Judicial deference to agency regulation: what can we learn with the us Supreme Court applicable standards*

Deferência judicial às escolhas regulatórias: o que podemos aprender com standards aplicados pela Suprema Corte estadunidense

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ABSTRACT

Judicial deference towards agency regulation is a frequent subject in SCOTUS docket, causing a consistent effort to build applicable standards capable to harmonize separation of powers and a functional Administrative State. This article examines the main judicial precedents in crafting those standards to judicial deference in controlling regulatory

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choices, mapping the legal categories that presided the Court's reasoning. The objective is to identify similarities with the Brazilian reasoning matrix in the matter, benefiting from cross-fertilization whenever possible.

KEYWORDS

Separation of powers — non-delegation doctrine — administrative State — discretion

RESUMO

Deferência judicial para com as escolhas administrativas regulatórias é matéria frequente nos escaninhos da Suprema Corte estadunidense, gerando um esforço consistente para a construção de standards de apreciação capazes de harmonizar a separação de poderes e um Estado administrativo funcional. Este artigo examina os precedentes principais que originaram esses standards de deferência judicial quando do controle de escolhas regulatórias, mapeando as categorias jurídicas que presidiram o razoamento da Corte. O objetivo é identificar semelhanças com a matriz de argumentação brasileira na matéria, beneficiando-se de uma fertilização recíproca sempre que possível.

PALAVRAS-CHAVE

Separação de poderes — doutrina de não delegação — Estado administrativo — discricionariedade

1. Initial considerations

The millennial challenge of containing power was based on the premise of balance and harmony between specialized areas. Despite the appropriacy of the solution, the problems related to the construction of this delicate equilibrium remain significant. Attention has now turned to academic research to find new perspectives — with, in the background, the challenge of ensuring the development of functions that ensure, without prejudice, effective control of abuses.

Judicial deference as a parameter for the control of power in Brazil is a controversial issue, suggesting undue constriction of jurisdictional authority. On the other hand, unfettered judicial scrutiny, including regulatory and public policy, implies interference in areas beyond its expertise, with inherent risks of loss of quality. Reconciliation of these views may lie in the construction of standards that allow for judicial rigour, while at the same time respecting the technical expertise relevant to the administrative decision — as in the construction of US jurisprudence.

The aim of this article is to show the development by the US Supreme of standards guiding a deferential judicial approach in relation to administrative regulation. This discussion will be preceded by an overview of the historical and theoretical context of relevant judicial precedents, without which full understanding of the decisions presented would be impossible. The purpose is to identify which theoretical categories guide the US judicial system in terms of deference; a question harmful, in fact, to an exploratory impulse to translate these same standards to the Brazilian scenario of regulatory control.

The main theme of this article is an issue that has become increasingly present in the environment of Brazilian doctrine, judicial and regulative.[1] More recently, the scenario of the pandemic has led to a revaluation of this approach with the publishing of *CNJ Recomendações* No. 66/2020[2] and *Recomendação Conjunta Presi-CN* No. 2, of June 19, 2020;[3] both expressly alluding to deference with regard to the choices made by health managers. Notwithstanding application of this model to those structures of control, little effort has been invested in the development of fundamental theories to justify deference in judicial inspection at the time of scrutiny of administrative choices.

Research developed by the the US Supreme Court reveals two distinct aspects of the debate. Firstly, there is the effort to recognize and objectify

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1 VALLE, Vanice Regina Lírio do. Deferência judicial para com as escolhas administrativas: resgatando a objetividade como atributo do controle do poder. *Revista Direitos Fundamentais e Democracia*, v. 25, p. 110, 2020.

2 BRASIL. Conselho Nacional de Justiça. Recommendation No. 66,05/13/2020. *Diário de Justiça Eletrônico* / CNJ no 137/2020, 05/14/2020, p. 2-4. Available at: https://atos.cnj.jus.br/atos/detalhar/3318. Accessed on: 8 July 2020.

3 BRASIL. Conselho Nacional do Ministério Público — CNMP. Joint Recommendation Presi-CN No. 2/2020b, Diário de Justiça Eletrônico / CNMP of 06/19/2020. Available at: www.cnmp.mp.br/portal/images/Recomendacoes/RECOMENDAO-CONJUNTA-PRESI-CN-N-2-DE-19-DE-JUNHO-DE-2020-1.pdf/2020. Accessed on: 8 July 2020.

the concept itself, highlighting the phenomenon of legislative delegation and its implications for balance and harmony between powers. The second set of precedents involves the application of deference to interpretations developed by the administration itself, to its own regulatory acts. In Brazil, the debate around control of regulation is also a focal point of the doctrine of separation of powers. Thus, the article will address especially the first set of cases, prioritizing the precedents marked as seminal, not only in American doctrine, but by the Supreme Court itself.

The research is bibliographical in nature, based on data from the US Supreme Court, and doctrinal formulations that relate to the effort to create the outlined standards in the cases discussed. The methodology combines a descriptive dimension with a critical-dialectical approach.

Part 1 focuses on methodological considerations, whereby, along with the problematization, the object and objective are presented. Part 2 explains the American historical context that allows for the growth of the administrative State and, as a consequence, intensification of debate around its limits, especially in the field of regulation. Part 3 presents the most striking precedents in the jurisprudential construction of standards of application of judicial deference. Part 4 describes the categories identified as relevant in the precedents examined, and their links to the Brazilian context. In Part 5 some conclusions are offered.

Regulatory choices — the object of control in the cases examined — bear relationship to the public policies conducted by regulating officials, at least in terms of genus and species, which in itself validates the investigation. To properly manage judicial control of administrative regulation cannot mean a simple transfer of ownership in the formulation of subjective judgments - thus the importance of of standards.

