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Against Chevron - A Modest Proposal

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AGAINST *CHEVRON*—A MODEST PROPOSAL

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INTRODUCTION

Prior to 1984, as regular readers of this journal will know, judicial review of administrative agency legal interpretations was governed by a cluster of doctrine which had cases like *NLRB v. Hears Publications*[1] and *Skidmore v. Swift*[2] at its core. Under this doctrine, courts reviewing formal agency actions such as adjudications were allowed to substitute judgment on agency interpretations that could be characterized as "questions of law" but were to defer to agency judgment on questions of fact. For so-called "mixed issues of law and fact" (often involved in the application of agreed legal principles to the facts of the case), courts were required to accept an agency's judgment about application if the agency conclusion had a "warrant in the record and reasonable basis in law."[3] Less formal agency actions (advice letters, routine bulletins, other informal expressions of agency legal opinion) were reviewable, if at all,[4] under a formula which allowed a court to defer to the agency position if it was persuasive.[5]

In 1984, the Court's *Chevron v. Natural Resources Defense Council, Inc.*[6] decision held that in judicial review of agency legal interpretations, a court must defer to a reasonable agency interpretation of law when the law being interpreted was ambiguous.[7] *Chevron* articulates the test as two distinct questions. The first question asks whether Congress has "directly spoken to the precise question at issue"[8] in which case the court does not defer but independently decides the meaning of statute. Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[9]

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1. 322 U.S. 111 (1944).
2. 323 U.S. 134 (1944).
3. *Hearst Publ'ns*, 322 U.S. at 131.
4. For general discussion of ripeness obstacles to judicial review of informal agency action, see Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771 (2002). *See also* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001).
5. The formula from *Skidmore* is classic:

> We consider that the rulings, interpretations and opinions of the Administrator . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

323 U.S. at 140.
6. 467 U.S. 837 (1984).
7. *Id.*
8. *Id.* at 842.
9. *Id.* at 843.

In *United States v. Mead*,[10] the Court elaborated on the kinds of agency actions that would be afforded deference under the *Chevron* tests. The Court said:

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference 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. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.[11]

The phrase "other indication of a comparable congressional intent" was illustrated the following year when the Court granted *Chevron* deference to an agency's legal interpretation which had appeared in manuals and other documents, but which was never the subject of notice and comment rulemaking.[12] Agency legal pronouncements which were not entitled to *Chevron* deference were to be weighed by the reviewing court according to their persuasiveness under the *Skidmore* doctrine.[13]

Since the language and holding of *Chevron* could easily fit into the *Hearst* and *Skidmore* cluster, *Chevron* did not have to be viewed as a change in the law of judicial review.[14] Nor is it clear that the Court intended any major change.[15] Be that as it may, *Chevron* was in fact treated by commentators and lower courts as a major change in prior law about the scope of judicial review of agency action.[16]

While the evidence is mixed, some studies have concluded that this change in the scope of review formula has in fact changed the outcome of cases. The direction of the change is generally presumed to be in the form

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10. 533 U.S. 218 (2001).

11. *Id.* at 226-27.

12. *See* Barnhart, Comm'r of Soc. Sec. v. Walton, 535 U.S. 212 (2002) ("[The] fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due." (citation omitted)).

13. *Id.*

14. Consider Jaffe's statement almost twenty years earlier than *Chevron*:

> [W]here the *judges* are themselves *convinced* that [a] certain reading, or application, of the statute is the *correct*—or the only *faithful*—reading or application, they should intervene and so declare. Where the result of their study leaves them without a definite preference, they can and often should abstain if the agency's preference is "reasonable."

LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 572 (1965).

15. *See* Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10606, 10613 (1993) (finding little evidence in Court papers that any of the justices thought the *Chevron* opinion was in any way remarkable).

16. Sunstein describes *Chevron* as "one of the very few defining cases in the last twenty years of American public law." Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990).

of less intensive judicial review, i.e., providing more deference to agency legal interpretations.[17]

The decision has produced an avalanche of scholarly writing. A spring 2004 Westlaw search in the Journals and Law Reviews database (using a search term like "ti(Chevron)") would generate more than 100 hits—most of which refer to our *Chevron* case. A search of that database for discussion of the problem itself (which can be found with the search term "chevron /p deference") turned up more than 3,000 hits.[18]

One might suppose that such an outpouring of literature would have led to some refinement, clarification, consistency or predictability in the application of the doctrine. After all, that is one of the missions of academic scholarship. The cases, however, show little sign of clarification. All articles about the question, as well as books summarizing the issues, continue to lament the lack of clarity in the doctrine.[19] The confusions extend to very basic questions, such as when the doctrine applies,[20] how to distinguish its two steps from each other,[21] and how to distinguish the test from other commonly used tests of agency action.[22] Indeed, the very volume of these cases[23] suggests something about the lack of doctrinal

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17. Early studies suggested that the change in the formula resulted in more affirmances of agency action. *See* Peter H. Schuck & E. Donald Elliot, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1060 (1990). Later articles seem to have modified this conclusion. *See* Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 59 (1998). *See generally* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2645 (2003) ("Several commentators have observed after conducting various studies of the case law that the effect of *Chevron* on judicial outcomes has not been as significant as one might have expected, although many have found some increased level of judicial deference to agency agency interpretations.").

