

DEFERENCE (AND RELATED ISSUES)

by Dudley D. McCalla*

I.	PREFACE	364
II.	INTRODUCTION	364
	A. Texas Citizens <i>and</i> Chevron	365
III.	WHO DECIDES	366
IV.	STATUTORY CONSTRUCTION.....	368
	A. <i>Legislative Intent</i>	368
	B. <i>De Novo “Review”</i>	369
	C. <i>Policy</i>	371
	D. <i>Aids to or Canons of Construction</i>	371
V.	WHY DEFERENCE?	376
VI.	AGENCY INTERPRETIVE FUNCTIONS	377
	A. <i>Notice and Comment</i>	377
	B. <i>Adjudication or Ad Hoc “Rules”</i>	378
	C. <i>Informal Statements</i>	378
VII.	DEGREES OF DEFERENCE	379
	A. <i>Great Weight</i>	379
	B. <i>Little Weight</i>	380
VIII.	FACTORS AFFECTING WEIGHT	381
IX.	AGENCY INTERPRETATIONS OF THEIR RULES.....	383
X.	STANDARDS OF JUDICIAL REVIEW	384
	A. <i>Arbitrary and Capricious</i>	385
	B. <i>Contrary to Statute</i>	387
	C. <i>Reasonable</i>	389
	1. <i>Pardon this Digression</i>	389
	2. <i>“Reasonable”—In Two Senses</i>	391
XI.	STEPS	392
	A. <i>Step One</i>	392
	B. <i>Step Two</i>	393
XII.	THE TEXAS NO STEP	393
XIII.	TWO SCHOOLS OF THOUGHT	396
XIV.	CONCLUSION	398

* Of Counsel, Jackson Walker L.L.P. The statements and opinions in this article are solely those of the author and do not indicate opinions or positions of Jackson Walker L.L.P. or any other entity.

I. PREFACE

It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?¹

It is not difficult to imagine what the fourth President of the United States would think of bills of thousands of pages read by no one prior to passage and understood by none upon passage. However, there should have been no cause for concern. The legislative bodies that pass these bills would create administrative agencies to interpret and implement those statutes.² The Judicial Branch of government would ensure that the agency interpretations and actions were consistent with those statutes and, therefore, reasonable.³ This article endeavors to focus on the roles played by those agencies and the courts.⁴

II. INTRODUCTION

Few words have engendered as much controversy in administrative law as the title of this article. Discussion of the issue of judicial deference to actions of administrative agencies when they interpret statutes leads, inevitably, to consideration of related aspects of administrative law. The presumptuous effort of this article is to explore these issues and aspects in the stream of consciousness, non-scholarly, practical, and occasionally irreverent observations and questions that follow in an attempt to determine if some reasonably lucid and cogent general principles may exist from among the countless writings on this and related issues.

Since Congress created the first federal agency in 1789, an explosion of agencies has taken place at federal and state levels.⁵ As legislative bodies create more agencies and increase the areas of activity existing agencies are to regulate, issues of statutory interpretation or construction by those agencies will occupy an ever larger share of court dockets.⁶ Consider legislation delegating

1. THE FEDERALIST NO. 62 (James Madison) (calling for stability of government generally, these words seem particularly relevant to the topics under discussion).

2. See Act of July 27, 1789, ch. 4, 1 Stat. 8.

3. See, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

4. Other than occasional reference, the author will make no effort to discuss judicial review of agency "judicial" decisions in contested cases.

5. 1st Congress ch. IV (1789).

6. See, e.g., *Chevron*, 476 U.S. 837.

equal and overlapping authority to as many as seven regulatory administrative agencies.⁷

A. Texas Citizens *and* Chevron

The recent case of *Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water* presents the question of whether Texas courts will endeavor to follow United States Supreme Court decisions analyzing and discussing issues raised by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* and related cases.⁸ Professor Pierce notes that *Chevron* is one of the most important decisions in the history of administrative law, and courts cite and apply it more than any other Supreme Court decision in history.⁹

Other writers express different thoughts about *Chevron*.¹⁰ One author writes that “[a]dministrative law scholars have leveled a forest of trees exploring the mysteries of the *Chevron* approach contemporary judges take to reviewing law-related aspects of administrative action,” suggests that “deference” is too confusing, and that the better terms would be “*Chevron* Space” and “*Skidmore* Weight.”¹¹ Another article recommends, “End the Failed *Chevron* Experiment Now.”¹² While many decry the confusion engendered by *Chevron*, one prominent scholar, the late Charles H. Koch, Jr., noted, “It has had the advantage of creating work for an impressive number of scholars.”¹³

The United States Supreme Court has exacerbated any uncertainty inherent in the *Chevron* opinion, as observed by Professor Pierce: “Sometimes it gives *Chevron* powerful effect, sometimes it ignores *Chevron*, and sometimes it characterizes the *Chevron* test in strange and inconsistent ways.”¹⁴ Other tendencies of the Supreme Court add to the confusion, as explained by the late Professor Robert A. Anthony:

7. See John F. Cooney, *Chevron Deference and the Dodd-Frank Act*, 37-SPG ADMIN. & REG. L. NEWS 7 (2012). One circuit court has indicated that agencies in a similar situation may only issue a valid rule by conducting a joint notice and comment proceeding. See *United Airlines, Inc. v. Brien*, 588 F.3d 158, 180 (2d Cir. 2009). However, an agency with overlapping authority may challenge rules issued by the other agency. See, e.g., *Tex. Orthopaedic Ass’n v. Tex. State Bd. of Podiatric Med. Exam’rs*, 254 S.W.3d 714 (Tex. App.—Austin 2008, pet. denied); *Tex. Soc’y of Prof’l Eng’rs v. Tex. Bd. of Architectural Exam’rs*, No. 03–08–00288–CV, 2008 WL 4682446 (Tex. App.—Austin Oct. 24, 2008, no pet.) (mem. op.). However, that state courts reach a particular result is no guarantee federal courts will do the same and vice versa.

8. *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011); *Chevron*, 467 U.S. 837.

9. See RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.2 (5th ed. 2010).

10. See, e.g., Peter L. Strauss, “*Deference*” Is Too Confusing—Let’s Call Them “*Chevron* Space” and “*Skidmore* Weight,” 112 COLUM. L. REV. 1143 (2012).

11. *Id.* at 1144.

12. Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overturned*, 42 CONN. L. REV. 779 (2010).

13. CHARLES H. KOCH, *ADMINISTRATIVE LAW AND PRACTICE* § 9:20 (3d ed. 2010).

14. PIERCE, *supra* note 9, at § 3.6.

Beyond neglect, the Court befogs APA concepts by sloppy and bloated opinions, which leave confusion in their wake. The Court's most hurtful sin is its pervasive imprecision. Too often, even sound holdings are accompanied by gratuitous and ill considered dicta that are susceptible to damaging misapplication.¹⁵

This problem, I believe, reflects a larger phenomenon of gigantism wherein so much in American life (including scholarly writings) is dauntingly oversized, complex and wearisome. The Court's typically tedious opinions in this field, served up in multitudinous subparts, seem to issue more from the anxious toiling of clerks fearful of leaving something out than from exact reasoning and matured reflection by the Justices.¹⁶

Criticism extends beyond the Judicial Branch. Critics often refer to agencies as the "headless" fourth branch of government, and some criticize them for tendencies to arrogate to themselves powers and authority not granted by their organic statutes and to interpret those statutes as they wish instead of recognizing the words used by the legislative body.¹⁷ One need consider any of daily media reports to know that legislative bodies receive their share of criticism from many quarters for passing statutes of the type identified by President (to be) Madison.¹⁸

As of this writing, countless articles and judicial opinions examine issues involving determination of the meaning of statutes passed by legislative bodies.¹⁹

III. WHO DECIDES

Many articles and opinions addressing *Chevron* and its ancestors and progeny present the fundamental issue of whether the holding of *Marbury v. Madison* ("[i]t is emphatically the province and duty of the judicial department to say what the law is") prevails or, as some contend, whether "it is emphatically the province and duty of the *administrative* department to say what the law is."²⁰

The answer to the question depends, as always, on the meaning assigned to the words used by courts in addressing this issue. Defer: "[t]o show deference to (another); to yield to the opinion of [another]"²¹; or "to submit or

15. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 3 (1996).