2. The New Deal, the administrative state and the institutional space of agencies: contextualizing deference

The New Deal, with its programs aimed at overcoming the economic and social effects of the Great Depression, prompted debate about the hidden tension between a traditional view of the constitutional parameters of political power and what was deemed necessary to support American society at such a critical moment. Identifying the low market

regulation typical of a more liberal view as an obstacle to overcoming the crisis, the new dealers proposed interventionism and more intense state activity, with the development of public programs for economic recovery and employment and for more extensive involvement in the operations of private agents.[4] To realize this, it was necessary to invoke a new reading of the structural components of the political and normative system, such as the role of common law and its principles and limits with regard to state regulatory activity, the performance space of each of the specialized structures of power, and the range of skills of the different federated entities.[5] The New Dealers proposed a model of state action less focused on a formalistic logic of strict legality, but one that emphasized administrative action, respecting a rationale instrumental in achieving the purposes indicated by the legislation, or by ongoing public programmes. The complexities of that period would require, especially in the scope of the executive function, structures endowed with flexibility, expertise, managerial capacity, political accountability and powers of initiative that allowed for quick, adequate responses.[6] This proposal gave rise to the creation of the so-called "agencies" — organizational units with the aforementioned attributes, which would sometimes unite, to facilitate legislative, executive and judicial functions.[7]

The proposal quickly attracted criticism, based on the argument that it would entail a serious violation of the balance and harmony between powers. In contrast, its advocates pointed out the advantages of institutional structures able to promote supervision and execution of public policy aimed at social or economic initiatives in carefully defined areas of activity. The combination of execution, regulation and adjudication within the same institutional structure would allow, according to this view, greater cohesion in public deliberations.[8] The result would not be a State

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4 SARGENTICH, Thomas O. Teaching administrative law in the twenty-first century. *Widener Journal of Public Law*, v. 1, p. 152-153, 1992.

5 Journal of Public Law, v. 1, p. 152-153, 1992. 5 SUNSTEIN, Cass R. Constitutionalism after the New Deal. *Harvard Law Review*, v. 101, p. 421-510, 1987. p. 423.

6 510, 1987. p. 423. 6 SUNSTEIN, Cass R. Law and administration after Chevron, *Columbia Law Review*, v. 90, n. 8, p. 2072, Dec. 1990.

7 LAWSON, Gary. The rise and rise of the administrative state. *Harvard Law Review*, v. 107, n. 6, p. 1233, 1994.

8 One cannot disregard the common law character of the US system, which already has in adjudication a combination of conflict settlement and legal development, which makes reproduction of this in other structures less institutionally impactful.

devoid of legislative and judicial bodies, but one in which organizations and administrative activities are particularly relevant, at least in a quantitative respect.[9] On the other hand, there was an evident risk to the principle of balance and harmony between the powers in the creation and strengthening of agencies with this range of skills.

A key development in this historical trajectory was the 1946 *Administrative Procedure Act* (APA), a legal intervention in an environment strained by the reformist impulse of the new dealers. While recognizing the phenomenon of multiplication of agencies, the APA acknowledged : "authority of the Government of the United States, whether or not it is subject to control by another agency."[10] As a strategy for prevention of excesses, the APA overvalued the procedural dimension of the regulation of agencies. These structures recognized regulatory competence in at least two different kinds of deliberation: rulemaking, a more complex and participatory procedure;[11] and adjudication,[12] a localized mechanism for the management of disputes in matters subject to the administration of the institutional body. Each of these kinds of regulation comprised two distinct modalities with a greater or lesser degree of formalization: informal rulemaking, formal rulemaking, informal adjudication, and formal adjudication.[13]

If the precepts of the APA represented an apparent victory for the New Dealers, a more comprehensive reading of the standard reveals an alignment with the so-called legalists, more attached to the premise of supremacy of Parliament, summarized in the non-delegation doctrine. The accommodation effort is acutely felt with regard to the topic of

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9 VAN RIPER, Paul P. The American administrative state: Wilson and the founders - An unorthodox view. *Public Administration Review*, p. 477, 1983.

10 UNITED STATES, 5 U.S.C., § 551 (2012). It was verified that, for the purposes of applying APA, the concept is much broader than that of the organization with which the agency is associated in Brazilian law, namely, special autarchy of the regulatory agency type. This data is particularly relevant when considering the feasibility of transposition of practices and concepts developed in the US theoretical and jurisprudential scenario in the matter of judicial deference, which is not restricted to independent agencies, but comprises all specialized competence centers that develop regulation.

11 UNITED STATES, 5 U.S.C., § 553 (2012).

12 UNITED STATES, 5 U.S.C., § 554 (2012).

13 The expression commonly used in American doctrine to defined the species of agency performance — both formal and informal — can be, for the Brazilian reader, misleading. Both modalities included in the APA have a specific procedural design (hence "informal", as expressed in Portuguese does not reproduce the exact meaning); a terminological adaptation, perhaps "simplified" better translates the idea.

judicial review of agency choice. Thus, on the one hand, the APA confers jurisdiction on the Judiciary to decide on "all relevant legal issues, interpret constitutional and legal precepts, and determine the meaning or applicability of the terms of an agency's performance."[14] Yet, this is contradicted, to a large extent, by the opening clause of the same chapter, which excludes cases where the law prevents judicial review or in which the action of the control agency results from the exercise of discretionary judgment granted by law.[15]

Note that the two caveats presented to the review court are rooted in law, since Congress is responsible for vetoing this same control action, or even granting discretion to the agency in its founding document, called an enabling statute. For no other reason, the issue of relations between the powers, in particular the legislative canon of the non-delegation doctrine, became central to the construction of the doctrine of deference, as will be demonstrated.

