



# TEXAS VERSUS *CHEVRON*

## Texas Administrative Law On Agency Deference After *Railroad Commission v. Texas Citizens*

BY SCOTT A. KELLER

The growth of the administrative state in recent decades means that issues of administrative law now arise in many different contexts. There has been no bigger question in administrative law than the issue of deference to an agency's interpretation of a statute it enforces. The issue of administrative deference in Texas, therefore, arises not only in fields traditionally regulated by administrative agencies (like energy,<sup>1</sup> communications,<sup>2</sup> insurance,<sup>3</sup> and tax<sup>4</sup>), but also in a wide range of other areas (such as actions under the Texas Wrongful Imprisonment Act<sup>5</sup> and judicial conduct proceedings,<sup>6</sup> to name a couple).

As the issue of agency deference pervades our state's legal system, litigants will need to understand when agency statutory interpretations merit deference. On March 11, 2011, the Texas Supreme Court in *Railroad Commission of Texas v. Texas Citizens for a Safe Future* began to consolidate three lines of precedent on this issue by establishing a seemingly straightforward 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."<sup>7</sup> The Court, though, explicitly noted one exception to this standard — an agency's informal opinion may not warrant deference — and alluded to a few others.<sup>8</sup> Ultimately, the Court accorded deference to the Railroad Commission's interpretation of the phrase "public interest" in the Texas Water Code.<sup>9</sup>

*Texas Citizens* also clarified that while Texas has never "expressly adopted" the federal standard for deference to an agency's interpretation of a statute it enforces — which is known as *Chevron* deference — the "analysis" used by Texas "is similar."<sup>10</sup> Thus, even though Texas has not adopted the federal *Chevron* standard,<sup>11</sup> litigants in Texas state court will need to familiarize themselves with both Texas and federal law on agency deference.

### FEDERAL LAW ON AGENCY DEFERENCE

Before 1984, federal law on agency deference "remained complex and confused."<sup>12</sup> The question of agency deference was an open-ended inquiry that examined various factors. An administrative interpretation received deference, under *Skidmore v. Swift & Co.*, if it had the "power to persuade."<sup>13</sup>

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."<sup>14</sup> First (Chevron Step One), courts "must give effect to the unambiguously expressed intent of Congress."<sup>15</sup> 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."<sup>16</sup> So, at Chevron Step Two, "a court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the adminis-

trator of an agency.”<sup>17</sup> In other words, a court is *required* to accept an agency’s reasonable interpretation if the court reaches Chevron Step Two.

Many courts and commentators have correctly explained that *Chevron* was the high watermark for agency deference,<sup>18</sup> as *Chevron* went to great lengths to emphasize the deference — or “controlling weight” — that should be accorded to reasonable agency interpretations.<sup>19</sup> Even *Texas Citizens* noted “the high deferential standard afforded in *Chevron*.”<sup>20</sup> As a result, when many lawyers 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.<sup>21</sup>

### CHEVRON DEFERENCE AIN’T WHAT IT USED TO BE

However, the view that *Chevron* entails an extreme amount of deference is a bit outdated. In the past decade, the U.S. Supreme Court has ratcheted back the degree of *Chevron* deference that courts owe to federal agency interpretations. Before courts can reach the traditional *Chevron* two-step inquiry and accord an agency’s interpretation deference, courts must address a new threshold prong, which commentators have called “Chevron Step Zero.”<sup>22</sup> Chevron Step Zero allows federal courts to reject informal agency interpretations (by according them only *Skidmore* deference, which is probably no deference at all<sup>23</sup>) when the agency lacked expertise, changed positions, did not carefully consider the relevant issues, or addressed an important issue.<sup>24</sup>

Chevron Step Zero, therefore, proceeds in two substeps (although U.S. Supreme Court Justice Stephen Breyer has argued that the two substeps should be collapsed into one).<sup>25</sup> A federal court will first consider whether the agency used formal procedures to reach its interpretation.<sup>26</sup> 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.<sup>27</sup> But if the agency interpretation is informal, then the court will reach Chevron Step Zero’s second substep, which is a balancing test of various factors such as the agency’s expertise and whether the interpretation has been consistently held by the agency.<sup>28</sup>

*Chevron* itself mentioned nothing about Chevron Step Zero’s additional criteria for deference, 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.