16. *Id.* at 16 n.5.

17. Tex. Dep't of Ins. v. Ins. Council of Tex., No. 03-05-00189-CV, 2008 WL 744681, at *2 (Tex. App.—Austin Mar. 21, 2008, no pet.) (mem. op.).

18. See THE FEDERALIST NO. 62, *supra* note 1 (James Madison).

19. See, e.g., Strauss, *supra* note 10; Beerman, *supra* note 12; R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619 (Tex. 2011).

20. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006) (emphasis in original).

21. BLACK'S LAW DICTIONARY 486 (9th ed. 2011).

yield through authority, respect, force, awe, propriety.”²² Deference: “a yielding of judgment or preference out of respect for the position, wish, or known opinion of another.”²³ Consider: “to reflect on[;] think about with a degree of care or caution.”²⁴

Much of the confusion in articles and opinions arises from possible conflation of the terms “deference” and “serious consideration”: “In our ‘serious consideration’ inquiry, we will generally uphold an agency’s interpretation of a statute it is charged by the [l]egislature with enforcing, “so long as the construction is reasonable and does not contradict the plain language of the statute.” . . . [T]his deference is tempered by several considerations”²⁵

The effect of this conflation depends on whether a court construes “defer” to mean to yield or submit to the interpretation of the agency when it differs from the meaning of the statute as determined by the judiciary or whether a court, as so many opinions state, gives “serious consideration” to the agency interpretations as an aid to judicial construction of the statute.²⁶

First American Title Insurance Co. v. Combs holds that “[o]ne of those ‘dominant rules of construction’ requires us to give ‘serious consideration’ to the ‘[c]onstruction of a statute by the administrative agency charged with its enforcement.’”²⁷ Other cases refer to degrees of deference accorded agency interpretations by the judiciary.²⁸

Chevron poses the issue: “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”²⁹ Yet, “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”³⁰ *Chevron* cites six cases in support of this second statement.³¹ None held that the agency interpretation was not one the court would have reached if the question initially had arisen in a judicial proceeding.³² None held the agency interpretation was not in harmony with the statute.³³

22. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 591 (3d ed. 1993).

23. *Id.*

24. *Id.* at 483.

25. *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011) (internal citation omitted).

26. *See, e.g., First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631–32 (Tex. 2008).

27. *Id.* at 632 (quoting *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993)).

28. *See, e.g., Combs v. Chapal Zenray, Inc.*, 357 S.W.3d 751, 756 (Tex. App.—Austin 2011, pet. denied).

29. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

30. *Id.* at 843 n.11 (citation omitted).

31. *See id.*

32. *See id.*

33. *See id.*

Alas, what is clear to one judge is ambiguous to another, leading to interesting majority and dissenting opinions. Professor Anthony posed the question: “Which Agency Interpretations Should Bind Citizens and the Courts?”³⁴ The short answer seems to be they do not “bind” the courts unless consistent with the statute as construed by the court, and they do not bind the regulated public when challenged, unless they are consistent with the statute as construed by the court and made pursuant to proper procedure.³⁵ However, if the regulated public acquiesces in the agency interpretation and yields to it in spite of doubts about its validity, the interpretation may become “binding.”³⁶

How do judges and courts decide when the administrative construction is contrary to legislative intent or is permissible even if not the one the court or justice would have reached in a judicial proceeding?

IV. STATUTORY CONSTRUCTION

A. Legislative Intent

Many opinions state the primary goal of statutory construction is to ascertain and implement legislative intent.³⁷ In the foreword to *Reading Law* by Justice Antonin Scalia and Professor Bryan A. Garner, Judge Frank H. Easterbrook, Chief Judge, United States Court of Appeals for the Seventh Circuit, spoke to “legislative intent”:

Legislative intent is a fiction, a back-formation from other and often undisclosed sources. Every legislator has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislature is a collective body that does not have a mind; it “intends” only that the texts be adopted, and statutory text usually are compromises that match no one’s first preference.³⁸

The authors suggest that the better view is that courts should seek “the meaning of the words which” legislatures have used and “that further uses of *intent* in questions of legal interpretation be abandoned.”³⁹

34. Robert A. Anthony, *Which Agency Interpretation Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990).

35. *See id.* at 42–44. Proper procedure applies to the notice and comment requirements of the Texas Administrative Procedure Act (APA) and the Federal APA.

36. *See* Robert A. Anthony, “Well, You Want the Permit, Don’t You?” *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 32–33 (1992). Discretion often is the better part of valor, or economics may prevent challenge to the agency interpretations. *See id.* at 36.

37. *See, e.g.*, *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

38. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxii (2012).

39. *Id.* at 394, 396 (citations omitted). There are other articles positing there is no such thing as “legislative intent.” *See, e.g.*, M.B.W. Sinclair, *Legislative Intent: Fact or Fabrication?* 41 N.Y.L. SCH. L. REV. 1329 (1997) (reviewing WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994)). However, the term is so ingrained in Texas (and other) jurisprudence that this article uses the term in its

Professor Pierce notes that “[a]ll statutory language contains some degree of ambiguity,” and “[t]he degree of precision in statutory language varies widely from statute to statute and even from issue to issue within the same statute.”⁴⁰

In *Reading Law*, Justice Scalia and Professor Garner express disagreement with statements of this type.⁴¹ “It is not true, as some commentators have claimed since the mid-20th century, that ‘[a]ll legislative language is ambiguous and usually susceptible of several reasonable readings.’”⁴² The authors do note that language at times is “notoriously slippery.”⁴³ Thus, “the unambiguously expressed intent” of legislatures may not be readily apparent in every case.⁴⁴

B. *De Novo* “Review”

This article primarily discusses statutes interpreted by agencies and judicial review of those interpretations. In these cases, and also in cases that do not involve agency interpretations, it is *de rigueur* for courts to begin their discussions or analyses with: “The construction of a statute is a question of law we review *de novo*.”⁴⁵ This expression may lead to confusion in cases involving agency interpretations of statutes and judicial review of those interpretations.

“De novo” means “anew.”⁴⁶ De novo “review” theoretically (and perhaps actually) is no review at all. It is the antithesis of giving deference or serious consideration to the agency interpretation. In discussing *Decision Making Between Courts and Agencies*, Professor Koch noted that “[t]he term ‘de novo review’ is literally illogical: the court cannot be told both to undertake a de novo finding and at the same time remain in a review posture.”⁴⁷

For an earlier discussion of this troublesome term in the contested case or adjudication context see my article, *The Administrative Procedure and Texas Register Act*.⁴⁸ The concept is illustrated by reference to an ambiguous standard often required for agency approval of a new financial institution:

customary sense, e.g., as though the legislative body had some purpose in passing a statute. Justice Ginsberg provided an interesting concept in referring to “the legislature’s revealed design.” *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995).

40. See PIERCE *supra* note 9, at §§ 3.1, .6.

41. See SCALIA & GARNER, *supra* note 38, at 6.

42. *Id.* (quoting Joseph P. Witherspoon, *Administrative Discretion to Determine Statutory Meaning: “The High Road,”* 35 TEX. L. REV. 63, 76 (1965)).

43. *Id.* at xxix.

44. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

45. *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011) (citations omitted).