3. Judicial deference to administrative choices in Supreme Court jurisprudence

The predominance of the common law matrix in the US system emphasized the progressive elaboration of judicial review of public choices. In terms of deference, it was no different, when we highlight the precedents that influenced the widely applicable standards.[16]

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

The case involved the claim articulated by Swift & Co. employees, for remuneration for stand-by hours, spent at the disposal of the employer for occasional emergency work. Such periods were declassified as working hours, in the Interpretative Bulletin No. 13, issued by the Wage and Hour

[14] UNITED STATES, 5 U.S.C., § 706 (2012).
[15] UNITED STATES, 5 U.S.C., § 701 (a) (2012).
[16] It is important to reiterate the reservation in the opening considerations, which will not be examined here, considering the proper limits to the scientific article, the set of precedents that involves the interpretation by the agency of its own regulatory acts, limited to brief information in subsection 3.5 below.

Division, part of the Department of Labor — the agency dealing with labor relations. The Bulletin regulated provisions of the *Fair Labor Standards Act* (FLSA), which identified minimum conditions for remaining at the disposal of the company, such as a work break, subject to remuneration. The employer claimed that the denial of payment stemmed from the simple application of the regulation articulated in the Bulletin, a petition accepted by the lower court.

The Supreme Court's decision begins by stating that there is no rule of law[17] that prevents consideration of stand-by hours as hours worked.[18] The characterization would depend on negotiations between employees and employers, whose disclosure, in turn, demanded analysis of actual circumstances, serving as an indication of the existence of such an agreement. Note that this proclamation alone allows for reform of the contested decision, which was based purely and simply on the idea that waiting time could not qualify as time worked, in light of the literalness of the FSLA in relation to Interpretative Bulletin No. 13; without investigating the existence of a specific agreement.

The decision, however, was confirmed, with the clarification that this analysis was entrusted by Congress to the Judiciary — which, curiously, suggests a departure from the notion of deference, i.e., granting the Judiciary the role of undertaking a factual investigation that would otherwise belong to the agency. It recognizes, at the same time, that the creation of the agency and the task of administering the standard legal framework under discussion (FLSA - *Fair Labor Standards Act*) would require, from this same institutional structure, inspection and prevention of violations; a series of activities that gave their agents "considerable experience in problems related to the calculation of hours worked and periods of inactivity, and, even more, a knowledge of the prevailing practices in the search for its solution". *Interpretative Bulletin No. 13* represented the synthesis of this understanding, as a guide to employers. Although the recommendation made by the agency in the oft-cited bulletin (stipulation to the contrary

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[17] Note that the decision entered into the common law system in 1944. Thus, even though there are legal rules in the strict sense, they do not exhaust the right, understood as a broader set of rules, established by elaboration of the Court itself.

[18] Fixing this premise proved important, as, on the same date, the Court decided on another precedent involving the same type of discussion - delimitation of hours worked in view of the FSLA - which had a different outcome, considering the specifics of case: Armor & Co. v. Wantock, 323 U.S. 126 (1944).

was according to the will of the parties), the Court recognized: 1) that the policy conceived by the agency is based on more specialized knowledge and in depth factual investigation than could be developed in court; and 2) that departure from the standards applied by the Executive in the administration of the FLSA could only be justified in the case of serious issues.[19]

In conclusion, the Court overturned the lower court decision - due to defects in the

procedure. As regards the factual question of the existence of an agreement between employees and employers, there was no way to decide on the applicability of Interpretative Bulletin No 13, and the case was returned to the lower courts. Once again, we note the circumstance that, respecting a system of common law, with the articulation of attributes that would make the decision persuasive, it is important to define a matrix of judicial control that, as will be seen, remained useful and applicable for the future.

Among these attributes, the Court reaffirmed agency expertise,[20] not only the theoretical qualification of its staff, but also the collection of information acquired daily regarding management of policies; but at the same time recognized thorough analysis of the regulated matter, the substance of motivation and consistency with past choices.

It should be noted that the criterion elucidated is predominantly epistemic, requiring analysis of the environment and the background of the decision control. The second observation lies in the statement that the agency decision must merit "consideration" — without yet being called "deference". The rhetorical details convey sensitivity to a debate that was already brewing at the time with regard to the preservation of judicial independence.[21]

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[19] UNITED STATES. Skidmore v. Swift & Co., 323 U.S. 140 (1944). "[The Court] consider that decisions, interpretations and opinions of the Administrator in relation to this Act [FSLA], although not determinants for the Court in terms of its own authority, constitute a body of experience of informed judgement which the Court and litigants can turn to for guidance. The weighting of this assessment in a given case will depend on the thoroughness of the analysis, the substance of its reasoning, its consistency with pronouncements anterior and posterior - factors that give it the power of persuasion, in the absence of power of determination."

[20] The argument in terms of expertise was reaffirmed by the Court in a relatively short period of time, in FTC v. Cement Institute, 333 U.S. 683 (1948), p. 333 U.S. 726.

[21] Note another phrase — distinct from deference — conveyed in Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), where the Court alludes to the controlling weight of interpretation conferred by the agency – in what is more than a simple "consideration". The specific precedent

The pioneering nature of the case is not of mere historical interest, as the epistemic standard continued to have secondary applications, as will be shown later.

