Presidential Policies and the Overruling of Chevron Doctrine

by Vincenzo De Falco

Abstract: *Politiche presidenziali e il superamento della* Chevron doctrine – The paper analyzes the impact of Chevron's overruling on the ability of the President to direct the interpretation of congressional delegations for the implementation of his policies. The author examines the pre-Loper Bright context and illustrates the possible effects of the overruling on the ability of the President to implement his political direction through the interpretation of the Statutes provided by agencies.

Keywords: Chevron deference; Loper Bright; Agencies' interpretation of law; Presidential policies; Judicial review

1. Introduction

Chevron is a very famous case in American constitutional doctrine.[1] For forty years, it represented the theoretical approach for maintaining the constitutional balance between powers, and gave greater weight to the agency's interpretation, if not irrational. Separation of powers implies a broad discretion of the administration in defining and pursuing political

[1] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In the theoretical approach prevailed in the Supreme Court in 1984, when a congressional delegation required an interpretation about the scope and limits of the power delegated to the agencies, the federal judges would essentially have to follow a phased investigation; first analyze whether the provision was actually ambiguous and, if so, decide whether the interpretation provided by the agency was in line with the provisions of the delegation, and then proceed to verify whether it presented profiles of irrationality. Once this first step was overcome, therefore, faced with an interpretation provided by the agency that was neither contrary to the delegation nor irrational, the American judiciary could examine whether the ambiguity of the provisions of the Statutes was in some way attributable to an express or tacit will of Congress. In this case, the existence of implicit powers would have been a direct effect of the delegation granted, and therefore the American judiciary would not have been able to delve into examining the interpretations made by the administrations, nor substitute its interpretation, if no profiles of irrationality were discernible. In 2001, this approach underwent a first restriction, defined as Chevron step zero, according to which a federal Court would have had to preliminarily analyze whether Congress had actually intended to confer to the agencies the power to interpret the legislative delegations, and then proceed to the subsequent phases. C.R. Sunstein, *Chevron Step Zero*, in 92 *Va. L. Rev.* 187, 189 (2006).

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objectives, but it is also necessary to ensure that agencies exercise their functions guaranteeing independence without exceeding limits of the congressional delegation.[2] Finding this balance is difficult, and particularly complex in all the cases in which American agencies must act within excessively broad Statutes, and identifying the degree of expansion of their powers. Excessive space granted to American judges could lead to interference in the achievement of political objectives,[3] but at the same time judicial review has to prevent that choices made can be dictated by pressure groups, or lacking an insufficient assessment of the interests involved.[4] However, a particularly incisive control would lead to the slowing down of rulemaking process, increasing the ossification.[5]

For a short period of time following the New Deal, American judges have widely shown a rather deferential approach, but in the following years the complexity of the issue has produced jurisprudential contrasts.[6] The conservative line led to limiting the judicial review within the classic mesh of total respect for the political choices made by agencies, while the innovative tendency extended the rationality control to verify, in detail, whether the administration could have also adopted different solutions. The deference of Chevron, supported by Skidmore[7] and Auer,[8] has provided an interpretative viaticum, but in reality there has never been a stable and

[2] Many government agencies, such as Medicare, Medicaid, the Food and Drug Administration, the National Institutes of Health, the Children's Health Insurance Program, hospitals, and insurers operate under thousands of pages of federal regulations, which govern everything from drug prices to fighting pandemics. T. A. Merrill & K. Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, in 116 *Harv. L. Rev.* 467 (2002). G. Lawson, G.I. Seidman, *Deference: The Legal Concept and the Legal Practice*, New York, 2020, 183 ss.

[3] T.J. Miles & C.R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, in 73 *U. Chi. L. Rev.* 823, 825 (2006).

[4] R.J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decision making: Lessons from Chevron and Mistretta*, in 57 *U. Chi. L. Rev.* 481, 483 (1990). J.F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, in 96 *Colum. L. Rev.* 612, 614-17 (1996).

[5] C. Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, in 22 *Geo. Mason L. Rev.* 575, 591-92 (2015). T.O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, in 75(3)*Tex L. Rev.* 525, 525 ss. (1997); W. S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, in 94 *Nw. U. L. Rev.* 393, 393 ss. (2000); W.N. Eskridge, Jr. & L.E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, in 96 *GEO. L.J.* 1083, 1083-1126, (2008).

[6] R.J. Pierce, Jr., *Administrative Law Treatise*, New York, N.Y., 3rd ed. 2002, vol. I, 73 ss. A. Woolhandler, *Judicial Deference to Administrative Action - A Revisionist History*, in 43 *Admin. L. Rev.* 197 (1991). R.E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, in 106 *Michigan L. Rev.* 399, 413 ss. (2007).

[7] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Skidmore* deference allows a federal Court to determine the appropriate level of deference for each case based on the agency's ability to support its position.