46. BLACK’S LAW DICTIONARY 500 (9th ed. 2011).

47. KOCH, *supra* note 13, at § 9:22.

48. See Dudley McCalla, *The Administrative Procedure and Texas Register Act*, 28 BAYLOR L. REV. 445 (1976).

“public need.”⁴⁹ Generally, if the agency approved such an application, a protesting party could appeal the decision, and today we know that the courts would review that decision under the substantial evidence test.⁵⁰ Although expressed many ways, this article will use a frequent definition of substantial evidence—could reasonable minds have reached the same decision as the agency?⁵¹

As noted in that article, the Texas legislature for many years was enamored of de novo review provisions regarding agency decisions in what now are called contested cases.⁵² Had the legislature provided that courts would “review” de novo the agency decision if appealed by a protestant or a denied applicant, the agency decision would be set aside (“as though there had not been an intervening agency action or decision”).⁵³ The court would determine “anew” from evidence adduced anew in court whether public need existed for the financial institution.⁵⁴ The burden to prove public need, by a preponderance of evidence, would remain with the applicant just as it would if the agency denied the application and the rejected applicant sought a de novo appeal. In theory the court was to pay no attention to the agency decision, but it would know from the alignment of the parties what the agency decision had been. Only the court would know whether it would give that decision consideration (serious or otherwise) or deference.

Is discussion of de novo judicial review provisions of contested case decisions relevant to court decisions in cases involving agency interpretation of a statute? In the latter case, the court must be aware of and cannot ignore the agency interpretation because the issue the court is to decide is whether that interpretation is consistent with the statute.⁵⁵ In contrast to cases holding that in de novo review of contested case decisions the court ignores the agency decision (it does not exist), courts must give serious consideration to agency interpretation of a statute.⁵⁶ And the legislature has provided that courts may consider administrative construction of a statute in construing it, “whether or not the statute is considered ambiguous on its face”⁵⁷

49. *See id.*

50. *See id.* The other review standards of section 2001.174 of the APA are also available, but the focus here is on the substantial evidence test. *See* TEX. GOV'T CODE ANN. § 2001.174 (West 2008).

51. *See* discussion *infra* Part X.C.

52. *See* McCalla, *supra* note 48. The APA still contains a de novo requirement if the legislature makes it clear and if it is constitutional. *See* GOV'T § 2001.173 (West 2008).

53. GOV'T § 2001.173(a).

54. *See id.*

55. *See* TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011).

56. *See* First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 632 (Tex. 2008).

57. GOV'T § 311.023 (West 2005).

C. Policy

Does judicial review of contested case decisions provide some insight? Legislative bodies enact policy when they pass statutes. Administrative agencies, part of the executive branch, interpret and implement those policies through executive, legislative, and judicial actions.

When the legislature has endeavored to provide de novo judicial review of agency decisions that involve questions of “pure public policy,” courts declare the statutes unconstitutional as a violation of the separation of powers provision of the Texas Constitution.⁵⁸ Those agency decisions enjoy a presumption of validity, but the judiciary may reverse them if not reasonably supported by substantial evidence and thus unreasonable.⁵⁹

Other opinions have held that courts could review agency “quasi-judicial” decisions de novo but not “quasi-legislative” decisions.⁶⁰ And the Texas Tax Code has its own de novo provision.⁶¹

When a court is reviewing an agency interpretation of a statute the legislature has instructed the agency to implement, how far may the court go in reviewing or judging that interpretation of policy? Setting aside the arbitrary and capricious procedural inquiry discussed below, the court may go as far as necessary to determine whether the interpretation is consistent with the statute as construed by the court.

D. Aids to or Canons of Construction

In pursuing the primary goal of ascertaining legislative intent, judges have access to numerous aids to statutory construction, many of which “have been accumulated by experience and ratified by the approbation of ages,” and “[b]y frequent application and reiteration in the Texas decisions, these rules have become recognized and settled.”⁶² Justice Scalia and Professor Garner now have provided courts with a comprehensive list of approximately fifty canons and a list of thirteen “falsities” to aid in determining legislative intent—or as the authors prefer, the meaning of the words of the statute.⁶³ The question is when and how courts will use these canons or aids in determining the meaning of these words. Various judicial opinions provide suggestions: “Our

58. See, e.g., *Chem. Bank & Trust Co. v. Falkner*, 369 S.W.2d 427, 432 (Tex. 1963); *Davis v. City of Lubbock*, 326 S.W.2d 699, 713 (Tex. 1959); *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex. 1966).

59. See, e.g., *Davis*, 326 S.W.2d at 715; *Gerst v. Cain*, 388 S.W.2d 168 (Tex. 1965).

60. See, e.g., *Key W. Life Ins. Co. v. State Bd. of Ins.*, 350 S.W.2d 839 (Tex. 1961); *State Bd. of Ins. v. Prof'l & Bus. Men's Ins. Co.*, 359 S.W.2d 312 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.); *USLife Life Ins. Co. of Tex. v. State Bd. of Ins.*, 527 S.W.2d 204 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); *State Bd. of Ins. v. Republic Nat'l Life Ins. Co.*, 384 S.W.2d 369 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.); *Am. Diversified Mut. Life Ins. Co. v. Tex. State Bd. of Ins.*, 631 S.W.2d 805 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

61. TEX. TAX CODE ANN. § 112.054 (West 2008).

62. 67 TEX. JUR. 3D *Statutes* § 81 (2012).

63. See SCALIA & GARNER, *supra* note 38, at 53–403.

fundamental purpose in construing statutes is to determine and give effect to the [l]egislature's intent. The words the [l]egislature employed are the best indicators of that intent. And [the courts] may be 'aided by the interpretive context provided by "the surrounding statutory landscape."'”⁶⁴

Holding that “an oral complaint of a violation of the Fair Labor Standards Act’ is ‘protected conduct under the [Act’s] anti-retaliation provision,’” the Court gave an unspecified “degree of weight” to the views of an agency about the meaning of language in a statute in which Congress delegated enforcement powers to the agency.⁶⁵ The Court upheld or agreed with the agency interpretation, finding that the agency views were reasonable and consistent with the statute.⁶⁶ The Court referred also to dictionaries and the fact “that legislators, administrators, and judges have all sometimes used the word ‘file’ in conjunction with oral statements” and that “state statutes sometimes contemplate oral filings.”⁶⁷

A unanimous Court rejected an agency interpretation in *Carachuri-Rosendo v. Holder*.⁶⁸ The Court “beg[a]n by looking at . . . the ‘commonsense conception’ of” the statutory provisions and considered the “text and structure of the relevant statutory provisions . . .”⁶⁹ The Court found “the [g]overnment’s argument [to be] inconsistent with common practice in the federal courts” and noted that “ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen’s favor.”⁷⁰ The Court did not refer to degrees of deference or serious consideration given to agency interpretations, but found the agency position to be unpersuasive for the reasons noted above.⁷¹

Agency interpretation is but one of many canons or aids available to judges; does agency interpretation, for reasons of policy, enjoy a special weight of serious consideration, as though the judiciary will not consider other canons seriously?

In a recent case, the Texas Supreme Court considered ambiguous provisions in a statute and applied traditional rules of statutory construction to accomplish the “primary objective [of] ascertain[ing] and giv[ing] effect to the [l]egislature’s intent.”⁷² The court recognized that the comptroller’s construction of the tax code should have “serious consideration” and that the

64. *Am. Zurich Ins. Co. v. Samudio*, 370 S.W.3d 363, 368 (Tex. 2012) (quoting *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011) (quoting *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929–30 (Tex. 2010))); see *In re Norris*, 371 S.W.3d 546, 548–49 (Tex. App.—Austin 2012, no pet.) (providing one list of aids or canons used often by Texas courts in ascertaining legislative intent).

65. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330, 1335 (2011) (citations omitted).

66. *Id.* at 1335.

67. *Id.* at 1331.

