either when an agency interprets a common-law term within a statute (a *Chevron* deference analysis), or when an agency interprets a common-law term in a regulation (an *Auer* deference analysis).

### 1. *Chevron Deference Should Not Extend to Agency Interpretations of Common-Law Terms*

Well established *Chevron* doctrine jurisprudence states that agencies receive deference for their interpretations of statutory language if 1) Congress gave the agency the authority to make rules with the force and effect of law; 2) the agency acts pursuant to that congressional grant of authority when issuing the rule; 3) the statute is ambiguous; and 4) the interpretation is based on a permissible reading of the statute.<sup>225</sup>

One problematic question raised by a blanket grant of *Chevron* deference to interpretations of common-law terms is whether Congress intended to give agencies the power to define common-law terms in statutes, even if the agency is granted the power to issue statutory interpretations with the force and effect of law. When Congress purposely uses a common-law term in a statute without defining it, it intends for the agency to give the term its common-law meaning.<sup>226</sup> Thus, any congressional grant of power to an administrative agency to interpret

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225. See *supra* section I.C.1.

226. See *supra* note 143.

statutory language is subordinate and subject to Congress's clear statutory intent.<sup>227</sup> When Congress includes a common-law term in a statute, the use of that common-law term does not create ambiguity in the statute because that term carries its common-law meaning.<sup>228</sup>

If *Chevron* had been applicable in *Flytenow*,<sup>229</sup> the court would have first needed to determine if anything in the statutory language or the legislative history of the Federal Aviation Act of 1958 indicated Congress's desire to give the FAA the power to define and change the common-law meaning of the term "common carrier." If those indications were missing, to quote Justice Frankfurter, the "old soil"<sup>230</sup>—the old meaning—still attached to the term, regardless of what FAA's notice-and-comment-approved definition said. Without any congressional indication to the contrary, the term, common carrier, as used in the Federal Aviation Act of 1958 maintains its common-law meaning. Before receiving deference for any informal clarification or interpretation of a common-law term, that interpretation should first be subject to a probing review by the court and only afforded deference if the court is convinced that the agency's interpretation aligns with the common-law meaning.

Another problem raised by a blanket grant of *Chevron* deference to interpretations of common law is whether the interpretation aligns with other statutes in which Congress used identical common-law language. When Congress uses a common-law term, it intends for that term's meaning to remain reasonably similar across statutes.<sup>231</sup> It is possible for an agency interpretation of a common-law term to be a permissible construction based on one statute, but completely out of line with other statutes using the same common-law term. Courts must use caution to ensure that the agency's interpretation of a common-law term does not broaden or narrow the meaning of that term so as to make it incompatible with other statutes.<sup>232</sup>

In *Flytenow*, this *Chevron* concern is likely less of a problem than it might potentially be in other contexts. Looking back to *Woolsey*,<sup>233</sup> the Fifth Circuit already declared that the FAA's definition of common carriage in Advisory Circular 120-12A did not seek to broaden the

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227. See *supra* note 146.

228. See *supra* note 145.

229. See *supra* section III.A.2.i for an explanation of why *Chevron* deference is inapplicable in *Flytenow*.

230. See *supra* note 145.

231. See *supra* note 144.

232. See *supra* note 199.

233. *Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516 (5th Cir. 1993).



traditional understanding of the term at common law.<sup>234</sup> In other cases with distinct fact patterns, it is possible that an agency might promulgate a definition of a common-law term that did not fit within the broader common-law understanding of the term. In this situation, providing *Chevron* deference to the agency's interpretation might be misconstrued as an implicit acceptance by the court of a change of the common-law meaning of the term.

2. *Auer Deference Should Not Extend to Agency Interpretations of Common-Law Terms*

Just as traditional *Chevron* deference raises issues with agency interpretations of common-law terms in statutes, *Auer* deference similarly presents issues for agency interpretations of common-law terms in regulations. Under *Auer* and its predecessor *Seminole Rock*, agencies receive deference for their interpretation of regulatory language if 1) the interpretation is not clearly erroneous or inconsistent with the regulation, and 2) the interpretation represents the agency's considered judgment.<sup>235</sup> However, the *Auer* framework does not apply neatly when applied to agency interpretations of common-law terms.

First, as is the case with *Chevron* deference for common-law terms, a definition of a common-law term can be consistent with one regulation, yet inconsistent with another regulation promulgated by another agency. Common-law terms carry specific meaning and are not terms of art susceptible to change at the whim of agencies.<sup>236</sup> Recall that when Congress uses a common-law term, it intends for that term to assume its common-law meaning.<sup>237</sup> The same must be true when agencies use common-law terms as well. If *Auer* could be applied to *Flytenow*,<sup>238</sup> the FAA's use of the term "common carrier" in its regulations should not receive such a broad grant of deference without further judicial review. "Common carrier" is a common-law term available for use by any agency in a regulation. Before giving deference to any particular agency's use of a common-law term, courts should ensure that the agency is using the term in a way that it is understood in the common law and across the various

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234. See *supra* note 199.

235. See *supra* section I.C.2 for an explanation of *Auer* deference.

236. *Neder v. United States*, 527 U.S. 1, 23 n.6 (1999).

237. *Id.* at 23.

238. Assuming, *arguendo*, that the argument in section III.A.1 is incorrect.

agencies that use the term. This ensures the stability and the precedential value of the common law.