[8] *Auer v. Robbins*, 519 U.S. 452 (1997). Under *Auer* deference, a federal Court must control if the interpretation is plainly erroneous or inconsistent with the regulation. C.R. Sunstein & A. Vermeule, *The Unbearable Rightness of* Auer, in 84 *U. Chi. L. Rev.* 297 (2017).

coherent approach.[9] Under Chevron, executive branch agencies have played a central role in interpreting federal regulatory Statutes. At the same time, the deference doctrine allowed Presidency to expand the boundaries of congressional delegations, and interpret them permitting the administration to address new contemporary issues, including housing finance, greenhouse gas emissions or artificial intelligence. Many of the mechanisms by which the modern US health care system works were built on years of Chevron doctrine, as environmental policies, and the powers granted to the Environmental Protection Agency are based on broad interpretations of the Clean Air Act.[10] It is only due to the interpretative spaces favored by Chevron that the Presidency has managed to implement its policies. Today, the Republicans' idea of pushing the judiciary to reform the deference doctrine is intended to hinder this tendency, shown more incisively by the Democratic Presidency.

In Loper Bright,[11] Supreme Court overturns the Chevron deference and removes a parameter that has limited judicial review to the analysis of the rationality of the interpretations provided by the agencies on congressional delegations. Chief Justice John Roberts wrote the majority opinion and held that Chevron deference conflicted with the Administrative Procedure Act.[12] According to his opinion, Courts have the responsibility to decide whether the law means what the agency says. Agency interpretation can still be respected under the weaker Skidmore deference.[13] The problem with Chevron, the Court explained, is that it presumed that any statutory ambiguity is an implicit delegation of Congress's authority to an administrative agency. And with respect to express delegations, the Court suggested that Congress must do more than simply delegate general rulemaking authority.

The reform of the Chevron doctrine has several implications for the balance of powers in American constitutionalism, with regard to the incisiveness of judicial review, the role of the President and the Congress. What will be the impact of Loper Bright on the President's ability to induce agencies to follow his political agenda? Will Congress need to approve more detailed delegations? Will there be a new balance in the separation of powers?

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[9] R.J. Kozel & J.A. Pojanowski, *Administrative Change*, in 59 *Ucla L. Rev.* 112, 135-67 (2011). J. Boughey, *Re-evaluating the doctrine of deference in administrative law*, in 45(4) *Fed. L. Rev.* 597 (2017).

[10] For example, Carbon dioxide is not on the list of traditional pollutants that lawmakers drafted when they wrote the Clean Air Act in 1970 or updated it two decades later, like radiation, ozone, dust and soot. As the EPA regulates greenhouse gas pollution from power plants, cars and trucks and other major sources, it must continually interpret the provisions to figure out how it can do so and how far its power can extend.

[11] The principle was overturned by the Supreme Court in *Loper Bright Enterprises, et al. v. Raimondo*, 603 U.S. (2024).

[12] B. Rappaport, *Chevron and Originalism: Why Chevron Deference Cannot Be Grounded in the Original Meaning of the Administrative Procedure Act*, in 57 *Wake Forest L. Rev.* 1281 (2022).

[13] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* deference allows a federal Court to determine the appropriate level of deference for each case based on the agency's ability to support its position.

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2. Court's ambiguous approach in agencies' ability interpretation of congressional delegations

Supreme Court ruled in Chevron that Courts must defer to the authority of an administrative agency's interpretation of a Statute, whenever both the intent of Congress was ambiguous and the agency's interpretation was reasonable or permissible. The Court reasoned that ambiguities in Statute may be a delegation of authority from Congress, thus limiting a federal court's ability to review an agency's interpretation of the law. In the first step of the test, the Court would have to determine whether there was an unambiguous expression of Congressional intent in the Statute. If not, the Court would have to proceed to the second step of the test: whether the agency's application of the Statute was based on a "reasonable" interpretation of ambiguous language. If so, the Court would have deferred to the agency's interpretation of the Statute. If not, the agency's interpretation would likely have been ruled impermissible.

This theoretical approach has never been fully shared by American legal thought, where there is constant oscillation between opposing theses. Those who expressed themselves in favor of Chevron over the years highlighted the fear that the judiciary could influence the agency political preferences, or that judges did not possess the technical-professional ability to delve into the merits of highly specialized choices.[14] Other approaches highlighted that a penetrating review would entail the possibility of interfering in the execution of presidential policies.[15] For some scholars, Chevron allowed federal agencies to operate more efficiently, interpret the Statutes issued by Congress and issue the necessary administrative rules, without the preventive approval of the judiciary for each interpretation or reinterpretation of a law.

The main opponents of Chevron highlighted other problems too, connected to the great power of the administrations, in absence of a penetrating judicial review.[16] Others, also expressed in several dissenting opinions,[17] defined Chevron as a sort of abdication of the judicial power.[18] Many scholars believed that in the absence of a unifying interpretation, each

[14] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, cit. and *Barnhardt v. Walton*, 535 U.S. 212, 222 (2002). D.W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, in 2 *Admin. L.J.* 269 (1988).