### TEXAS LAW ON AGENCY DEFERENCE

As the Texas Supreme Court explained in *Texas Citizens*, the Court has “never expressly adopted the *Chevron* or *Skidmore* doctrines” on agency deference — although “the analysis in which [the Court] engage[s] is similar.”<sup>29</sup> The Texas Supreme Court, in contrast, has said that issues of agency statutory interpretation are questions of law that are reviewed *de novo*,<sup>30</sup> and an agency’s

construction is “not controlling.”<sup>31</sup> At the same time, the Court does not simply disregard agency statutory interpretations.

Before *Texas Citizens*, Texas had three different lines of precedent on this issue.<sup>32</sup> The Court had explained that agency statutory interpretations should be given “serious consideration,”<sup>33</sup> “great weight,”<sup>34</sup> or “some deference”<sup>35</sup> if certain conditions existed. For instance, an agency interpretation would only receive favorable treatment if the agency interpreted a statute it enforced<sup>36</sup> and its interpretation did not contradict the statute’s plain language.<sup>37</sup> Both of these threshold conditions for deference exist under the federal *Chevron* inquiry as well; in fact, Chevron Step One deals explicitly with the latter condition about the statute’s plain language.<sup>38</sup> The Court also had acknowledged, as with Chevron Step Two, that the reasonableness of an agency’s interpretation is quite relevant in determining whether the interpretation is entitled to deference. But the Court’s statements were not always clear about whether a reasonable agency interpretation (that does not contradict the plain language of a statute the agency enforces) 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. Some cases stated that an agency’s interpretation must be reasonable as a pre-condition for the Court to reach the serious-consider-

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ation,<sup>39</sup> great-weight,<sup>40</sup> or some-deference<sup>41</sup> inquiries. A different set of cases, though, 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.<sup>42</sup>

*Texas Citizens* appears to have reconciled all these cases by establishing that reasonable agency interpretations are entitled to deference if certain conditions exist. It first canvassed the Court's serious-consideration, great-weight, and some-deference precedents, noting that the Court has stated, "in differing ways," the same principle on deference to agency statutory interpretations.<sup>43</sup> *Texas Citizens* then articulated this principle: If an agency interprets a statute it enforces and its interpretation does not contradict the statute's plain language, the Court will "generally uphold" the interpretation if it is "reasonable."<sup>44</sup> *Texas Citizens* did not pull this principle out of thin air. In 2008, the *Combs* Court similarly said that it "will uphold" such agency interpretations.<sup>45</sup> And the seminal Texas case on deference to agency interpretations, *Stanford v. Butler*, stated that courts "will ordinarily adopt and uphold" reasonable agency interpretations of ambiguous statutes that they enforce.<sup>46</sup>

Beyond these three conditions for agency deference (i.e., the agency enforces the statute, the interpretation does not contradict the statute's plain language, and the interpretation is reasonable), *Texas Citizens* alluded to three other possible threshold conditions — all of which parallel Chevron Step Zero factors. First, *Texas Citizens* quoted a 2006 Texas Supreme Court case, *Fiess*, which established that agencies are not necessarily entitled to deference if their interpretations stemmed from "isolated comments during a hearing or opinions [in a court brief]" — as opposed to "formal opinion adopted after formal proceeding."<sup>47</sup> Whether an agency used formal procedures is the first substep in the federal Chevron Step Zero inquiry,<sup>48</sup> and both *Texas Citizens* and *Fiess* cited U.S. Supreme Court Chevron Step Zero cases for this proposition.<sup>49</sup> Second, *Texas Citizens* analyzed whether the agency's interpretation did not "lie within its administrative expertise or pertain to a nontechnical issue of law."<sup>50</sup> Just a week before deciding *Texas Citizens*, the Court in *In re Smith* also said that courts may "give less deference" to an agency when the issues do not involve "the application of technical or regulatory matters within the agency's expertise."<sup>51</sup> An agency's expertise also can be considered at Chevron Step Zero's second substep.<sup>52</sup> Third, *Texas Citizens* considered whether the agency's interpretation of a statute was "long-standing."<sup>53</sup> Chevron Step Zero's second substep similarly considers whether an agency has consistently held its interpretation.<sup>54</sup>

In sum, *Texas Citizens*' statements on agency deference suggest a series of decision rules that relate to the federal *Chevron* inquiry.

