

Chevron, Simplot, and Boo Radley

Leslie Hayes
Appellate Section CLE
June 8, 2023

1

“Best way to clear the air
is to have it all out in the
open.”

- The opinions of this presentation are mine alone and not the opinions of the Idaho Office of Administrative Hearings

2

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

“We consider that the rulings, interpretations and opinions of the [agency] under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”

- Thoroughness evident in its consideration
- The validity of its reasoning
- Consistency
- The persuasiveness of the agency’s position

3

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

- Step 1: Is the statute ambiguous?
- Step 2: Is the agency’s interpretation of the ambiguous provision reasonable?

4

Loper Bright Enterprises v. Ramondo

Petitioner

1. Whether, under a proper application of *Chevron*, the MSA implicitly grants NMFS the power to force domestic vessels to pay the salaries of the monitors they must carry.
2. Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity required deference to the agency.

5

Loper Bright Enterprises v. Ramondo

Respondent

Whether the court of appeals erred in holding that the National Marine Fisheries Service was acting within the scope of its delegated statutory authority under the Magnuson-Stevens Fishery Conservation and Management Act, when the agency adopted a rule in 2020 under which certain vessels fishing in the Atlantic herring fishery may be required to hire third-party observers, who are carried on the boats to collect data for fishery conservation and management purposes.

6

Loper Bright Enterprises v. Ramondo

Petitioner

Whether the court should overrule *Chevron v. Natural Resources Defense Council*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

7



“Atticus told me to delete the adjectives and I’d have the facts”

- Four family-owned and family operated fishing companies in the northeast
- Challenging a rule by the National Marine Fisheries Services
 - Requires monitors onboard vessel
 - Requires vessel to pay salary of monitor
- Statute
 - “may require” fishing vessels to carry observers/monitors
 - Including “necessary and appropriate” rules to carry out that provision

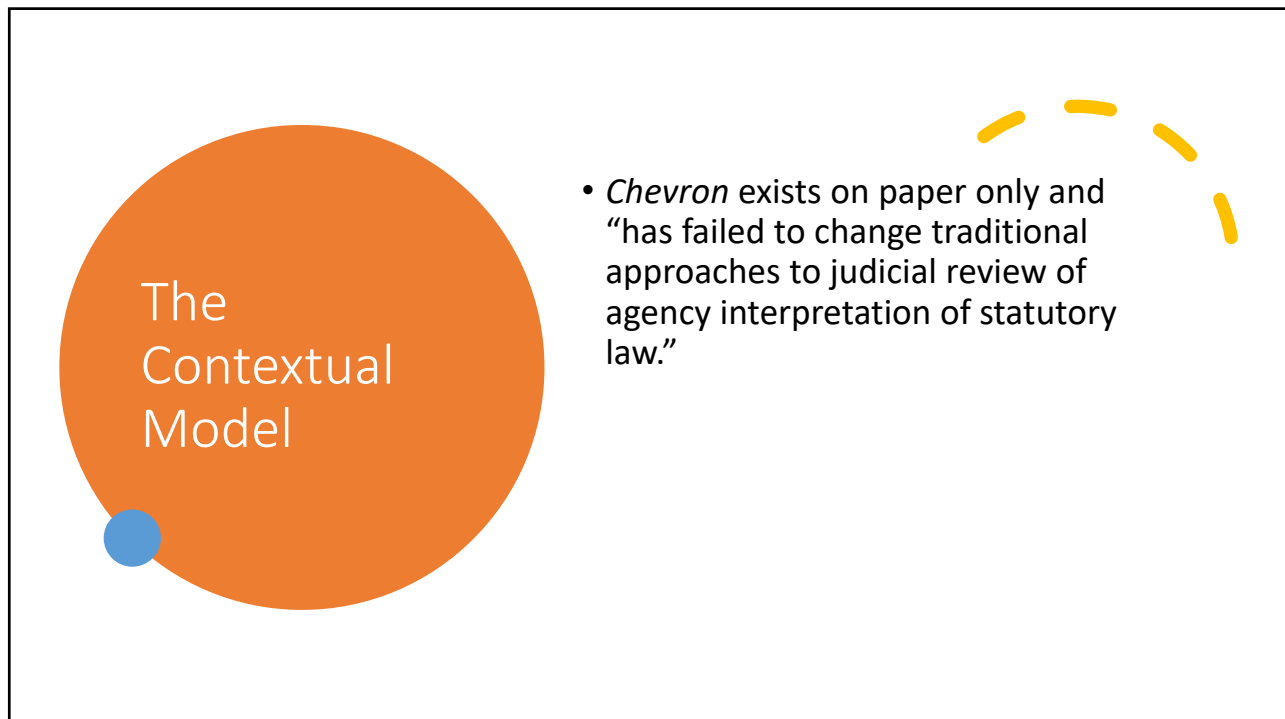
8



Criticism of Chevron

“You were so busy looking at the fire you didn’t knot when [Boo Radley] put the blanket around you.”

