

PRESENTED AT

The University of Texas School of Law
13th Annual Advanced Texas Administrative Law Seminar

August 16-17, 2018
AT&T Conference Center
Austin, TX

Judicial Deference to Agency Interpretations of Statutes

Thomas R. Phillips
Christine Harvat Ng
Wade Allison

Thomas R. Phillips
Wade Allison
Baker Botts L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, TX 78701-4078
tom.phillips@bakerbotts.com
wade.allison@bakerbotts.com
512.322.2500

Christine Harvat Ng
Baker Botts L.L.P.
One Shell Plaza
910 Louisiana St.
Houston, TX 77002
christine.ng@bakerbotts.com
713.229.1234

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Texas Deference to Agency Interpretation	1
A.	<i>Texas Citizens</i> ’ Standard for Judicial Deference to Agency Interpretation of Statutes.....	1
B.	One Benefit of <i>Texas Citizens</i>	3
C.	Agency Deference After <i>Texas Citizens</i>	4
D.	Continued Applicability of Pre- <i>Texas Citizens</i> Cases and Additional Considerations.....	6
E.	Ambiguity Determinations and Deference at the Third Court of Appeals	7
F.	Unresolved Questions	10
III.	Federal Deference to Agency Interpretation: <i>Chevron</i> Deference	12
IV.	How <i>Texas Citizens</i> Deference Compares to Federal <i>Chevron</i> Deference.....	14
A.	Different Steps and Requirements	14
B.	Differences in Step Zero	15
C.	Treatment of Informal Opinions	16
D.	Absolute Deference.....	16
E.	Focus on Ambiguity.....	17
V.	Checklist	18

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>AEP Tex. Comm. & Indus. Retail Ltd. P'ship v. Pub. Util. Comm'n of Tex.</i> , 436 S.W.3d 890 (Tex. App.—Austin 2014, no pet.)	9
<i>Argonaut Ins. Co. v. Baker</i> , 87 S.W.3d 526 (Tex. 2002).....	4
<i>AT&T Commc'ns of Tex., L.P. v. Sw. Bell. Tel. Co.</i> , 186 S.W.3d 517 (Tex. 2006).....	4
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997).....	10
<i>Burroughs v. Lyles</i> , 181 S.W.2d 570 (Tex. 1944).....	4
<i>Calvert v. Kadane</i> , 427 S.W.2d 605 (Tex. 1968).....	6
<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	1, 12, 13, 14, 15, 16
<i>Cities of Austin et al. v. Sw. Bell. Tel. Co.</i> , 92 S.W.3d 434 (Tex. 2002).....	4
<i>City of Corpus Christi v. Pub. Util. Comm'n of Tex.</i> , 51 S.W.3d 231 (Tex. 2001).....	4
<i>City of Dall. v. Pub. Util. Comm'n of Tex.</i> , No. 03-11-00635-CV, 2014 WL 108363 (Tex. App.—Austin Jan. 9, 2014, no pet.) (mem. op.).....	9
<i>Combs v. Chapal Zenray, Inc.</i> , 357 S.W.3d 751 (Tex. App.—Austin 2011, pet. denied).....	8
<i>Combs v. Health Care Servs. Corp.</i> , 401 S.W.3d 623 (Tex. 2013).....	5, 17
<i>Dodd v. Meno</i> , 870 S.W.2d 4 (Tex. 1994).....	4
<i>El Paso Cty. Hosp. Dist. v. Tex. Health & Human Servs. Comm'n</i> , 400 S.W.3d 72 (Tex. 2013).....	11