68. See *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010).

69. *Id.* at 2589, 2585.

70. *Id.* at 2589.

71. See *id.*

72. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

court normally would defer to the agency interpretation, but not when that interpretation is plainly erroneous or inconsistent with the language of the statute.⁷³ After considering the statute, the court held the Comptroller's construction to be inconsistent with the statute and reversed lower court decisions upholding the agency construction.⁷⁴ Although the agency interpretation apparently was reasonable enough to result in ambiguity, the taxpayer's interpretation was the better one because the agency interpretation was inconsistent with the statute and thus unreasonable.⁷⁵

The court in *Texas Citizens* also cited numerous canons, most of which along with the references to *Chevron*, were unnecessary.⁷⁶ The Texas Supreme Court did not need to delve into *Chevron* related issues of deference in *Texas Citizens*.⁷⁷ The legislature's inclusion of "traffic safety factors" in the Texas Commission on Environmental Quality (TCEQ) permitting statute and not in the Texas Railroad Commission (RRC) permitting statute, when both involved the standard of "public interest," was sufficient to preclude adoption of the respondents' argument.⁷⁸ *Texas Citizens* recognized this aid to construction. "When the [l]egislature has employed a term in one section of a statute and excluded it in another, we presume that the [l]egislature had a reason for excluding it."⁷⁹ "When the legislature uses a word or phrase in one portion of a statute but excludes it from another, the term should not be implied where it has been excluded."⁸⁰

The concurring opinion in *Texas Citizens* relied on this aid to construction to reach the same judgment as the majority; however, this aid did not render the single statutory standard of public interest unambiguous.⁸¹ The aid did demonstrate the legislature did not intend for the RRC to consider traffic safety factors in determining public interest.⁸² The standard of public interest is ambiguous, as well as "public need," "fair, just, and equitable," and other vague statutory standards incorporated in statutes by legislatures and given to agencies for implementation. The duty of courts is to determine what these standards mean and whether agency action taken under them by adjudication or interpretation is valid.

Other statements in both *Texas Citizen* opinions invite exploration of the subject of statutory construction. The concurring opinion holds, "We do not

73. *Id.* at 438.

74. *Id.* at 443–44.

75. *Id.*

76. *See* R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 624–25 (Tex. 2011).

77. *See id.*

78. *See id.* at 628–30.

79. *Id.* at 628 n.12 (quoting *Fireman's Fund Cnty. Mut. Ins. Co. v. Hidi*, 13 S.W.3d 767, 769 (Tex. 2000)).

80. *Id.* at 628 (citing *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995)).

81. *See id.* at 633–34 (Jefferson, Willett & Lehrmann, JJ., concurring).

82. *See id.* (Jefferson, Willett & Lehrmann, JJ., concurring).

defer to agency interpretations of unambiguous statutes.”⁸³ This statement finds support in opinions holding that statutory construction begins with the words of the statute.⁸⁴ If those words demonstrate clearly that the legislature “has ‘directly spoken to the precise question at issue’” and if the agency interpretation clearly is within the court’s determination of legislative intent, there is no issue of deference.⁸⁵ The concept has been expressed in other cases.

“The degree of deference a court owes is not at issue when the agency’s interpretation is reasonable and consistent with the court’s independent interpretation of the statute.”⁸⁶ The interesting aspect of this statement is the suggestion that the court will ascertain legislative intent without considering the agency interpretation and then measure that interpretation against the court’s interpretation—despite the legislature’s admonition that the court may consider the “administrative construction of the statute” whether or not the statute is ambiguous and despite opinions holding that a dominant rule of construction requires courts to give serious consideration to interpretation of the statute by the agency.⁸⁷

The Dallas court’s citation of *Edelman v. Lynchburg College* is interesting.⁸⁸ In *Edelman*, the court found the Equal Employment Opportunity Commission (EEOC) “rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch.”⁸⁹ In other words, the independent analysis of the statute from scratch coincided with the agency rule (or vice versa) and thus there was no issue of deference.⁹⁰ Is there any doubt that the court would have rejected the rule had it not been consistent with the court’s from scratch analysis?

The court considered competing interpretations in *Hammerman & Gainer, Inc. v. Bullock* and concluded “that if the [c]omptroller’s interpretation of the scope of insurance services is reasonable, *in that it harmonizes with the statute*, then this [c]ourt is bound to accept his interpretation regardless of the possible existence of other reasonable interpretations.”⁹¹ Without conceding the other interpretations had some merit, the court obviously held the comptroller’s interpretation was the better of the two and relied on a frequently used aid to

83. *Id.* at 634 (Jefferson, Willett & Lehrmann, JJ., concurring).

84. *See id.* at 628.

85. *Id.* at 625 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

86. *Omnibus Int’l, Inc. v. AT&T, Inc.*, 111 S.W.3d 818, 821 (Tex. App.—Dallas 2003, vacated agr. w/o opinion) (citation omitted).

87. TEX. GOV’T CODE ANN. § 311.023(6) (West 2005); *see First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008).

88. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002).

89. *Id.* at 114.

90. *See id.*

91. *Hammerman & Gainer, Inc. v. Bullock*, 791 S.W.2d 330, 333 (Tex. App.—Austin 1990, no writ) (emphasis added).

construction often said to carry great weight—an opinion of the Texas attorney general.⁹²

Despite the legislative language of section 311.023(6) of the Texas Government Code, court opinions often hold that resorting to or consideration of agency interpretation of a statute is appropriate only when the statute is ambiguous.⁹³ “[O]ur practice when construing a statute is to recognize that ‘the words [the legislature] chooses should be the surest guide to legislative intent.’”⁹⁴ “Only when those words are ambiguous do we ‘resort to rules of construction or extrinsic aids.’”⁹⁵

The better approach is that of federal courts, which, as observed by Pete Schenkkan, “will use all the traditional canons of statutory construction, including legislative history, at step one, to determine whether or not a statute is ambiguous.”⁹⁶ Federal and state courts continue to refer to and rely on legislative history despite its shortcomings.⁹⁷

Resorting to extrinsic aids may create ambiguity or may resolve an apparent or initial impression of ambiguity. Other opinions implement the legislature’s permissive language: “Even when a statute is not ambiguous on its face, we can consider other factors to determine the [l]egislature’s intent, including . . . administrative construction of the statute”⁹⁸

Agency interpretation is one of many aids to construction courts should and do use to initially determine if the statute is ambiguous and, ultimately, whether the agency interpretation is contrary to the statute and thus unreasonable.⁹⁹ Canons of construction considered by the court in *Texas Citizens* included: *ejusdem generis*; the TCEQ similar statute; presumption that the legislature acts with complete knowledge of existing law; statute’s statement of purpose; agency expertise; discretion given to the agency; long-standing interpretation by the agency; and legislative acquiescence in the agency interpretation.¹⁰⁰

Courts should ascertain legislative intent, or the meaning of the words used by a legislature, by consideration of every appropriate aid to or canon of statutory construction, including the agency interpretation, to which the

92. *See id.*

93. *See* Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433, 437 (Tex. 2009).

94. *Id.* (quoting Fitzgerald v. Advanced Spine Fixation Sys., Inc., 996 S.W.2d 864, 866 (Tex. 1999)).

95. *Id.* (quoting *In re* Estate of Nash, 220 S.W.3d 914, 917 (Tex. 2007)).

96. Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH ADMIN. L.J. 288, 316 (2006). The Supreme Court asks “whether Congress has directly spoken to the precise question at issue.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

97. *See* SCALIA & GARNER, *supra* note 38, at 369–90.

98. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (citing TEX. GOV’T CODE ANN. § 311.023 (West 2005)).

99. *See* R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 623 (Tex. 2011).

