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*Against Chevron – A Modest Proposal*

56 Admin. L. Rev. 957 (2004)

Abstract by Raymond R. Janairo

For over twenty years, the *Chevron* decision has prompted a flood of legal commentary. A majority of the commentary bemoans the *Chevron* doctrine's lack of clarity. Scholars frequently question when the doctrine applies, how to distinguish its two steps, and how to distinguish the *Chevron* test from others used to evaluate government action. The author argues that the time has come to consider a different approach. In order to address the lack of predictability of judicial review of agency legal interpretations, the piece proposes an amendment to § 706 of the Administrative Procedure Act, which would effectively abolish the *Chevron* doctrine.

The author proposes a functionalist approach in guiding judicial deference to agency legal interpretations. The amendment presents four factors courts will use to determine the degree of deference to give to an agency interpretation: the authority of the interpretation (i.e., the level of agency approval of the interpretation); the agency's use of its technical expertise, political and other resources; notwithstanding procedural defects and *Vermont Yankee*, the quality of the procedure and the involvement of "those specially affected with an opportunity to participate"; and whether the interpretation needs the "special weight of a judicial pronouncement." Three principles act as a foundation for this proposal: the Rule of Law requires a look at other solutions in the face of persistent confusion; solutions should give more attention to the use of functional standards, as opposed to formal standards; and, legislative solutions have "extraordinary advantages over continued refinement in judicial opinions." The piece addresses a number of concerns regarding the proposal, including whether it enhances the power of courts, the proposal's effect on case-by-case adjudication, its effect on formalism, and whether Congress would pass such a statute. Among other things, the author concludes that the proposal will reduce the uncertainty of the *Chevron* doctrine. Moreover the author states that legislation and not common law judgments will bring about certainty in judicial deference to agency legal interpretations.