<i>Emps. Ret. Sys. of Tex. v. Garcia</i> , 454 S.W.3d 121 (Tex. App.—Austin 2014, no pet.)	8, 12
<i>Encino Motorcars, LLC v. Navarro</i> , 136 S. Ct. 2117 (2016).....	16
<i>Entergy Tex., Inc. v. Pub. Util. Comm’n of Tex.</i> , No. 03-14-00709-CV, 2016 WL 1039023 (Tex. App.—Austin Mar. 9, 2016, pet. denied) (mem. op.)	8
<i>Fiess v. State Farm Lloyds</i> , 202 S.W.3d 744 (Tex. 2006).....	2, 4, 13, 18
<i>Fire Ass’n of Phila. v. Love</i> , 108 S.W. 810 (Tex. 1908).....	4
<i>First Am. Title Ins. Co. v. Combs</i> , 258 S.W.3d 627 (Tex. 2008).....	2, 3, 4
<i>Galveston, H. & S.A. Ry. Co. v. State</i> , 17 S.W. 67 (Tex. 1891).....	4
<i>Hallmark Mktg. Co., LLC v. Hegar</i> , 488 S.W.3d 795 (Tex. 2016).....	11
<i>Heritage on the San Gabriel Homeowners Assoc. v. Tex. Comm’n on Envt’l Quality</i> , 393 S.W.3d 417 (Tex. App.—Austin 2012, pet. denied).....	11
<i>In re Keller</i> , 357 S.W.3d 413 (Tex. Spec. Ct. Rev. 2010).....	4
<i>In re Smith</i> , 333 S.W.3d 582 (Tex. 2011).....	3, 4
<i>Jaster v. Comet II Const., Inc.</i> , 438 S.W.3d 556 (Tex. 2014).....	4, 5
<i>Khan v. State</i> , No. 03-09-00708-CV, 2011 WL 3890394 (Tex. App.—Austin Aug. 31, 2011, no pet.) (mem. op.).....	10
<i>King v. Burwell</i> , 135 S. Ct. 2480 (2015).....	12, 13, 15
<i>Liberty Mutual Insurance Co. v. Adcock</i> , 412 S.W.3d 492 (Tex. 2013).....	6, 15, 18

<i>Martin v. Terrell</i> , 76 S.W. 743 (Tex. 1903).....	4
<i>Mid-Century Ins. Co. of Tex. v. Ademaj</i> , 243 S.W.3d 618 (Tex. 2007).....	4, 7
<i>Mont Belvieu Caverns, LLC v. Tex. Comm’n on Env’tl Quality</i> , 382 S.W.3d 472 (Tex. App.—Austin 2012, no pet.)	11
<i>Nucor Steel-Tex. v. Pub. Util. Comm’n of Tex.</i> , 363 S.W.3d 871 (Tex. App.—Austin 2012, no pet.)	9
<i>Ojo v. Farmers Grp., Inc.</i> , 356 S.W.3d 421 (Tex. 2011).....	6, 17
<i>Oncor Elec. Delivery Co. LLC v. Pub. Util. Comm’n of Tex.</i> , 507 S.W.3d 706 (Tex. 2017).....	5
<i>Osterberg v. Peca</i> , 12 S.W.3d 31 (Tex. 2000).....	4
<i>Pub. Util. Comm’n of Tex. v. City Pub. Serv. Bd. of San Antonio</i> , 53 S.W.3d 310 (Tex. 2001).....	6, 18
<i>Pub. Util. Comm’n of Tex. v. GTE-Sw., Inc.</i> , 901 S.W.2d 401 (Tex. 1995).....	6, 18
<i>Pub. Util. Comm’n of Tex. v. Gulf States Utils. Co.</i> , 809 S.W.2d 201 (Tex. 1991).....	10, 11, 19
<i>Quick v. City of Austin</i> , 7 S.W.3d 109 (Tex. 1998).....	4
<i>R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water</i> , 336 S.W.3d 619 (Tex. 2011).....	<i>passim</i>
<i>Rodriguez v. Serv. Lloyds Ins. Co.</i> , 997 S.W.2d 248 (Tex. 1999).....	10, 11
<i>Rogers v. Tex. Bd. of Architectural Exam’rs</i> , 390 S.W.3d 377 (Tex. App.—Austin 2011, no pet.)	9
<i>San Antonio Union Junior Coll. Dist. v. Daniel</i> , 206 S.W.2d 995 (Tex. 1947).....	4
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944).....	13, 14, 16