3.2 Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)

The context involved efforts to enforce the *Clean Air Act* (1963), a legislative act related to the reduction of pollution and other environmental preservation measures. The legislative matrix was reviewed by *Clean Air Act Amendments* (1977) in view of failure to meet the original targets of reduction, and includes specific directives addressed to federative entities which had not met the standards. One of the strategies consisted of strict special licensing programs to address initiatives of the "construction and operation of stationary sources, mainly new or modified". A central component is the incidence of the special licensing program; the concept of an outside stationary source in the past was, on several occasions, the object of attention of the Environmental Protection Agency (EPA). The controversy surrounds new regulation established in 1981, which, reviewing the agency's previous position, reintroduced the so-called "bubble concept", which identifies as a stationary source: buildings, structures or facilities that belong to the same industrial group, located in one or more contiguous properties or adjacent, under the control of the same person (or people under the same common control. With this definition, changes undertaken in the industrial installation could be excluded from special licensing (more onerous), provided that the volume of emissions from the entire set of installations did not increase.

The issue was brought to court by the Natural Resources Defense Council (NRDC),[22] an environmental protection group that maintains that the bubble concept adopted by the EPA was not a reasonable expression

has not been examined here, as it concerns the second vector of jurisprudential construction, referred to in the opening considerations: relating to judicial approximation borrowed from the agency interpretation of its own regulatory acts.

[22] This same organization had previously sparked debate around EPA competence to undertake revisions in plans to adapt to new environmental standards determined by other provisions of the same Clean Air Act (see Train v. Natural Resources Defense Council, Inc. 421 U.S. 60 (1975)). At the time, the Court also preserved the choice of agency, with the argument that there was legislative delegation in its favor.

of the term "main stationary source", included in the legal norm. The opposition stems from circumstance that the regulated law related to, in another applicable passage, only States that had achieved the goals of reduction of pollutants, a more restrictive definition of stationary source than the bubble concept. From the comparison, it was concluded that the adoption via simple regulation of a broad concept should not favor the action of the polluter who failed to reduce emissions. The thesis was accepted by the District Court, and submitted to the Supreme Court, whose decision is summarized as follows: "With regard to the judicial review of the agency's interpretation of the law it administrates, if Congress has not directly ruled on the precise question, the issue for the Court is whether the agency's response is based on a permissible interpretation of the meaning of the law."[23]

The apparently simple conclusion unfolds rigorously on two levels of analysis, identified in the US doctrine as the two-steps test.[24] In the first, the inquiry is about the existence of specific deliberation of the Congress with respect to delegating responsibility to the agency to regulate the subject under examination.[25] If such deliberation exists, both the Court and the agency must yield to the congressional ruling, stated in an unambiguous way. Step two of the test is defined in the following terms: "whether the norm is silent or ambiguous in relation to the specific issue, the question posed to the Court is whether the answer of the agency is based on a permissible construction of the norm."[26] Referencing a long list of precedents, the Court concludes that deference should apply whenever:

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[23] UNITED STATES. U.S. Supreme Court. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837-838 (1984).

[24] The (in)correctness of the decision of the Supreme Court in the indication of the two-level test is subject to great controversy in American doctrine, with some affirming that the test expresses a redundancy and would be better stated with a single level of appreciation (STEPHENSON, Matthew C.; VERMEULE, Adrian. Chevron has only one step. Virginia Law Review, vol. 95, p. 597, 2009); others arguing that there are "interstitial steps" to be covered when exercising judicial review (COGLIANESE, Cary. Chevron's Interstitial Steps. George Washington Law Review, vol. 85, p. 1339, 2017). Controversy intensifies with the decision United States v. Mead Corp. — 533 U.S. 218, to be commented on in sequence, which, according to some, implied an earlier step to be developed in the analysis — Chevron step zero (SUNSTEIN, Cass R. Chevron step zero. Virginia Law Review, v. 92, p. 187, 2006). This discussion, however challenging, is not detrimental to the analysis undertaken in the present text.

[25] In the specific case, the question was whether the definition offered by the Clean Air Act Amendment to stationary sources, initially referent to air quality maintenance programs, would apply equally to exception programs (permit programs) instituted in favor of States not in line with the standards of pollutants reduction.

[26] UNITED STATES US Supreme Court. Chevron USA, Inc., Op. Cit. p 843

1) the administration of the legal norm conferred on the agency involves reconciling conflicting public policies; and 2) a full understanding of the relevance of this policy outlined by law requires more knowledge than usual on the regulated matter.

Besides the motivation, the Court's decision alludes to the infeasibility of a substitutive action by the Judiciary, when, faced with a scenario of technical and complex regulation, the agency has considered the issue in a detailed and reasoned manner. (There are echoes of the Skidmore decision here). In such cases, what actually happens is the reconciliation of interests in the regulatory option - a matter foreign to judicial review.[27] It is interesting to note that, if, on the one hand, the decision includes references to the attributes required of the regulatory choice — a complex environment, with detailed consideration of cognition elements, supported by sufficient justification, etc. — the conclusion is given in terms of a formal criterion, which examines the existence of legislative delegation, and from it recognizes relative presumption of the adequacy of administrative choice; which is removed only if it is arbitrary, capricious or manifestly contrary to the law.[28]

Notwithstanding common ground with Skidmore — the sensitivity of the congressional choice of legislative delegation to deal with the agency matter, and recognition that it is upon this administrative structure that expertise necessary for proper treatment of the matter falls — Chevron resulted in a different solution. The two-step test rejects the logic of appreciating the specifics of the regulatory choice, that control developed by the Judiciary involves investigating whether the agency choice was correct; rather, it contemplates an option implied within the limits of delegation, which does not reflect abuse of power.

The argument for legislative delegation is strengthened by the idea that specific legitimation would allow strong presumption in favor of regulatory administrative choice; this same presumption would authorize the establishment of an objective analytical standard regarding the applicability of judicial deference to administrative choices.