## TEXAS VERSUS FEDERAL LAW ON AGENCY DEFERENCE AFTER *TEXAS CITIZENS*

Important differences still exist between Texas and federal law on deference to agency interpretations of statutes. The Texas

Supreme Court has given itself multiple outs to reject agency deference even if the federal *Chevron* inquiry would require deference. For instance, the Court has said that an agency's construction is "not controlling."<sup>55</sup> And even *Texas Citizens* hedged in many ways, besides the fact that it did not adopt the federal *Chevron* standard. The Court stated that it "generally uphold[s]" an agency's reasonable interpretation of an ambiguous statute it enforces,<sup>56</sup> while noting that "this deference is tempered by several considerations"<sup>57</sup> and "several qualifiers."<sup>58</sup> All of these linguistic hooks could allow the Texas Supreme Court to reject deference where the federal *Chevron* inquiry would require it.

There is even more direct evidence that *Texas Citizens* was not applying the federal *Chevron* inquiry. Even though the agency's interpretation in *Texas Citizens* was made through formal procedures,<sup>59</sup> *Texas Citizens* still addressed whether the agency's interpretation did not "lie within its administrative expertise or pertain to a nontechnical issue of law"<sup>60</sup> and whether the agency's interpretation was "long-standing."<sup>61</sup> Those inquiries would have been unnecessary under the federal *Chevron* inquiry. At Chevron Step Zero's first substep, once a court determines that the agency interpretation was made through formal procedures, it skips ahead to the traditional *Chevron* two-step inquiry — asking only whether the statute is ambiguous and then whether the agency interpretation is reasonable.<sup>62</sup> Thus, had *Texas Citizens* been applying the federal *Chevron* inquiry, it would have had no reason to consider the agency's expertise or whether the agency's interpretation was long-standing.

One reason why the Texas Supreme Court has not definitively addressed how the Texas doctrine on deference to agency statutory interpretations differs from the federal doctrine may be that the Court has frequently found statutes unambiguous. Justice Nathan Hecht argued in *Entergy GulfStates, Inc. v. Summers* that "the phrase 'plain language' has been overworked to the point of exhaustion."<sup>63</sup> This suggests that the Court — rightly or wrongly — has not had to consider other factors besides the statute's plain language in many cases on agency 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 under either doctrine. If Justice Hecht is right and the Court begins to find more statutes ambiguous, the Court will have to distinguish the Texas and federal doctrines on deference to agency statutory interpretations.

Regardless, Texas' reluctance to adopt the federal *Chevron* inquiry on deference to an agency's interpretation of a statute it enforces 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.*,<sup>64</sup> 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.’<sup>65</sup> This test functions analogously to the traditional *Chevron* two-step inquiry.<sup>66</sup> 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.<sup>67</sup> Since the Court announced this doctrine in 1991, it has become entrenched in Texas law.<sup>68</sup> The Texas Supreme Court’s willingness to adopt federal law for deference to an agency’s interpretation of its own regulation 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.

### IF TEXAS ADOPTS CHEVRON ...

If the Texas Supreme Court were to adopt some form of the federal *Chevron* inquiry, the sky will not fall in Texas administrative law because — as this article earlier explained — *Chevron* deference ain’t what it used to be. Even when a statute is ambiguous and an agency’s interpretation is reasonable, *Chevron* Step Zero would still allow Texas courts to reject deference. 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. Indeed, these additional factors were recognized by the Texas Supreme Court long before the U.S. Supreme Court created *Chevron* Step Zero. Now that *Chevron* Step Zero has been entrenched in the federal doctrine, 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, as did *Fiess* in 2006.<sup>69</sup>

In fact, 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, federal law would require agency deference when Texas law would 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 conditions are satisfied, it could accomplish this by adopting the federal *Chevron* inquiry 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.<sup>70</sup> 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.<sup>71</sup>

The well-developed body of federal law on agency deference also could be quite instructive in solidifying and clarifying certain aspects of Texas law.<sup>72</sup> Texas’ adoption of *Chevron* in some form might alter the labels used by courts and litigants to discuss issues of agency deference. For instance, the Court’s “serious consideration” and “great weight” labels could become obsolete. But if Texas were to adopt *Chevron* in some form, agencies would not be accorded an extreme amount of deference.