[15] C.W. Clayton, *Separate Branches--Separate Politics: Judicial Enforcement of Congressional Intent*, in 109 *Pol. Sci. Q.* 843, 871 (1995).

[16] S. Breyer, *Judicial Review of Questions of Law and Policy*, in 38 *Admin. L. Rev.* 363, 373 (1986). C.R. Sunstein, *Judicial Review of Administrative Action in a Conservative Era*, in 39 *Admin. L. Rev.* 353 (1987). M. Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, in 87 *Cornell L. Rev.* 486, 547 (2002). M.C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, in 119 *Harv. L. Rev.* 1036, 1070 (2006). J.M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, in 42 *Conn. L. Rev.* 779 (2010). J.P. Larkin, & E.H. Slattery, *The World After Seminole Rock and Auer*, in 42(2) *Harvard Journal of Law & Public Policy* 625, 625 ss. (2019).

[17] Decker, 568 U.S. at 616, Scalia, J. concurring and dissenting, *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994) (dissenting).

[18] *Gutierrez-Brizuela v Lynch*, 834 F 3d 1142, 1152 (10th Cir, 2016).

agency can expand or reduce the meaning of a provision of the congressional delegation, in a constant legal uncertainty.[19] Then there are those who highlighted that Chevron allowed the expansion of presidential powers, and undermined the legal certainty after each succession of Presidency.[20] In many states Supreme Courts hindered the Chevron approach in their territory.

This division in American legal thought has had consequences on the incisiveness of Chevron deference, which has been anything but linear, and has not prevented judiciary from carrying out penetrating checks on the actions of American agencies.[21] Some scholars highlighted that Chevron operates as an optional canon of interpretation,[22] which is influenced by various elements, including ideological considerations and attention to the preferences of Congress and the President.[23]

So, American legal thought acknowledged that Courts applied Chevron without any linearity,[24] and in a completely unpredictable way.[25] Some scholars highlighted that judiciary appeared more inclined to a more incisive review when it did not share the agency approach, or when the interpretation concerned criminal cases. In other cases, Courts relied on the

[19] C.R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, in 89 *Colum. L. Rev.* 452, 502-11 (1989).
[20] A. Scalia, *Judicial Deference to Administrative Interpretations of* Law, in 1989(3) *Duke Law Journal* 511, 511-521 (1989).
[21] Supreme Court has recently shown that it wants to go beyond the traditional deference in *Kisor v. Wilkie* WL 6439837 (2018). So in *American Hospital Association v. Becerra*, 596 U.S. 724 (2022). The last case involved applications of Chevron deference. The judgment involved a 2018 decision by the U.S. Department of Health and Human Services (HHS) to reduce the reimbursement rate HHS pays certain hospitals for treating Medicare patients. A hospital coalition filed suit, arguing that HHS's decision, in the absence of adequate supporting data, violated the Medicare Statute. The case questioned whether Courts should exercise Chevron deference and defer to HHS's formulation of Medicare drug reimbursement rates as interpreted by the agency. U.S. Supreme Court ruled that HHS violated statutory authority and that HHS's interpretation of the underlying Statute in the case was flawed, and that the agency had acted in violation of its statutory authority when it reduced reimbursement rates. Justice Brett Kavanaugh's majority opinion made no mention of Chevron deference.
[22] T.W. Merrill & K.E. Hickman, *Chevron's Domain*, in 89 *Geo. L.J.* 833, 833-35 (2001).
[23] L. Epstein, J. Knight & A.D. Martin, *The Supreme Court as a Strategic National Policymaker*, in 50 *Emory L.J.* 583, 610-11 (2001) W.N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, in 79 *Calif. L. Rev.* 613, 617-64 (1991).
[24] R.J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean*?, in 63 *Admin. L. Rev.* 77, 85 (2011). M.F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, in 93 *Tex. L. Rev.* 625, 638 ss. (2015). Y. Dotan, *Deference and Disagreement in Administrative Law*, in 71(4) *Admin. L. Rev.* 761, 766 ss. (2019).
[25] W.N. Eskridge, Jr. & L.E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, cit. 1083, 1089-90, 1105. W.N. Eskridge, C. Raso, *Chevron as a Canon, not a Precedent: An Empirical Test of what Motivates Judges in Agency Deference Cases*, in 110 *Columbia Law Review* 1727 (2010), according to which the Court does not apply its announced regimes of deference in a predictable manner and that such regimes do not operate as a formal constraint on judges.

technical arguments provided by the agencies,[26] or on parameters such as the proportionality of the choices,[27] the completeness of the technical data, the logic, the conformity to previous interpretations.