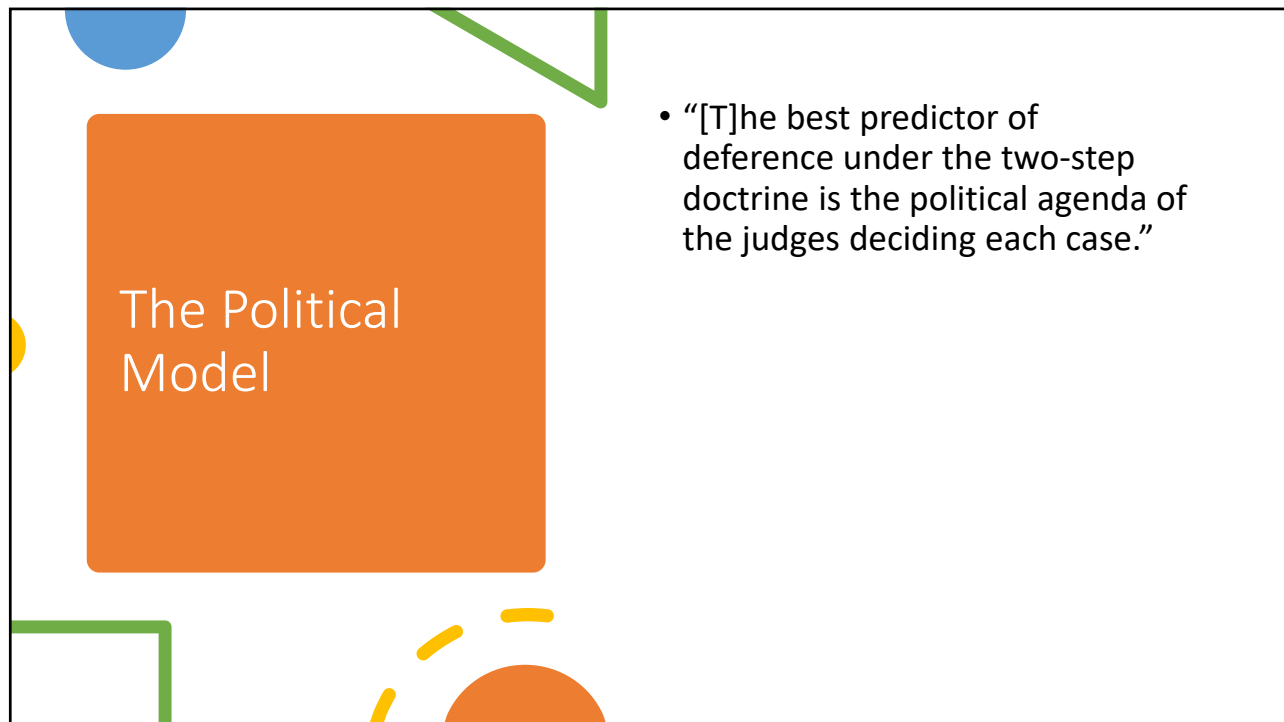
9



The Contextual Model

- *Chevron* exists on paper only and “has failed to change traditional approaches to judicial review of agency interpretation of statutory law.”