### CONCLUSION

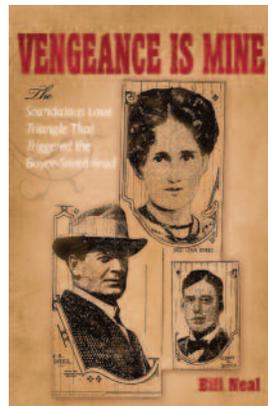
Texas has not adopted the federal *Chevron* doctrine for deference to an agency’s interpretation of a statute it enforces. But even if it were to adopt *Chevron* in some form, with the advent of *Chevron* Step Zero, federal law has moved closer to Texas law. Both recognize that reasonable agency interpretations of ambiguous statutes will not always receive deference. In any event, the Texas Supreme Court has made clear that the federal cases engage in an inquiry that is analogous to Texas law. Consequently, litigants dealing with agency interpretations of statutes they enforce will need to know the nuances of both Texas precedents on point and federal *Chevron* deference cases, which will be — at the very least — highly persuasive authority in Texas after *Texas Citizens*.

### NOTES

1. *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future and Clean Water*, \_\_\_ S.W.3d \_\_\_, 2011 WL 836827, at \*4 (Tex. 2011).
2. *AT&T Comm’ns of Tex., L.P. v. Su. Bell. Tel. Co.*, 186 S.W.3d 517, 529–30 (Tex. 2006).
3. *Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 623–24 (Tex. 2007).
4. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008).
5. *In re Smith*, 333 S.W.3d 582, 588 (Tex. 2011).
6. *In re Keller*, \_\_\_ S.W.3d \_\_\_, 2010 WL 4840863, at \*12 (Tex. Spec. Ct. Rev. 2010) (no relation to the author).
7. *Texas Citizens*, 2011 WL 836827, at \*4.
8. *Id.*
9. *Id.* at \*1.
10. *Id.* at \*4.
11. Some commentators have argued that Texas should explicitly reject *Chevron*. See, e.g., D. Zachary Hudson, Comment, *A Case For Varying Interpretive Deference at the State Level*, 119 Yale L.J. 373 (2009); Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 Tex. Tech Admin. L.J. 288 (2006).
12. Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 Yale L.J. 2580, 2585 (2006).
13. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (highlighting the importance of “all those factors which give [the agency] power to persuade”).
14. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).
15. *Id.* at 843.
16. *Id.*
17. *Id.* at 844 (emphasis added).
18. 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.”).
19. *Chevron*, 467 U.S. at 844 (“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)).
20. *Texas Citizens*, 2011 WL 836827, at \*3.
21. See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 329 (2000) (*Chevron* is “an emphatically prodelegation canon.”).

22. 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 19.
23. See *supra* note 14 and accompanying text; see, e.g., 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”).
24. See Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. Cal. L. Rev. 45, 67–69 (2008) (citing *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).
25. *Id.* Justice Breyer would eliminate Chevron Step Zero’s first substep and consider the formality of the agency’s interpretation simply as another factor in the doctrine’s balancing test (which is currently the second substep of Chevron Step Zero). *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)). In other words, Justice Breyer would accord agencies even less deference, positing that courts should be able to reject even *formal* agency interpretations under Chevron Step Zero.
26. *Id.* at 67–69.
27. *Id.*
28. *Id.*
29. *Texas Citizens*, 2011 WL 836827, at \*4.
30. *State v. Pub. Util. Comm’n of Tex.*, \_\_\_ S.W.3d \_\_\_, 2011 WL 923949, at \*3 (Tex. 2011) (citing *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008)).
31. *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998).
32. It also appears that there are some outlier precedents, both favoring and opposing agency deference. See, e.g., *Pub. Util. Comm’n of Tex. v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001) (Court would only “consider” an agency’s interpretation of its own powers if that interpretation was reasonable and not inconsistent with the statute); *Tex. Emp’rs Ins. Ass’n v. Holmes*, 196 S.W.2d 390, 395 (Tex. 1946) (agency interpretation “entitled to highest respect”).
33. *Texas Citizens*, 2011 WL 836827, at \*4; *Tex. Indus. Energy Consumers v. CenterPoint Energy Houston Elec., LLC*, 324 S.W.3d 96, 106 (Tex. 2010); *State v. Pub. Util. Comm’n of Tex.*, 2011 WL 923949, at \*3; *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008); *Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 623–24 (Tex. 2007); *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 531 (Tex. 2002); *Tex. Water Comm’n v. Brushy Creek Mun. Util. Dist.*, 917 S.W.3d 19, 21 (Tex. 1996); *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994); *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993); *Tex. & N. O. R. Co. v. R.R. Comm’n of Tex.*, 200 S.W.2d 626, 630 (Tex. 1947); *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944).
34. *In re Smith*, 333 S.W.3d 582, 588 (Tex. 2011); *In re Keller*, \_\_\_ S.W.3d \_\_\_, 2010 WL 4840863, at \*12 (Tex. Spec. Ct. Rev. 2010); *Tex. Mun. Power Agency v. Pub. Util. Comm’n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007); *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); *Quick*, 7 S.W.3d at 123; *State v. Pub. Util. Comm’n of Tex.*, 883 S.W.2d 190, 195–96 (Tex. 1994); *Thomas v. Groebl*, 212 S.W.2d 625, 632 (Tex. 1948); *S.A. Union Junior College Dist. v. Daniel*, 206 S.W.2d 995, 998 (Tex. 1947); *Burroughs v. Lyles*, 181 S.W.2d 570, 573 (Tex. 1944); *Stanford*, 181 S.W.2d at 273; *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); *Galveston, H. & S.A. Ry. Co. v. State*, 17 S.W. 67, 74 (Tex. 1891).
35. *Fievs v. State Farm Lloyds*, 202 S.W.3d 744, 747–48 (Tex. 2006); *AT&T Comm’ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 517, 529–30 (Tex. 2006); *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); *TXU Elec. Co. v. Pub. Util. Comm’n of Tex.*, 51 S.W.3d 275, 286–87 (Tex. 2001).
36. See, e.g., *Texas Citizens*, 2011 WL 836827, at \*4; *State v. Pub. Util. Comm’n of Tex.*, 2011 WL 923949, at \*3; *Combs*, 258 S.W.3d at 623; *Tarrant*, 845 S.W.2d at 823.
37. See, e.g., *Texas Citizens*, 2011 WL 836827, at \*4; *State v. Pub. Util. Comm’n of Tex.*, 2011 WL 923949, at \*3; *Combs*, 258 S.W.3d at 623; *Tex. Mun. Power Agency v. Pub. Util. Comm’n of Tex.*, 253 S.W.3d at 192; *Ademaj*, 243 S.W.3d at 623–24; *CenterPoint Energy, Inc. v. Pub. Util. Comm’n of Tex.*, 143 S.W.3d 81, 87; *Cities of Austin*, 92 S.W.3d at 441; *Pub. Util. Comm’n of Tex. v. City Pub.*

