Chevron as Remedy

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Andrew F. Hessick, *Remedial Chevron*, 96 **N.C. L. Rev** __ (forthcoming 2018), available at SSRN.

What's not to love about a remedies approach to solving an Administrative Law problem? Professor Andrew Hessick's forthcoming article, Remedial *Chevron*, aims to do just that. Critics of *Chevron* deference assert its foundation is shaky. Still, *Chevron* deference underlies countless judicial decisions. Originalists and textualists challenge *Chevron*'s legality under the Constitution, the Administrative Procedures Act (APA), and nondelegation doctrine. Two sitting Supreme Court justices call for its demise. Professor Hessick views these threats as dangerous and seeks to save *Chevron* through reinterpretation. He pragmatically alters tack to overcome formalist objections by reformulating our existing conception of *Chevron* to a "Remedial *Chevron*"—a constraint on the court's remedial authority. The article's goal is to save *Chevron* from peril and retain useful purposes. Courts would not be bound to agency interpretation but instead conduct *de novo* review of the law. This *de novo* power would be limited to the authority to vacate an agency determination only if it were unreasonable.

The reason the challenges pose threats to the continued vitality of *Chevron*, according to Professor Hessick, is that the logical conclusion to the legal challenges is that *Chevron* cannot stand. Professor Hessick seeks to avoid this conclusion and proposes a reconceptualization in order to save *Chevron*. Underlying his argument is a commitment to retaining the functional advantages of *Chevron* within the administrative system and to maintaining certainty and stability of agency regulation and adjudications.

According to Professor Hessick, the three primary legal obstacles to *Chevron*'s legality are: (i) judicial power under Article III of the Constitution, (ii) delegation of interpretive authority, and (iii) scope of judicial review under the APA. Under the first category of attack, Justices Gorsuch and Thomas contend that Article III's judicial power centers on the federal judiciary's independent interpretation of law. Professor Hessick outlines Founders' support for this view but notes a contrary line of court opinions providing for deference to agency decisions. He does not resolve this split, but offers that if Article III requires independent judicial interpretation, *Chevron* deference conflicts with the Constitution. Under the second line of attack, Congress's passing of statutes for agency administration amounts to an implicit delegation of power to interpret laws to agencies. Professor Hessick explains two flaws with this critique: it rests on a fiction and violates Article I's nondelegation doctrine. *Chevron* flounders under this attack. The last legal obstacle to *Chevron* is tension with the APA's requirement that courts interpret statutes. As Professor Hessick explains, any attempt to surmount this hurdle with an implied theory conflicts with the APA's requirement of express modifications. Accordingly, *Chevron* remains vulnerable to legal attack.

Remedial *Chevron* as the answer. Professor Hessick doesn't respond to policy critiques of *Chevron* but offers a theory of *Chevron* as remedy to eliminate the legal barriers. And it does so without overturning mountains of precedent and agency regulations. Viewing *Chevron* as a remedial doctrine, the judiciary would not show deference to agency interpretations of the law. Courts could vacate agency interpretations on erroneous grounds only if the agency unreasonably interpreted the statute. It is unclear, however, whether Professor Hessick's conception of *Chevron* as remedial doctrine is a prudential suggestion for courts to reinterpret *Chevron* precedent to a limited remedy and behave accordingly in the future or is it a statutory or constitutional mandate that Congress must implement. Given Professor Hessick's endorsement of Congress's power over statutory remedies, his proposal may require congressional action.

Professor Hessick proposes a modified interpretation of *Chevron* to a remedies doctrine as the solution but offers limits on its application. To support this theory, he provides a concise argument for the practice of placing limits on remedies. For example, he notes the legal requirements a movant must meet before securing an injunction. While I appreciate his effort to show limitations, the first category and perhaps the third simply remind readers that remedies law is bounded by laws, precedent, and doctrines. These bounds exist even if the remedy is equitable such as the injunction. It aids his argument that the Supreme Court, in *eBay* and *Winter*, strengthened the requirements for injunctive relief: imposing a more pronounced judicial obligation to analyze four factors before issuing (or denying) an injunction, even where historically a judge might have automatically granted the relief. Professor Hessick also emphasizes that similar limitations exist for damages. This assertion is true: scores of doctrines of limitation confine damage remedies. For example, the law of remedies includes a variety of limits including avoidability, certainty, and foreseeability. In certain vectors, the remedy simply will not lie. This result is true for purely economic losses even though caused by a defendant's negligence. As the last example of limitations on remedies, Professor Hessick reminds us that violations of constitutional rights do not guarantee relief. Regarding this claim, Professor Hessick is correct, though it is sometimes regrettable that for every wrong, the law does not afford a remedy. Accordingly, a limited conception of *Chevron* would fit within the remedies canon.

Reconceiving of *Chevron* to a limited remedies frame addresses the legal objections stemming from the Constitution, the APA, and the nondelegation doctrine. No doubt it is within the judicial power of Article III for Congress to tailor the ways the federal judiciary lends relief. Further, Congress has broad Article III power to constrain federal judicial power to issue and shape remedies. Would adoption of Professor Hessick's reframe result if we simply think about *Chevron* differently and convince courts to do the same or would it require congressional action? Congress has that power as long as it steers clear of constitutional boundaries such as *Klein* and *Plaut*. Professor Hessick's solution involves a narrowing of when the court can grant relief to instances of agency unreasonableness; he does not suggest altering the rules of decision or the results in a particular case. Thus, Remedial *Chevron* appears within judicial power; it does not rely upon a delegation fiction, and it better comports with the APA.

Might it garner critique due to its own formalism? The reinterpretation requires courts to be in good faith about when an interpretation is unreasonable versus erroneous on other grounds. Professor Hessick addresses other likely concerns. He offers that the reinterpretation applies narrowly: "courts would consider the reasonableness of an agency interpretation only in adjudicating challenges to that agency's action" but "would not be bound by agency interpretations in suits that do not challenge agency actions." Professor Hessick replies with a helpful example about vehicle regulations. The reframe also would eliminate *Chevron* step zero, which delimits the agency interpretations subject to *Chevron* deference. Instead, Remedial *Chevron* would apply to agency interpretations of any law underlying its action—even laws the agency is not charged with administering. The APA limits a reviewing court's power to vacate an agency's action as contrary to law. Professor Hessick maintains that Remedial *Chevron* does not rely on the theory of congressional delegation of interpretative authority to agencies. Accordingly, courts need not resolve whether the agency possessed authority to issue binding interpretations of the statute. Last, Professor Hessick acknowledges that his approach constitutes a sizeable departure from existing law in that an agency would not be permitted to adopt a contrary interpretation of an ambiguous statute already interpreted by a court. The court's interpretation is the law as "Remedial *Chevron* does not depend on the theory that agencies have primary interpretive authority."

Should we reconceive *Chevron* to embody a remedies doctrine? If you wish to retain administrative stability and diminish formalist objections to *Chevron* deference, Professor's Hessick's proposal warrants your serious consideration.

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