100. *See id.* at 624–32.

reasonable mind of each individual jurist may give a particular weight.¹⁰¹ “Of course, reasonable people ‘will sometimes disagree about what reasonable people can disagree about’”¹⁰² As Professor Pierce notes: “Even when the Justices agree in their choice of an applicable canon, they often disagree concerning the effect of the canon in a given case.”¹⁰³

Whether an agency interpretation is consistent with the relevant words of a statute is in the mind of each individual jurist. Thus we have dissenting and concurring opinions in cases too numerous to mention, including statements such as that of Justice Scalia in *National Cable & Telecommunications Association v. Brand X Internet Services*: “It is indeed a wonderful new world that the Court creates, one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators.”¹⁰⁴

V. WHY DEFERENCE?

There are many theories, including legislative delegation, reasons of policy, and separation of powers. *Chevron* informs that courts have long recognized considerable weight should attach to an agency’s construction of a statutory scheme it administers.¹⁰⁵ Early pronouncements came from the judiciary:

In *Edwards v. Darby*, . . . it was said by this court that “in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect.” . . . “The officers concerned are usually able men and masters of the subject.” . . . “[W]e are not inclined to interfere at this late day with a rule which has been acted on by the court of claims and the executive for so long a time.” . . . These authorities justify us in adhering to the construction of the law under consideration, adopted by the executive department of the government, and are conclusive against the contention of [the] appellant¹⁰⁶

Although some suggest the deference doctrine originated in Texas in *Stanford v. Butler*, it began long before that opinion:

101. See *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 445–46 (Tex. 2009) (Hecht, J., concurring).

102. *Id.* at 446 (Hecht, J., concurring) (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 828 (Tex. 2005)).

103. PIERCE, *supra* note 9, at § 3.6.

104. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting); see *Chem. Mfrs. Ass’n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985) (majority and dissenting opinions).

105. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

106. *Brown v. United States*, 113 U.S. 568, 571 (1884) (internal citations omitted). The agency interpretation was conclusive because it was consistent with construction of the statute by the court. See *Chevron*, 467 U.S. at 843. It would not have been conclusive or acceptable had the interpretation been manifestly contrary to the statute. See *id.*

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. . . . If the words contained in the act under consideration were of doubtful meaning, we could not lightly disregard the construction given them by the officers of the state who were called upon to act upon them.¹⁰⁷

These statements do not reveal the “why” of deference. Professor Pierce writes that the policy considerations provide the basis for the why.¹⁰⁸

When Congress drafts a statute that does not resolve a policy dispute that later arises under the statute, some institution must resolve that dispute. The institution called upon to perform this task is not engaged in statutory interpretation. It is engaged in statutory construction. It is not resolving an issue of “law.” Rather, it is resolving an issue of policy. . . . In other words, policy disputes within the scope of authority Congress has delegated to an agency are to be resolved by agencies rather than by courts.¹⁰⁹

Other writings and judicial decisions question whether agency opinions on questions of law warrant deference, and many opinions state that statutory construction is a question of law.¹¹⁰

All writings on the subject demonstrate that deference will always be with us. The issues are how deference accords to different agency functions, how many degrees of deference exist, and how does the judiciary review agency interpretations of statutes?

VI. AGENCY INTERPRETIVE FUNCTIONS

Agencies interpret statutes in three ways: notice and comment; in contested cases or judicial proceedings; and by “informal” statements.¹¹¹

A. Notice and Comment

As used herein, “notice and comment” means adherence to the provisions of the sections of the Texas Administrative Procedure Act (APA) and the Federal APA—requiring notice of proposed rule making, opportunity for

107. *Galveston, H. & S.A. Ry. Co. v. State*, 17 S.W. 67, 74 (Tex. 1891); see *Stanford v. Butler*, 181 S.W.2d 269 (Tex. 1944). However, when the words of the statute are “too clear to admit of any reasonable doubt,” the court is “constrained . . . to follow [its] own convictions, regardless of the views manifested by the acts of the officers of the executive department . . .” *Galveston, H. & S.A. Ry. Co.*, 17 S.W. at 74. In *Quick v. City of Austin*, the supreme court took care to state that although it agreed with the agency interpretation, it was not controlling. *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998).

108. See PIERCE, *supra* note 9, at § 3.3.

109. *Id.*

110. *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011).

111. See discussion *infra* Part VI.A–C.

comment, possible hearing, and inclusion of a “reasoned justification” or statement of basis and purpose in the agency order adopting the rule.¹¹²

B. Adjudication or Ad Hoc “Rules”

Agencies advance these interpretations in judicial proceedings, as in *Texas Citizens*.¹¹³ The parties argued the agency interpretation in the hearing at the RRC and in the ensuing litigation.¹¹⁴ Agencies have discretion whether to proceed by notice and comment rule making or by contested case adjudication.¹¹⁵

C. Informal Statements

Informal statements are agency statements made outside of notice and comment or adjudicative proceedings where agencies advise the regulated public of the agency’s interpretations of a statute.¹¹⁶ Informal statements come in many forms: manuals, bulletins, policy statements, staff reports, opinion letters, guidelines, and others. This article and other articles refer to those statements as “interpretive rules.” Agencies may re-promulgate interpretations issued informally by notice and comment procedures.¹¹⁷

Although opinions state that agencies are creatures of statutes and have no “inherent” authority, they do have inherent authority to issue interpretive rules.¹¹⁸ Agencies also have implied powers to do that which is essential or necessary to execute and implement their charges from the legislature.¹¹⁹

If the presumption is true that legislatures act with complete knowledge of existing law, they must be aware that agencies they create will not always be able to use notice and comment procedures and that agencies frequently will issue or promulgate interpretive rules in many informal ways.¹²⁰ Whether agencies have implied or inherent authority to adopt these informal interpretations, and regardless of the weight given, informal interpretations, like the most formal of interpretations, still must be consistent with the governing

112. TEX. GOV’T CODE ANN. §§ 2001.023–.033 (West 2008); 5 U.S.C. § 553 (2006).

113. See *Tex. Citizens*, 336 S.W.3d at 623.

114. See *id.* at 621.

115. See, e.g., *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 209 (1947); *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 271 (1974); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 799 (Tex. App.—Austin 1982, writ ref’d n.r.e.).

116. See *United States v. Mead Corp.*, 533 U.S. 218, 243–44 (2001) (Scalia, J., dissenting).

117. See *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 123 (2002) (O’Connor & Scalia, JJ., concurring).

118. See *PIERCE*, *supra* note 9, at § 6.2 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); RONALD L. BEAL, *TEX. ADMIN. PRAC. & PROC.* § 2.3.4 (2012) (citing *Skidmore*, 323 U.S. 134); *Tex. Comm’n on Envtl. Quality v. Abbott*, 311 S.W.3d 663, 673 (Tex. App.—Austin 2010, pet. denied); *R.R. Comm’n of Tex. v. Tex. Coast Utils. Coal.*, 357 S.W.3d 731, 737 (Tex. App.—Austin 2011, pet. granted).

119. See *PIERCE*, *supra* note 9, at § 4.10; *Thomas v. Long*, 207 S.W.3d 334 (Tex. 2006).

120. See *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990); *Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247, 255 (Tex. App.—Austin 2011, pet. denied); see discussion *infra* Part XIII.

statute as construed by the courts.¹²¹ In addition, these interpretive rules face special issues in Texas.¹²²

VII. DEGREES OF DEFERENCE

Vast amounts of ink have been spilled discussing deference as though it is a commodity measured by the ounce or pound. Courts give serious consideration to agency interpretations and the degree of weight afforded is within a spectrum that measures “from great respect at one end (“substantial deference” to administrative construction), to near indifference at the other.”¹²³ *Texas Citizens* recognizes this spectrum.¹²⁴

A. Great Weight

Opinions state that courts accord a higher degree of deference or great weight to interpretations made in the formal process of notice and comment or adjudication.¹²⁵ “All courts agree that agencies with grants of legislative rulemaking authority are entitled to *Chevron* deference, and most courts have concluded that agencies that have authority to render binding adjudications are entitled to *Chevron* deference.”¹²⁶ One reason is that the legislative body created the agency and charged it with implementation of the policy stated in the governing statute.¹²⁷ Interpretations adopted through notice and comment may have their special weight in part because the process followed gives interested parties opportunity to comment.¹²⁸ The same reasons apply to interpretations advanced in judicial proceedings, although the opportunity for interested parties to comment is not as great.¹²⁹ In addition, the notice and comment process assists courts by the reasoned justification required by Texas APA section 2001.033 or Federal APA’s § 706 requirement of a statement of basis and purpose. No matter how formal the process, the court will not uphold the interpretation if it is inconsistent with the statute.¹³⁰

121. See *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

122. See discussion *infra* Part XII.

123. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (internal citations omitted).