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- Serv. Bd.*, 53 S.W.3d at 316; *City of Corpus Christi*, 51 S.W.3d at 261 (Owen, J., concurring and announcing opinion of the court); *Brushy Creek*, 917 S.W.2d at 21; *Tarrant*, 845 S.W.2d at 823; *Stanford*, 181 S.W.2d at 273; *Galveston*, 17 S.W. at 74. Cf. *TXU Elec. Co.*, 51 S.W.3d at 286–87 (court can consider agency interpretation even if the statute is not ambiguous under Tex. Gov't Code §311.023(6)).
38. *Chevron*, 467 U.S. at 842–43.
  39. *CenterPoint*, 324 S.W.3d at 106; *State v. Pub. Util. Comm'n of Tex.*, 2011 WL 923949, at \*3; *Ademaj*, 243 S.W.3d at 623–24; *Brushy Creek*, 917 S.W.2d at 21; *Tarrant*, 845 S.W.3d at 823.
  40. *In re Smith*, 333 S.W.3d at 588; *Cities of Austin*, 92 S.W.3d at 441; *Osterberg*, 12 S.W.3d at 51.
  41. *City of Corpus Christi*, 51 S.W.3d at 261 (Owen, J., concurring and announcing opinion of the court); *TXU Elec. Co.*, 51 S.W.3d at 286–87.
  42. See, e.g., *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d at 192; *Quick*, 7 S.W.3d at 123; *Brushy Creek*, 917 S.W.3d at 21; *State v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d at 195–96; *Thomas*, 212 S.W.2d at 632; *Daniel*, 206 S.W.2d at 998; *Tex. & N. O. R. Co.*, 200 S.W.2d at 630; *Burroughs*, 181 S.W.2d at 573; *Galveston*, 17 S.W. at 74; see also *Stanford*, 181 S.W.2d at 273 (not examining reasonableness of agency interpretation in asserting that they should be given “serious consideration” and “great weight”).
  43. *Texas Citizens*, 2011 WL 836827, at \*3; see *id.* at \*3 n.6 (collecting cases).
  44. *Id.* at \*4.
  45. *Combs*, 258 S.W.3d at 632.
  46. *Stanford*, 181 S.W.2d at 873.
  47. *Texas Citizens*, 2011 WL 836827, at \*4 (quoting *Fiess*, 202 S.W.3d at 747–48) (brackets in original).
  48. See Keller, *supra* note 25, at 67–68.
  49. *Texas Citizens*, 2011 WL 836827, at \*3 (citing *Mead*, 533 U.S. at 229–30); *Fiess*, 202 S.W.3d at 737 n.13 (citing *Christensen*, 529 U.S. at 587).