18. Professor Mashaw says the *Chevron* Court should have been required to issue an environmental impact statement given the number of trees that have been sacrificed to print the voluminous *Chevron* literature. Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 229 n.116 (1994).

19. *See* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5 (4th ed. Supp. 2004) (stating that recent Supreme Court and lower court considerations of the *Chevron* doctrine reveal a set of opinions that are impossible to rationalize or integrate into any coherent scheme).

20. *See Mead*, 533 U.S. at 226-27 (holding that a Customs ruling letter cannot receive *Chevron* deference).

21. *See* Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 500 (1997) (finding that the National Credit Union Administration's interpretation of an "occupationally defined federal credit union" was impermissible under step one of the *Chevron* analysis).

22. *See* Arent v. Shalala, 70 F.3d 610, 619 (D.C. Cir. 1995) (disagreeing on basic terms where Judge Edwards treated the case under the arbitrary and capricious test while Judge Wald treated the case as falling under the first step of *Chevron*). *But see* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1276 (1997) (arguing that these two tests are equivalent). *See generally* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 848 (2001) (finding 14 major and still unanswered questions raised by this case).

23. A spring 2004 Westlaw search in the All State and Federal Cases database (with the

clarity. Other than litigation, there does not seem to be any practical way of predicting what a court will do with an agency legal interpretation.

Beyond the cost of this method of resolving conflicts, doctrine framed in this elusive way is always subject to manipulation.[24] Doctrinal indeterminacy is always an invitation to use other, less principled factors. David Beatty's description of the case law on the Free Exercise Clause identifies the situation here with precision:

> [O]ne very serious problem with precedents is that they can be read at very different levels of generality. No one formulation . . . dominates the alternatives. It is impossible to say that either the majority, or those who ended up writing in dissent, read the relevant cases in a way that was mistaken or wrong. Neither the majority . . . nor the minority . . . could be contradicted in their description of the Court's past decisions. As a matter of interpretation both were accurate statements of what the Court had and had not done in its previous consideration of the issue. All the doctrinal analysis that dominates both opinions creates a veneer of legality and an impression of legitimacy but it cannot cover up the fact that the split on the Court was all about politics and had nothing to do with the law.[25]

On the twentieth anniversary of *Chevron*, it is worth asking if this situation needs to be reconceptualized. Now that it is clear that years of conventional scholarly exegesis and analysis have not produced the clarity we need, it is perhaps worth considering a wholly different approach.

This Article proposes a short amendment to § 706 of the Administrative Procedure Act (APA), which is intended to effectively abolish the *Chevron* doctrine. The solution will not end all debate on these important issues. It will, however, put the decisions and discussions on a sounder basis, leading to improved decisions and more predictability. The proposal is based on three principles whose validity cannot seriously be questioned.

First, the Rule of Law requires that professionals attend seriously to doctrinal sets marked by bewildering inconsistency and its resulting unpredictability. Whatever components one includes in the concept of Rule of Law, surely these are basic. If confusions persist despite extensive critical analysis, we have an obligation to look harder for other solutions.

Second, while problems with this subtlety and complexity cannot be solved with specific rules—general standards are needed—there has not been sufficient recognition of the value of functional standards, as distinguished from formal standards. We need standards that direct attention to identifiable and findable real world functions that can channel

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search term "chevron/p deference") produced over 4,000 case citations.

24. *See* Garrett, *supra* note 17, at 2,645 (illustrating various ways *Chevron* doctrine can be applied to achieved desired outcomes).

25. *See* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 55 (2004).

argument and thought into empirically resolvable discussion. Only in this way can we hope to achieve the kind of consistency and predictability the Rule of Law demands.

Third, a legislative solution has extraordinary advantages over continued refinement in judicial opinions. This is not a new message to students of administrative law, where it has long been recognized that formulating new policies in general legislative form has marked advantages over case-by-case adjudication. Rulemaking, we regularly teach, provides broader fact-finding capacity unhindered by rules of evidence and other limits. It provides more open access and wider input from those affected. It allows more general and comprehensive solutions as distinguished from piecemeal fixes or solutions affected by and limited to the peculiar facts of a given case. Rulemaking's explicit focus on policy, rather than logic and precedent, its prospective operation, and its relative ease of comprehensive change when a rule needs adjustment, all give rulemaking significant advantages over adjudication as a tool for changing policy. The legislative solution proposed here intends to capture exactly those kinds of benefits.