124. *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011).

125. See *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

126. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 878 (2001).

127. See *id.* at 879.

128. See *id.* at 885.

129. See *id.* at 886.

130. See *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

B. Little Weight

Skidmore deference began in *Skidmore v. Swift & Co.*¹³¹ Congress considered a bill that would grant the Administrator of the Fair Labor Standards Act general rule-making power but adopted a measure withholding that power.¹³² Because interpretations were essential to operation of the agency, the Administrator announced his interpretations in the form of “interpretive bulletins.”¹³³ The Court addressed the question of how much weight the court should give to the bulletins:

There is no statutory provision as to what, if any, deference courts should pay to the Administrator’s conclusions. . . . This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident 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.¹³⁴

Skidmore deference is alive today as stated in *United States v. Mead Corp.*, *Christensen v. Harris County*, and *Texas Citizens*.¹³⁵ In *Mead*, the Court noted that it had “sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”¹³⁶ The Court held the informal ruling of the Customs Service did not deserve *Chevron* deference but under *Skidmore* was “eligible to claim respect according to its persuasiveness.”¹³⁷

Query: Would the deference afforded the agency interpretation in *Texas Citizens* been of less weight if the RRC promulgated it in a bulletin?

Professor Pierce writes that *Skidmore* deference relies solely on common sense and that a court should consider adopting the agency interpretive rule

131. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

132. *Id.* at 137.

133. *Id.* at 138.

134. *Id.* at 139–40.

135. *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011).

136. *Mead*, 533 U.S. at 231 (citation omitted).

137. *Id.* at 221. In *Christensen* the Court held that *Skidmore* deference applied to a Department of Labor Opinion Letter and remanded the case to the lower court for consideration of that issue. *Christensen*, 529 U.S. 576.

“because there are reasons to believe that agency positions are often wise and correct.”¹³⁸ The Austin Court of Appeals, in *First Federal Savings & Loan Ass’n v. Vandygriff*, stated in dicta that courts may afford great weight to agency informal interpretations.¹³⁹ In *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, the Court upheld agency interpretation of a statute set out in interpretive letters.¹⁴⁰ “If the administrator’s reading fills a gap or defines a term in a way that is reasonable in light of the legislature’s revealed design, we give the administrator’s judgment ‘controlling weight.’”¹⁴¹ Among the extrinsic aids relied on to ascertain that “revealed design” was *Black’s Law Dictionary*.¹⁴²

VIII. FACTORS AFFECTING WEIGHT

Judicial opinions frequently list factors considered by the courts in determining the weight afforded to agency interpretations.¹⁴³ Sometimes the factors can be a basis for deference, e.g., expertise of the agency; in other opinions they give factors as reasons for determining the particular degree of deference afforded by a court or individual jurist.¹⁴⁴ Some court opinions indicate the formal processes of notice and comment and ad hoc rulemaking alone are sufficient for deference, but they continue to list other factors considered as support for the ultimate decision.

The court in *Texas Citizens* considered the consistency and length of standing of the agency interpretations, although *Chevron* and *Mayo Foundation for Medical Education and Research v. United States* inform these are not necessary for deference.¹⁴⁵ “We have repeatedly held that ‘[a]gency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.’”¹⁴⁶ *TGS-NOPEC Geophysical Co. v. Combs* holds agency inconsistency is a reason for reduced weight and may have led to rejection of the agency position.¹⁴⁷

138. PIERCE, *supra* note 9, at § 6.4.

139. *First Fed. Savs. & Loan Ass’n v. Vandygriff*, 639 S.W.2d 492, 498 (Tex. App.—Austin 1982, writ dismissed).

140. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995).

141. *Id.* at 257 (citation omitted).

142. *Id.*

143. *See id.* at 256–57.

144. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 632 (Tex. 2011).

145. *Tex. Citizens*, 336 S.W.3d at 632; *Chevron*, 467 U.S. at 863; *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712 (2011).

146. *Mayo Found.*, 131 S. Ct. at 712 (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

147. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 443 (Tex. 2011). When agencies wish to change a prior position, the better practice is to do so by notice and comment, and they may be required to do so. *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999); *see discussion infra* Part XII.

Courts state frequently that agency expertise is a reason for giving serious consideration or deference to agency interpretations, especially concerning “technical statutes.”¹⁴⁸ *Chevron* recognized that courts may give weight to agency interpretations when understanding of the statute “has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.”¹⁴⁹ The Austin Court of Appeals, in *Nucor Steel-Texas v. Public Utility Commission of Texas*, cited extensively to *Texas Citizens* and “emphasized that deference is particularly warranted when the statutory term at issue is ‘as amorphous as “public interest,”’ when the agency oversees ‘a complex regulatory scheme,’ and when the analysis to be performed ‘implicates’ the agency’s technical expertise.”¹⁵⁰

However, that expertise may not extend to legal interpretation or construction of statutes.¹⁵¹ “We ‘do not defer to administrative interpretation in regard to questions which do not lie within administrative expertise, or deal with a nontechnical question of law.’”¹⁵² “The construction of a statute is a question of law we review de novo.”¹⁵³

Legislatures may grant an agency specific or explicit rule making authority or they may, as they often do, grant in general terms, e.g., “The comptroller shall . . . adopt regulations the comptroller considers essential to the speedy and proper assessment and collection of state revenues”¹⁵⁴ “The commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under this code and other laws of this state.”¹⁵⁵

In a recent case the United States Supreme Court noted two pre-*Chevron* decisions affording less deference to an agency interpretation “contained in a rule adopted under that ‘general authority’” instead of “‘a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision.’”¹⁵⁶ The Court observed the administrative landscape had changed significantly since those early cases and held that, under *Chevron*,

deference is appropriate “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of

148. See *Chevron*, 467 U.S. at 865.

149. *Id.* at 844.

150. *Nucor Steel-Tex. v. Pub. Util. Comm’n of Tex.*, 363 S.W.3d 871, 878 (Tex. App.—Austin 2012, no pet.) (quoting *Tex. Citizens*, 336 S.W.3d at 629–30).

151. See *Rylander v. Fisher Controls Int’l, Inc.*, 45 S.W.3d 291, 302 (Tex. App.—Austin 2001, no pet.).

152. *AEP Tex. Cent. Co. v. Pub. Util. Comm’n of Tex.*, 286 S.W.3d 450, 460 (Tex. App.—Corpus Christi, pet. denied) (quoting *Rylander*, 45 S.W.3d at 302).

153. *First Am. Title Ins. Co. v Combs*, 258 S.W.3d 627, 631 (Tex. 2008) (citation omitted).