Despite the apparent Cartesian character of the stated standard, *Chevron* quickly prompted disagreements within the Supreme Court

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[27] UNITED STATES US Supreme Court. Chevron USA, Inc., Op. Cit. p 865
[28] UNITED STATES US Supreme Court. Chevron USA, Inc., Op. Cit. p 844

itself,[29] considering the scope of protection conferred on decisions formulated in the exercise of agency discretion. The debate is synthesized in two polarized positions: 1) *Chevron* would effectively institute a strong presumption in favor of agency choice (unless arbitrary, capricious or in violation of the law), of a standard applicable to any kind of regulatory decision; or, in contradistinction, 2) *Chevron* could not, considering the separation of powers and judicial independence, seek a general application that could, in the exercise of jurisdiction, reject case-by-case analysis.[30] This divergence provided opportunities for a series of other decisions in which the comprehensive claim of the *Chevron* criterion appears in a reduced form.

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

The debate over the scope of *Chevron's* application manifested itself to the Court in terms of diversity of agency decision making instruments. Observing the comprehensive definition expressed in the *Administrative Procedure Act* (APA), there are two articulations of the decision, identified as rule[31] and rule-making.[32] Brazilian readers should be aware of a false cognate, since the intuitive translation of rule suggests a generic and abstract command, evoking the notion of a normative administrative act, However, the APA concept also encompasses concrete decisions. To the typology of agency decisions, it is necessary to add order - a mandatory resolution[33] arising from the procedure identified by the APA as adjudication. The

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[29] SCALIA, Antonin. Judicial deference to administrative interpretations of law. Duke Law Journal, v. 1989, n. 3, p. 512, Jun. 1989.

[30] Cass R. Sunstein, Chevron step zero, op. cit., p. 187.

[31] UNITED STATES, 5 U.S.C. § 551 (4) (2012) "[...] the whole or part of a statement of generic or private application, with future effect, intended to implement, interpret or prescribe a standard or policy, or even describe the organization, procedure or requirements for agency's practices, including approval or creation of future fees, remunerations, financial or corporate restructuring or organizations in any capacity; prices, facilities, equipment, services or allowances for or arising from valuations, costs or accounting, or practices relating to any of the above components [...]"

[32] UNITED STATES, 5 U.S.C. § 551 (5) (2012) "[...] formulation procedure, amendment or revocation of a rule [...]"

[33] UNITED STATES, 5 U.S.C. § 551 (6) (2012) "[...] the whole or part of a final decision of the agency, whether affirmative, negative, injunctive or declaratory in form, other than rule making, including, however, licensing"

question discussed in the precedent rested on whether Chevron could apply indistinctly to any of these decision-making scenarios.

A first approach to this question is seen in the earlier *Christensen v. Harris County*,[34] where the exercise of regulatory competence of the agency was manifested in an opinion-letter; a model not expressly referenced in the APA. In absence of the specific concept, the decision falls under the generic category of "rule". The Court rejected the application of the Chevron deference, considering the nature of the pronouncement — an opinion-letter — which it was claimed was not covered by the "force of law". In the following year, the issue was represented to the Court, which set a precedent that would prove paradigmatic in the limitation of the *Chevron* scope of deference: *United States v. Mead Corp*.

The decision of the Treasury Department related to the establishment of tax rates levied on commercial entries or registries by the claimant Mead. The determination of the rate was usually made through a ruling letter to the interested party, a method referred to in the Code of Federal regulation,[35] in response to a written request. Contesting the tax rate indicated in the ruling letter,[36] Mead proposed its review, arguing that the regulatory determination appealed to deference based on the *Chevron* model, as an admissible internal administrative mechanism, with little formality.

The debate revolves, once again, around the exercise of discretion developed by the agency - which previously conferred a particular tax rate on the product marketed, but now levied another, more onerous, one. The guiding vote of justice Souter makes explicit at the outset that the Court intends to deliberate in the best way possible when dealing with the wide variety of formative laws of each agency, applying discretion; as well as procedures aimed at regulatory production[37] to make sense of

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[34] Christensen v. Harris County, 529 U.S. 577 (2000). It should be noted that justice Scalia, in his dissenting vote in United States v. Mead Corp. 533 U.S. 254, states that this reference would translate in other words, as, the result of the judgment, rejecting the application of Chevron deference, due to acknowledgment of the anachronism of the decision.

[35] UNITED STATES, 19 CFR § 177.1, (d) (1).

[36] The agency undertook a reframing of the product marketed by the company, moving it to a category with a substantial increase in taxation.

[37] Bear in mind that, in order to implement the regulatory decision, the agency has at its disposal the range of procedures provided for in the APA, which may be specified in its enabling statute.

the acts of Congress.[38] Next, we see the identification of two distinct levels of analysis with regard to legislative delegation: a first level involves the type of regulatory action Congress intends to transfer to the agency; the second the deliberative space reserved for it. At both levels, discretion is taken care of responsibly — in the first, to know if there was a transfer of regulatory authority in the abstract for pronouncements with apparent coercivity; in the second, whether this same identified transfer suffered in terms of the substance of the matter delegated, a limitation expressed by the Legislative in its central thematic axis.

To solve the question posed at the first level — whether there is in theory transfer of coercive regulatory authority - the Court resorts to the category already mentioned, of "rules with the force of law",[39] to say that only in these cases is deference possibile, still subject to application of the two-step test proposed by *Chevron*. Confirmation of this harmful procedure led to claims that the Court in *Mead* created a step zero.