I. THE UNDERLYING TENSIONS

Our predicament arises from the intersection of two apparently conflicting notions. First, for more than 200 years the *Marbury v. Madison*[26] tradition has held that when the meaning of a legal term arises in the course of a judicial proceeding it is "emphatically the province and duty of the judicial department to say what the law is."[27] In the field of administrative law, this venerated authority has specific statutory support.[28]

On the other hand, there is obvious practical value in paying some attention to agency legal interpretations. Especially in complex cases, better interpretations might come from an agency since the agency: (a) administers the relevant act on a daily basis; (b) has continuing contact and familiarity with the regulatory context; (c) may have been involved in the drafting and passage of the legislative policy being administered; (d) has technical expertise a court may not have; and (e) to the extent the legal interpretation turns on policy grounds—is more politically accountable than the federal courts. Some degree of deference to agency preferences is also supported by the legislator's choice of working through an agency in the first place. As Professor Jaffe says, that choice presumptively confers

26. 5 U.S. (1 Cranch) 137 (1803).
27. *Id.* at 177.
28. The federal APA provides that "the reviewing court shall decide all relevant questions of law, [and shall] interpret constitutional and statutory provisions . . . ." 5 U.S.C. § 706 (2000).

policymaking power on the agency, a discretion the reviewing judges should normally permit to function.[29]

The resolution of this tension between *Marbury* on the one hand, and the value of deference to agencies on the other, has come largely through the widespread acceptance of a fiction. In the cases in which *Chevron* deference is granted, it is said that Congress has somewhere delegated law-interpreting power to the agencies. *Marbury* is thus thought to be satisfied as the courts independently interpret the law, identifying the delegation and marking its outer boundaries. On the other hand, the need for deference to agencies is satisfied as the court is required to defer to agency legal interpretations which stay within the marked boundaries.

Since there is seldom any direct evidence of such a delegation,[30] we are asked to infer the delegation from other legislative action. As indicated above, congressional delegation can be inferred from an ambiguous statutory term, or from granting of the agency authority to take action; which has the force of law.[31] Few believe, however, there is any actual intentional delegation in these cases—we are dealing instead with a convenient fiction.[32] Even *Chevron* itself said that deference should be owing to an agency interpretation even when "Congress did not actually have an intent."[33]

There is nothing per se wrong with legal fictions; they have played a long and mostly honorable role in common law development. In this case, however, the bewildering confusion in the decisions and the commentary suggests that the delegation fiction is not a useful tool—neither the

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29. *See* JAFFE, *supra* note 14, at 572-73 (stating that this discretion should be allowed unless judges believe that the statute's purpose is contradicted).

30. Professor Garrett identifies some examples of explicit delegation to agencies and some counter examples of explicit expressions that courts were not to defer to agency interpretations. Garrett, *supra* note 17, at 2,642 n.19.

31. *See Mead*, 533 U.S. at 221 (holding that a tariff classification will not receive Chevron deference because there is no evidence that "Congress intended such a ruling to carry the force of law").

32. The use of the word "fiction" in discussing the basis of *Chevron* is common. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 517 (1989) (stating that any rule regarding legislative intent represents a "fictional, presumed intent"); *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (stating that courts have used legislative intent, in connection with law-interpreting function, as a legal fiction); Levin, *supra* note 4, at 792. Some go beyond the word fictional:

> [A]n inquiry into actual congressional intent, of the kind the *Mead* Court advocated, cannot realistically solve this question. Although Congress has broad power to decide what kind of judicial review should apply to what kind of administrative decision, Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases.

David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (2001).

33. 467 U.S. 837, 845 (1984).

occasions for invoking it nor its content when invoked are capable of clear statement. The proposal made here is intended to make the legislative delegation explicit, and to state in simple, direct terms the conditions the legislature believes should control the degree of deference.

II. THE PROPOSAL

What is proposed is the following amendment to § 706 of the APA. Italicized words are additions to the existing language and strikethroughs indicate deletions.

A. Proposed Amendment

SECTION 706. SCOPE OF REVIEW.

To the extent necessary to decide and when presented, the reviewing court

shall decide all relevant questions of law *and* interpret constitutional and

statutory provisions, *except that in carrying out any of the law-interpreting*

functions required by this section the court may defer to a contemporaneous

agency legal interpretation to the extent that the interpretation (a) is

authoritative, (b) significantly reflects relevant agency technical, political or other resources,

(c) was formulated through a careful process, including providing

those specially affected with an appropriate opportunity to participate in its

formulation and (d) does not require the special weight of a judicial

pronouncement ~~and determine the meaning and applicability of the terms of an agency action.~~ The reviewing court shall—

B. A Few Textual Notes

The phrase "law-interpretive function" in lines three and four is intended to limit the authority for judicial deference to settings in which the agency addresses "questions of law." By contrast, the correct level of judicial deference on "questions of fact," and on review of agency exercises of discretion, are not affected by this amendment. The degree of deference on these questions will continue to be controlled by the formulas expressed elsewhere in § 706.