50. *Texas Citizens*, 2011 WL 836827, at \*7 (citing *Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 302 (Tex. App. — Austin 2001, no pet.)).
51. *In re Smith*, 333 S.W.3d at 588 (citing *Flores v. Employees Retirement Sys. of Tex.*, 74 S.W.3d 532, 545–46 (Tex. App. — Austin 2002, pet. denied), in turn citing 2B Norman J. Singer, *Statutes & Statutory Construction* §49:04, at 23–24 (6th ed. 2000)).
52. See Keller, *supra* note 25, at 69 n.123 (collecting cases).
53. *Texas Citizens*, 2011 WL 836827, at \*9 (citing *Stanford*, 181 S.W.2d at 273); see *Amarillo Oil Co. v. Energy-Agri Prods., Inc.*, 794 S.W.2d 20, 29 (Tex. 1990) (Gonzalez, J., dissenting) (“Courts give great weight to long standing construction of statutes by the RRC.”); *Tex. & N. O. R. Co.*, 200 S.W.2d at 630; *Burroughs*, 181 S.W.2d at 573 (“long-continued administrative construction is entitled to great weight”).
54. *Mead*, 533 U.S. at 228 (“consistency” is a Chevron Step Zero factor); *Skidmore*, 323 U.S. at 140 (considering the agency’s “consistency with earlier and later pronouncements”).
55. *Quick*, 7 S.W.3d at 123.
56. *Texas Citizens*, 2011 WL 836827, at \*4 (emphasis added).
57. *Id.*
58. *Id.* (quoting *Fiess*, 202 S.W.3d at 747–48).
59. *Id.*
60. *Id.* at \*7 (citing *Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 302 (Tex. App. — Austin 2001, no pet.)).
61. *Id.* at \*9 (citing *Stanford*, 181 S.W.2d at 273).
62. See *supra* notes 27–28 and accompanying text.
63. 282 S.W.3d 433, 445 (Hecht, J., concurring).
64. 325 U.S. 410 (1945). The U.S. Supreme Court now calls deference to agency interpretations of their own regulations “Auer deference,” *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) — after *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997), which solidified this principle. But *Auer* also traces back to *Bowles v. Auer*, 519 U.S. at 461 (quoting *Roberson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989), in turn quoting *Bowles*, 325 U.S. at 414).
65. *Pub. Util. Comm'n of Tex. v. Gulf States Utils. Co.*, 809 S.W.2d 201, 207 (Tex. 1991) (quoting *United States v. Larionoff*, 431 U.S. 864, 872 (1977), in turn quoting *Bowles*, 325 U.S. at 414).
66. 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).
67. See, e.g., *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 193–94 (4th Cir. 2009); *Linares Huaracaya v. Mukasey*, 550 F.3d 224, 228–30 (2d Cir. 2008).
68. *In re Keller*, 2010 WL 4840863, at \*10; *State Office of Risk Mgmt. v. Lawton*, 295 S.W.3d 646, 650 (Tex. 2009); *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254–55 (Tex. 1999).
69. *Texas Citizens*, 2011 WL 836827, at \*3 (citing *Mead*, 533 U.S. at 229–30); *Fiess*, 202 S.W.3d at 737 n.13 (citing *Christensen*, 529 U.S. at 587).
70. See *supra* note 26.
71. See *supra* notes 60–63 and accompanying text.
72. Federal cases have considered many administrative law issues stemming from fact patterns that have not yet arisen in Texas, so these cases could be quite instructive for Texas courts. See, e.g., *Gonzales v. Oregon*, 546 U.S. at 256–57 (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”).

STATE BAR OF TEXAS  
**Administrative and Public Law Section**



The Administrative and Public Law Section of the State Bar of Texas sponsored the 14th Annual Mack Kidd Administrative Law Moot Court Competition in Austin on October 20 and 21, 2011. The competition focuses on administrative law and enjoys active participation from numerous Texas law schools. Judges for the competition are recruited from the private sector, agency legal staff, and the judiciary. The competition championship was won by Stephanie Larsen and Will Thomas of Baylor Law School, who were coached by Kathy Serr.

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