Second, even if an interpretation of a common-law term represents the agency's considered judgment, it does not necessarily follow that the agency's interpretation is correct at common law. When an agency interpretation is based on "principles of law announced by courts, its validity [or invalidity] must likewise be judged on that basis."<sup>239</sup> Courts do not owe agencies *Auer* deference "[w]hen the administrative interpretation is not based on expertise in the particular field . . . but is based on general common law principles."<sup>240</sup> Common-law terms are legal terms of art, and in a legal context, should be given their common-law meaning, regardless of their use in a statute or an agency regulation. Courts can only determine if an agency's good faith interpretation of a common-law term aligns with the term's well-settled meaning in the common law after a probing, or at least a greater than superficial, review. Refusing to apply *Auer* deference to agency interpretations of common-law terms in regulations allows courts to engage in a deeper, more meaningful analysis of an agency's interpretation. This deeper review encourages courts, at the risk of minor temporal inefficiencies, to preserve the integrity of the common law instead of summarily and dismissively invoking *Auer*'s "plainly erroneous" standard.

Finally, current *Auer* deference jurisprudence is unclear on whether *Auer* applies to informal agency interpretative guidance (guidance not issued pursuant to notice-and-comment rulemaking). This issue recently came before the U.S. Supreme Court, but the Court vacated the lower court ruling and remanded the case to the Fourth Circuit without examining the issue.<sup>241</sup> If the Supreme Court eventually rules that *Auer* applies to informal interpretative guidance as well as notice-and-comment rulemaking, there is a reasonable argument that an agency's interpretation of a common-law term still does not warrant *Auer* deference. For the same reasons listed above (inconsistency with other agencies that use the same common-law term and agency lack of expertise in parsing the common law), *Auer* deference should not apply to any agency interpretation of a

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239. *Jicarilla Apache Tribe v. Fed. Energy Regulatory Comm'n*, 578 F.2d 289, 293 (10th Cir. 1978).

240. *Id.* at 292.

241. *See G.G. ex. rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1239 (2017).

common-law term, regardless of whether that interpretation was issued informally or through notice-and-comment rulemaking.

3. *Skidmore Deference Is the Most Appropriate Deference Doctrine for Courts Giving Deference to an Agency Interpretation of a Common-Law Term*

Because of the potential issues with applying either *Chevron* or *Auer* deference to agency interpretations of common-law terms, courts would benefit from simply giving these interpretations, at most, *Skidmore* deference. *Skidmore* deference allows for a court to focus its inquiry exclusively on whether the agency's interpretation is aligned with common-law precedent. If an agency's interpretation is persuasive, which is to say if an agency's interpretation of the common-law term aligns with traditional judicial meaning, the court should defer to the agency's definition.

There are several reasons why *Skidmore* deference makes sense in this situation. First, *Skidmore* deference makes sense because it ensures that common-law terms maintain their common-law meaning. Common-law terms should not have wildly variable meanings in different contexts. Maintaining definitional continuity of common-law terms across a spectrum of legal disciplines allows for the predictable application of common-law terms across a variety of statutory schemes.<sup>242</sup> Second, *Skidmore* deference gives meaning to Congress's decision to incorporate a common-law doctrine into a statute. *Skidmore* entrusts the court, as the gatekeeper and maintainer of the common law, with ensuring that any agency interpretation of the common law is in accordance with "the language and received traditions" of the common law.<sup>243</sup> If agencies wish to assign a different meaning to a common-law term within a regulation, the agency should simply choose another, non-common-law term.

Finally, and most importantly, *Skidmore* deference makes sense because agencies do not maintain expertise in the common law—courts do. Agencies are policy experts and are "less likely to be concerned about careful application of common law."<sup>244</sup> It is the court's responsibility to ensure that the agency interpreted the common law in a way consistent with the court's view of long-established common law. Because agencies are "'prone to policy shifts' . . . [and] because they are not bound by a

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242. See Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 833 (2010).

243. *Id.* at 832 (discussing predictability) (citations omitted).

244. *Id.* at 833.

strong doctrine of *stare decisis*, they can often reverse interpretations at their own initiative.”<sup>245</sup> Agencies may inadvertently introduce ambiguity into the common law if left to their own devices. It is the court’s responsibility to ensure that an agency’s interpretation of a common-law term is concomitant with the well-settled judicial interpretation of that same term. If the agency’s interpretation follows the court’s interpretation, the court should be sufficiently persuaded to give the agency *Skidmore* deference.

## CONCLUSION

This Comment explores whether the *Chevron* or *Auer* deference doctrines are appropriate when agencies interpret common-law terms. *Chevron* deference is inappropriate in cases involving disputes over agency interpretations of common-law terms because Congress does not ordinarily delegate to agencies the power to define terms that it, by invoking the common law, has already defined. *Chevron* only gives agencies the power to interpret ambiguous provisions and terms in statutes. Common-law terms, though, are not ambiguous. These terms have a well-settled meaning that Congress intended to adopt when it used the term in a statute. *Auer* deference is similarly inappropriate in cases involving disputes over agency interpretations of common-law terms. Common-law terms are terms of art and are not susceptible to change at the whim of an individual agency. Agencies cannot unilaterally assign a new definition to a common-law term in a regulation and receive deference for that definition if it is not aligned with the term’s common-law meaning. Of the available deference doctrines in administrative law, *Skidmore* deference is most appropriate in cases involving disputes over agency interpretations of common-law terms. *Skidmore* deference allows courts, as the final arbiters of the meaning of common-law terms, to ensure that agencies do not inappropriately alter the meaning of the common law. To receive *Skidmore* deference for an interpretation of a common-law term, an agency would be required to make a persuasive argument that its interpretation correctly aligns with the common law. *Skidmore* deference correctly balances power between an agency’s right to interpret statutes and regulations and the judiciary’s right to review agency decision making.

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245. *Id.* at 834.