Review of so-called "mixed-questions of law and fact" is so difficult to fit neatly into any taxonomy that some have doubted the value of using the words at all.[34] The appropriate degree of deference on mixed questions should depend on whether one can identify separate components of the agency decision that could plausibly be called "legal." The issue decided in the *Hearst* case, for example—whether "newsboys" were newspaper "employees" within the meaning of the labor act—has traditionally been called a mixed question of law and fact. But it would be conventional to characterize as a legal question that part of the issue which required a decision about whether the statutory term "employee" was intended to have a broader meaning than the common law meaning. On that precise question, the proposed amendment would not require deference as the issue is not one necessarily within the expertise of the agency. Moreover, this issue might be one of those whose resolution by a general judicial response might have been thought especially useful. This is consistent with *Hearst*, where the Court seems to have answered this question without deference.[35]

By contrast, those issues in the case that would more properly be characterized as factual, such as the number of newsboys, the nature of their contractual arrangements and the impact of those arrangements on the individual newsboys, would presumably be reviewed under the substantial evidence test, where considerable deference is required.

When the *Hearst* Court came to the question of the application of the legal rule so identified to the facts found by the Board, it chose to defer:

> [W]here the question is one of the specific application of a broad statutory term in a proceeding in which the agency . . . must determine it initially, the reviewing court's function is limited . . . . [T]he Board's

34. *See* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1280 n.44 (2002) (discussing the court practice of deferring to agency findings of fact and reviewing de novo pure questions of law) (citing Roy A. Schotland, *Scope of Review of Administrative Action-Remarks Before the D.C. Circuit Judicial Conference*, 34 FED. B.J. 54, 58 (1975) (asserting that judges are best suited to interpret laws on the "general construction of a statute")).

35. Of course, since the Court agreed with the Board, it is not wholly clear that no deference was afforded. Nevertheless, the Court's discussion of the history and purpose of the Act carries unmistakable tone of an independent judicial judgment.

> determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.[36]

The proposed amendment would authorize such deference on "application" cases, with the understanding that the degree of deference would be determined by use of the amendment's stated factors.

Perhaps the most important change made by the amendment is its extension to any "law-interpreting" action of the agency and authorization of deference to any agency legal interpretation irrespective of the form in which that interpretation was expressed. It would no longer be necessary to search for formal indicators from which a fictional congressional delegation could be inferred. If the agency purports to act in a "law-interpreting" way, deference is authorized, but its degree would be considered under the stated standards. To the extent that form is a surrogate for other functional factors bearing on the appropriate degree of deference, the proposal would require the court to consider those matters directly.

The word "may" in the fourth line is intended to clarify that discretion over all that follows is left with the reviewing court. The proposed statute authorizes judicial deference but does not compel any particular level. It would be rare, in this author's judgment, for a judicial determination of the correct level of deference to be overruled by a higher court.

The word "contemporaneous" in the fourth line is to apply the *Chenery*[37] wisdom that the most reliable and the most relevant statements of an agency's legal views are those issued at the time the related agency action is taken.

The phrase "to the extent that" in the fifth line allows the court to adjust the level of deference up or down as its consideration of the listed factors informs. Deference is not "all or nothing," as it sometimes seems to be today,[38] but can be graduated in terms of the court's overall judgment about the nature, magnitude, and interrelationship of the factors identified in the stated criteria.

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36. *Hearst Publ'ns*, 322 U.S. at 131.
37. SEC v. Chenery Corp., 332 U.S. 194 (1947).
38. Merrill argues that:

> [T]he [*Chevron*] two-step structure makes deference an all-or-nothing matter. If the court resolves the question at step one, then it exercises purely independent judgment and gives no consideration to the executive view. If it resolves the question at step two, then it applies a standard of maximum deference. In effect, *Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch.

Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992).

The four factors which control the degree of discretion are largely self-explanatory. Subsection (a) of the draft invites a court to consider the actual authority of the interpretation, an inquiry into whether the interpretation reflects the opinion of those in the agency authorized to make judgments of this sort. This actual authority permits greater weight to agency interpretations that are more fully considered, reflect relatively higher levels of agency approval and thus have some promise of reliability and stability. Using this factor, for example, the reviewing court could afford more deference to a writing that had worked its way up through staff and was signed by the head of the agency, than it would an oral statement of a junior agency employee. Some would grant this major weight in deciding on the degree of deference[39] and it seems a central feature in Justice Scalia's continuing dissents in this area.[40]

Subsection (b) of the draft refers to the degree to which the agency's legal interpretation owes anything to the agency's special resources and its special political position. This is a necessarily general statement and probably cannot be further particularized. The general idea is to insure, where such things are relevant to the legal interpretation expressed by the agency, that courts consider such things as the agency's special access to expertise, the degree of understanding an agency may have as a result of its knowledge of the players and its continuous dealing with the problem, its knowledge about the legislative purpose in drafting the provision being interpreted (as when the agency was "present at the creation" of the statute), and its closer connection to accountable policy makers. In *Chevron* itself, for example, the Court justified deference to the agency's interpretation since the question being interpreted involved both the agency's technical expertise and its political accountability.[41]

Subsection (c) of the draft allows a court to consider the care with which the agency formulated the interpretation. Of course, if an agency's interpretation is procedurally defective, i.e., is not formulated according to required procedure, it is simply unlawful on that ground; the deference question is not reached. But there may be cases where the procedure, though complying with all specific requirements, is nevertheless not done with the care which would generate judicial confidence. While *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[42] may prevent setting aside such agency action on procedural grounds, a general sense of the quality of the process might affect the degree of

39. William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is* Chevron *Step Two, Not* Christensen *or* Mead, 54 ADMIN. L. REV. 719 (2002).