Based on delegation for editing rules with the force of law — dressed up as coercivity - the idea of discretionary resort follows (now step one of *Chevron*) with verification of any expression by Congress of the transfer of regulated issues to agency management. Thus, a food agency may be recognized as competent in the abstract to issue a rule with the force of law with regard to excluding, as a regulatory order, for example, the prohibition of production of transgenic food. The regulatory act of this hypothetical agency would surpass step zero, but would not go beyond step one. The question follows: when may it be recognized as having the right to legislative delegation for editing norms "with the force of law"? The first statement is the most intuitive, linking this attribute to the manifestations to which the APA itself confers generality and coerciveness — *notice-and-comment* and *adjudication*. The evaluation, however, clearly provides an escape valve, stating that the "force of law" may still be identified through any other indication in the legislative text[40] with respect to the real intention of Congress to transfer this type of authority — not limited, therefore, to the hypotheses expressly stated in the APA. The intention of the legislator may be determined from the general attributions conferred by law to the

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38 United States vs Mead Corps 533 US 220.

39 Ibid., p. 226-227. It is important to bear in mind that the concept used by the Court - "rules with force of law" — is not enunciated in the APA.

40 Ibid. p. 218

delegating agency; or, if that is not a result specified in the law,[41] of other indicators of the same law that show the legislature expects the agency to carry out this type of subordinate pronunciation.

It is important to note that the segmentation of the analysis of the delegation of discretionary judgment — first, in the abstract, authorizing the editing of binding standards (*Mead*), and then in the concrete, reducing the spectrum of discretionary choices possible (*Chevron* step one) - does not preclude that the statement before congressional deliberation (by the delegation) can be verified expressly and implicitly.

The decision's most immediate concrete effect on *Mead* is to temper across-the-board[42] application of judicial deference in the control of agency — leading opinion labels this view, defended by Scalia, a simplification, hence the imperativeness of its rejection. The model, strictly speaking, combines detailed epistemic analysis (step zero) with formal measurement (steps one and two of the *Chevron* model). The precedent proves insufficient to parameterize decisions throughout the US Judiciary, a weakness that entails, after a short period of time, new ruling on the matter.

3.4 Barnhart v. Walton, 535 U.S. 212 (2002)

The appropriateness of the different judicial approach is discussed here, in the light of the decision of the Social Security Administration, the agency in charge of management of the Social Security Act. The hypothesis involved a social security issue related to a disabling health condition that would potentially involve a cash benefit. The legislative clause involved in the debate, identified, as a qualification for the benefit, health issues[43] and incapacity for work; expressly indicating that the condition arising from the first component should last at least 12 months, without stating the time limit for the latter.

The standard stated by the agency requires boundaries for both conditions, and, thus, Walton was denied the benefit. With the decision

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41 Ibid. p. 219

42 The expression — across-the-board presumption — had already been used by Scalia (1989) in hisacademic text to synthesize its scope according to the *Chevron* paradigm. That scope would have to be cut, in Scalia's view, in his dissenting vote in Mead (Ibid., p. 257).

43 The expression in English is "impairment".

amended by the State Court, the matter was submitted to the Supreme Court by the agency, which postulated deference to the regulatory act, pointing out non-compliance with the precedent set in *Mead*. It is important to highlight that the regulatory decision in favor of deference did not align itself with the hypotheses that intuitively would be recognized as "force of law" — but, according to the agency, deserved application of the standard of judicial deference.

In the issue in question, the Court evoked the statement made earlier in *Mead* that the force of law is not reserved for formal modalities of deliberation, and seeks to deepen the indicative elements of this same attribute, which can be extracted from the enabling statute, as confirmed in the following:

> In this case, the interstitial nature of the legal issue; the reported agency expertise; the importance of the issue for the administration of the legal rule; the complexity of that same rule, and the careful consideration that the agency has given to the situation over a long period indicate that *Chevron* provides the appropriate legal basis through which the legality of interpretation undertaken by the agency should be examined.[44]

The decision intended to clarify the elements checked in step zero, relative to the delegation to edit norms "with the force of law", but its terms do not favor this conclusion. On the one hand, there is the obscure sense of "interstitial nature of the legal issue"; on the other, the allusion to the "[...] careful consideration [of...] that the agency gave to the matter over a long period [...]" goes beyond the limits of analysis of boundaries of legislative delegation, considering a feature that belongs to the practice of agency regulation, in that matter - a typical component of the *Skidmore* model described in subsection 3.1. For this reason, the application of *Mead* remains uneven in state courts,[45] a circumstance that results in a scenario of legal uncertainty, whether in relation to the agency or their jurisdictions.

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[44] 44 Barnhart v. Walton, 535 U.S. 222.

[45] BRESSMAN, Lisa Schultz. How "Mead" has muddled judicial review of agency action. *Vanderbilt Law Review*, v. 58, n. 5, p. 1445, Oct. 2005.

3.5 More on the construction of jurisprudence in the area of deference

The conceptual development of judicial deference to regulatory choices developed within the scope of public administration does not end with *Mead*, or *Barnhart*. In the initial considerations here, a second consideration was pointed out, that, adopting the constitutional viability of deference as a premise, concerns the appropriateness of this same judicial approach to interpretation developed by the agency in relation to its own regulatory acts. It is worth noting that, as presented in sub-item 3.3, in the US system, adjudication integrates the concept of regulation, so that the exercise of adjudication in relation to a specific case involves interpretation by the agency not only of the original law of delimitation of its competences, but also of regulatory norms that may already be established and that are applicable to the case.

In this second debate, *Auer v. Robbins*[46] is a relevant precedent, establishing the appropriateness of judicial deference to the interpretation applied by the agency to its own regulation, except when this is clearly shown to be wrong, or inconsistent with the original regulation.