The degree of deference has also appeared to vary in relation to the type of acts adopted, and reached its peak when the analysis concerned rulemaking, or interpretations involving foreign affairs and national security.[28]

In other words, the regular application of different levels of deference has been admitted, in relation to the characteristics of the matter, or whether the relevant factors concerned technological, economic or social issues.[29] For some scholars, Supreme Court followed the Auer deference in cases involving the interpretation of the rules approved by agencies,[30] the Chevron doctrine regarding the expansion of powers deriving from congressional delegations,[31] and Skidmore when the interpretation of the Statutes prolonged effects over time.[32]

3. Rethinking rulemaking process and the incisiveness of judicial review

Loper Bright fits into a context of general tendency to reform the rulemaking process, with a new definition of the balance of powers. The bill under discussion in the Senate requires agencies to demonstrate that the proposed rule is the most effective, both from the point of view of the cost-benefit ratio and in relation to the expected objectives.[33] In other words, the

[26] R.L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, in 85 *Va. L. Rev.* 805 (1999). F.B. Cross & E.H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, in 107(7) *Yale L.J.* 2155, 2175-76 (1998).

[27] J.F. Belcaster, *The D.C. Circuit's Use of the Chevron Test: Constructing a Positive Theory of Judicial Obedience and Disobedience*, in 44 *Admin. L. Rev.* 745, 758-59 (1992). F.B. Cross & E.H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, in 107 *Yale L.J.* 2155 (1998).

[28] O.S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, in 15 *Yale J. Reg.* 1, 31 ss. (1998).

[29] K.E. Hickman & A.L. Nielson, *The Future of Chevron deference*, in 70 *Duke L. Journal* 1015, 1023 – 1024 (2021). *County of Maui v. Hawaii Wildlife Fund*, n. 18-260, 590 U.S. 2020. *Kisor v. Wilkie* 2018 WL 6439837 (2018). *Epic Sys. Corp. v. Lewis*, 138 S. C. 1612, 1630 (2018). *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. C. 2051, 2055 (2019). *Babb v. Wilkie*, 140 S. C. 1168 (2020).

[30] *Coeur Alaska, Inc. v. Se. Alaska Conserv. Council*, 129 S. Ct. 2458, 2468 (2009).

[31] *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

[32] *Christensen v. Harris Cnty.*, 529 U.S. 576, 594-95 (2000).

[33] The first draft of the Regulatory Reform Act, in 1981, attempted to introduce the obligation for agencies to submit the rules for approval to regulatory impact analysis and to identify the costs and benefits of alternative solutions, with the concurrent aim of allowing the expansion of judicial review of rulemaking. S.A. Shapiro & R.E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, in 44(6) *Duke L.J.* 1051,1052 ss. (1995). The new draft contained in the Regulatory Accountability Act of 2017 takes up and strengthens this approach to the extent that it requires agencies to not only consider the benefits and costs of potential alternatives

administrations would be required to demonstrate factors that go well beyond the Chevron doctrine.[34] In the current bill, the investigation that the American administrations should carry out is much more complex than the current. For many scholars, the consequence of this procedural aggravation should lead to strengthening the judicial control on the impact analyses provided by agencies.[35] The bill even includes the idea of reforming the substantial evidence test,[36] and to stem the tendency of some Courts to consider only the evidence provided by the agencies to support the choices made, and not also those that could have led to different solutions.

But it is quite evident that these changes, if on the one hand they would strengthen the control on the legitimacy of the procedure, on the other hand they would determine excessive prolongations of decision times, in addition to favoring the pressure groups that, if opposed to the projects under approval, would be induced to challenge the decisions taken even just to delay the final approval.[37] For others, judicial review should remain relegated to the control of the reasonableness of the choices made, in compliance with the separation of powers that has so far induced the American judges not to enter into the merit of the regulatory choices made by the agencies[38] and, in any case, to exclude that the judicial review could be based on elements other than those that emerged from the documents of the procedure.

4. New tendencies in separation of powers

Loper seems only to have accelerated a process that has already been underway for years, in the idea that judicial review should have moved from the analysis of the absence of irrationality of the cost-benefit ratio, to the verification that the chosen solution is the best possible, compared to other alternatives.[39]

There is a widespread tendency to give judiciary the power to also refer the project to the agencies in the approval phase, with a review

but also to base their decisions on the best available scientific, technical, or economic information.

[34] C.J. Walker, *Modernizing the Administrative Procedure Act*, in 69(3) *Admin. L. Rev.* 629, 653 ss. (2017); R.M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, in 94(2) *Chicago-Kent Law Review* 487, 30 (2019). M.F. Cuéllar, *Rethinking regulatory democracy*, in 57(2) *Admin. L. Rev.* 411, 411 ss. (2005). C.R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, in 41 *Harv. Envtl. L. Rev.* 1, 22-36 (2017).

[35] J.S. Masur & E.A. Posner, *Cost-Benefit Analysis and the Judicial Role*, in 85 *U. Chi. L. Rev.* 935 (2018).

[36] Substantial evidence would be that which a reasonable mind could accept as adequate to support a conclusion in light of the investigation conducted.