40. *See, e.g.*, *Mead*, 533 U.S. at 256-57 (Scalia, J., dissenting) (advocating court deference to all authorative and reasonable agency interpretations of statutes).

41. *Chevron*, 467 U.S. at 865-66.

42. 435 U.S. 519 (1978).

deference the judge may be comfortable affording. As part of the court's sense of the quality of the agency process, the subsection explicitly allows a court to consider the degree to which appropriate opportunities for participation have been made available to those specially affected by the interpretation.

Finally, subsection (d) of the draft reminds a court that there are times when the court should assume the role of senior partner in the interpretive process. These may be circumstances where the question involved is of special importance;[43] is beyond the usual responsibility or expertise of the agency involved;[44] or where agency uncertainty or vacillation make the objectivity, clarity, and dependability of a judicial ruling especially valuable.[45]

The factors listed in the proposal do not specifically mention agency consistency or its absence as factors to be separately considered. The notion appears in the classic *Skidmore* formulation,[46] but the Court has been reluctant to adopt a view that inhibits an agency from changing a policy position which, for technical or political reasons, it no longer prefers.[47] Of course, major changes in position may have to be explained,[48] but consistency or its absence should not automatically be counted on the appropriate deference scale.[49]

These standards are intended to be functional rather than formal. Functional standards of this kind are not unknown to administrative law. The ripeness test found in *Abbott Laboratories v. Gardner*[50] is a good example. However much uncertainty may remain in the law of ripeness after *Abbott*, it certainly is the case that conclusions about ripeness should depend primarily on whether the issues have crystallized into a form

43. *See Barnhart*, 535 U.S. at 222 (finding the "interstitial" quality of an interpretation merited deference, and thus implying that broader or more central agency rulings might not warrant the same level of deference as more particularized agency decisions).

44. *See* Breyer, *supra* note 32, at 371 (describing the Court's feeling that the agency's interpretation had implications well beyond the agency's usual responsibility).

45. *See* JAFFE, *supra* note 14, at 585-86 (using the *Webster Motor Car Co. v. Packard Motor Car Co.* case as an example. 355 U.S. 822 (1957)).

46. *See Skidmore*, 323 U.S. at 140 (quoting the classic *Skidmore* formula).

47. *See* Rust v. Sullivan, 500 U.S. 173, 186 (1991) (noting that "[t]his Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question") (quoting *Chevron*, 467 U.S. at 862). *Chevron* itself was a case in which the rule under scrutiny represented a reversal of recent policy. *Chevron*, 567 U.S. at 838.

48. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (explaining that an agency must give a reasoned analysis after it has rescinded a rule).

49. The question is related to the broader question of stare decisis in agency legal interpretations. For a recent discussion of these issues, see Richard W. Murphy, *A "New" Counter-*Marbury*: Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1 (2004) (analyzing the Supreme Court's narrowing of the *Chevron* doctrine in recent years).

50. 387 U.S. 136, 148-49 (1967).

suitable for judicial treatment and on what costs the party may suffer if review is postponed. Another example is the functional due process test of *Mathews v. Eldridge*.[51] For all the uncertainties left by *Eldridge*, there can be little doubt that determining the correct procedure required by due process should be affected by the interests of the parties, by the degree to which the procedural shortfall complained of would likely contribute to the accuracy of the determination made, and by the cost of curing the shortfall.

There is clearly a common-sense dynamic at work in the use of functional standards. The proposal made here would allow a court to adjust the levels of deference by considering real factors that provide relevant information about the degree to which deference is warranted.

In any public debate over the proposal, additions, subtractions, and improvements to this factor list will emerge. These are most welcome. The only caution is that at the end of the day, the list should contain only functional factors that can be investigated, thought about, discussed, and resolved with some connection to empirical reality and functional significance. We will not find our way out of the present thicket by adjusting deference levels as a function of formal categories, such as whether the interpretation occurs in an interpretive or a legislative rule, mystical investigations about fictional delegations, or by sometimes question-begging inquiries about whether the interpretation in question does or does not have the "force of law." It is our inability to deal objectively and consistently with formal factors of this sort which has led to our present predicament. Functional factors which can be discussed in terms of observable realities offer the hope of more consistency and predictability. One might think of the factors this way: if you were a judge trying to decide how much deference to give an agency interpretation, what things would you most want to see briefed and argued?