The foregoing revives the debate around deference in two sensitive repects, related to the principle of checks and balances. On the one hand, by stating that deference is applicable where the agency interprets and applies its own regulation, the Court reinforces the viability of concentrating in a single specialized area of power the authority to regulate, apply and interpret. On the other hand, stating that the only possibility of moving away from the premise of judicial deference where the agency interprets its own previous regulatory erroneous decisions, the Court expands agency authority by widening the field of deferential approach fixed at *Chevron*. In the end, patent error, required in Auer to justify judicial control, is more difficult to characterize than judgment of constitutional permissibility recommended in step two of *Chevron*. The result is the interpretation that an agency undertaking its own regulation deserves greater deference than reference to the law.

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[46] UNITED STATES. U.S. Supreme Court. Auer v. Robbins, 519 U.S. 452 (1997).

The matter is clear in the Supreme Court's deliberation in Kisor v. Wilkie,[47] the circumstances of which allow us to understand the subtlety of the current debate. In 1982, James Kisor, a Vietnam vet, applied for financial benefit related to post-traumatic stress. The request was rejected on the basis of the factual argument that the pathology was not evident in the applicant. Subsequently, the request was resubmitted and granted, but with *ex nunc* effect, yielding to the regulatory norm hypothesis, which authorized retroactive effects only when the decision was based on "official service records" deemed "relevant". The agency argued that, although the participation of the veteran in traumatic military operations was recorded in official records of service, that had not been the basis for the initial rejection. Thus, the data contained in official records were not considered "relevant" to support reconsideration of the original decision, based on the review of the medical diagnosis — hence the unreasonable retroactivity of the benefit. The case clearly involves interpretation with respect to the standard adjudication regulatory framework previously instituted by the agency (providing for retroactive benefits); in this case the meaning given to what was reputed "relevant" in the collection of data from in its own records determined denial of the benefit.

Kisor formally invoked Auer's overruling claim — which was not accepted by the Court. It is important to note, however, that, as happened in *Mead* and *Barnhart*, the Court explained that the rationale needed to undertake the application of deference in *Auer* was reaffirmed. It is on this rational path of judicial analysis of the agency that the type of investigation that allows for resolution has this regulatory option delimited, preserving the intention of the Congress to delegate discretionary judgments to the agency, without violation of the principle of checks and balances, which is the basis of the organization of powers.Given all this, returning to the objective of this study, we now focus on identification of the theoretical categories that determine the construction of standards in terms of a deferential judicial approach.

[47] UNITED STATES. U.S. Supreme Court. Kisor v. Wilkie, No. 18-15, 588 U.S. ___ (2019).

4. Legislative delegation, discretion and democratic legitimacy: key elements in US deference

Understanding the historical environment of the emergence of agencies, and of what is now called the administrative State, allows identification of central categories for the entire debate on judicial deference: 1) limits and possibilities of legislative delegation, in its favor; 2) the spectrum of discretion susceptible to delegation; and 3) democratic legitimacy of this translation of competence.

In this field, a centrality of US law is the non-delegation doctrine - the theoretical premise extracted from the constitutional clause disciplining Legislative Power. Although it does not arise from literalness of the text in terms of the prohibition to delegate exercise of the normative function,[48] the predominant understanding was based on translating the founding fathers' command that relevant choices pertaining to collective policy must be formulated legislatively — and not by the Executive Branch.[49] Add to this the Lockean argument that delegation of authority by citizens to their representatives admits no further transfer. Nor is it rare to hear the argument that non-delegation is a structuring component of the principle of balance and harmony between powers — which, curiously, is clearly stated in the US Constitution.

Evidently, the non-delegation parameter could not be presented forcefully, at the risk of derailing, at the same time, development of the legislative function (which would be overloaded by the duty of ruling on all matters involving the functioning of the State) and even the executive (blocked in its actions due to the absence of non-delegable regulation). Thus, according to the interpretation of the Supreme Court in *J.W. Hampton Jr. & Company v. United States*[50], the non-delegation doctrine evolved into an understanding that delegation is possible, since it oriented a delegatory

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[48] In a literal sense, the clause invests Congress with legislative powers, but it says nothing in relation to transfer by the same holder of the original investiture. Accepting that the constitutional text, be it by the clause contained in article I, Section I, or by enshrining the principle of separation of powers, does not authorize the non-delegation doctrine, see POSNER, Eric A.; VERMEUL, Adrian. Interring the nondelegation doctrine. *The University of Chicago Law Review*, vol. 69, p. 1721-1762, 2002.

[49] SUNSTEIN, Cass R. Nondelegation canons. *The University of Chicago Law Review*, vol. 67, no. two, p. 316, Spring 2000.

[50] UNITED STATES. U.S. Supreme Court. J.W. Hampton Jr. & Company v. United States 276 U.S. 394 (1928).

administration through what was called an intelligible principle,[51] pointing the way for the development of regulation by organs other than the Legislative.

Despite the absence in Brazilian law of a doctrine of non-delegation, the discussion of the limits of transfer of regulatory choice to administration and its implications for the separation of powers is a frequent topic in the Plenary of the STF,[52] which highlights the proximity between the US debate and concerns highlighted nationally.

The notion of discretion, in turn, becomes relevant, linked to a series of precedents from various directions. Initially, the idea of checks and balances already presupposes the rejection of the possibility of excessive concentration of discretionary judgments in the same power structure.[53] Thus, the category should be considered from this double perspective - excess of discretion is something to be avoided, whether directed at the agency or the Judiciary.[54] The trajectory of the precedents studied evidences the search for this just means, with Skidmore opening up to the judiciary a spectrum of discretion for gauging the components that the Supreme Court considered relevant for the application of the standard of judicial deference.