154. TEX. GOV’T CODE ANN. § 403.011(a) (West 2005).

155. TEX. INS. CODE ANN. § 36.001(a) (West 2009).

156. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (quoting *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981)).

that authority.” Our inquiry in that regard does not turn on whether Congress’s delegation of authority was general or specific.¹⁵⁷

Other cases add weight to the agency interpretation if rights have been acquired or substantial reliance has been placed on the interpretation.¹⁵⁸

IX. AGENCY INTERPRETATIONS OF THEIR RULES

Several opinions hold that an agency’s interpretation of its own rules that it adopted by notice and comment is entitled to substantial deference:

The Commission’s interpretation of its own regulations is entitled to deference by the courts. Our review is limited to determining whether the administrative interpretation “is plainly erroneous or inconsistent with the regulation.” However, if the Commission has failed to follow the clear, unambiguous language of its own regulation, we must reverse its action as arbitrary and capricious.¹⁵⁹

“The key idea is that the administrative interpretation is controlling unless plainly erroneous or inconsistent with the regulation.”¹⁶⁰ In *Talk America, Inc. v. Michigan Bell Telephone Co.*, the court reaffirmed the holding in *Chase Bank USA, N.A. v. McCoy*, stating “we defer to an agency’s interpretation of its regulations, even in a legal brief, unless the interpretation is “plainly erroneous or inconsistent with the regulation[s]” or there is any other “reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.”¹⁶¹ Both cases relied on the earlier case of *Auer v. Robbins* setting out this rule of deference.¹⁶²

Here again, courts should endeavor to ascertain the meaning of the regulation from the words used and should find assistance through a reasoned justification or statement of basis and purpose included in the order adopting the regulation.

A regulation may have what seems to be plain or clear words: “The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.”¹⁶³ However, deference to administrative interpretations and other aids to construction led to

157. *Id.* at 713–14 (quoting *United States v. Mead*, 533 U.S. 218, 226–27 (2001)).

158. *See, e.g.*, *McLaren v. Fleischer*, 256 U.S. 477, 482 (1921); *Udall v. Tallman*, 380 U.S. 1, 15 (1965); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 456 (1978).

159. *Pub. Util. Comm’n of Tex. v. Gulf States Utils. Co.*, 809 S.W.2d 201, 207 (Tex. 1991) (citation omitted).

160. *PIERCE*, *supra* note 9, at § 6.11.

161. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (Tex. 2011) (quoting *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011)).

162. *See Auer v. Robbins*, 519 U.S. 452 (1997).

163. *Rodriguez v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 251 (Tex. 1999) (citation omitted).

a concurring opinion suggesting relaxation of the ninety day period under some circumstances.¹⁶⁴

X. STANDARDS OF JUDICIAL REVIEW

Courts often cite *Chevron* as the paragon of extreme deference to agency interpretation of a statute.¹⁶⁵ Yet the opinion places limits on the agency: the agency interpretation must not be “arbitrary, capricious, . . . manifestly contrary to the statute,” or unreasonable.¹⁶⁶ These are the *Chevron* standards of review under which courts are to decide whether agency interpretations are valid.¹⁶⁷ *Mayo Foundation* recently repeated these standards.¹⁶⁸ *Texas Citizens* informs that the interpretation must “be reasonable and in accord with the statute’s plain language”¹⁶⁹

In addition to the limits on deference announced in *Chevron*, the Texas Supreme Court in *Texas Citizens* took an interesting approach by analogizing review of agency interpretation of statutes in that case to agency interpretation of insurance policies as in *Fiess v. State Farm Lloyds*.¹⁷⁰

Nor can we agree with the dissent that this policy is ambiguous because the Texas Department of Insurance advances an interpretation that, while not convincing, is a reasonable alternative to our own. 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 *unreasonable* constructions do not make a policy ambiguous. An agency’s opinion can help construe an existing ambiguity, but it cannot *create* one; that the Department agrees with the Fiess’s construction does not make this policy ambiguous.¹⁷¹

The opinion mixes several concepts. Reasonable alternative interpretations do render a provision ambiguous.¹⁷² Ordinarily, courts must give some degree of deference to even informal agency interpretation.¹⁷³ Note that in

164. See *id.* at 257 (Phillips, Hecht, Hankinson & O’Neill, JJ., concurring).

165. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

166. *Id.* at 844.

167. See *id.*

168. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011).

169. *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011).

170. See *id.* at 625; *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006).

171. *Fiess*, 202 S.W.3d at 747–48 (citations omitted).

172. See *Tex. Citizens*, 336 S.W.3d at 628 (explaining that both interpretations had “some merit”).

173. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

Quick v. City of Austin, the Texas Supreme Court recognized that the agency interpretation with which it agreed apparently was in the agency amicus brief.¹⁷⁴ The agency interpretations approved in *Chase Bank v. McCoy* were stated in amicus briefs.¹⁷⁵ If arguments in an amicus brief, perhaps not made by any other party to the case, persuade judges, why should they not utilize the reasoning in that brief to reach the best result?¹⁷⁶ The court in *Fiess* determined the policy provision was clear or plain and the agency interpretation was unreasonable because it was not convincing.¹⁷⁷ The judicial review standards in *Texas Citizens* are essentially the same as those in *Chevron*; the agency interpretation must be reasonable and not contrary to the statute.¹⁷⁸

A. Arbitrary and Capricious

The courts utilize the arbitrary and capricious standard in judicial review of contested case decisions and, as suggested in *Chevron*, in judicial review of agency interpretation of statutes by formal rule making procedures.¹⁷⁹ Under § 706 of the Federal APA, courts are to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”¹⁸⁰ Another tenet of the Federal APA with regard to rulemaking generally is that “[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”¹⁸¹

In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court held, in Professor Pierce’s words, “that an agency must engage in reasoned decisionmaking and must consider obvious alternatives to the policy it adopts in order to avoid reversal of its policy choice as arbitrary and capricious.”¹⁸²

In *State Farm*, the Supreme Court held that:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

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

175. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–84 (2011).

176. *See Quick*, 7 S.W.3d at 123.

177. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747.

178. *See R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011).

179. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); TEX. GOV’T CODE ANN. § 2001.174(2)(F) (West 2008); *City of Waco v. Tex. Comm’n on Env’tl. Quality*, 346 S.W.3d 781, 819 (Tex. App.—Austin 2011, pet. granted).

180. 5 U.S.C. § 706(2) (2006).

181. *Id.* § 553(c) (2006).

182. *PIERCE, supra note 9*, at § 1.7; *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁸³

The Federal APA's statement of basis and purpose requirement finds expression in section 2001.033 of the Texas APA, requiring agencies adopting rules (as defined in the Texas APA) to use notice and comment procedure and to include in the order adopting the rule a reasoned justification setting out the factual basis for the rule (if any), the legal basis, and why the rule is a reasonable means to a legitimate objective.¹⁸⁴ Failure to do so may result in invalidation of the rule with or without the possibility of remand to the agency and a chance to correct the procedural error.¹⁸⁵ The Austin Court of Appeals, in *Railroad Commission of Texas v. ARCO Oil & Gas Co.*, placed the arbitrary and capricious label on the agency's failure to explain why the rule was valid.¹⁸⁶ In *Texas Hospital Ass'n v. Texas Workforce Commission*, the Austin Court of Appeals invalidated an agency notice and comment rule for failure to consider alternative factors the court deemed relevant to the issue under consideration, as the Supreme Court had in *State Farm*.¹⁸⁷ The court did not apply an arbitrary and capricious label to the agency action but simply held the action was void and enjoined the agency from enforcing it.¹⁸⁸

The Texas Supreme Court did not need or use an arbitrary and capricious label to invalidate agency rules for which the agency did not explain or justify why the practices prohibited by the rules were unfair.¹⁸⁹ The court did not hold the agency could not justify the rules; the agency simply had not done so in the orders adopting the rules.¹⁹⁰

Though the Federal APA statement of basis and purpose and the Texas APA reasoned justification requirements are often referred to as procedural standards, they clearly have elements of substance by requiring agencies to demonstrate how an interpretation is consistent with the relevant statute—or as in Texas APA section 2001.035, why it is a reasonable means to a legitimate objective.¹⁹¹

183. *State Farm*, 463 U.S. at 43.