It is likely that more emphasis on functional factors will induce more helpful conduct on the part of all the players in the process. It should induce agencies wishing maximum deference to use care in formulating legal interpretations, to insure appropriate inside approvals and clearances, and to provide specially affected outsiders meaningful opportunities to be heard. It should encourage lawyers writing briefs and making arguments to focus on and marshal evidence about factors that really should affect the degree of deference. The proposal should certainly allow judges to decide cases more intelligently and, in their opinions, to provide us with more usable guidance. All these behaviors, over time, should develop and refine functional criteria that will lead to more consistent and predictable outcomes.

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51. 424 U.S. 319 (1976).

III. SOME POSSIBLE CONCERNS ABOUT THE PROPOSAL

Since the proposal is new and somewhat far-reaching, it seems useful to consider some of the concerns that may arise in considering it.

A. Does the Proposal Unduly Enhance the Power of the Courts?

The *Chevron* debates have rekindled earlier issues about the proper role of the judge in our governmental system. For example, Merrill argues that today we are in danger of being ruled by judges, not by law.[52] Judge Noonan argues that judges are, after all, political actors and that a shift of power to judges results in policy making by political actors allied with prior appointing administrations.[53] To those holding such views, *Chevron* may be seen as a needed corrective. *Chevron* essentially teaches that in the absence of other congressional direction, courts must accept reasonable agency legal interpretations. A proposal of the kind advanced here, committing to judicial discretion the decision about the appropriate level of deference to agency legal interpretations, may be seen as shifting power back to courts—of reinstalling *Marbury* in place of *Chevron*.

There are three immediate responses. First, for perspective, it is useful to remember that judicial review is not an accidental or casual part of this institutional matrix which can be set aside or limited without careful thought. Judicial review is nothing less than an instrument for bringing all government action within the reign of law broadly considered. As Jaffe taught us many years ago,

> The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the "common law," and the ultimate guarantees associated with the Constitution.[54]

Second, it is important that judges should play a significant role here both because of their experience and their institutional placement. Judges are experienced at the sort of close analysis of language which statutory interpretation involves. In addition, being independent of the two elected branches of government, courts are able to exercise these skills with an objectivity and impartiality which is harder for naturally-biased political officers to attain. There is no doubt that judges are political actors in some degree. But the degree is important. Given their experience, skills, and institutional placement—and given the apparatus of professional critique

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52. Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 482 (2004).

53. John T. Noonan, Jr., *Foreword: A Silk Purse?*, 101 MICH. L. REV. 2,557, 2,558 (2003).

54. JAFFE, *supra* note 14, at 590.

within which they function—one should have reasonable confidence in their judgment, especially when statutory factors are listed to guide and critique their work.[55]

Finally, if the charge is that the proposal aggrandizes judicial power at the expense of the other branches, it is simply not fairly laid. The proposal does give judges considerable discretion in choosing the level of deference, but that discretion is cabined by legislatively articulated factors. *Chevron* deference, as has been noted above, is justified as being legislatively commanded—according to the prevailing fiction, the court must defer to the agency because the legislature has delegated power to the agency to make certain legal interpretations. The present proposal is simply intended to make that legislative delegation explicit, obviating the need for fictions and for unstructured guessing about when and how deference is to be shown.

B. Will We Lose the Sensitivity of Proceeding Through Case-by-Case Adjudication?

It can be suggested that the current case-by-case approach to determining the appropriate level of deference is ultimately better than trying to solve the problems with a general legislative rule. It may be argued that the problem of deference appears in too many varieties to be treated with a general rule and for that reason a general solution like the one proposed here is a "one size fits all" arrangement which cannot be expected to fit any situation well. By contrast, the current *Chevron* approach allows solutions to be matched to individual variations as they are presented in cases.

The proposal's factors are stated in relatively general terms and leave adequate room for judicial adaptation to novel circumstances as they arise. Moreover, by stating the factors in explicit legislative form, there is some assurance they will be weighed in every case. If sensitivity to individual variations is one way of assuring that like cases will really be treated alike, so is the assurance that the same set of factors will be weighed in each case. By giving all judges the same verbal starting place, one can expect inconsistencies to be reduced to a considerable degree.

C. Will We Lose the Values of Formalism?

Some will object to the proposal's frank abandonment of doctrinal and formal elements and its effort to focus on function. Most lawyers and judges are formalists at heart, understanding the critical importance of form, of doctrine, and of conceptual analysis to a consistent and predictable system of law. But for formal doctrine to accomplish those goals, it must

55. *Cf.* BEATTY, *supra* note 25, at 94.

be a doctrine that is capable of reasonably clear and stable formulation. We seem not to have arrived at that position yet in *Chevron* analysis, despite twenty years of intensive effort. It is a mistake to treat with formal dignity doctrine which is undefined and undefinable, and I believe that questions regarding the appropriate judicial deference to agency legal interpretations would be better managed with factual and functional analysis.