[37] C. Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, cit., 591 ss. W.N. Eskridge & Jr., L. E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, cit., 1083-1126.

[38] D. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effect on Agency Rules*, in 118 *Colum. L. Rev.* 85 (2018).

[39] M.J. McGrath, *Note, Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, in 54 *Geo. Wash. L. Rev.* 541, 541 ss. (1986).

therefore no longer aimed only at the annulment of the contested acts.[40] In other words, there would be a suspension period for the high-impact provisions within which, in the event that a judicial appeal were proposed, the rules would not come into force until after the favorable response in Court.[41] The judicial control would not be limited by the arbitrary and capricious test,[42] but would reach as far as the analysis of the costs-benefits connected to the introduction of a high-impact rule.

The participatory mechanisms that should have filled the democratic deficit in agency rulemaking have shown so many dysfunctions over time that they have led American legal thought to a total re-establishment of the model. Over time, lobbies have significantly influenced public decisions through procedural participation. Congress is trying to recover the spaces taken away by the use of blank delegations, and rebalance the relationship of powers with the Presidential Offices that in the meantime, through the function of direction and coordination, have affected the regulatory activity of the agencies with ever greater depth.[43] In other words, the relationship between participation in regulatory activity and the function of political direction is being rethought. But the increase in the powers of Congress could further favor those organizations that have not been able to assert their ideas within the rulemaking process. To stem the dysfunctions especially induced by the use of the informal procedure, it is being considered to return to more formal models, increasing the obligation to expose the reasons on which the action of the agencies is based. It means expanding that formalism that in the American tradition has remained mostly relegated to exceptional hypotheses.

It is the effect of the permanent tension between formalism and the need for simplification that seems endemic in legal systems, and which will probably constantly lead to observing historical moments in which one aspect cyclically prevails over the other.

Before Loper Bright, Supreme Court, with a majority of conservative justices, had been seen as leading towards weakening or overturning Chevron.[44] In *West Virginia v. EPA*,[45] Supreme Court defined the major questions doctrine that was used in future cases to question the interpretation of administrative law when the financial impact of the law had

[40] Modifing § 706 APA. R. M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, cit., 27 ss.

[41] J.S. Masur & E.A. Posner, *Cost-Benefit Analysis and the Judicial Role*, cit. 935 ss.

[42] According to which an enacted provision is unlawful if the agency relied on factors that Congress did not intend to take into account, failed to fully consider an important aspect of the problem, offered a rationale that conflicts with the evidence available, or appeared so implausible that it could not be justified by a difference of opinion or by technical and professional skill. M.J. McGrath, *Note, Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, cit., 543.

[43] A reconstruction of the guide lines of the presidential orders in rulemaking is in V. De Falco, *Agency rulemaking under the Biden Administration*, in *DPCE online*, 1/2023, 85 ss.

[44] G. Romeo, *Statutory stare decisis e tenuta del precedente wrongly decided*: una lettura di *Loper Bright Enterprises v. Raimondo*, in *DPCE online*, *3/2024*, *2132 ss.*

[45] 597 U.S. 697 (2022).

not been considered by the agency, such as in *Biden v. Nebraska,*[46] which blocked President Joe Biden's student loan forgiveness project under the Heroes Act for failing to account for its financial cost to states.

Today, Loper leaves American judiciary free from Chevron's deference, with effects that are difficult to predict.

It would seem that Loper has transferred power and responsibility for interpreting federal Statutes from the executive to the judicial branch. So there is the risk that judicial review could slip into a type of evaluation capable of raising issues, of a social nature and with economic policy effects,[47] that do not belong to the role given to the judiciary in American constitutionalism. But this condition is not simple to realize. *Marbury v. Madison* notwithstanding, significant questions are likely to arise as to the Courts' capacity to determine what the law is, in specialized areas of the law, absent clear and specific congressional direction.

Supreme Court based its decision on the APA and did not specifically address the issue of separation of powers. So Loper has implications for all three branches of government. Among other things, the overruling of Chevron increases the likelihood of success of challenging federal regulations, limits executive agencies' ability to fill gaps in the laws, or to address situations not expressly anticipated by Congress, may cause agencies to proceed more cautiously and narrowly in adopting regulations, and places pressure on Congress to legislate with greater specificity, or to make express delegations of interpretative authority, where possible.

In Loper, Supreme Court has not provided clear or specific direction about what comes next. What approach or standard should lower Courts apply to resolve uncertainty? Until that question is resolved, federal Courts of appeals and district Courts may apply different approaches and analyses, fostering uncertainty – and possibly increased forum shopping – until a consistent approach emerges. Statutory ambiguity, gaps, and unanticipated developments are inevitable. Rejecting Chevron's precept, Supreme Court concluded that the statutory interpretation, if it is not the best, it is not permissible. How will federal Courts determine the best reading of Statutes?