Chevron, in turn, adapts a model in which the court decision could be based on different criteria,[55] selected from the purely subjective deliberation of the judge, for a formulation according to which the agency vision expressed in the regulatory decision has special weight, respecting its special institutional capacity. There is, therefore, protection of agency

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51 "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." (J.W. Hampton Jr. & Company v. United States).

52 By way of illustration, see ADI 4.874, in which the STF, analyzing the constitutionality of a regulatory norm edited by Anvisa, adopted as the main axis of discussion the analysis of the limits of the legislative delegation.

53 CASS, Ronald A. Vive la deference? rethinking the balance between administrative and judicial discretion. *George Washington Law Review*, v. 83, n. 4/5, p. 1294-1329, Sept. 2014

54 Antonin Scalia, *Judicial deference to administrative interpretations of law*, op. cit. p. 515.

55 For Merril (MERRILL, Thomas W. Judicial deference to Executive precedent. Yale Law Journal, v. 101, p. 972-973) the systematization of criteria usually considered by the Courts when analyzing administrative decisions respects the following categories: 1) related factors with respect the attribution of competence by Congress to agencies to interpret and regulate a legislative clause; 2) factors related to the concrete administrative decision under analysis; and 3) factors believed to demonstrate congruence between the results sought by the agency and the intention of the Legislative in relation to that specific matter.

discretion, only admitting its reversal in the absence of delegation (step one) or in the extreme case that regulatory choice is not permissible.[56]

The debate regarding the existence and limits of the formulation of discretionary and coercive choices is clearly established in *Mead*[57] and reiterated in *Barnhart*, with the articulation of elements identifying the authority granted by legislative deliberation. Judicial deference presents itself as a harmonization between the operational benefits of the transfer of regulatory discretion, and prevention of concentration of undesired discretion in the same institutional structure.[58]

The approach in the examined precedents sheds light on issues little examined in Brazil regarding discretion — usually studied from the perspective of concrete decisions and possible pathologies arising from this discretion. It seems clear, however, that development of the regulatory activity itself as a deliberative procedure is an important manifestation of the exercise of administrative discretion, and as such should be understood and controlled.

Finally, the question of democratic legitimacy is at the root of the entire debate. From a more intuitive perspective, in the case of tension between agency and legislature, the application of judicial deference according to a broader conception — across the board, as proposed by Scalia — suggests contradictory ideas as to the unauthorized emptying of functions of the Congress by the agency; and the Judiciary, limited by the deferential approach. The counterargument is that public agents responsible for the agencies do not escape accountability proper. In these terms, there is democratic prestige in its manifestation, rather than a representation of censorship.

Observing the same problem from the perspective of the relationship between the Judiciary and Legislative, the judicial reproach to delegation by Congress expresses a judgment of censorship of this same power

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[56] HICKMAN, Kristin; KRUEGER, Matthew D. In search of the modern Skidmore standard. *Columbia Law Review*, v. 107, n. 6, p. 1250-1254, Oct. 2007. 57 UNITED STATES. U.S. Supreme Court. Mead Corp, op. cit.

[57] UNITED STATES. U.S. Supreme Court. Mead Corp, op. cit. p. 236.

[58] The debate presented — but not explored fully — in this text, regarding deference to agency decisions in interpreting their own regulation, conveys resistance to this concentration of discretion, as it can manifest itself in normative and adjudication plans.

structure where it proclaims which agency has the institutional structure best suited to the management of that matter.[59]

Synthesizing the criteria developed in the precedents covered, there are at least three tests resulting from the combination of Chevron and Mead: 1) Is there a legislative delegation to issue binding pronouncements? 2) Is there a transfer of discretionary judgment in the particular matter? 3) Is the regulatory choice made by the administration, if normatively permissible — not the best choice, but a choice constitutionally and legislatively possible? These point, by themselves, are useful parameters for judicial analysis of the issue of deference in Brazil, as a response to the conflict of the same set of theoretical categories.

Regulatory choices, even when based on technical discretion, are characterized by political deliberation. Hence, they are initially entrusted to institutions invested with representative legitimacy. Alternatives that matter in variations of this intuitive response — either by legislative delegation to the agency or replacement of Legislative or Executive power by controlling action of the Judiciary - prompt the vexing question of the adequacy of the substitute institutional structure to formulate that same discretionary judgment. This is the issue in the precedents examined; and the ongoing debate in Brazil with regard to the judicial control of regulatory choices.

Evidently, greater clarity as to the legislative options for transfer of this authority to make discretionary choices would be helpful - but since they result from political judgment, they will always be subject to the unstated and covert. Whether it is true that legislative omission or cryptic wording on the issue of regulatory powers recognized by management may result in shielding control, it is no less certain that judicial inquiry is based on objective criteria. In this sense, the precedents reviewd are extracted from the three steps of the standard currently applicable in US law, which, if approved, merit application in Brazil.

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[59] Cass R. Sunstein, *Chevron step zero*, op. cit., p. 206.

5. Conclusion moving forward

The research agenda on the subject of judicial deference is not exhausted in this text, which suggests consolidation of standards applicable to Brazilian reality, from the experience of the US jurisprudential construction. My invitation to researchers, is to contribute to this approach I am now following.

The latest learning extracted from the path outlined here is that a theoretical category stating that judicial deference is in favor of regulatory administrative choices, which communicates directly with the structuring axis of the organization of power, as in the system of checks and balances, does not depend on a single pen stroke — but requires a gradual conceptual development, and a dialogic revisiting of the precedents already established.

The increase in the complexity of state functions leads to constant intercessions between traditional element of power, politics and practice that must be internalized by law in this updated interpretation, regarding actual contribution of checks and balances in a power structure; this will only be relevant if it is capable of ensuring the operation of the State in fulfilling its institutional commitments.

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