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Texas Versus Federal Law on Deference to Administrative Interpretations of Statutes

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Abstract

The growth of the administrative state in recent decades means that the issue of deference to an agency’s interpretation of a statute it enforces arises in many contexts. As the issue of agency deference pervades Texas’s legal system, courts and litigants will need to understand when agency statutory interpretations merit deference.

As this article shows, Texas’s doctrine on deference to agency statutory interpretations is not as developed as the federal doctrine. However, the Texas Supreme Court in Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water recently began to develop a comprehensive doctrine on deference to state agency statutory interpretations. Texas Citizens has the potential to become the Court’s seminal decision on agency deference, as it consolidated Texas’s three lines of precedent in this area and began to flesh out a comprehensive standard for agency deference. The Court also explained that while Texas has never “expressly adopted” the federal Chevron doctrine for agency deference, the “analysis” used by Texas “is similar.” Thus, even though Texas has not adopted the federal Chevron standard, Texas courts and litigants will need to familiarize themselves with both Texas and federal law on agency deference.

Although there has been a mountain of scholarship on the federal Chevron doctrine, there has been surprisingly little commentary on Texas law regarding deference to agency statutory interpretations. To date, no one has canvassed the Texas Supreme Court’s precedents on agency deference, much less compared them to historical or existing federal doctrine. This article’s novel comparative examination between Texas and federal law illuminates many facets of Texas’s doctrine on agency deference. Texas Citizens is the Court’s clearest articulation of Texas law on deference to agency statutory interpretations, and it is the first case that actually grapples with how Texas law is similar to and different from the federal Chevron doctrine. That said, Texas Citizens leaves open many important questions on agency deference.

This article seeks to identify and clarify these open issues. Texas and federal law agree on four core prerequisites for agency deference. Beyond that, Texas leaves open many questions on deference to agency statutory interpretations that federal law has already addressed—rather than outright rejecting these facets of the federal doctrine. And Texas may yet recognize even more prerequisites for deference than federal law. This article concludes by considering what Texas administrative law would look like if Texas adopted the federal Chevron doctrine, and it posits the counter-intuitive suggestion that this actually would not change Texas law all that much because federal law has moved closer to Texas on agency deference in the past decade.

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Texas Versus Federal Law on Deference to Administrative Interpretations of Statutes

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The growth of the administrative state in recent decades, at both the federal and state levels, means that issues of administrative law now arise frequently in many different contexts. And there has been no bigger question in administrative law than the issue of judicial deference to an agency’s interpretation of a statute it enforces. This issue of agency deference arises in Texas not only in fields traditionally regulated by administrative agencies (like energy, communications, insurance, and tax) but also in a wide range of other areas (such as actions under the Texas Wrongful Imprisonment Act and judicial conduct proceedings, to name a couple). As the issue of agency deference pervades Texas’s legal system, it will be increasingly important for courts and litigants to understand when agency statutory interpretations merit deference.

As this article shows, Texas’s doctrine on deference to agency statutory interpretations is not as developed as the federal doctrine. The U.S. Supreme Court first addressed the issue of deference to federal agencies in 1827. Since then, the Court has decisively overhauled its doctrine at least twice—once in 1944 when Skidmore v. Swift & Co. reacted to the New Deal by ratcheting back the amount of deference courts owed to agency statutory interpretations, and then again forty years later in 1984 when Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. famously expanded agency deference by adopting its well-known two-step inquiry. Furthermore, for the past decade, the Court has been consciously limiting Chevron deference through a threshold inquiry to Chevron’s two steps that commentators have dubbed Chevron Step Zero.

In contrast, the Texas Supreme Court has just begun to fill in the contours of Texas law on deference to state agency statutory interpretations. Texas law on this point was so undeveloped that the Court’s 1944 opinion in Stanford v. Butler quoted at length a treatise—

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5 See, e.g., In re Smith, 333 S.W.3d 582, 588 (Tex. 2011).
9 See infra notes 53-61 and accompanying text.
rather than caselaw—to establish a multi-faceted doctrine on agency deference that was internally inconsistent. This sent the Court into a tailspin, as it created three separate lines of precedent on the issue while trying to unravel Stanford's doctrine on agency deference. With administrative law permeating our State’s legal system, the Court has had to address issues of agency deference about once per year for the past two decades. Yet, until recently, the Texas Supreme Court was content to leave in place its three divergent lines of precedent and not explain how Texas law was similar to or different from the federal Chevron doctrine.

That all changed on March 11, 2011, when the Texas Supreme Court in Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water began to develop a comprehensive doctrine on deference to state agency statutory interpretations. Texas Citizens has the potential to become the Court’s seminal decision on agency deference, as it consolidated Texas’s three lines of precedent in this area by establishing a seemingly straight-forward standard for deference: the Court “will generally uphold an agency’s interpretation of a statute it is charged with enforcing, so long as the construction is reasonable and does not contradict the plain language of the statute.”

Texas Citizens, though, explicitly noted one exception to this standard—an agency’s informal opinion may not warrant deference—and alluded to a few others. The Court also explained that while Texas has never “expressly adopted” the federal Chevron doctrine for agency deference, the “analysis” used by Texas “is similar.” In fact, the Court cited with approval the U.S. Supreme Court’s main Chevron Step Zero case. Thus, even though Texas has not adopted the federal Chevron standard, Texas courts and litigants will need to familiarize themselves with both Texas and federal law on agency deference.

Texas Citizens is a good first step towards clarifying Texas’s law on deference to state agency statutory interpretations. Specifically, the two major questions in this area are largely still open: What prerequisites must be satisfied for an agency’s statutory interpretation to warrant deference, and what degree of deference must courts give to such agency interpretations? Relatedly, and perhaps more importantly, Texas Citizens essentially did not address the aspects of federal law on agency deference that Texas has adopted or rejected. Texas Citizens made an initial positive stride by recognizing that Texas has never “expressly adopted” Chevron although the “analysis” used by Texas “is similar.” But this leaves much to be fleshed out.

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12 Id. at 625.
13 Id.
14 Id. at 624.
15 Id. (citing United States v. Mead Corp., 533 U.S. 218, 229-30 (2001)).
16 Id.
17 Id.
Although there has been a mountain of scholarship on the federal *Chevron* doctrine, there has been surprisingly little commentary on Texas law regarding deference to agency statutory interpretations. The existing commentary generally starts from the premise that Texas does not use the federal *Chevron* doctrine. As *Texas Citizens* made clear, that observation is technically true in that Texas has not said that its law on agency deference is coextensive with federal law. But this is also an oversimplification of Texas law, because there are significant parallels between Texas and federal law on agency deference. Before *Texas Citizens*, a couple commentators even argued that Texas should explicitly reject *Chevron*. *Texas Citizens* appears to have rejected that view, by noting that Texas law “is similar” to *Chevron*.

To date, no one has canvassed the Texas Supreme Court’s precedents on agency deference, much less compared them to historical or existing federal doctrine. Perhaps that is

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18 See Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH ADMIN. L.J. 288 (2006) (“Thus, the Texas Supreme Court will analyze the merits of a statutory construction dispute for itself, and adopt an interpretation that is different from even a plausible agency interpretation, if that interpretation is sufficiently more reasonable than the agency’s interpretation.”); Suzy E. Rosov, *Federal Courts Do the Two-Step While Texas Dances to a Different Tune: Judicial Review of Agency Rulemaking*, 2 TEX. TECH J. TEX. ADMIN. L. 299 (2001) (“Texas has its own standards which are applied consistently and do not appear to be quite as deferential as on the federal level”); 2 TEX. JUR. 3D ADMINISTRATIVE LAW §210 (“A Court is not bound by an administrative agency’s construction of a statute.”). Cf. Ann Graham, *Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 L.A. L. REV. 1105 (2008) (“Texas occupies the middle ground of our continuum, neither rejecting nor parroting the *Chevron* doctrine.”).

19 See D. Zachary Hudson, Comment, *A Case For Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373 (2009) (“While the states have not adopted a uniform approach to agency deference, most states share common attributes that, this Comment argues, justify denying state agencies *Chevron*-like deference on *Chevron’s* own terms.”); Schenkkan, supra note 18, at n.78, 86 (“*Chevron* is not the law in Texas”; “Texas should not adopt *Chevron*.”).

20 *Texas Citizens*, 336 S.W.3d at 624.

21 Schenkkan briefly quoted some of the Texas Supreme Court’s major deference cases. Schenkkan, supra note 18, at nn.69-74. And he explained the federal *Chevron* inquiry, alluding to *Chevron* Step Zero. *Id.* at n.80. But rather than compare and contrast the elements of the federal and state doctrines, Schenkkan presented a brief argument for why Texas should not adopt the federal *Chevron* inquiry. *Id.* at n.87. Even if Schenkkan is correct that Texas should not adopt *Chevron, cf. infra* Part IV, a comparative analysis shows what elements of the Texas doctrine remain open and how the Texas doctrine functions differently from federal law.

In another article, Schenkkan canvassed Texas and federal precedents regarding broader questions pertaining to judicial review of agency rules in general, but this article did not purport to address the issue of deference to agency statutory interpretations. Pieter M. Schenkkan, *When and How Should Texas Courts Review Agency Rules?*, 47 BAYLOR L. REV. 989, 1039-71 (1995). While addressing the machinations of a challenge to an agency rule, the article examined the standard of review that courts should use in reviewing agency action (e.g., substantial evidence, preponderance of the evidence, substantial evidence de novo, arbitrary and capricious). *Id.* at 993; see also Oscar Javier Ornelas, *Justified Reasoning for Reasonable Minds: The Reasoning Behind Standards of Judicial Review of Administrative Decisions in Texas*, 1 TEX. TECH. J. TEX. ADMIN. L. 235 (2000) (distinguishing de novo fact trial, substantial evidence de novo, pure de novo, and pure substantive evidence standards of review).