5. Judicial review and technical data

Loper Bright reinforces the fear that American judges do not possess the technical and professional knowledge to control the interpretations of Statutes. This fear is, however, uncertain. Judicial control can usually be traced back to two distinct but closely connected levels. The first includes the analysis of formal elements, such as the presence of a complete investigative file, the exposition of the reasons, the purpose to be pursued and the presence of impact analyses. This phase is aimed at verifying the methods of acquiring information and its correct processing.[48] The lack of an investigative file, of sufficient motivation linked to the decision taken, of

[46] 600 U.S. 477 (2023).
[47] B. Jackson, in *Supreme Court of the United States*, Relentless, Inc., et al., v. Department of Commerce, et al. January 17, 2024.
[48] M.C. Stephenson & A. Vermeule, *Chevron Has Only One Step*, in 95 *Va. L. Rev.* 59 (2009).

cost-benefit analysis, from a strictly formal point of view, prevent the reconstruction of the logical arguments underlying the rules being approved. It is rather difficult, however, for these elements to be missing, and the real analysis shifts to the completeness of the information collected, the sufficient exposition of the underlying reasons, and the verification of a detailed reasoning on costs and benefits.

These are analyses that are not connected to specific technical knowledge, and appear to be aimed only at ensuring that the final decision is taken on the basis of a complete investigation of the most relevant information. In these cases, the judiciary limits itself to inviting the agencies to consider relevant factors that have been omitted, and its function is in any case contained within the scope of the investigation carried out on the presence of formal elements.

While deference does not create particular problems when the American judiciary verifies compliance with the formal elements of the procedure, it is in the discretionary evaluation of the factors analyzed that the deference of the American judiciary reaches its peak, especially considering that the elements evaluated and considered in the preliminary investigation phase influence the final decision.[49] So the issue becomes more complex when the judicial review shifts to the judgment of rationality in relation to the analysis of the relevant factors or the completeness of the investigation carried out.[50] The concept of breadth of the information acquired is discretionary, involving quantity and quality. It is necessary to verify, especially in cases where complex technical and scientific issues are addressed, whether the data collected have been provided by agencies, whether they come from internationally recognized studies, whether there are conflicts of interest, keeping in mind that in the majority of cases there is no uniformity of views even among the greatest experts. These assessments necessarily change from case to case, depending on the complexity of the matter being discussed.[51]

Although there is no single method to identify the relevant factors, judicial analysis is usually based on the specific function assigned to the agency, the details provided by the internal regulation of its activity, the traditional role assumed over time in the organizational system.[52] Verification of the quality and breadth of the data collected in the preliminary investigation and of the reasons provided, which in turn influence the choices made, do not constitute the product of a particular experience or technical awareness that can be considered the exclusive prerogative of agencies. American Courts will not be able to say which is the best interpretation of the Statutes. The judiciary will instead have to verify whether the agencies have analyzed all the elements to support that the choice made is the best possible.

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[49] V. De Falco, *Judicial Review and Independent Authorities Rulemaking. L'America alla ricerca di un nuovo equilibrio nella separazione dei poteri*, in *DPCE online*, 2/2021, 2126 ss.
[50] L.J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, in 92 *N.C. L. Rev.* 738 (2014).
[51] D. Zaring, *Reasonable Agencies*, in 96(1) *Va. L. Rev.* 135, 135 ss. (2010).
[52] R.J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, in *Mich. St. L. Rev.* 67, 67 ss. (2009). G. Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, in 48 *Rutgers L. Rev.* 313, 313 ss. (1996).

6. Chevron and the implementation of presidential policies

Under Chevron, from a strictly formal point of view, there has been no formal space for a different parameter of judgment, based on the President's preferences. In other words, it is the agency itself that carries out any alignment with the directions of presidential policies and chooses the line that it deems most effective, within the scope of the powers conferred by the congressional delegations.

American judiciary has, however, shown that it applies less deference when the choices made by agencies did not receive the President's favor.[53] In reality, the problem is strictly connected to administrative transparency, on which the principle of participation is then rooted and the acts and documents that will subsequently be the object of the evaluation of the judiciary are determined.[54]

The investigation into the impact of presidential policies on the agencies' action would then require that the investigation documents also contain data from the Presidential Offices, on the basis of which the choice of agencies would then be formed. In cases where it were to emerge from the investigation documentation that the Presidential Offices and the agency had agreed on an interpretation of the Statute or that the administration had been induced by the President to choose a solution different from the one initially envisaged, in both cases the role played by the Presidential Offices would not condition the intensity of the judicial review, due to the fact that in any case the administration, in choosing to follow the presidential directions, would have only exercised its discretionary power.[55]

As long as the agencies are able to demonstrate the rationality of the choices made, the rule of law is in fact respected.[56] The impact of presidential policies must be analyzed in the context of the delegation received from