<i>Stanford v. Butler</i> , 181 S.W.2d 269 (Tex. 1944).....	4, 11
<i>State v. Pub. Util. Comm’n of Tex.</i> , 334 S.W.3d 349 (Tex. 2011).....	4
<i>State v. Pub. Util. Comm’n of Tex.</i> , 883 S.W.2d 190 (Tex. 1994).....	4
<i>Sw. Pharmacy Sols., Inc. v. Tex. Health & Human Servs. Comm’n</i> , 408 S.W.3d 549 (Tex. App.—Austin 2013, pet. denied).....	9, 11
<i>Sw. Royalties, Inc. v. Hegar</i> , 500 S.W.3d 400 (Tex. 2016).....	5, 7, 17, 18
<i>Tarrant Appraisal Dist. v. Moore</i> , 845 S.W.2d 820 (Tex. 1993).....	4
<i>Tex. & N. O. R. Co. v. R.R. Comm’n</i> , 200 S.W.2d 626 (Tex. 1947).....	4
<i>Tex. Bd. of Chiropractic Exam’rs v. Tex. Med. Assoc.</i> , No. 03-12-00151-CV, 2012 WL 5974063 (Tex. App.—Austin Nov. 21, 2012, no pet.)	9, 19
<i>Tex. Coast Utils. Coal. v. R.R. Comm’n of Tex.</i> , 423 S.W.3d 355 (Tex. 2014).....	10
<i>Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC</i> , 324 S.W.3d 96 (Tex. 2010).....	4
<i>Tex. Mun. Power Agency v. Pub. Util. Comm’n of Tex.</i> , 253 S.W.3d 184 (Tex. 2007).....	4
<i>Tex. Nat. Res. Conservation Comm’n v. Lakeshore Util. Co.</i> , 164 S.W.3d 368 (Tex. 2005).....	6, 15
<i>Tex. State Bd. of Exam’rs of Marriage & Family Therapists v. Tex. Med. Ass’n</i> , 511 S.W.3d 28 (Tex. 2017).....	5, 11
<i>Tex. Water Comm’n v. Brushy Creek Mun. Util. Dist.</i> , 917 S.W.2d 19 (Tex. 1996).....	4
<i>Texas Dep’t of Ins. v. Am. Nat. Ins. Co.</i> , 410 S.W.3d 843 (Tex. 2012).....	6, 11, 12, 16, 17
<i>TGS-NOPEC Geophysical Co. v. Combs</i> , 340 S.W.3d 432 (Tex. 2011).....	11

<i>Thomas v. Groebl</i> , 212 S.W.2d 625 (Tex. 1948).....	4
<i>Thompson v. Tex. Dep’t of Licensing & Regulation</i> , 455 S.W.3d 569 (Tex. 2014).....	5
<i>Tolleson v. Rogan</i> , 73 S.W. 520 (Tex. 1903).....	4
<i>TracFone Wireless, Inc. v. Comm’n on State Emergency Commc’ns</i> , 397 S.W.3d 173 (Tex. 2013).....	5, 7, 17
<i>TVA v. Hill</i> , 437 U.S. 153 (1978).....	13
<i>TXU Elec. Co. v. Pub. Util. Comm’n of Tex.</i> , 51 S.W.3d 275 (Tex. 2001).....	4
<i>U.S. v. Mead Corp.</i> , 533 U.S. 218 (2001).....	13, 16
<i>Wimberley Springs Partners, Ltd. v. Wimberley Valley Watershed Assoc.</i> , No. 03-13-00467, 2017 WL 2229876 (Tex. App.—Austin 2017, no pet. h.)	11
STATUTES	
TEX. GOV’T CODE § 311.023(6).....	17
OTHER AUTHORITIES	
Tex. Att’y Gen. Op. No. KP-0115, 2016 WL 5873029 (2016)	8, 15, 16, 17, 18
Allen Wilson, <i>A Tie Goes to the Runner: Texas Citizens Deference after Rail Road Commission v. Texas Coast Utilities, or What the Court Said by Saying Practically Nothing on the Subject</i> , 16 TEX. TECH ADMIN. L.J. 107 (2014).....	15, 16
Cass R. Sunstein, <i>Beyond Marbury: The Executive’s Power to Say What the Law Is</i> , 115 YALE L.J. 2580 (2006)	10
Jack M. Beerman, <i>End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled</i> , 42 CONN. L. REV. 779 (2010).....	14
Manuel H. Hernandez, <i>Running Out of Gas: Why Texas Must Distance Itself Completely from the Chevron Doctrine of Administrative Deference</i> , 14 TEX. TECH ADMIN. L.J. 225 (2012).....	14

Scott A. Keller, <i>Texas Versus Chevron: Texas Administrative Law on Agency Deference After Railroad Commission v. Texas Citizens</i> , 74 TEX. B.J. 984 (2011).....	4, 15, 16
William N. Eskridge, Jr. & Lauren E. Baer, <i>The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan</i> , 96 GEO. L.J. 1086 (2008)	10
Brantley Starr and James E. Davis, <i>Agency Deference at the Texas Supreme Court</i> , University of Texas School of Law 11th Annual Advanced Texas Administrative Law Seminar (Sept. 1-2, 2016), Austin, Texas.....	18

I. INTRODUCTION¹

The term “*Chevron* deference” has become so ubiquitous in the legal lexicon that the general practitioner would probably assume that every state uses the federal approach in determining whether to defer to agency interpretations of statutes. However, most states have not adopted *Chevron* in all particulars and neither has Texas.

Texas has, however, followed the United States Supreme Court’s example in *Chevron* by attempting to regularize what had previously been a rather haphazard, almost ad hoc approach to determine whether courts should accord deference to agencies, and if so, how much. In 2011, nearly three decades after the United States Supreme Court handed down *Chevron*, the Texas Supreme Court articulated its own agency-deference standard in *Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011).