In contrast, the Texas Supreme Court has settled this issue in the context of reviewing agency statutory interpretations: courts should review “de novo” issues pertaining to an agency’s statutory interpretation. *See, e.g.*, R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future and Clean Water, 336 S.W.3d 619, 624 (Tex. 2011). The distinction between a court’s review of an agency’s processes or evidence versus an agency’s statutory interpretation tracks the difference in the federal system between arbitrary-and-capricious review for agency action in general and the *Chevron* inquiry for agency statutory interpretations. *Cf.* Scott A. Keller, *Depoliticizing Judicial Review of
because a consensus had formed around the view that Texas has not incorporated *Chevron*. But this overlooks the fact that Texas need not adopt *Chevron* wholesale for federal law to influence Texas’s doctrine on agency deference.

This article’s novel comparative examination between Texas and federal law illuminates many facets of Texas’s doctrine on agency deference. This article proceeds in four parts. Part I briefly examines the U.S. Supreme Court’s precedents on deference to agency statutory interpretations. Part II then canvasses the Texas Supreme Court’s decisions on agency deference. This confirms that *Texas Citizens* is the Court’s clearest articulation of Texas law on deference to agency statutory interpretations, and it is the first case that actually grapples with how Texas law is similar to and different from the federal *Chevron* doctrine. That said, *Texas Citizens* leaves open many important questions on agency deference.

Part III compares and contrasts Texas and federal law on deference to an agency’s statutory interpretation. This comparison shows that Texas and federal law agree on four core prerequisites for agency deference. An agency statutory interpretation cannot get deference unless (1) the agency is interpreting a statute it administers, (2) the statutory language is ambiguous, and (3) the agency’s interpretation is reasonable. Moreover, both Texas and federal law (4) examine, to some degree, the formality of the procedures used when an agency adopts its statutory interpretation.

Beyond that, Texas leaves open many questions on deference to agency statutory interpretations that federal law has already addressed—rather than outright rejecting these facets of the federal doctrine. When an agency’s interpretation is made through formal procedures, Texas may have more prerequisites for agency deference than federal law. Under federal law, when an agency uses formal procedures to create its statutory interpretation, the interpretation can merit deference even if the agency does not have special expertise in the area or has not consistently held its interpretation. Texas law, on the other hand, leaves open the possibility that other factors, such as an agency’s expertise and consistency, are relevant even when the agency uses formal procedures. *Texas Citizens*’s articulation of the agency deference doctrine said nothing about other factors such as an agency’s expertise or whether its interpretation was long-standing, yet *Texas Citizens* examined those factors even though the agency used formal procedures.

In light of this fact, *Texas Citizens* may not have articulated an exhaustive list of prerequisites for agency deference, so Texas law may yet recognize even more prerequisites for deference than federal law. For instance, early federal and Texas cases required that an agency’s statutory interpretation be contemporaneous with the statute’s enactment to get deference. Federal law appears to have largely dispensed with this prerequisite, whereas Texas cases suggest that this prerequisite lives on. Finally, federal law is clear that when all the prerequisites for deference are satisfied, courts *must* adopt the agency’s interpretation. The Texas Supreme Court, on the other hand, has occasionally said that agency interpretations never have

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*Agency Rulemaking*, 84 WASH. L. REV. 419, 450 (2009) (suggesting that *Chevron* is a particular type of arbitrary-and-capricious review). In any event, this article starts from the premise that the Texas Supreme Court will review agency statutory interpretations de novo, and then examines what deference is due under this “de novo” review.
“controlling weight,” which leaves open the degree of deference that Texas accords agency statutory interpretations.22

Part IV concludes by considering what Texas administrative law would look like if Texas adopted Chevron. To be clear, Texas has not adopted Chevron: Texas Citizens said that Texas has not adopted Chevron, and that appears to be a conscious decision as Texas has adopted federal law on deference to agency interpretations of their own regulations. But some may still argue that Texas Citizens is the Texas Supreme Court’s first step toward adopting Chevron given its observation that the analysis for agency deference in Texas “is similar” to Chevron.23 Even if Texas does adopt Chevron, agencies will not be accorded an extreme amount of deference, contrary to the view of some commentators.24 The traditional Chevron two-step inquiry now includes Chevron Step Zero, which makes it easier for courts to reject agency deference. The Texas Supreme Court may have been wary of Chevron before, but the federal doctrine actually has moved closer to existing Texas doctrine since the U.S. Supreme Court has created Chevron Step Zero. That may be why Texas Citizens cited the federal Chevron Step Zero doctrine approvingly, just as the Texas Supreme Court did in 2006.25 Finally, if the Texas Supreme Court opted for Justice Breyer’s approach to Chevron Step Zero, Texas law on agency deference would basically remain unchanged if Texas adopted Chevron.

Although Texas Citizens began to clean up Texas law on agency deference, the Texas Supreme Court still has much work to do to solidify this doctrine. A great place to start is a comparative examination between Texas and federal law.

I. U.S. Supreme Court Precedent on Deference to Agency Statutory Interpretations

Federal law on agency deference has oscillated between formalist tests that generally accord agencies a significant degree of deference and functionalist tests that give courts discretion to reject agency statutory interpretations. For the first hundred years of U.S. Supreme Court precedents on agency deference, the Court basically used a formalist doctrine that favored agency deference, although not every case fit that mold. The Court reacted to the New Deal, however, by shifting to a functionalist test that gave courts wide latitude to overrule agency statutory interpretations. It was not until 1984 that Chevron pulled the Court back to its formalist roots, creating a simple two-step inquiry for agency deference and establishing the high watermark for agency deference. In the past decade, though, the Court has fashioned a threshold prong onto Chevron called Chevron Step Zero, which has reduced the degree of deference courts owe to informal agency statutory interpretations.

22 Quick v. City of Austin, 7 S.W.3d 109, 123 (Tex. 1998).


24 See, e.g., Schenkan, supra note 18, at n.78 (“The minority Austin cases reflect an extreme degree of agency deference in language that resembles, though the cases do not cite, the federal Chevron doctrine.” (footnote omitted)).

A. Pre-New Deal

The U.S. Supreme Court addressed the issue of agency deference on many occasions before the New Deal culminated in the federal Administrative Procedure Act being enacted in 1946. In 1827, Edwards’ Lessee v. Darby recognized that courts should accord some amount of deference to agency interpretations of ambiguous statutes they administer:

In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect. 26

The U.S. Supreme Court’s initial foray into agency deference thus addressed two questions that continue to plague courts today: What prerequisites must exist before an agency is entitled to deference, and what degree of deference is accorded to agency statutory interpretations? On the former question, Edwards’ Lessee said an agency is entitled to deference if (1) it construes an ambiguous law, (2) its construction is cotemporaneous with the law’s enactment, and (3) it administers the statute. And, on the latter question, such interpretations are entitled to very great respect. Since Edwards’ Lessee, both federal and Texas state courts have offered a wide array of answers to these two fundamental questions on agency deference.

Agencies, of course, were mere infants in 1827 when Edwards’ Lessee was decided. In the century following Edwards’ Lessee, the U.S. Supreme Court revised both the prerequisites for agency deference and the degree of deference owed to agency statutory interpretations. But the Court was not always consistent. For instance, one line of cases suggested that a prerequisite for agency deference was that the agency’s interpretation be consistently held for a sufficient period of time. 27 Another asserted that an agency was not entitled to deference if it lacked

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27 See, e.g., Union Stock Yard & Transit Co. of Chicago v. United States, 308 U.S. 213, 223 (1939) (“settled or uniform administrative construction of a doubtful statute” “is of weight in determining its meaning”); Alaska S.S. Co. v. United States, 290 U.S. 256, 262 (1933) (“Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to.”); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16 (1932) (“The court is not bound by an administrative construction” where “not uniform and consistent.”); Louisville & Nashville R.R. Co. v. United States, 282 U.S. 740, 757 (1931) (“The principle is a familiar one that in the interpretation of a doubtful or ambiguous statute the long-continued and uniform practice of the authorities charged with its administration is entitled to great weight, and will not be disturbed, except for cogent reasons.”); United States v. Missouri Pac. R.R. Co., 278 U.S. 269, 280 (1929) (“And if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons.”); United States v. Healey, 160 U.S. 136, 141 (1895) (“[W]hen the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution, where that construction has, for many years, controlled the conduct of the public business.”); Robertson v. Downing, 127 U.S. 607, 613 (1888) (“The regulation of a department of the government is not of course to control the construction of an act of congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for
expertise regarding the interpretation at issue. A related set of cases even suggested that deference to an agency’s statutory interpretation turned on whether Congress subsequently had reenacted the statute without relevant alterations. But many cases did not add these additional prerequisites—or Edwards’ Lessee’s contemporary-construction prerequisite—and instead simply examined whether the agency’s interpretation of a statute it administered was ambiguous.

Likewise, the Court used different labels to describe the degree of deference owed to agency statutory interpretations. Edwards’ Lessee started with “very great respect.” This formulation morphed into “respectful consideration” and “great weight.” A different set of precedents said agency interpretations were “persuasive,” at times conflating the prerequisite inquiry (e.g., an interpretation must be persuasive before it gets some degree of deference) with the degree-of-deference inquiry (e.g., an interpretation that meets all the prerequisites will be deemed persuasive).

While the labels and doctrines varied, the pre-APA cases generally followed the same pattern: the Court first examined a checklist of prerequisites for agency deference, and it then

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28 See, e.g., Haggar Co. v. Helvering, 308 U.S. 389, 341 (1940) (rejecting deference where agency’s regulations “have not been consistent” and “do not embody the results of any specialized departmental knowledge or experience”); Sanford’s Estate v. Comm’r of Internal Revenue, 308 U.S. 39, 52-53 (1939) (“If a practice is to be accepted because of the superior knowledge of administrative officers of the administrative needs and convenience, there is no such reason for its acceptance here. The Government by taking no position confesses that it is unable to say how administrative need and convenience will best be served.” (citation omitted)).

