EDITORIAL

LEAVING *CHEVRON* BEHIND?

*Giacinto della Cananea**

1. Judicial preconceptions of discretion

In every legal system – at least in democracies and other well-ordered polities – there are issues concerning how judicial review applies in relation to fact, law, and discretion. The demarcation between law, fact, and discretion may however be problematic, as every public lawyer may observe. In different legal systems, there can be diversity of opinion as to where the distinction between law and fact should be drawn. The intensity of judicial review, too, can, and often does, differ. While recognizing all this, and giving due weight to the choices made by both constitutions and statutes, it is nonetheless necessary to be mindful of the key role that is played by background theories about public law, as well as by changing doctrines concerning whether and how far the courts should review the exercises of discretion by administrative authorities. The recent ruling of the US Supreme Court in *Loper* is both a paradigmatic and problematic example. It is paradigmatic, because it concerns the test for review of issues of law that had been used for four decades. It is problematic, because the *révirement* follows a single school of thought. It shows, moreover, that administrative law does not necessarily follow a certain path, but may, and sometime does, move backwards.

* Full Professor of Administrative and Public Law, Bocconi University Milan

2. *Chevron*

Until last year, the approach of US courts was centered on *Chevron* (*Chevron USA Inc v NRDC* 467 US 837 (1984). Decided by the Supreme Court at the epoch of the Reagan presidency, *Chevron* concerned agency's interpretation of statutes. In its essence, *Chevron* implied and rested upon a basic distinction. On the one hand, if the reviewing court decided that Congress had a specific intention (that is, legislative intention) on a particular question, then the court had to substitute judgement for that of the agency, in order to ensure the respect of the intention manifested by Congress. On the other hand, if the reviewing court decided that Congress had not directly addressed the point for which the agency had made a policy choice, then the court did not have to impose its judgment, even though the agency's interpretation was very distant from that which the court itself would have deemed preferable. The only limit which the agency had to respect was that of rationality or reasonableness, in the sense that it sufficed that the agency had remained within the range of permissible – that is, non-irrational or unreasonable – choices.

With regard to *Chevron*, probably everything that needs to be said has already been said, or contested. For various critics of the modern administrative State, *Chevron* was simply unacceptable, because – as Justice Antonin Scalia asserted – it implied the "adoption of a blanket default rule, which presumed that statutory ambiguity constituted a conferral of delegation from Congress" (*Remarks made by Justice Scalia for the 25th anniversary of Chevron v. NRDC*, 66 Administrative Law Review, 244 (2014)). It thus amounted to an unwarranted transfer of interpretative authority from the courts to agencies. For others, *Chevron*'s underlying assumption was that, after all, agencies are better equipped than judges to solve certain complex policy issues including. For example, Cass R. Sunstein held that, although *Chevron*'s critics addressed legitimate concerns, with which public lawyers were inevitably confronted, the arguments for overruling it were unconvincing. Moreover, he continued, overruling *Chevron* would create a "major upheaval – a large shock to the legal system, producing confusion, more conflicts in the courts of appeal" (*Chevron as Law*, 107 Georgetown Law Journal, 1658 (2019)).

Interestingly, still others, from a comparative perspective, observed that *Chevron* was a significant approach, but not the only one. Thus, for example, Paul Craig said that Canadian courts took

a more nuanced approach, oscillating between a correctness test and a reasonableness or rational basis test (*Judicial Review of Questions of Law: A Comparative Perspective,* in S. Rose Ackerman and P. Lindseth (eds.), *Comparative Administrative Law*, Elgar, 2017, 2nd ed., 389). This is helpful to relativize the perceived peculiarity of judicial approaches, but it does not diminish their importance. Quite the contrary, as will be said in the next paragraph, few months ago the Supreme Court issued a landmark decision.

3. "Leaving *Chevron* behind"

In recent years, the US Supreme Court reversed various precedents. In 2022, in *Dobbs* it officially reversed *Roe v. Wade*, which guaranteed a constitutional right to abortion under federal standards. Writing for the majority, Justice Alito held that the only legitimate rights that are not explicitly stated in the Constitution are those "implicit in the concept of ordered liberty", and abortion was not such a right (*Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022)). The following year, the Court's majority ruled – by 6 to 3 - that race-conscious admissions are unconstitutional in cases involving some universities, thus reversing decades of rulings supporting affirmative action (*Students for Fair Admissions Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023). *Chevron* was the next target. It did not escape overruling by the Court's majority.

In *Loper Bright Enterprises* c. *Raimondo* (603 U.S.369 (2024)), the Supreme Court reiterated the doctrine enounced several times before *Chevron*, that is, "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits". It then criticized *Chevron*, on grounds that it had been "decided in 1984 by a bare quorum of six Justices" and had "triggered a marked departure from the traditional judicial approach of independently examining each statute to determine its meaning". For the Court, therefore, *Chevron* could not be reconciled with the APA. Quite the contrary, it was "the antithesis of the time honored approach the APA prescribes". Moreover, and perhaps more importantly from a constitutional perspective, the Supreme Court rejected the view that agencies have special competences – due to their expertise – in resolving statutory ambiguities (for it, only "the courts do"). The upshot of all this was the decision to "leave *Chevron* behind".

4. Institutional ramifications of *Loper Bright*

There is, not surprisingly, variety of opinion about the scope and effects of *Loper Bright*. Some commentators observe that it shows that even super-precedents can be overruled. Others emphasize the overturning of the longstanding doctrine known as "*Chevron* deference". From this viewpoint, *Loper Bright* expands the powers of the judiciary, first and foremost those of the Court itself. Still others see *Loper Bright* as another manifestation of the split along ideological lines, a further weakening of what remains of the "liberal" era.

But things are more complex than it may appear at first sight. First, *Chevron* was initially celebrated as a triumph by many Republicans, in a period in which they could rely more on appointees in agencies than on federal courts. Secondly, both agencies and courts will have to clarify the ramifications of *Loper Bright*. To begin with, was the overruling prospective only or would it have retroactive effects? To continue, though Chief Justice Roberts wrote in *Loper Bright* that "statutes, no matter how impenetrable, do – in fact, must – have a single, best meaning", in some cases it may be hard, if not almost impossible, to say which interpretation is the best. Did, then, the judiciary really obtain more power? Or will conflicts proliferate, as Sunstein held? Agencies take every year thousands of decisions, often either on highly technical issues or in areas characterized by rapid changes. Will judges be able to manage these issues and, thus, to respond to social demands? Last but not least, in *Loper Bright* what was at stake was the agency's attempt to prevent the excesses of fishing, which undermine the survival of an adequate stock. In this respect, the correctness of the majority's approach will be established some time in the future. But if the outcome is that natural resources – as the agency held - are exhaustible, it might be just too late.