As Dudley McCalla, one of the legends of Texas administrative law, has said: “Few words have engendered as much controversy in administrative law as” the word “deference.” Dudley D. McCalla, *Deference (and Related Issues)*, 14 TEX. TECH ADMIN. L.J. 363, 364 (2013). Neither federal nor state standards will end this controversy, as neither yield definitive answers in every case as to whether deference should be given. But both the *Texas Citizens* and *Chevron* tests provide a useful framework for analysis, and any lawyer making or resisting a deference argument should start with one of these cases, depending on the forum.

II. TEXAS DEFERENCE TO AGENCY INTERPRETATION

In *Texas Citizens*, the Texas Supreme Court attempted to articulate the proper level of deference that a court owes to an agency’s interpretation of a statutory provision. After reviewing the apparently disparate standards that Texas courts had previously employed in addressing this question, the Court attempted to synthesize these past holdings into one unified test. Importantly, though, the Court did not feel called upon to overrule or disavow any prior decisions, perhaps suggesting that past distinctions had been a function of loose language rather than deliberate distinction. Thus, favorable prior decisions can be argued as authority in current agency-deference cases, so long as they are filtered through the *Texas Citizens* paradigm. Accordingly, this section provides an overview of the specific agency-deference test adopted by the Supreme Court in *Texas Citizens*, then looks at both the pre- and post-*Texas Citizens* cases to provide additional context for deciding what is clear—and what is open to argument—about the scope of agency deference in Texas.

A. *Texas Citizens*’ Standard for Judicial Deference to Agency Interpretation of Statutes

Texas Citizens involved a challenge to a permit issued by the Texas Railroad Commission for a waste-injection well based on the Commission’s finding that the well was “in the public interest” as required by statute. 336 S.W.3d 621–23. At issue was whether the Commission’s narrow interpretation of “public interest,” which did not include any consideration of increased vehicular traffic, deserved deference. *Id.* at 623–24. Acknowledging that its prior decisions

¹ Special thanks to Shay Longtain, University of Michigan Law School, J.D. candidate 2019, for his assistance with this paper.

“stated this principle in differing ways,” the Texas Supreme Court articulated what purported to be a definitive standard on deference to agency interpretations: “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.” *Id.* at 624. Thus, in such situations, Texas courts “should grant an administrative agency’s interpretation of a statute it is charged with enforcing some deference.” *Id.* To accord “serious consideration,” Texas courts “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.” *Id.* at 625 (internal quotations omitted) (quoting *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008)).

Flexibility is the watchword of the *Texas Citizens* test. The Court prefaced the modifier “generally” to a standard that already applied only to a “reasonable” agency construction of statutory language that the reviewing court had already determined was not “plain.” Beyond that, the Court preserved the previously-articulated limitation that deference is given only to “formal opinions adopted after formal proceedings.” *Id.* at 625 (quoting *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747–48 (Tex. 2006)). The Court summarized these additional requirements, not part of its formal test but equally important, in these words:

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 a court brief]. 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 *unreasonable* constructions do not make a policy ambiguous.

Id. (alteration in original) (first two emphases added) (quoting *Fiess*, 202 S.W.3d at 747–48).

The careful reader will note that the three “qualifiers” really add only one new requirement to the *Texas Citizens* three-part test—the “formal opinion adopted after formal proceedings” requirement. But, in the words of a late-night TV sales pitch, “wait—there’s more!!”

Beyond these four thoroughly-discussed requirements, the Court raised and considered two additional matters, which might perhaps be called “emphasizing factors.” Although not susceptible to a simple “yes” or “no” answer, these factors are to be considered along a continuum from less deference to more, which in a close case might tilt the balance one way or the other.

First, the Court noted that the Commission’s interpretation of the statute was “long-standing” and remarked that “an agency’s long-standing construction of a statute, especially in light of subsequent legislative amendments, is particularly worthy of [a court’s] deference.” *Id.* at 632. While this by no means is an absolute rule, if the converse is generally true—that recent changes in long-standing agency interpretation are to be viewed skeptically, even if the new interpretation otherwise meets the *Texas Citizens* test—then this might represent a real change in Texas law. The Court has, however, previously found novel interpretations to be persuasive. *See*

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Judicial Deference to Agency Interpretation of Statutes

Also available as part of the eCourse

[2018 Advanced Texas Administrative Law eConference](#)

First appeared as part of the conference materials for the
13th Annual Advanced Texas Administrative Law Seminar session
"Judicial Deference to Agency Interpretation of Statutes In Texas"