29 See, e.g., New York, New Haven & Hartford R.R. Co. v. Interstate Commerce Comm’n, 200 U.S. 361, 401-02 (1906) (“[A] construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute.”); United States v. Barringer, 188 U.S. 577, 587 (1903) (“it follows that the re-enactment of the previous laws carried with it the settled administrative construction which had prevailed in their enforcement from the beginning”).

30 See, e.g., N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24 (1932) (deference where statute was ambiguous); Fawcus Machine Co. v. United States, 282 U.S. 375, 378 (1931) (deference unless “unreasonable or inconsistent with the statute”); United States v. Philbrick, 120 U.S. 52, 59 (1887) (”A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and, since it is not clear that the construction was erroneous, it ought not now to be overturned.”);


either deferred to the agency’s interpretation if all prerequisites were satisfied or it rejected the agency’s interpretation if the prerequisites were not satisfied. Thus, the initial doctrine for agency deference was rather formalistic, even though the labels hide this. Indeed, the Court never rejected agency deference after finding all the prerequisites satisfied. It may have revised its list of prerequisites, but it never said that agency deference should turn on a totality-of-the-circumstances test—until 1944.

B. **Skidmore**

Two years before the federal APA was enacted, *Skidmore v. Swift & Co.* created an open-ended inquiry for addressing the question of agency deference. Instead of continuing the Court’s enterprise of creating a checklist of prerequisites for agency deference, *Skidmore* discarded that framework—without citation. In its place, *Skidmore* adopted a totality-of-the-circumstances doctrine that gave courts must greater authority to overrule agency interpretations:

> We consider that the rulings, interpretations and opinions of the Administrator under the 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. The weight of such a judgment in a particular case will depend upon the thoroughness evidence in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Thus, after *Skidmore*, agency deference turned on whether the interpretation had the “power to persuade.” As commentators have recognized, however, this may be no deference at all, because the “power to persuade” is “exactly what every litigant attempts to accomplish.” *Skidmore* may have been a political compromise—“a feigned response to the New Deal, creating the appearance of deference but with open-ended factors that provide deference only when the view of an agency parallels the views of the reviewing court.” In any event, *Skidmore* gave courts wide latitude to reject or accept agency statutory interpretations.

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36 *Id.*

37 Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 8–9 (2006) (calling *Skidmore* “deference in name but not in practice” because the “power to persuade . . . is exactly what every litigant attempts to accomplish”). Lipton tries to rehabilitate *Skidmore* by saying that *Skidmore* means that a court is required to treat the agency’s interpretation as a persuasive precedent, much like how a federal circuit court of appeals treats other circuits’ opinions. Bradley Lipton, Note, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2133-35 (2010). That may be a proper interpretation of *Skidmore*, but it is unclear whether this is any form of deference. Rather, it may be more analogous to a procedural requirement that a court address the arguments made by the agency—just as a federal circuit court of appeals would probably not ignore an on-point decision from another circuit.

38 *Id.* at 19.
During the forty years after *Skidmore*, the U.S. Supreme Court essentially adhered to its open-ended test for agency deference. A few cases, though, suggested that the Court should be much more deferential to agencies. Four decades after *Skidmore*, the Court finally came around to that view.

C. *Chevron*

Before 1984, federal law on agency deference “remained complex and confused” under the *Skidmore* doctrine. But in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the U.S. Supreme Court announced a two-step inquiry for reviewing an “agency’s construction of the statute which it administers.” First (“Chevron Step One”), courts “must give effect to the unambiguously expressed intent of Congress.” Second (“Chevron Step Two”), “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” So, at Chevron Step Two, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” In other words, a court must accept an agency’s reasonable interpretation if the court reaches Chevron Step Two.

*Chevron* pulled the Court back to its formalistic, pre-*Skidmore* doctrine for agency deference. Instead of mulling over a nonexhaustive list of factors, *Chevron* requires courts to examine set rules with delineated prerequisites for agency deference. Note, though, that *Chevron* said nothing about Edwards’ Lessee’s cotemporaneous-construction prerequisite, although *Chevron* retained Edwards’ Lessee’s other two prerequisites for deference (the statute must be

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40 See, e.g., Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) (“Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive for several reasons.”); Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979) (“Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute.”); Udall v. Tallman, 380 U.S. 1, 16 (1965) (“To sustain the Commission’s application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.”).


43 Id. at 843.

44 Id.

45 Id. at 844 (emphasis added).
ambiguous and one that the agency administers). Nor did *Chevron* require the interpretation to be consistently held for a sufficient period of time. Justice Scalia argues that this factor is irrelevant if one adopts a positivist view of statutory interpretation.\(^{46}\) And as the Court recently acknowledged, neither its precedents nor the APA require “that all agency change be subjected to more searching review.”\(^{47}\)

Many courts and commentators therefore have correctly explained that *Chevron* was the high watermark for agency deference,\(^{48}\) as *Chevron* went to great lengths to emphasize the “controlling weight” that should be accorded to reasonable agency interpretations.\(^{49}\) Even the Texas Supreme Court recently in *Texas Citizens* noted “the high deferential standard afforded in *Chevron*.”\(^{50}\) As a result, when many think of *Chevron*, they think of a doctrine that gives agencies an extreme amount of deference and basically eliminates the ability of courts to interpret ambiguous statutes that are enforced by agencies.\(^{51}\)

*Chevron* was not necessarily trying to change the law, although it certainly had that effect. In fact, *Chevron* itself cited *Skidmore* approvingly.\(^{52}\) In that part of the *Chevron* opinion, the Court explained that deference was warranted because “the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”\(^{53}\) These factors, though, seemed to have no place under the *Chevron* two-step framework—that is until the U.S. Supreme Court clarified that *Chevron* actually has more than two steps.

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\(^{46}\) See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 ("[T]here is no longer any justification for giving “special” deference to “long-standing and consistent” agency interpretations of law. That venerable principle made a lot of sense when we assumed that both court and agency were searching for the one, permanent, “correct” meaning of the statute; it makes no sense when we acknowledge that the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose. Under the latter regime, there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind."); *Barnhart v. Walton*, 535 U.S. 212, 226-27 (2002) (Scalia, J., concurring in part and concurring in the judgment).


\(^{48}\) See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 190 (2006) (“In the last fifteen years, however, the simplest interpretations of *Chevron* have unraveled. . . . In some cases, the Court appears to have moved strongly in the direction of pre-*Chevron* law, in an evident attempt to reassert the primacy of the judiciary in statutory interpretation.”).

\(^{49}\) *Chevron*, 467 U.S. at 844; see id. (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.” (footnote omitted)).


\(^{52}\) *Chevron*, 467 U.S. at 865 n.40.

\(^{53}\) Id. at 865 (footnotes omitted).
D. **Chevron Step Zero**

The view that *Chevron* entails an extreme amount of deference is a bit outdated. Since 2000, a series of U.S. Supreme Court cases has ratcheted back the degree of *Chevron* deference that courts owe to federal agencies’ statutory interpretations. Before courts can reach the traditional *Chevron* two-step inquiry and accord an agency’s interpretation deference, courts now must address a new threshold prong, which commentators have called “Chevron Step Zero.”

Chevron Step Zero partially resuscitates *Skidmore*. Under Chevron Step Zero, a federal court confronting an informal agency statutory interpretation may use *Skidmore* instead of *Chevron* when the agency lacks expertise, changes positions, does not carefully consider the relevant issues, or addresses an important issue.

Chevron Step Zero proceeds in two substeps, funneling agency interpretations into either the *Chevron* or *Skidmore* framework. A federal court will first consider whether the agency used formal procedures to reach its interpretation. If so, then the court will bypass Chevron Step Zero’s second substep, skipping ahead to Chevron Step One and commencing the traditional *Chevron* two-step inquiry. But if the agency interpretation is informal, then the court will reach Chevron Step Zero’s second substep, which is a balancing test of five factors:

1. the breadth of the statutory delegation;
2. the agency’s expertise;
3. whether the agency has consistently observed its statutory interpretation;
4. the agency’s deliberation, including procedures used for the current agency interpretation;
5. the nature of the question addressed by the current agency interpretation.

If these factors suggest that Congress “delegated authority to the agency generally to make rules carrying the force of law,” then the court will proceed to the *Chevron* two-step inquiry. But if these factors suggest that Congress

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54 The phrase “Chevron Step Zero” was coined in Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L.J. 833, 836 (2001), and then solidified in Sunstein, supra note 48.


56 Id.

57 Id. at 67-69.

58 Id.

59 Id.

60 Id. The Texas Supreme Court in *Texas Citizens* may have been a bit imprecise in stating, “[i]nformal interpretations, such as advisory opinions, may merit some deference, as articulated in *Skidmore* . . ., but not the high deferential standard afforded in *Chevron*.” 336 S.W.3d at 625. Informal interpretations that survive the second substep of Chevron Step Zero do go on to the traditional *Chevron* two-step inquiry; those that do not survive this balancing test face the *Skidmore* inquiry. See, e.g., Barnhart v. Walton, 535 U.S. 212, 222 (2002) (“Indeed, *Mead* pointed to instances in which the Court has applied *Chevron* deference to agency interpretations that did not emerge out of notice-and-comment rulemaking.”).
did not delegate such authority, then the court will analyze whether deference is due under
*Skidmore*’s power-to-persuade test.\(^{61}\)

Justice Breyer, in contrast, has argued that Chevron Step Zero’s two substeps should be
collapsed into one. He would eliminate Chevron Step Zero’s first substep and consider the
formality of the agency’s interpretation as another factor in the doctrine’s balancing test, which
is currently the second substep of Chevron Step Zero.\(^{62}\) In other words, Justice Breyer would
accord agencies less deference by allowing courts to reject even *formal* agency interpretations
under Chevron Step Zero.