D. Can We Agree on the Language of a Statute?

It may be that consensus on the language of a statute will be difficult to reach. After all, the decisions and the outpouring of critical literature suggest, if nothing else, that views vary greatly on the question of the proper judicial deference in this setting. There is cause for optimism, however, about the prospects for consensus. Academics, regulators, and practitioners are thoughtful professionals and (as the deeply missed Administrative Conference repeatedly showed) there is a core of common thought among us that permits movement toward consensus on difficult and divisive issues of administrative law. To be sure, there may be a few among us who are firmly wedded to their own view of the matter. I will concede their right to resist this reform effort and even concede that they may be theoretically right. But the best should not be the enemy of the good: A general consensus among the core of us that a clearer and more predictable regime is possible would be a substantial advance, even granting that in a perfect world we could do better.

E. Would Congress Pass Such a Statute?

Even if we do reach consensus on a draft statute, could one expect Congress to pass it? That is, the legislative process is cumbersome and full of obstacles, "vetogates" as the legislative process literature calls them.[56] Many have doubted that Congress would agree to a broad, generally applicable statement about the scope of judicial review. Moreover, the subject of administrative procedure may be so far from the direct concern of voters that it might seem impossible for such a proposal to get the serious attention of legislators.

My own occasional experience in this field[57] has been that with general

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56. *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 77 (Foundation Press 2000) (using the term "vetogates" to support a depiction of the legislative system as "difficult" and "full of hurdles").

57. I spent several years in legislative drafting as Associate General Counsel for Legislation of the then Federal Aviation Agency; later I was a principal draftsman on the Task Force that wrote and secured passage of the Washington State Administrative Procedure Act. *See* William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L. REV. 781, 781 n.* (1989); *see also* William R.

agreement among the major affected groups, legislative reform is in fact possible. Indeed, that administrative procedure does not seem to excite ordinary voters is a benefit: when legislators are convinced that no major interest group is opposed to a proposal and are persuaded that most voters are indifferent, "vetogates" can be opened. Of course, as discussed earlier we may not be able to get full agreement among ourselves. But that would be our own failing as professionals, not any defect in the legislative process. In that case, as Pogo said, the enemy is us.

F. Would the Proposed Statute Entail High Judicial Decision Costs?

It has been said that any use of a multi-factored test of the kind proposed would entail high decision costs as the various factors are generally stated and have to be identified, weighed, and considered in each case.[58] Certainly there will be costs. It is not at all obvious, however, that those costs will be more than the costs we are now paying as lawyers, judges, and parties trying to puzzle out the possible meanings of the *Chevron* doctrine. Moreover, the high decision cost of cases applying *judicially* created multi-factored formulas may not be a good measure of the costs of judicial application of a *legislatively* created test—a test of the latter kind is likely to be more carefully stated, is surely built on wider input, and certainly will be more stable.

G. Why Not Let Courts Modify Chevron *Problems?*

Some who applaud a more functional approach might suggest that we do not need to go through the difficult legislative process, that the Court can correct the *Chevron* doctrine by writing a correcting opinion at the next opportunity. As we have seen in the *Abbott* and *Eldridge* cases, the Court has shown that it can adopt functional standards. Thus, judicial correction is possible and would certainly be better than struggling with the uncertainty we face or confronting the new uncertainties of a legislative campaign.

Our experience does not suggest that an early judicial solution is likely. For twenty years, despite mountains of critical analysis, the Court has resisted clarification of the *Chevron* doctrine. From the divided opinions that the issue often presents, one assumes that the question is thoroughly debated. The absence of a consensus after twenty years of controversy creates doubt that a judicial solution is about to emerge.

Even if the courts were willing to revise the doctrine along the lines

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Andersen, *Judicial Review of State Administrative Action—Designing the Statutory Framework*, 44 ADMIN. L. REV. 523 (1992).

58. *See* Garrett, *supra* note 17, at 2646 (claiming that use of a standard comprised of many factors would "impose[] high decision costs on the judiciary").

suggested here, one still has to confront all the limitations of policy-making through adjudication. It would take just the right case and such a case may not arise in a timely manner. Even if a suitable vehicle could be found, a truly dispositive and stable solution might not result. The Court's propensity for multiple dissenting and concurring opinions might dim the brightness of any new line. Still further, there is no guarantee that a new judicially developed *Chevron* rule would be truly general. It might take years to work out its applicability in the many contexts in which the deference question arises. In my view, the advantages of a clean legislative effort with a truly general solution are well worth the work it will take.

Note also, that a legislative solution will be more stable than even a unanimous judicial decision. Legislation speaks with one national authoritative voice. While a statute can always be amended, experience with most administrative procedure statutes suggests that once a legislature settles an issue, it is not frequently revisited. A judicial clarification of *Chevron* on the other hand, even if miraculously unanimous, can be affected, shaded, colored, excepted, and adjusted by new facts, new arguments, a new tide of political passion or new personnel on the bench. Having the clarification in deliberated legislative form is surely the best avenue to stability.