[53] L. Baum, *The Supreme Court in American Politics*, in 6 *Ann. Rev. Pol. Sci.* 161 (2003).
[54] Judge Wald's 1981 opinion in *Sierra Club v. Costle* upheld the legality of a set of regulations called "new source performance standards" (NSPS) that govern emissions controls from coal-fired power plants. The NSPS were challenged as inadequate and too stringent by environmental and industry plaintiffs, respectively. Among the environmental plaintiffs' complaints was that EPA had failed to record a White House meeting held after the regulatory comment period in which the White House could have encouraged EPA to maintain its current 1.2 lb/MBtu cap for total sulfur dioxide emissions, rather than lowering that cap, which EPA had at least considered as an option. The Court concluded that the failure to record the meeting was not improper because the 1.2 lb/MBtu cap had adequate factual support in the administrative record and EPA had assured the Court that the NSPS was not based on any information or data received through the White House meeting. Judge Wald implicitly noted the possibility that White House influence might have influenced EPA to accept the 1.2 lb/MBtu cap rather than another option, but held that this result was not problematic, and in any case not reviewable by the Court, in the absence of documentary evidence. *United States Court of Appeals for the District of Columbia Circui*t 657 F.2d 298 (1981).
[55] E. Kagan, *Presidential Administration*, in 114 *Harv. L. Rev.* 2244, 2248 (2001), according to the regulatory activity of the executive branch became more and more an extension of the President's own policy and political agenda.
[56] A. Scalia, *The Rule of Law as a Law of Rules*, in 56 *U. Chi. L. Rev.* 1175, 1176-80 (1989).

Congress.[57] In this way, in application of the Chevron deference, the involvement of the White House in persuading an agency to adopt a non-arbitrary interpretation that the agency shared would have no influence, even in the event that the administration would have preferred a different solution.

The same deference would apply in the event that the Presidential Offices have induced the agency to depart from a previous interpretation more in line with the provisions of the congressional delegation, since even in this case, the judiciary could not delve into the final choice, except for reasons of irrationality. The interpretation of the law of Congress is in fact not a prerogative of the President.

In some cases, Chevron has so far essentially limited the President's ability to impose his own interpretation of congressional delegations, if they had not been shared by the agency. Administrations had the ability to maintain their own approach by providing valid reasons for consistency with that given by Congress, in the face of which the judiciary could only delve into in depth to the extent that the Presidential Offices had demonstrated that the different interpretation was more in line with the will of Congress. A system that instead would allow an interpretation preferred by the White House to prevail over that provided by the agency would have the effect of reducing the quality of rulemaking. In other words, having provided the best possible interpretation would not put the agency at risk of being forced to change its approach, and the President would not need the best possible argument to remove the agency's interpretative authority.

Under Chevron, the same deference was applied in cases where the Presidential Offices has induced the agency to depart from a previous interpretation more in line with the provisions of the congressional delegation, except for reasons of irrationality. Administrations had the ability to maintain their own approach by providing valid reasons for consistency with that provided by Congress, which the judiciary could only delve into to the extent that the presidential offices demonstrated that the different interpretation was more in line with congressional will.

7. The possible effects of Loper Bright

Chevron has allowed Biden to push the congressional delegation beyond the text of Statute, and succeed in passing economic, financial and social reforms of significant impact. The overruling of Chevron should induce Congress to provide more detailed delegations and consequently reduce the interpretative powers of the Presidential Offices. Among the most significant effects produced by the overruling of Chevron, there is the fear that many of the recent reforms introduced by the Biden administration could be easily overturned. Deference doctrine has allowed Biden

[57] G.F. Ferrari, *Loper Bright: cronaca di una morte annunziata?*, in *DPCE online*, 3/2024, 2122 ss. highlights the existence of different standards depending on the type of acts adopted by the President.

administration to execute one of the most sweeping progressive agendas on labor, climate change and corporate profits in decades, to eliminate late fees on credit cards, reduce industrial pollution, force airlines to issue cash refunds, and increase overtime pay.

The effects of the expansion of judicial review could be even more evident in the sectors affected by new technologies, with particular reference to artificial intelligence, where specific indications are lacking in the congressional delegations. Biden has exerted great pressure on the Federal Trade Commission, to induce it to introduce rules aimed at eliminating emerging monopolies as a result of the use of artificial intelligence; at the same time, Biden has required several agencies to update themselves on the use and evaluation of new technology tools. Another problem concerns Biden's initiatives on the ways in which transgender students participate in school sports, considered based on an overly broad interpretation. The effects of overruling could also regard other Biden administration initiatives, including its push to make it harder for companies to classify on-call workers as contractors rather than employees, and to extend overtime pay requirements to more workers, to establish network neutrality, considered essential for consumer protection, or initiatives promoted under the Packers and Stockyards Act, to promote competition in the food sector and help lower product prices. Republicans, on the other hand, have pushed hard overruling Chevron, especially by appointing judges who were hostile to the deference doctrine.[58] But if Loper forces Congress to set more precise parameters in its delegations, and the absence of detailed guidelines increases the intensity of judicial review, it is clear that Republicans will have greater difficulty implementing their policies too.