*Chevron* itself mentioned nothing about Chevron Step Zero’s additional criteria for
deerence, yet the Court added these conditions to scale back the number of agency
interpretations that are accorded *Chevron* deference. Consequently, the *Chevron* inquiry today is
not nearly as deferential as when it was first announced in 1984, because it now includes
Chevron Step Zero.

II. Texas Supreme Court Precedent on Deference to Agency Statutory Interpretations

The Texas Supreme Court’s recent decision in *Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water* is the Court’s clearest articulation of Texas law on
deerence to agency statutory interpretations. In fact, it is the first case that actually grapples
with how Texas law is similar to and different from the federal *Chevron* doctrine. For that
reason alone, *Texas Citizens* could become the Court’s definitive precedent on this issue. But
that also means that courts or litigants could overread *Texas Citizens* and conclude that it
resolved nuanced questions of agency deference that were not presented. *Texas Citizens* actually
leaves open many important questions on agency deference, and these questions are illuminated
only by understanding the history of the Texas Supreme Court’s jurisprudence in this area.

A. Early Cases

The Texas Supreme Court’s initial cases on deference to state agency statutory
interpretations look very similar to early U.S. Supreme Court cases on federal agency deference.
In 1891, the Texas Supreme Court in *Galveston, Harrisburg & San Antonio Railway Co. v. State*
noted:

> We recognize the rule that in cases of doubt the contemporaneous construction of
any department of the government is entitled to great weight, and is sometimes
given a controlling influence. . . . But it seems to be well settled that, when the
meaning of the language in a statute is clear, it has no application. If the words
contained in the act under consideration were of doubtful meaning, we could not


\(^{62}\) *Id.* at 67 n.117 (citing Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005)
(Breyer, J., concurring)).
lightly disregard the construction given them by the officers of the state who were called upon to act upon them.63

Thus, just like the U.S. Supreme Court in Edwards’ Lessee, the Texas Supreme Court in Galveston said that an agency statutory interpretation is entitled to some degree of deference if (1) the agency construes an ambiguous law, (2) its construction is contemporaneous with the law’s enactment, and (3) it administers the statute.64 Edwards’ Lessee said agency interpretations were entitled to “very great respect,”65 and Galveston said they were entitled to “great weight”—a formulation later used by the U.S. Supreme Court as well.67

Following Galveston, the Texas Supreme Court began to tinker with its doctrine of agency deference, just as the U.S. Supreme Court refined its views after Edwards’ Lessee. The Texas Supreme Court continued to say that certain agency interpretations were entitled to “great weight,”68 but that began to mean that agency interpretations had a controlling influence. For instance, in 1903, the Court explained:

The great weight which, from necessity, courts must often give to the contemporaneous construction put upon laws by other departments and officers to whom is committed their practical administration is so well understood that it need not be dwelt upon. Sound public policy requires the solving of all mere doubts in favor of constructions so made and uniformly acted upon.69

This was not an outlying formulation of Texas’s doctrine on agency deference,70 yet the Texas Supreme Court provided little insight on agency deference during the first half of the 1900s.71

64 See supra note 26 and accompanying text.
66 Galveston, 17 S.W. at 74.
67 See supra note 33 and accompanying text.
68 See, e.g., Fire Ass’n of Phila. v. Love, 108 S.W. 810, 810-11 (Tex. 1908); Martin v. Terrell, 76 S.W. 743, 745 (Tex. 1903); Tolleson v. Rogan, 73 S.W. 520, 524 (Tex. 1903).
69 Tolleson v. Rogan, 73 S.W. 520, 524 (Tex. 1903) (emphasis added).
70 See, e.g., Mumme v. Marrs, 40 S.W.2d 31, 35 (Tex. 1931) (“The universal rule of construction is that legislative and executive interpretations of the organic law, acquiesced in and long continued . . . are of great weight in determining the validity of any act, and in case of ambiguity or doubt will be followed by the courts.”); Yoakum County v. Slaughter, 195 S.W. 1129, 1135 (Tex. 1916) (long-standing agency interpretation “should not be cast aside . . . unless it is clearly wrong”).
71 See, e.g., Harris County v. Crooker, 248 S.W. 652, 655 (Tex. 1923). See also Harris County v. Hammond, 203 S.W. 445, 448 (Tex. Civ. App.—Galveston 1918, writ ref’d); State v. Houston Oil Co. of Tex., 194 S.W. 422, 435 (Tex. Civ. App.—Austin 1917, writ ref’d); cf. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 754 n.52 (2006) (unclear whether “writ refused” cases before 1927 have same precedential value as a Texas Supreme Court opinion).
was not until 1944—about six months before the U.S. Supreme Court decided Skidmore—that the Texas Supreme Court in Stanford v. Butler significantly addressed its doctrine on agency deference.\footnote{181 S.W.2d 269 (1944).}

\section*{B. Stanford}

Texas law on agency deference was so undeveloped in 1944 that Stanford v. Butler quoted at length the Texas Jurisprudence treatise’s discussion of this doctrine.\footnote{See id. at 273 (quoting Texas Jurisprudence, Vol. 39, §§125-26).} But Stanford’s reliance on this treatise probably led to more confusion than clarification. Stanford adopted the following doctrine on agency deference from Texas Jurisprudence:

The contemporaneous construction of an act by those who are charged with the duty of its enforcement—that is, executive and administrative officers and departments, as well as by the courts and the Legislature—is worthy of serious consideration as an aid to interpretation, particularly where such construction has been sanctioned by long acquiescence. Although a contemporaneous or practical construction is not absolutely controlling, it has much persuasive force and is entitled to great weight in determining the meaning of an ambiguous or doubtful provision.

The courts will ordinarily adopt and uphold a construction placed upon a statute by an executive officer or department charged with its administration, if the statute is ambiguous or uncertain, and the construction so given it is reasonable.\footnote{Id. (quoting Texas Jurisprudence, Vol. 39, §§125-26).}

The tension and internal inconsistency between these two paragraphs in Stanford is glaring. The former paragraph looks like Skidmore’s totality-of-the-circumstances power-to-persuade test. But the latter paragraph appears to channel Chevron forty years before the U.S. Supreme Court said that an agency’s reasonable interpretation of an ambiguous statute it administers is entitled to deference.

Shortly after Stanford, in 1947, the Court appeared to favor agency deference in San Antonio Junior College District v. Daniel.\footnote{S.A. Union Junior College Dist. v. Daniel, 206 S.W.2d 995, 998 (Tex. 1947); see also Tex. Emp. Ins. Ass’n v. Holmes, 196 S.W.2d 390, 395 (Tex. 1946) (“[T]he practical interpretation of the Act by the agency charged with the duty of administering it is entitled to the highest respect from the courts. And this is especially so when that interpretation has been long continued and uniform.” (quoting Indus. Accident Bd. v. Glenn, 190 S.W.2d 805, 808 (Simpson, J., dissenting))).} Daniel reasoned that because an agency official administered a statute, “his construction of the sections in question is entitled to great weight, and this court should not give a different construction unless we are convinced that his is wrong.”\footnote{Daniel, 206 S.W.2d at 998 (emphasis added).} Nevertheless, it is hard to draw many conclusions from this single data point,
especially when *Daniel* did not cite *Stanford*.\(^77\) After *Daniel*, the Texas Supreme Court essentially did not reexamine its doctrine on agency deference until the 1990s.\(^78\)

C. 1993-2006

With the modern explosion of the administrative state, it was only a matter of time before the Texas Supreme Court refined its doctrine on agency deference. Nearly fifty years after *Stanford* was decided, the Court returned to the issue of agency deference by addressing it almost once a year for the past two decades. By the 1990s, of course, the U.S. Supreme Court had decided *Chevron*. Until 2006, however, the Texas Supreme Court conspicuously failed to even cite *Chevron* on the issue of deference to state agency statutory interpretations.\(^79\) In fact, Texas law on agency deference became even more muddled during this time period, as at least three competing formulations of the doctrine emerged.

In 1993, *Tarrant Appraisal District v. Moore* kicked off the Texas Supreme Court’s modern jurisprudence on agency deference.\(^80\) *Tarrant Appraisal District* cited *Stanford* for the following proposition: “Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute.”\(^81\) It is unclear whether the Court’s choice of the phrase “serious consideration” instead of “great weight”—both of which appeared in *Stanford*—made any difference. Had the Court replaced “serious consideration” with “controlling weight,” *Tarrant Appraisal District* would have adopted *Chevron*. Subsequent cases, though, make clear that an agency’s statutory interpretation is not controlling just because it is a reasonable interpretation of an ambiguous statute that the agency administers.

\(^77\) *Id.* (citing Harris County v. Hammond, 203 S.W. 445, 448 (Tex. Civ. App.—Galveston 1918, writ ref’d)).

\(^78\) See, e.g., Calvert v. Kadane, 427 S.W.2d 605, 608 (Tex. 1968) (“If, on the other hand, the meaning of the provision be doubtful or ambiguous, the construction placed upon a statutory provision by the agency charged with its administration is entitled to weight.”); State v. Aransas Dock & Channel Co., 365 S.W.2d 220, 224 (Tex. Civ. App.—San Antonio 1963, writ ref’d) (“Where an Act of the Legislature is ambiguous, the Courts are inclined to follow the administrative construction of the Act over a long period of time by the officials charged with its administration.”); Tex. & N. O. R. Co. v. R.R. Comm’n of Tex., 200 S.W.2d 626, 630 (Tex. 1947) (“Were the legislative intent not so plainly apparent, this contemporaneous construction of the act by the [agency], which was charged with the duty of its enforcement, would be worthy of serious consideration as an aid to interpretation, and particularly so here, where that construction appears to have been sanctioned by long acquiescence. But resort to those aids to construction is not required in this situation where the meaning of the statute is so manifest.” (citations omitted)).