10

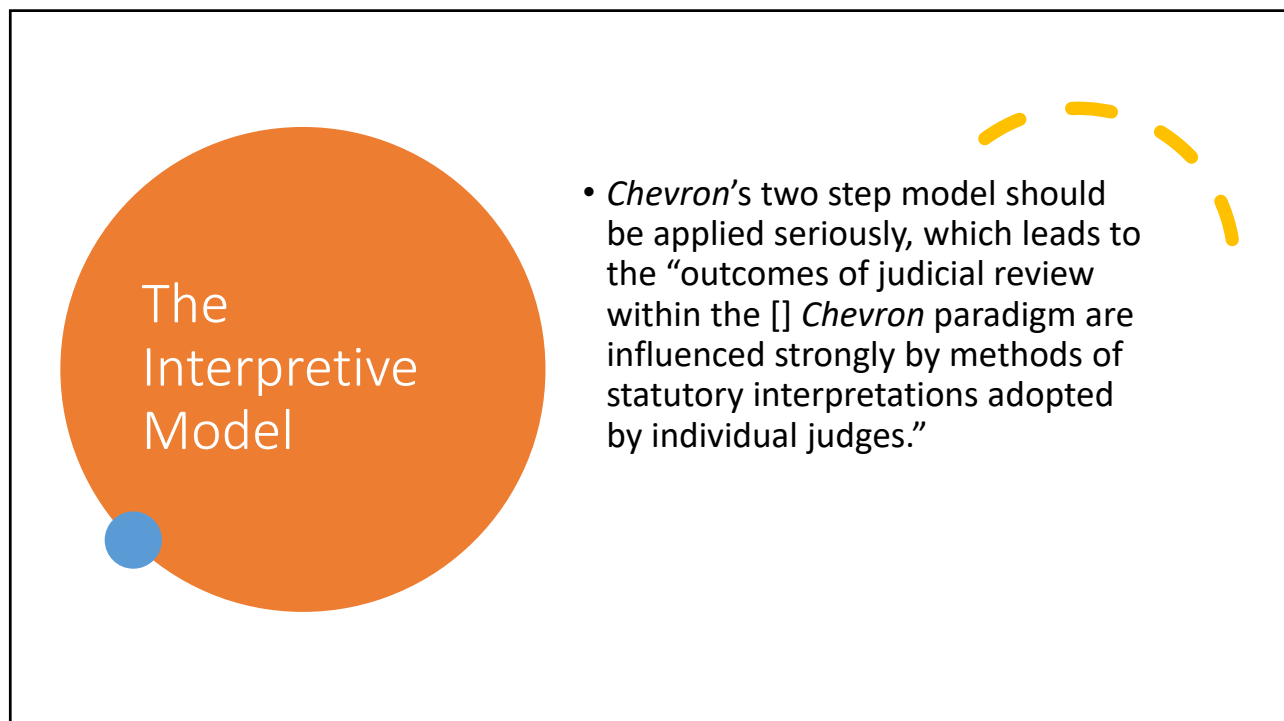


The Political Model

- “[T]he best predictor of deference under the two-step doctrine is the political agenda of the judges deciding each case.”

Decorative elements: A blue semi-circle at the top left, a green line forming a partial square at the top and left, a yellow semi-circle on the left edge, and a dashed yellow arc above an orange semi-circle at the bottom.

