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Agency Deference at the Texas Supreme Court

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Agency Deference at the Texas Supreme Court

I. Introduction

In what circumstances do courts defer to agency interpretations of statutes? As usual, the answer is: "It depends." The United States Supreme Court has more than doubled its requirements for agencies to obtain agency deference, known as *Chevron* deference.[1] But the fact remains that federal courts frequently defer to agencies. Texas is different. Even though the Texas agency deference shares many elements in common with *Chevron*, in reality, the Texas Supreme Court now rarely defers to agencies. The key reason for the deference difference is that the Texas Supreme Court rarely finds a statute to be ambiguous——a predicate to agency deference under both the federal and state tests. Instead, the statutes that ultimately result in agency deference tend to be statutes that indicate an intentional grant of legislative authority to an agency rather than an accidental legislative use of an ambiguous term.

This is not to say that agencies are not trusted in Texas courts. The Court treats agencies on similar footing with other litigants, which stems from the notion that ordinary persons should be able to read the text of a law and understand what it means from the text, context, and rules for construing language alone. Even when agencies are not involved, the Court rarely finds a statute or contract to be ambiguous and tends to engage in a rigorous contextual analysis to resolve any ambiguity that may be present on the face of a statute or contract.

[1] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

This analysis should help us shift our agency arguments away from almost certain losers (like agency deference, legislative history, and results) and toward those with a higher winning percentage (like text, context, and the canons of statutory construction).

II. Federal *Chevron* Deference

Agency deference arguments are understandable, largely in part because of how frequently federal courts defer to agencies. The foundation of the federal doctrine of agency deference under *Chevron* is that a federal court must "give effect to the unambiguously expressed intent of Congress"[2] but that when a statute contains an ambiguity or is silent on an issue, the court must defer to an agency's interpretation as long as that interpretation is "reasonable."[3] Over time, the U.S. Supreme Court has added elements to its test for when to apply agency deference.

Those steps combine to form this working analysis:

Step 0a: **Is the question one of deep economic and political significance, such that Congress would not have deferred the matter to an agency?**[4]

Step 0b: **Has the agency used formal procedures?** [5] **If so, skip to Step 1.**

Step 0c: **If interpretation is informal, use balancing test to determine whether to treat interpretation as formal.**[6]

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[2]*Id*. at 843.
[3]*Id*. at 865.
[4]*King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Instead of deferring to the relevant agency, the Court waded through the test and context of the Affordable Care Act on its own. *Id*. at 2492–95. Notably, the Court arrived at the same conclusion the federal agency argued, but not because the agency was entitled to deference. *Id*. at 2495–96.
[5]Scott A. Keller, *Texas versus Chevron*, 74 TEX. B.J. 984, 985 (2011).
[6]Informal interpretations are given much less deference, known as *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

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