\(^79\) When deference to federal agency statutory interpretations was at issue, the Texas Supreme Court relied on *Chevron* and federal precedents instead of state caselaw. See, e.g., Am. Cyanamid Co. v. Geye, 79 S.W.3d 21, 26 & n.29 (Tex. 2002); In re Am. Homestar of Lancaster, Inc., 50 S.W.3d 480, 490 (Tex. 2001); Worthy v. Collagen Corp., 967 S.W.2d 360, 371-72 (1998); Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 255 n.4 (Tex. 1994) (Phillips, C.J., dissenting).


\(^81\) *Id.*
One year later, the Court decided a pair of cases on agency deference that presaged the competing serious-consideration and great-weight lines of precedent that would ensue. *Dodd v. Meno* quoted *Tarrant Appraisal District*’s serious-consideration test for agency deference and relied on the agency’s expertise, deferring to the agency official’s “reasonable determination in an area where he possesses considerable authority and expertise.”\(^\text{82}\) *State v. Public Utility Commission of Texas* then cited *Dodd* and *Tarrant Appraisal District* for the Court’s agency deference doctrine, but the Court also revived its contemporaneous-construction prerequisite for deference and returned to the “great weight” formulation of the doctrine: “[T]he contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight.”\(^\text{83}\)

The fact that *State v. Public Utility Commission of Texas* used the label “great weight” after citing only cases that used the “serious consideration” label (*Tarrant Appraisal District* and *Dodd*) suggests that these two labels are interchangeable. That would make sense as *Stanford* in 1944 used both labels in the first paragraph quoted above for the proposition that courts are not bound by agency interpretations although they cannot ignore them.\(^\text{84}\) However, two lines of cases would subsequently develop—one that adopted the “great weight” formulation and another that used the “serious consideration” label. The Court, though, never expressly stated whether there was any difference between the two.

In 1998,\(^\text{85}\) *Quick v. City of Austin* made an important clarification: although certain agency statutory interpretations merited some degree of deference, agency interpretations lack “controlling” weight.\(^\text{86}\) After the Court noted that its ruling in that case was consistent with the agency’s statutory interpretation, it went out of its way to explain that agency interpretations are not controlling: “While not controlling, the contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight.”\(^\text{87}\) This stands in stark contrast to the federal *Chevron* doctrine, which does confer “controlling weight” on certain agency statutory interpretations.\(^\text{88}\) Yet the Texas Supreme Court did not address—much less cite—*Chevron*, and it adopted the agency’s interpretation anyway.

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\(^{82}\) *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994).


\(^{84}\) *See supra* Part II.B.


\(^{86}\) *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998).

\(^{87}\) *Id.* (citing State v. Pub. Util. Comm’n of Tex., 883 S.W.2d 190, 196 (Tex. 1994); *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994)).

Quick’s clarification that Texas agency statutory interpretations are not controlling may have caused a third line of precedent—besides the great-weight and serious-consideration lines—to form in the 2000s.89 In 2001, TXU Electric Co. v. Public Utility Commission of Texas cited Stanford for the proposition that reasonable agency interpretations of unclear statutes are entitled to merely “some deference.”90 This formulation of the agency deference doctrine is the least deferential of all the formulations articulated by the Texas Supreme Court. But the Court in TXU nevertheless adopted the agency’s interpretation.91 Also in 2001, the Court backed off its “serious consideration” line of precedent, rejecting an agency interpretation after explaining that it was entitled to only “consideration” if reasonable and not inconsistent with the statute.92

For the next five years, the Court wavered back and forth between various formulations of the doctrine.93 In 2002, the Court returned to the “serious consideration” formulation to defer to94 and reject95 an agency’s statutory interpretation. And it rejected another after stating that an agency’s interpretation is entitled to mere “weight” when it is reasonable and not inconsistent with the statute.96

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89 In 2000, the Court decided two other agency deference cases. In one, it adopted an agency’s statutory interpretation, stating that “[a] reasonable construction of a statute by the administrative agency charged with its enforcement is entitled to great weight.” Osterberg v. Peca, 12 S.W.3d 31, 51 (Tex. 2000) (citing State v. Pub. Util. Comm’n of Tex., 883 S.W.2d 190, 196 (Tex. 1994); Dodd v. Meno, 870 S.W.2d 4, 7 (Tex. 1994)). In another, it rejected an interpretation as inconsistent with the statute’s plain language. See FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 883 (Tex. 2000) (“Although we defer to administrative interpretations of legislation, we do so only when they are reasonable interpretations.”) (citing State v. Pub. Util. Comm’n of Tex., 883 S.W.2d 190, 196 (Tex. 1994)).

90 TXU Elec. Co. v. Pub. Util. Comm’n of Tex., 51 S.W.3d 275, 286 (Tex. 2001); see City of Corpus Christi v. Pub. Util. Comm’n of Tex., 51 S.W.3d 231, 261 (Tex. 2001) (Owen, J., concurring and announcing opinion of the court) (“As we explained above and as we explain today in TXU, when faced with an ambiguous code provision, we give some deference to the Commission’s interpretation when it is reasonable and does not conflict with the code’s clear language.” (footnote omitted)).

91 TXU, 51 S.W.3d at 286.


93 During this period, the Court also rejected an agency interpretation as inconsistent with a statute’s plain language. Pretzer v. Motor Vehicle Bd., 138 S.W.3d 908, 915 & n.29 (Tex. 2004) (citing FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 883 (Tex. 2000)).


an agency interpretation as unreasonable.\footnote{97 AT&T Commc’ns of Tex., L.P. v. Sw. Bell. Tel. Co., 186 S.W.3d 517, 529-30 & n.62 (Tex. 2006) (citing Cities of Austin et al. v. Sw. Bell. Tel. Co., 92 S.W.3d 434, 441 (Tex. 2002)).} It was not until later that year that the Texas Supreme Court would cite \textit{Chevron} for the first time.

D. \textit{Fiess and Combs}


It is true that courts give some deference to an agency regulation containing a reasonable interpretation of an ambiguous statute. But there are several qualifiers in that statement. First, it applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions in documents like the Department’s amicus brief here. Second, the language at issue must be ambiguous; an agency’s opinion cannot change plain language. Third, the agency’s construction must be reasonable; alternative \textit{unreasonable} constructions do not make a policy ambiguous.\footnote{104 \textit{Fiess}, 202 S.W.3d at 747-48 (footnotes omitted).}

The Court ultimately rejected the agency’s interpretation, finding it contrary to the statute’s plain language.\footnote{105 \textit{Id.} at 748.}

While \textit{Fiess} was the Court’s first attempt at announcing a comprehensive doctrine on agency deference, it unfortunately provided little clarification on how its doctrine compared with \textit{Chevron}. The Court mysteriously cited \textit{Chevron} as support for Texas’s “some deference”
formulation of the doctrine,\textsuperscript{106} even though \textit{Chevron} established that some agency interpretations are accorded “controlling weight”—not just some deference\textsuperscript{107}. Additionally, the second and third “qualifiers” mentioned in \textit{Fiess}—that a statute must be ambiguous and an agency’s interpretation must be reasonable to get deference\textsuperscript{108}—are settled aspects of the doctrine; indeed, those are the precise inquiries at \textit{Chevron} Steps One and Two\textsuperscript{109}.

The first \textit{Fiess} qualifier, in contrast, is quite notable. This formal-procedure prerequisite to agency deference is the first substep in \textit{Chevron} Step Zero\textsuperscript{110} and \textit{Fiess} adopted this prerequisite by citing a \textit{Chevron} Step Zero case from the U.S. Supreme Court\textsuperscript{111}. It may be notable that the Texas Supreme Court did not cite \textit{Chevron} until after the U.S. Supreme Court began scaling back on agency deference through \textit{Chevron} Step Zero. This may indicate that the Texas Supreme Court was never comfortable with the high degree of agency deference accorded by \textit{Chevron}’s two-step inquiry and only started to warm up to the federal doctrine after the addition of \textit{Chevron} Step Zero.

\textit{Fiess} may have been the Texas Supreme Court’s most thorough canvassing of its precedents on agency deference up to that point. Nonetheless, for the next five years, the Court failed to cite \textit{Fiess}’s discussion of agency deference. And one year after \textit{Fiess}, the Court went back to oscillating between its serious-consideration and great-weight lines of precedent\textsuperscript{112}.

Then, in 2008, a five-Judge majority in \textit{First American Title Insurance Co. v. Combs} came as close to adopting \textit{Chevron} as the Court ever has—although \textit{Combs} never even mentioned \textit{Chevron}.\textsuperscript{113} \textit{Combs} said that where an agency reasonably interprets an ambiguous


\textsuperscript{107} \textit{Chevron}, 467 U.S. at 844.

\textsuperscript{108} \textit{Fiess}, 202 S.W.3d at 747-48.

\textsuperscript{109} See supra notes 43-44 and accompanying text.

\textsuperscript{110} See supra notes 57-58 and accompanying text.

\textsuperscript{111} \textit{Fiess}, 202 S.W.3d at 747-48 nn. 13, 15 (citing Christensen v. Harris County, 529 U.S. 576, 587 (2000)).