11

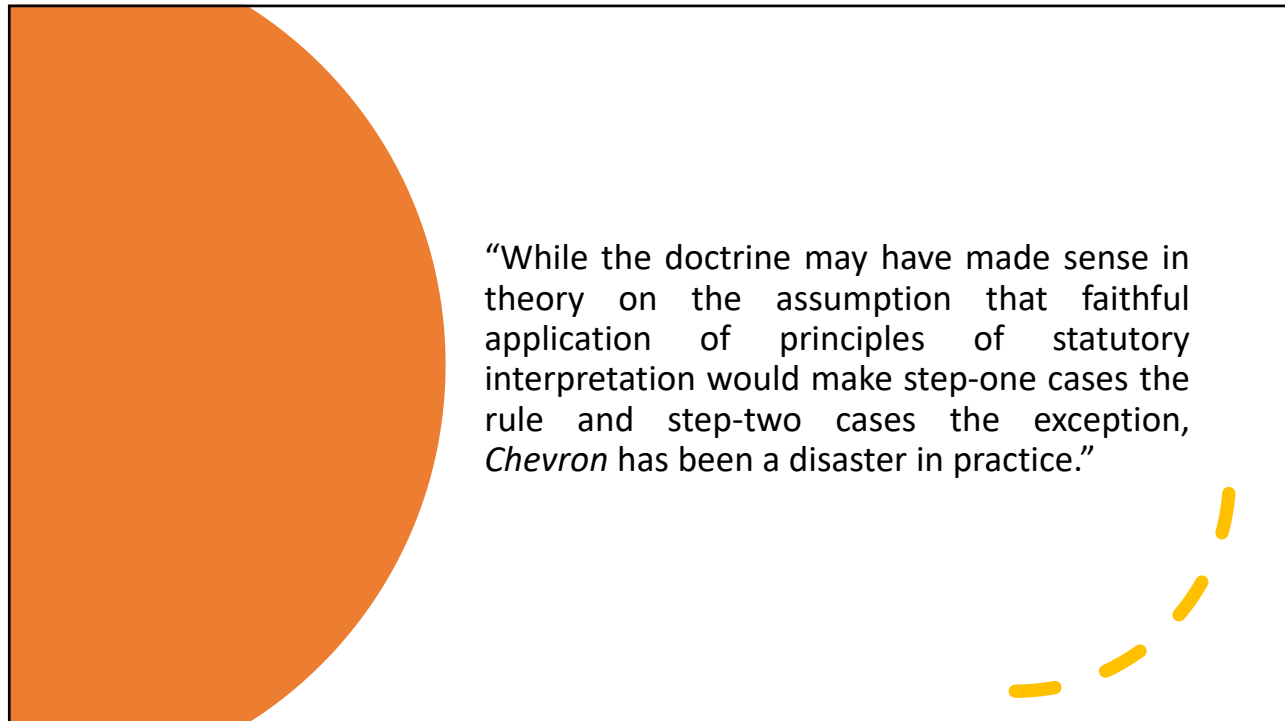


The Interpretive Model

- *Chevron’s* two step model should be applied seriously, which leads to the “outcomes of judicial review within the [] *Chevron* paradigm are influenced strongly by methods of statutory interpretations adopted by individual judges.”

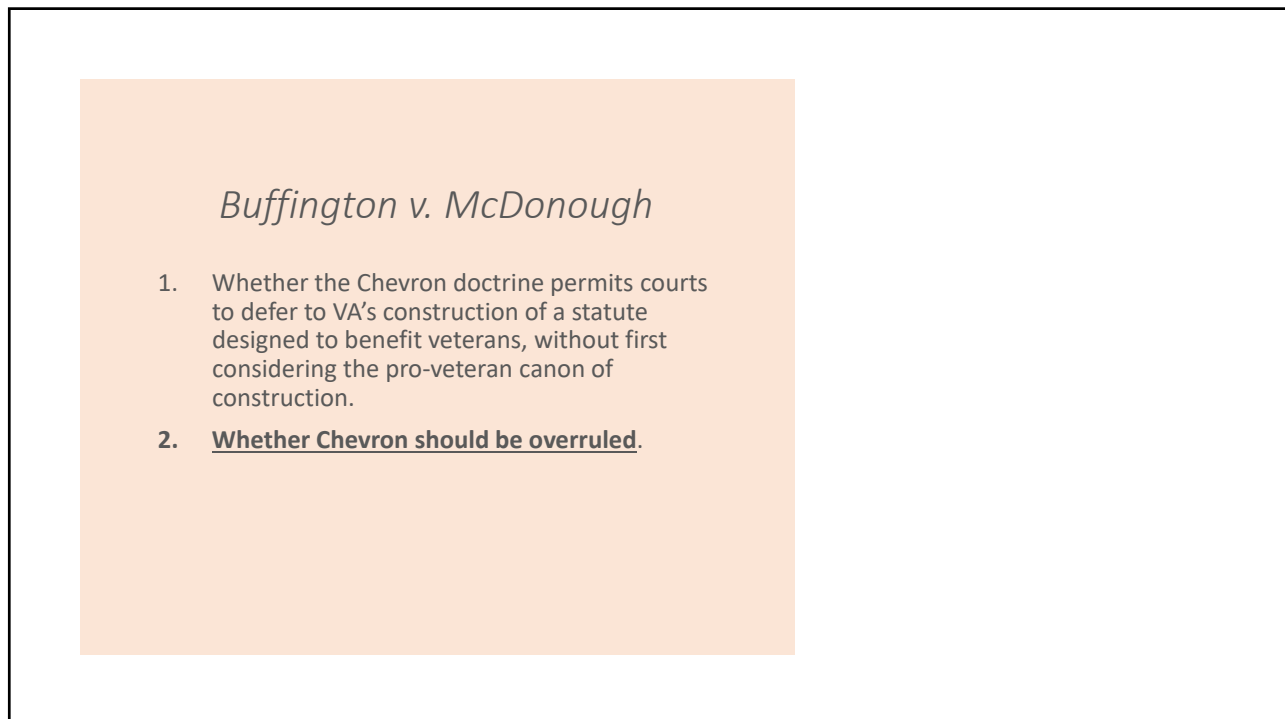
Decorative elements: A dashed yellow arc at the top right and a blue semi-circle at the bottom left of the orange circle.