H. Have Other Legislative Solutions Been Considered?

While the states have been relatively active, we have not had much legislation at the federal level on the general question regarding scope of judicial review of administrative action. In the 1970s and 1980s, Congress came close to passing a measure to *decrease* judicial deference to agency interpretations of law. The so-called Bumpers Amendment went through several iterations and in its mature form provided that courts should "independently decide all relevant questions of law" and that "in making determinations on . . . questions of law, the court shall not accord any presumption in favor of or against agency action."[59] The amendment did not pass.[60]

Unlike the Bumpers Amendment, the current proposal does not require any special level of deference. Instead, it seeks to vary deference as a function of practical indicia identifying situations in which deference would be sensible. Of course, Congress would retain full control. In any matter in which it really wanted judicial deference, or did not want judicial deference, Congress could express that preference specifically. Subject to

59. For a full account of the origins and history of the Bumpers Amendment, see Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 2 n.5 (1985) (discussing the purpose and framework of the Bumpers Amendment).

60. *Id.*

any Article III limits and subject to whatever remains of the Nondelegation Doctrine, one would suppose Congress would have pretty free rein to address specific deference levels, where that was thought wise.

Professor Garrett recently wrote a thoughtful proposal urging a different type of legislative solution to the *Chevron* problem.[61] She does not favor the general statute of which the Bumpers amendment is an example. Nor does she think agency-by-agency legislation describing the appropriate level of deference is feasible. Instead, she proposes that Congress adopt procedural rules which would insure that in each appropriation bill, reauthorization bill, or omnibus appropriation bill, Congress express its views about whether delegation of law-interpreting power to covered agencies was intended. If successful, Garrett's proposal would be a great advantage over the current situation because we would not be dealing in the fictional area of legislative intent, but would have express legislative guidance on the nature of the delegation.

Whether such an enactment could be passed is a more troubling question. The proposal made here may be easier to enact, as it needs legislative action only once. It also takes the approach of having an explicit statement of congressional preference to guide and control courts, but it provides that guidance in terms of the quality of the agency's interpretive work, not the indirect implication of delegation. Finally, it would make clear that its injunctions applied to all agency law-interpreting action.

One of the disadvantages of the approach suggested by Professor Garrett is that it will make the question of deference a chip in the political bargaining over each appropriations or reauthorization statute. It is not self evident that the choice of deference levels should vary from statute to statute as a function of particular constituent views, ideology, party pressure, or the many interacting chemistries of the congressional players and their staffs. In my view, a general and less politically involved formula embedded in the APA would promise a more principled outcome.[62]

CONCLUSION

This proposal will not end all uncertainties arising in determining the meaning and effect of agency legal interpretations. Instead its purposes are (a) to radically reduce the quantity of those uncertainties, and (b) to change

61. Garrett, *supra* note 17, at 2676.

62. *See* William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1061 (2004) (proposing a legislative solution to important parts of the *Chevron* puzzle, namely, the problem of distinguishing between legislative and interpretive rules, the problem of determining if deference is affected by whether the agency has interpreted a statute rather than a rule, and the problem of deciding when an interpretive rule is ripe for review).

the quality of the uncertainties which remain to permit their resolution on firmer grounds.

We have had twenty years of vigorous scholarly debate over *Chevron*. The cumulative effect of that outpouring has been to make clear that the doctrine resists refinement in the usual fashion—by traditional accretion of individual common law judgments informed by professional criticism. What is needed now, informed as we are by this rich scholarship, is to grasp the nettle and resolve the matter directly by a thoughtful and comprehensively applicable legislative stroke.

Historically, common lawyers have been distrustful of legislation.[63] Those who work with administrative law, however, should be the last to carry forward this historic bias. Not only do administrative lawyers deal regularly with non-judicial adjudicative systems, we have generally had good luck with general legislative solutions to difficult administrative law procedural problems. Our federal and state administrative procedure acts have been generally useful, as have our Model Acts. Certainly it is in the area of procedure that the kind of certainty which can result from legislation is most important.

True, we cannot hope for a perfect solution. Justice Frankfurter taught us half a century ago that "the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words." But he also held out some hope for a standard that, while leaving "an unavoidable margin for individual judgment does not leave the judicial judgment at large." We need, in short, a solution that does not rely on "talismanic words," and does not "falsify[] the actual process of judging"[64] but which recognizes that the weight to be given an agency's legal judgments should be measured on a scale calibrated to measure functional and real world elements.

Shifting sharply from a formal to a more functional approach, the proposal advanced here would represent a legislative instruction to the court to defer to agency legal interpretations (no matter their form) to the extent there is a plausible empirical showing that the conditions for deference are present. The conditions listed in the amendment (and proposals to add other empirical conditions are invited) include considerations of the authority of the agency's interpretation, what it owes to special agency technical or political resources, how carefully it was produced, and whether there has been a showing of the need for an

63. *See* Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908) (contending that "[n]ot the least notable characteristics of American law today are the [substantial] output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers").

64. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

independent judicial voice on the question. Such an approach stands a fair chance of creating the kinds of consistency and predictability that the Rule of Law demands.

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