\textsuperscript{113} First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 632 & nn.24, 27 (Tex. 2008) (citing Tarrant Appraisal Dist. v. Moore, 845 S.W.2d 820, 823 (Tex. 1993)). Ironically, Justice Hecht’s dissent cited \textit{Chevron} (for the second time in the Texas Supreme Court’s history). \textit{Id.} at 645 nn.27-28. Interestingly, the dissent also cited U.S. Supreme Court authority for the proposition that “an agency’s decision to depart from a longstanding interpretation is entitled to ‘considerably less deference’ unless the agency provides some reasonable explanation for the change.” \textit{Id.} at 645 (quoting \textit{Watt} v. Alaska, 451 U.S. 259, 273 (1981)). That U.S. Supreme Court authority may be in tension with \textit{Chevron} and more recent decisions. See supra notes 46-47 and accompanying text.
statute it enforces, the Court “will uphold” that interpretation—not just give it serious consideration, great weight, or some deference.\textsuperscript{114} This “will uphold” language may look familiar: the second—Chevron-esque—paragraph in Stanford quoted above stated that courts “will ordinarily adopt and uphold” certain agency interpretations.\textsuperscript{115} If Combs really meant that the Court “will uphold” such interpretations,\textsuperscript{116} that would have the same effect as according interpretations “controlling weight” like Chevron does.\textsuperscript{117} And Combs did, in fact, defer to the agency’s “reasonable” interpretation, which was “in harmony with the statute’s plain meaning.”\textsuperscript{118} But not only did Combs fail to cite Chevron, it never addressed the Court’s 1998 statement in Quick that agency interpretations are “not controlling.”\textsuperscript{119}

After Combs was decided, the Court began citing it as its definitive precedent on agency deference. But the Court merely cited Combs for the proposition that agency interpretations were entitled to “serious consideration”\textsuperscript{120}—not that the Court “will uphold” them.\textsuperscript{121}

This was indicative of a crucial split of authority in the Texas Supreme Court’s precedents on agency deference. The Court’s statements were not always clear about whether a reasonable agency interpretation (that did not contradict the plain language of a statute the agency enforced) was automatically entitled to deference, or whether reasonableness was instead a pre-condition for the Court to even reach the serious-consideration, great-weight, or some deference inquiries. Combs adopted the former view.\textsuperscript{122} And some cases said nothing about the reasonableness of an agency’s interpretation, insinuating that reasonableness was not a pre-condition for giving an agency interpretation serious consideration or great weight.\textsuperscript{123} On the

\begin{itemize}
\item \textsuperscript{114} Id. at 632 (majority opinion).
\item \textsuperscript{115} Stanford v. Butler, 181 S.W.2d 269, 273 (1944).
\item \textsuperscript{116} Combs, 258 S.W.3d at 632.
\item \textsuperscript{118} Combs, 258 S.W.3d at 633.
\item \textsuperscript{119} Quick v. City of Austin, 7 S.W.3d 109, 123 (Tex. 1998) (emphasis added).
\item \textsuperscript{121} Combs, 258 S.W.3d at 632.
\item \textsuperscript{122} Id.
\end{itemize}
other hand, various cases suggested that an agency’s interpretation must be reasonable as a pre-
condition for the Court to reach the serious-consideration,\textsuperscript{124} great-weight,\textsuperscript{125} or some-
deferece\textsuperscript{126} inquiries.

Suffice it to say, by 2011, Texas law on agency deference was anything but clear. In early March 2011, the Court took another step toward adopting Chevron Step Zero. \textit{In re Smith} explained that “[c]ourts may give less deference to an agency’s reading of a statute . . . when legislative intent is at issue rather than the application of technical or regulatory matters with the agency’s expertise.”\textsuperscript{127} Chevron Step Zero also allows courts to give less deference based on the agency’s lack of expertise.\textsuperscript{128} Finally, one week after \textit{In re Smith} was decided, the Texas Supreme Court consolidated its precedents on deference to agency statutory interpretations and, in the process, produced its most comprehensive examination of this doctrine.

\textbf{E. \textit{Texas Citizens}}

\textit{Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water} is easily the Texas Supreme Court’s most exhaustive discussion of its law on deference to state agency statutory interpretations.\textsuperscript{129} Without having canvassed the Court’s precedents in this area, though, one would not necessarily know that just from the text of the \textit{Texas Citizens} opinion. \textit{Texas Citizens} is also the first opinion in which the Court began to grapple with how Texas law is both similar to and different from the federal \textit{Chevron} doctrine for agency deference. But what \textit{Texas Citizens} did not answer becomes apparent when one keeps in mind the Court’s many articulations of the agency deference doctrine over the years, as well as the plethora of prerequisites for agency deference that the Court has identified in the past.

\textit{Texas Citizens}’s analysis proceeded in three steps. First, the Court canvassed its precedents and recognized that it had formulated its standard for agency deference in various ways. It cited its major agency deference cases (\textit{Combs, Fiess, Quick, Tarrant Appraisal District, and Stanford}) among others from all three lines of its precedents (its serious-consideration, great-weight, and some-deference cases).\textsuperscript{130} The Court essentially established

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\textsuperscript{124} State v. Pub. Util. Comm’n of Tex., 2011 WL 923949, at *3; \textit{CenterPoint}, 324 S.W.3d at 106; Mid-Century Ins. Co. of Tex. v. Ademaj, 243 S.W.3d 618, 623-24 (Tex. 2007); \textit{Tarrant Appraisal Dist.}, 845 S.W.3d at 823,
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\textsuperscript{125} \textit{In re Smith}, 333 S.W.3d 582, 588 (Tex. 2011); Cities of Austin et al. v. Sw. Bell. Tel. Co., 92 S.W.3d 434, 441 (Tex. 2002); Osterberg v. Peca, 12 S.W.3d 31, 51 (Tex. 2000).
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\textsuperscript{127} \textit{In re Smith}, 333 S.W.3d at 588 (citing Flores v. Emps. Ret. Sys. of Tex., 74 S.W.3d 532, 545-46 (Tex. App.—Austin 2002, pet. denied)).
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\textsuperscript{128} \textit{See} Keller, \textit{supra} note 55, at 69 n.123 (collecting cases on agency expertise at Chevron Step Zero).
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\textsuperscript{130} \textit{Id.} at 624 & n.6.
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what its previous opinions had suggested—the labels “serious consideration,” “great weight,” and “some deference” were interchangeable:

The gravamen of this dispute, however, is a governmental agency’s construction of a statute it is charged with administering. The construction of a statute is a question of law we review de novo. We have long held that an agency’s interpretation of a statute it is charged with enforcing is entitled to “serious consideration,” so long as the construction is reasonable and does not conflict with the statute’s language. We have stated this principle in differing ways, but our opinions consistently state that we should grant an administrative agency’s interpretation of a statute it is charged with enforcing some deference.\footnote{Id. at 624.}


We have never expressly adopted the \textit{Chevron} or \textit{Skidmore} doctrines for our consideration of a state agency’s construction of a statute, but we agree with the Commission that the analysis in which we engage is similar. In our “serious consideration” inquiry, we will generally uphold an agency’s interpretation of a statute it is charged by the Legislature with enforcing, “so long as the construction is reasonable and does not contradict the plain language of the statute. As we observed in \textit{Fiess}, this deference is tempered by several considerations: [the interpretation must be made through formal procedures, the statute must be ambiguous, and the interpretation must be reasonable].\footnote{Id. at 625 (quoting First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 632 (Tex. 2008), in turn quoting Tarrant Appraisal Dist. v. Moore, 845 S.W.2d 820, 823 (Tex. 1993)).}

This appears to be an all-encompassing articulation of the agency deference doctrine. For the first time, the Texas Supreme Court explicitly recognized that Texas law on agency deference is similar to, yet not coextensive with, the federal \textit{Chevron} doctrine. Courts and litigants may seize on this quoted paragraph as setting forth the sole determinants for agency deference. But that would be too narrow a view of \textit{Texas Citizens}, as \textit{Texas Citizens} itself would later confirm.

Third, \textit{Texas Citizens} applied its newly announced framework and deferred to the Railroad Commission’s interpretation of the phrase “public interest” in the Water Code.\footnote{Id. at 633.} This
application—in contrast to Texas Citizens’s articulation—of the doctrine on agency deference left open important questions.

The Court’s articulation of the doctrine, which is quoted above, only identifies four prerequisites for agency deference: the agency must be interpreting a statute it administers and the three Fiess qualifiers must be satisfied—that is, the interpretation must be made through formal procedures, the statute must be ambiguous, and the interpretation must be reasonable. Indeed, Texas Citizens followed in Combs’s footsteps by stating that because the agency’s interpretation of a statute it enforced had been adopted through formal procedures, the Court would “uphold it”—not just give it serious consideration, great weight, or some deference—“if it is reasonable and in accord with the plain language of the statute.”

But when the Court applied its doctrine, it examined two other factors—the agency’s “expertise” (as In re Smith had just said was permissible) and whether the interpretation was “long-standing.” The articulated doctrine made no mention of these additional prerequisites, so the Court would have had no reason to address them if the articulated doctrine had been a comprehensive test for agency deference. Interestingly, both of these additional prerequisites are also factors considered by Chevron Step Zero’s threshold inquiry to Chevron deference.

All in all, there were many positive developments in Texas Citizens: it canvassed the Court’s precedents on agency deference, it finally began to consider how Texas law compares and contrasts with the federal Chevron doctrine, and it articulated a consolidated doctrine on when courts should defer to state agency statutory interpretations. But it did not answer everything. Namely, Texas Citizens leaves ambiguity over what prerequisites must exist before an agency is entitled to deference and what that level of deference will be. Of course, these are two huge questions about agency deference that have challenged courts ever since the U.S. Supreme Court’s Edwards’ Lessee decision in 1827. So Texas Citizens can hardly be faulted for not solving these puzzles when countless decisions have struggled with them as well. Nevertheless, the same issues on agency deference that have been plaguing Texas and federal courts for years will continue to arise after Texas Citizens. Thus, an understanding of the

135 Id. at 625 (emphasis added).
136 Id. at 630. The challengers argued that the Railroad Commission’s interpretation should not have been accorded deference because it “d[id] not lie within its administrative expertise or pertain to a nontechnical issue of law.” Id. (citing Rylander v. Fisher Controls Int’l, Inc., 45 S.W.3d 291, 302 (Tex. App.—Austin 2001, no pet.)). The Court disagreed, finding that the Commission’s decision was “very technical” and that the public-interest inquiry was related to the agency’s expertise. Id.
137 In re Smith, 333 S.W.3d 582, 588 (Tex. 2011).
138 Texas Citizens, 336 S.W.3d at 632 (citing Stanford v. Butler, 181 S.W.2d 269, 273 (1944)).
140 See supra note 26 and accompanying text.
historical Texas and federal jurisprudence in this area—and the continued debates over these recurring questions of agency deference—is necessary to compare and contrast Texas and federal law on this issue.