12



“While the doctrine may have made sense in theory on the assumption that faithful application of principles of statutory interpretation would make step-one cases the rule and step-two cases the exception, *Chevron* has been a disaster in practice.”

13



Buffington v. McDonough

1. Whether the Chevron doctrine permits courts to defer to VA's construction of a statute designed to benefit veterans, without first considering the pro-veteran canon of construction.
2. Whether Chevron should be overruled.

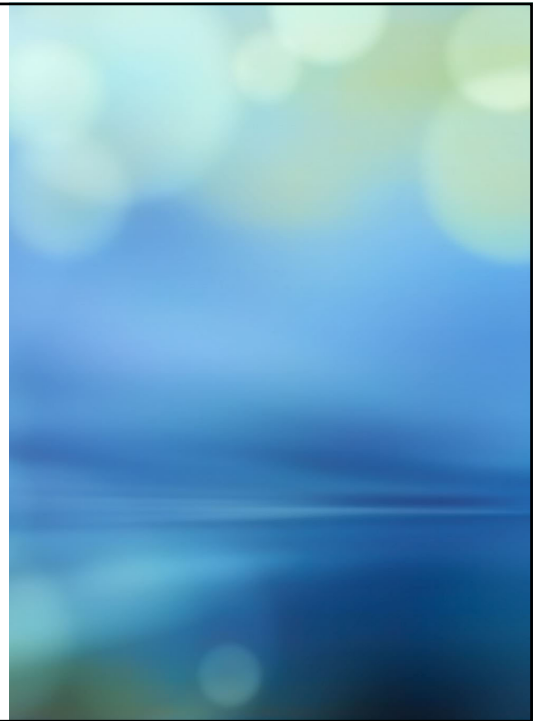
14

Guedes v. Bureau of Alcohol

Whether deference under *Chevron*, rather than the rule of lenity, takes precedence in the interpretation of statutory language defining an element of various crimes when such language also has administrative applications;

Whether, if *Chevron* deference applies and takes priority over the rule of lenity, such deference can be waived in the course of litigation and on appeal; and

Whether, if *Chevron* deference applies and cannot be waived, *Chevron* should be overruled.



15

Fixing Statutory Interpretation

- Problem: Undue political influence in the “interpretation” under *Chevron*
- Supreme Court’s attempt to “rein in” *Chevron* creates more questions as to when it applies

“As the summer progressed, so did our game. We polished and perfect it, added dialogue and plot until we had manufactured a small play upon which we rang changes every day.”

16

“Atticus, are we going to win it?”

Keep *Chevron*

- Sotomayor
- Kagen

Overrule *Chevron*

- Roberts
- Thomas
- Alito
- Gorsuch
- Kavanaugh
- Barrett
- Sotomayor
- Kagen

17

“Before I can live with other folks, I’ve got to live with myself.”

Keep *Chevron*, but clarify “ambiguity in Step 1”

- Kegan
- Sotomayor

Overrule *Chevron*

- Roberts
- Thomas
- Alito
- Gorsuch
- Kavanaugh
- Barrett

18

*Simplot v.
Idaho State
Tax Comm'n,
120 Idaho 849
(1991)*

- Four-Prong test
 - “[F]irst determine if the agency has been entrusted with the responsibility to administer the statute at issue. Only if the agency has received this authority will it be ‘impliedly clothed with power to construe’ the law.”
 - “The second prong of the test is that the agency’s statutory construction must be reasonable.”
 - Third, “[a]n agency construction will not be followed if it contradicts the clear expressions of the legislature because ‘the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” (citing *Chevron*).
 - Finally, “a court must ask whether any of the rationales underlying the rule of deference are present.” If not, then the court can justify departing from agency interpretation.

19

“Boo was our neighbor. He gave us two soap dolls, a broken watch and chain, a pair of good-luck pennies, and our lives. But neighbors give in return. We never put back into the tree what we took out of it: we had given him nothing, and it made me sad.”

20