The overruling of Chevron today opens new and different scenarios in separation of powers. The judiciary will no longer have a theoretical obstacle to deal with, and will have the possibility of expanding the incisiveness of the judicial review, but which in any case will not be able to reach the point of establishing political lines.

The American judiciary has analyzed powers of agencies with respect to the delegating laws, and verified the rigor with which the discretion had been exercised. From a strictly formal point of view, there was no formal space for a different parameter of judgment, based on political matter.[59] The incisiveness of the presidential directions must therefore be analyzed in relation to the functions exercised,[60] and in the context of the investigative findings from the proceedings followed.[61]

In reality, the issue could differ depending on the case. In fact, if the presidential directions were attributable to the exercise of the power of

[58] Reference is made in particular to Neil Gorsuch, appointed to the Supreme Court for his strong opposition to the Chevron Doctrine. Cfr 10th Cir. 834 F.3d 1142, 1149 (2016).
[59] *United States v. Mead Corp.*, 533 U.S. 218 (2001).
[60] Trought the appointment of the heads of agencies. T.M. Moe, *An Assessment of the Positive Theory of "Congressional Dominance*, in 12 *Legal Stud. Q.* 475, 489 (1987) argued that President appoints agency heads who are conducive to presidential control.
[61] J.L. Smith, *Presidents, Justices, and Deference to Administrative Action*, in 23 *J.L. Econ. & Org.* 346 (2007).

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coordination of the executive function, in essence the President would be exercising his constitutional prerogative.[62]

8. Changing President's influence in interpretation of congressional delegation

The issue of the limits of judicial review presents greater difficulties when the reasons given could lead to political considerations, or strictly technical ones, that immediately affect the final result. The overruling of Chevron deference could have the effect of pushing the judiciary to direct the agencies towards a particular relevance to one factor with respect to others. In this case there would be the risk that the judiciary could go beyond the limits of its competences and slip into reviewing the political choice made.[63] The assessment of relevance of the omitted factors should essentially not go beyond the verification of whether the failure to consider some elements has in fact prevented the administration from being able to hypothesize a different choice.[64] The judiciary would explain the reasons for the assessment of relevance of the factors not considered, and the administration, once it has considered these additional elements, will always be free in its discretionary assessment, to confirm the decision previously adopted or to opt for a different solution. The effects of overruling will also depend on the concepts that the American judiciary will examine.

Under Skidmore, Courts give no presumptive weight to agency interpretations, but consider the agency's power to persuade. Skidmore could allow Courts to continue to recognize, where appropriate, the persuasive power of an agency's expertise and experience.[65] In short, a Statute's best reading will often point to substantial agency authority. Statutory discretion is not the same as legal deference. Eliminating or narrowing Chevron's command to defer to agencies' reasonable legal interpretations of ambiguous Statutes should have no bearing on these principles, if they are faithfully applied.

Presidents who wish to induce agencies to follow the political line in interpreting the congressional delegations will have to demonstrate that his solution is the best possible, both from the point of view of coordination action and from a strictly legal perspective. The judicial control will be more penetrating and it will be more possible that, faced with two different interpretations of the congressional delegations, one by the President and

[62] In this case the President's preferences are not subject to judicial review, in line with art. 84 Administrative Procedure Act.

[63] In many Statutes, when they refer, for example, to adequate safety margins, or fair and reasonable rates, transfer to the administrations a wide operating latitude where it remains highly likely that the Courts will simply verify whether the agency has acted rationally, considered all the arguments and provided the reasons for the decision.

[64] *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997). *Rabbers v. Comm'r Soc. Sec. Admin.*, 582 F.3d 647, 654-55 (6th Cir. 2009). *ECM BioFILMS, Inc. v. Federal Trade Commission*, (6th Cir. 2017).

[65] With the dissenting opinion expressed in *Christensen v. Harris Cnty.*, cit. 576, 596-97, J. Breyer argued that Chevron made no relevant change to Skidmore's deference, where political choices are involved. K.E. Hickman & M.D. Krueger, *In Search of the Modern Skidmore Standard*, in 107 *Colum. L. Rev.* 1235 (2007).

the other by the agency, the choice of the administrations not to follow the political line of the White House may not be shared by the American judiciary, which will therefore have the possibility of deciding which of the two appears the best possible.

Under Chevron, agencies could also vary the intensity of their presentation of the reasons behind the approved rule, depending on the characteristics of the matter, whether the facts concern technological, economic or social issues. After Loper Bright, on one hand, the business groups or the strong organizations that would be favored by the presidential directions will thus have more chances to oppose the solutions preferred by the administrations. But, on the other hand, Loper should lead to an improvement in rulemaking, as both the President and the agencies will have to demonstrate that the chosen solution is the best possible interpretation of congressional delegation.

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