III. Texas Versus Federal Law on Agency Deference After Texas Citizens

Texas Citizens will require the Texas Supreme Court to address the intricate similarities and distinctions between Texas law and the federal Chevron doctrine for the first time in the Court’s history. That is due in large part to Texas Citizens’s important observation on how Texas law on agency deference interacts with the federal Chevron doctrine: Texas has not “adopted” Chevron, but Texas’s doctrine “is similar” to Chevron.\footnote{R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future and Clean Water, 336 S.W.3d 619, 625 (Tex. 2011) (“We have never expressly adopted the Chevron or Skidmore doctrines for our consideration of a state agency’s construction of a statute, but we agree with the Commission that the analysis in which we engage is similar.”).} This suggests that Texas law on deference to agency statutory interpretations must account for the nuances not only of the Texas Supreme Court’s precedents but also U.S. Supreme Court cases on agency deference.

At the very least, the Texas Supreme Court will have to say why certain aspects of federal law are not followed by Texas, even though Texas’s doctrine “is similar” to the federal doctrine on agency deference.\footnote{Id.} In other words, both Texas and federal caselaw on agency deference will affect Texas’s doctrine under Texas Citizens. The Court eventually will have to pick and choose which federal precedents and doctrinal innovations will be adopted by Texas and which will be disregarded. For all the positive developments in Texas Citizens, it still leaves much to be decided; Texas Citizens basically invited litigation over what aspects of the federal Chevron doctrine are sufficiently “similar” to—and therefore part of—Texas law.\footnote{Id.}

A. Similarities Between Texas and Federal Law on Agency Deference

A few elements of Texas’s agency deference doctrine clearly overlap with federal law. Under both Texas Citizens and Chevron, an agency’s statutory interpretation can only get deference if (1) the agency is interpreting a statute it administers, (2) the statutory language is ambiguous, and (3) the agency’s interpretation is reasonable.\footnote{Id.; Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).} This is significant common ground, which solidified after decades of caselaw. A brief glance at the early Texas and federal cases on agency deference confirms that these are unassailable propositions of administrative law that were never really in dispute.

Texas law on agency deference and Chevron Step Zero also both (4) examine the formality of the procedures used by agency to develop its statutory interpretation.\footnote{Texas Citizens, 336 S.W.3d at 624 (quoting Fiess v. State Farm Lloyds, 202 S.W.3d 744, 747-48 (Tex. 2006)); see supra notes 55-58 and accompanying text.}
formal-procedure prerequisite, however, may be treated differently under federal and Texas law. Under federal law, if these four prerequisites are established, a court will be bound to accept the agency’s statutory interpretation. But as will be discussed below, there is still an open debate in Texas regarding whether these four prerequisites are sufficient for deference. Similarly, under federal law, if the first three prerequisites can be established but formal procedures were not used, an agency’s statutory interpretation may still be accorded deference under the factors used for Chevron Step Zero’s second substep balancing test. Texas law, though, leaves open the possibility that an agency’s statutory interpretation may not get deference simply because formal procedures were not used in creating the interpretation.

Additionally, the fact that Texas Citizens examined the agency’s expertise and whether the agency’s interpretation was long standing suggests that Texas law treats both of these factors as relevant in determining whether an agency’s statutory interpretation merits deference. Both of these are factors at Chevron Step Zero’s second substep, which means that federal law treats them as relevant as well—but only if the agency did not use formal procedures to create its interpretation. Texas law has not clearly spelled out when these two factors are relevant, so it is hard to say whether Texas’s treatment of the agency-expertise and long-standing-interpretation prerequisites is more aligned with than divergent from federal law.

Before turning to the differences between Texas and federal law on deference to agency statutory interpretations, it is worth highlighting one possible reason why the Texas Supreme Court has not definitively addressed this issue. The Court has frequently found statutes unambiguous, and in such circumstances, the Court can adopt the statute’s plain language without considering the agency’s interpretation or whether it merits deference. In 2009, Justice Hecht argued in Entergy Gulf States, Inc. v. Summers that “the phrase ‘plain language’ has been overworked to the point of exhaustion.” And just two months after Texas Citizens was decided in 2011, Justice Willett chided the majority in Ojo v. Farmers Group, Inc. for finding a statute unambiguous and then proceeding to consider the agency’s interpretation anyway. This suggests that the Court—rightly or wrongly—has not had to consider whether other factors besides the statute’s plain language are dispositive in many cases involving an agency’s statutory interpretation. If so, the Court may not have perceived a need to clarify how the Texas doctrine specifically parts ways from the Chevron inquiry, because the statute’s plain language controls

146 See supra notes 56-61 and accompanying text.
147 See infra notes 162-165 and accompanying text.
148 See supra notes 56-61 and accompanying text.
149 Texas Citizens, 336 S.W.3d at 624 (quoting Fiess, 202 S.W.3d at 747-48).
150 Id. at 630, 632.
151 See supra notes 56-61 and accompanying text.
under either doctrine. This concern, however, stems from the Texas Supreme Court’s law on statutory interpretation. Justice Willett’s Ojo concurrence called on the Court “to bring more predictability to its bread-and-butter work of statutory interpretation.” If the Court does clarify its law on statutory interpretation and begins to find more statutes ambiguous, in accord with Justice Hecht’s Entergy concurrence, the Court will have to distinguish the Texas and federal doctrines on deference to agency statutory interpretations.

B. Differences Between Texas and Federal Law on Agency Deference

Important differences still exist between Texas and federal law on deference to agency statutory interpretations. The Texas Supreme Court has given itself multiple outs to reject agency deference even if the federal Chevron inquiry would require deference. The differences between Texas and federal law on agency deference all pertain to the two central questions initially raised by Edwards’ Lessee in 1827: What are the prerequisites for deference to an agency’s statutory interpretation, and what degree of deference is due if all the prerequisites are satisfied?

On the latter question, Chevron clearly states that the degree of deference is “controlling weight,” such that courts are bound to accept the agency’s interpretation. Texas Citizens, though, did not definitively answer this question.

Texas Citizens cited Quick approvingly, and the Court in Quick stated that an agency’s interpretation is “not controlling.” This is a large escape hatch that could be used to reject agency deference even if all prerequisites for deference are satisfied. Unless the Texas Supreme Court repudiates this language from Quick, this will remain a fundamental distinction between Texas law and the federal Chevron doctrine.

Texas Citizens, moreover, hedged in many ways besides the fact that it did not adopt the federal Chevron standard wholesale. The Court stated that it “generally uphold[s]” an agency’s reasonable interpretation of an ambiguous statute it enforces, and it noted that “this deference is tempered by several considerations” and “several qualifiers.” All of these linguistic hooks could allow the Texas Supreme Court to reject deference where the federal Chevron

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154 Id. at *17.

155 See supra note 26 and accompanying text.


157 Texas Citizens, 336 S.W.3d at 624 & n.6.

158 Quick v. City of Austin, 7 S.W.3d 109, 123 (Tex. 1998).

159 Texas Citizens, 336 S.W.3d at 625 (emphasis added).

160 Id.

161 Id. (quoting Fiess, 202 S.W.3d at 747-48).
inquiry would require it. It remains to be seen, nevertheless, whether these were merely passing phrases or legal standards with teeth.

On the issue of prerequisites for agency deference, there are also fundamental differences between Texas and federal law. Simply put, Texas may have more prerequisites for agency deference than federal law.

When an agency’s interpretation is made through formal procedures, Texas may have more prerequisites for agency deference. Under the federal Chevron Step Zero, if an agency’s interpretation is made through formal procedures, a court skips ahead to the traditional Chevron two-step inquiry—asking only whether the statute the agency enforces is ambiguous and then whether the agency interpretation is reasonable, without considering any other factors like the agency’s expertise and whether the agency’s interpretation is long-standing.\textsuperscript{162} \textit{Texas Citizens}, in contrast, leaves this issue open. Even though the agency’s interpretation in \textit{Texas Citizens} was made through formal procedures,\textsuperscript{163} \textit{Texas Citizens} still addressed whether the agency’s interpretation did not “lie within its administrative expertise or pertain to a non-technical issue of law,”\textsuperscript{164} and whether the agency’s interpretation was “long-standing.”\textsuperscript{165} Those inquiries would have been unnecessary under federal law, given that the agency’s interpretation was made through formal procedures.

Plus, it appears that \textit{Texas Citizens} did not articulate an exhaustive list of prerequisites for agency deference, so Texas law may yet recognize the other Chevron Step Zero factors. Recall that \textit{Texas Citizens}’s articulation of the agency deference doctrine did not align perfectly with its application of the doctrine: \textit{Texas Citizens}’s articulation of the doctrine said nothing about prerequisites based on agency expertise or long-standing interpretations, yet the Court considered those two factors when it applied the doctrine.\textsuperscript{166} This raises a crucial question: if \textit{Texas Citizens}’s articulation of the agency deference doctrine was not meant to be exhaustive, then what other prerequisites for agency deference exist? \textit{Texas Citizens} examined two other factors (agency expertise and long-standing interpretation), but there is no indication that these are the only other relevant prerequisites; they may have been the only factors raised by the parties. Both of these two factors are Chevron Step Zero factors,\textsuperscript{167} but Chevron Step Zero recognized three other relevant considerations for agency deference: the breadth of the statutory delegation, the agency’s deliberation or care in adopting its interpretation, and the nature of the question addressed by the interpretation.\textsuperscript{168} Given that Texas law has not favored agency deference as

\textsuperscript{162} See supra notes 55-59 and accompanying text.

\textsuperscript{163} Texas Citizens, 336 S.W.3d at 625.

\textsuperscript{164} Id. at 630.

\textsuperscript{165} Id. at 632.

\textsuperscript{166} See supra notes 135-139 and accompanying text.

\textsuperscript{167} See supra note 59 and accompanying text.

\textsuperscript{168} See id.
much as federal law, it is likely that Texas could adopt Chevron Step Zero’s additional factors for denying agency deference.

Texas might even recognize more prerequisites for agency deference beyond the federal Chevron Step Zero factors. For example, what happened to the prerequisite that an agency’s statutory interpretation be *contemporaneous* with the enactment of the statute? It appears that no Texas or federal case has turned on this factor, which is not too surprising given that the explosion of the administrative state has occurred fairly recently. But as agencies begin to offer interpretations of statutes passed years ago, it is conceivable that the Texas Supreme Court could revive the contemporaneous-interpretation prerequisite to reject deference to an agency interpretation made years after the statute was enacted. After all, this prerequisite was articulated in nearly all of the early cases on agency deference—including the U.S. Supreme Court’s *Edwards’ Lessee* and the Texas Supreme Court’s *Galveston* decisions. The U.S. Supreme Court’s modern cases on agency deference have largely ignored this factor. But many of the Texas Supreme Court’s major cases on agency deference—Stanford, *State v. Public Utility Commission, Quick, Combs*, and even *Texas Citizens*—have repeatedly acknowledged that agency deference may depend on whether the agency’s statutory interpretation is contemporaneous with the enactment of the statute.

In sum, *Texas Citizens* confirms that Texas law on deference to agency statutory interpretations differs in important ways from federal law. Texas may have more prerequisites for agency deference than federal law, and Texas law is still not settled on whether agency interpretations are accorded controlling weight.

### IV. If Texas Adopts Chevron . . .

Some may argue that *Texas Citizens* essentially adopted *Chevron*. After all, *Texas Citizens* noted that the Court “will generally uphold an agency’s interpretation of a statute it is charged with enforcing, so long as the construction is reasonable and does not contradict the plain language of the statute.” That is almost a verbatim recitation of the *Chevron* two-step inquiry, and *Texas Citizens* said that Texas’s analysis regarding deference to agency statutory


171 But see United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001) (“A regulation may have particular force if is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.” (quoting National Muffler Dealers Ass’n, Inc. v. United States, 440 U.S. 472, 477 (1979))).


173 *Texas Citizens*, 336 S.W.3d at 625.
interpretations is “similar” to Chevron. Moreover, the Court’s acknowledgment that it has “never expressly adopted the Chevron or Skidmore doctrines” is not an express rejection of Chevron, so some might say that this would allow the Texas Supreme Court to adopt Chevron in the future.

For multiple reasons, that is probably an over-reading of Texas Citizens. As mentioned previously, Texas Citizens articulated and applied the formal-procedure requirement from Chevron Step Zero, and it applied the agency-expertise and long-standing-interpretations prerequisites, which are also Chevron Step Zero factors. So at the very least, Texas has not adopted the traditional Chevron two-step inquiry without any other limiting factors, such as parts of the Chevron Step Zero threshold inquiry.

Moreover, Texas’s reluctance to adopt the federal Chevron inquiry appears to be a conscious decision, as the Texas Supreme Court has adopted the federal doctrine on deference to agency interpretations of their own regulations. Quoting the seminal federal case on point, Bowles v. Seminole Rock Co., the Texas Supreme Court in 1991 ruled that an agency’s “interpretation of its own regulations is entitled to deference,” unless the interpretation is “plainly erroneous or inconsistent with the regulation.” This test functions analogously to the traditional Chevron two-step inquiry: the plain language of the regulation controls, but if the language is ambiguous then the court must defer to the agency’s reasonable interpretation of its own regulation. Since the Court announced this doctrine in 1991, it has become entrenched in Texas law. The Texas Supreme Court’s willingness to adopt federal law for deference to an

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174 Id.

175 Id.

176 See supra notes 134-139 and accompanying text.


179 Other than the requirement that the agency be interpreting its own regulation, there is no other threshold inquiry—that is, a Chevron Step Zero equivalent—to the Bowles/Auer/Gulf States two-step inquiry for addressing deference to agency interpretations of their own regulations. See, e.g., Bassiri v. Xerox Corp., 463 F.3d 927, 930 (9th Cir. 2006) (Auer deference can apply “where an agency interprets its own regulation, even if through an informal process”); Belt v. EmCare, Inc., 444 F.3d 403, 416 n.35 (5th Cir. 2006) (same).


agency’s interpretation of its own regulations suggests that the Court knows full well the implications of not adopting the federal *Chevron* standard for deference to an agency’s interpretation of a statute it enforces.

But suppose the Texas Supreme Court does adopt *Chevron* in the future. Will the sky fall on Texas administrative law? No. *Chevron* now carries with it the Chevron Step Zero threshold prong that the U.S. Supreme Court has recently grafted on to the traditional *Chevron* two-step inquiry. Thus, if the Texas Supreme Court adopts *Chevron*, it will not simply be adopting the two-step inquiry—it will also be adopting the Chevron Step Zero factors that make it easier for courts to reject agency deference.

Even when a statute is ambiguous and an agency’s interpretation is reasonable, Chevron Step Zero would still allow Texas courts to reject deference in various circumstances. Before Chevron Step Zero recently became a part of the *Chevron* inquiry, the Texas Supreme Court may have been wary of adopting only the traditional *Chevron* two-step doctrine, which looks to whether the agency’s interpretation of an ambiguous statute was reasonable—while ignoring the agency’s expertise along with the formality and consistency of its interpretation. Now that Chevron Step Zero has been entrenched in federal law, the federal doctrine actually has moved closer to the existing Texas doctrine. That may be why *Texas Citizens* just cited the federal Chevron Step Zero doctrine approvingly, as did *Fiess* in 2006.\(^{182}\)

Interestingly, if the Texas Supreme Court opted for Justice Breyer’s approach to Chevron Step Zero, Texas law on agency deference would basically remain unchanged. Under existing law, the federal doctrine would require agency deference—when Texas law may not—only when (1) the statute the agency enforces is ambiguous, (2) the agency’s interpretation is reasonable, and (3) the agency used formal procedures to adopt its interpretation. If the Texas Supreme Court wanted to retain the flexibility to reject agency deference when those three prerequisites are satisfied, it could accomplish this by adopting the federal doctrine with one modification: the Court could opt for Justice Breyer’s approach to Chevron Step Zero instead of the approach adopted by the U.S. Supreme Court’s majority. Under Justice Breyer’s approach, even if an agency used formal procedures to reasonably interpret an ambiguous statute it enforces, a court could still reject deference after balancing the other Chevron Step Zero factors like the agency’s expertise and how long the agency has held its interpretation.\(^{183}\) This approach actually maps on well to *Texas Citizens*, which considered the agency’s expertise and how long it had held its interpretation, even though the agency used formal procedures to create its interpretation.\(^{184}\)

As argued above, *Texas Citizens* will probably not lead the Court to adopt, in its entirety, the federal doctrine on deference to agency statutory interpretations. But even if Texas does adopt the federal *Chevron* inquiry in some form, the only thing that may change could be the

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\(^{183}\) *See supra* note 62 and accompanying text.

\(^{184}\) *See supra* notes 136-139 and accompanying text.
labels used by courts and litigants to discuss issues of agency deference. For instance, the Texas Supreme Court’s “serious consideration” and “great weight” labels could become obsolete—assuming Texas Citizens has not already rendered them obsolete. Ultimately, if Texas were to adopt Chevron in some form, agencies would not be accorded an extreme amount of deference.

V. Conclusion

Texas Citizens signals to lower courts and litigants that the Texas Supreme Court is in the process of clarifying Texas law on deference to agency statutory interpretations. In addition to consolidating three lines of precedent, Texas Citizens was the first case that began to examine the differences and similarities between Texas and federal law on agency deference. Although Texas Citizens was a good first step, this initial comparison was naturally quite basic. A more robust analysis will require Texas courts to delve into both the Texas and U.S. Supreme Courts’ precedents to understand all the moving parts of this complex inquiry.

Regardless of whether Texas adopts Chevron wholesale, the well-developed body of federal law on agency deference also could be quite instructive in clarifying certain aspects of Texas law. Federal cases have considered many administrative law issues stemming from fact patterns that have not yet arisen in Texas, so these cases could have significant persuasive value in Texas courts 185—especially in light of Texas Citizens’s statement that Texas law “is similar” to the federal Chevron inquiry. 186

Time will tell whether the Texas Supreme Court treats Texas Citizens as a watershed precedent on deference to agency statutory interpretations. But, at the very least, Texas Citizens will spur Texas courts and litigants to determine the aspects of federal law on agency deference that should be adopted or rejected by Texas. This, in turn, will bring much needed clarity to this increasingly significant area of law. For that alone, Texas Citizens may be the Texas Supreme Court’s most important administrative law decision to date.

185 See, e.g., Gonzales v. Oregon, 546 U.S. 243, 256-57 (2006) (rejecting deference even when the agency reasonably interpreted an ambiguous statute it enforced, and noting that “[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language”).

186 Texas Citizens, 336 S.W.3d at 624.