184. GOV'T § 2001.033 (West 2008).

185. *Id.* § 2001.040 (West 2008). In *Texas Medical Ass'n v. Texas Workers' Compensation Commission*, plaintiffs challenged the reasoned justification promulgated by the Texas Workers' Compensation Commission when adopting substantive rules setting reimbursement rates for medical care providers. *Tex. Med. Ass'n v. Tex. Workers' Comp. Comm'n*, 137 S.W.3d 342, 347, 352–55 (Tex. App.—Austin 2004, no pet.). The trial court did not find the reasoned justification was sufficient and remanded the case to the agency, which issued a supplemental statement that passed judicial scrutiny. *Id.*

186. *R.R. Comm'n of Tex. v. ARCO Oil & Gas Co.*, 876 S.W.2d 473, 490–92 (Tex. App.—Austin 1994, writ denied).

187. *Tex. Hosp. Ass'n v. Tex. Workers' Comp. Comm'n*, 911 S.W.2d 884, 888 (Tex. App.—Austin 1995, writ denied).

188. *Id.* at 885.

189. *See Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996).

190. *See id.* at 671.

191. *See* TEX. GOV'T CODE ANN. § 2001.035 (West 2008).

B. Contrary to Statute

Chevron holds that agency regulations should not be manifestly contrary to the statute at issue.¹⁹² Is the term “manifestly” unnecessary? Should courts reject an agency interpretation that is contrary to the statute (manifestly or otherwise)? Contrary to statute is not difficult when the statute is specific or plain and the agency makes an unacceptable change, (e.g., the legislature requires a \$500 bond for a permit and the agency raises it to \$1,000) whether by formal or informal actions; or when a governing statute provides for a contested case hearing in certain situations, but the agency adopts a formal rule that does not allow such a hearing.¹⁹³

When the statute is not clear or plain, the court must engage in its own statutory construction analysis to ascertain the legislative intent and determine if the agency interpretation is consistent with that intent or purpose, or the words of the statute.¹⁹⁴

What role, if any, does agency informal interpretation play in that judicial inquiry? One view is that informal interpretation is simply one of many aids to construction employed by the courts to decide if the rule is clear or ambiguous or consistent with the statute, although the court may give the interpretation differing weight depending on the method of promulgation and the view of each individual jurist.¹⁹⁵

Important here is that while the Texas Supreme Court in *Texas Citizens* recited deference statements from many opinions, it concluded that note by reference to the case of *Stanford*, in which the court held:

“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

192. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

193. *Tex. Dep’t of Ins. v. Ins. Council of Tex.*, No. 03–05–00189–CV, 2008 WL 744681, at *2 (Tex. App.—Austin Mar. 21, 2008, no pet.) (mem. op.). “[W]hen determining whether an agency’s rule is valid, we must ascertain whether the rule is contrary to the relevant governing statutes, or whether the rule is in harmony with the general objectives of the statutes involved.” *Id.* at *3 (internal citation omitted).

194. *See Chevron*, 467 U.S. at 844; *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011).

195. *See Chevron*, 467 U.S. at 842–43; *Tex. Citizens*, 336 S.W.3d at 625.

administration, if the statute is ambiguous or uncertain, and the construction so given it is reasonable.”¹⁹⁶

Why do courts say “ordinarily”?¹⁹⁷ In a presentation made at the 2011 University of Texas School of Law Advanced Texas Administrative Law Seminar, I asked audience members to apprise me of a case in which a court held the agency interpretation was consistent (or in harmony) with the relevant statute but rejected it as unreasonable. I have not received any citations to date. Nor am I aware of any federal case so holding. Is it accurate to say that as long as the agency interpretation is consistent (or not inconsistent) with the statute, as construed by the court, the court will uphold it? Not if the court determines a competing interpretation is the better of the two. On the other hand, are there cases holding that an agency interpretation was contrary to the statute (manifestly or otherwise), but the court upheld it by applying some degree of deference?

Is there a case in which a court has held the agency construction is contrary to the reading the court has reached in its independent analysis, but the court upheld it? There have been suggestions that courts will uphold agency interpretations “even though the court might have construed the statute differently.”¹⁹⁸ The cited case turned on interpretation of the word “modify.”¹⁹⁹ The Court held the word modify had no plain meaning as used in the statute and was the proper subject of construction by the Environmental Protection Agency (EPA) and the courts.²⁰⁰ The majority discussed legislative history at length, including comments of several legislators, and held that history itself did not evince an “unambiguous congressional intention” contrary to the agency’s interpretation of the statute.²⁰¹ After referring to numerous aids to construction, the majority held the agency interpretation was not “inconsistent with the language, goals, or operation of the [statute and did not] undermine the will of Congress.”²⁰²

Other justices disagreed:

The Court today defers to [the] EPA’s interpretation of the Clean Water Act even though that interpretation is inconsistent with the clear intent of Congress, as evidenced by the statutory language, history, structure, and purpose. I had not read our cases to permit judicial deference to an agency’s

196. *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex. 1944) (citations omitted); see *Tex. Citizens*, 336 S.W.3d at 624 n.6.

197. *Stanford*, 181 S.W.2d at 273 (citations omitted).

198. *Anthony*, *supra* note 34, at 27.

199. *Chem. Mfrs. Ass’n v. Natural Res. Def. Council*, 470 U.S. 116, 125–26 (1985).

200. *Id.* at 126.

201. *Id.* at 129.

202. *Id.* at 134.

construction of a statute when that construction is inconsistent with the clear intent of Congress.²⁰³

Justice O'Connor joined three parts of the dissent's four part opinion because "[t]hey accurately demonstrate that the Court's interpretation of [the Act] is inconsistent with the language of the statute and its legislative history."²⁰⁴

In another case in a concurring opinion, Justice O'Connor concurred in the majority opinion upholding an agency interpretation despite her belief it was not the "natural" interpretation of the statute.²⁰⁵ Query: Had the majority agreed with Justice O'Connor, would the Court have upheld the agency interpretation?

C. Reasonable

Now we come to the most ambiguous and amorphous of the judicial review standards. If it is true that words are only the skins of living thoughts, what thoughts or ideas does that skin capture? Agency action that is arbitrary and capricious for failure to adhere to procedural requirements is unreasonable, and an interpretation inconsistent with or contrary to legislative intent of a statute is equally unreasonable or more so.²⁰⁶

Beyond this, other general "unreasonable" agency interpretations are hard to find. We may assume that an "absurd" agency interpretation would be contrary to the statute and unreasonable. And agency interpretations of statutes not within their jurisdiction or ambit are unreasonable and invalid.²⁰⁷ Surely an agency interpretation contrary to the constitution would be unreasonable; but these instances are unusual and in the vast majority of cases the duty of the court is to ascertain the "intent" of the legislature, as revealed in the words of the statute, and to determine if the agency interpretation is contrary to the statute as construed by the court—the true "reasonable" inquiry.²⁰⁸

1. Pardon this Digression

An interesting digression at this point is a reference to Professor Zaring's article, *Rule by Reasonableness*, in which he argues "that reasonableness is tractable, cognizable, and ultimately the right way to design judicial review, especially when courts review the work of agencies."²⁰⁹ Professor Lubbers writes there is much truth in this insight and that Professor Pierce has signed

203. *Id.* at 135 (Marshall, Blackmun & Stevens, JJ., dissenting).

204. *Id.* at 165 (O'Connor, J., dissenting).

205. *See* Edelman v. Lynchburg Coll., 535 U.S. 106, 120 (2002) (O'Connor & Scalia, JJ., concurring).

206. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

207. *See* Tex. Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628, 640 (Tex. 2010); Gonzales v. Oregon, 546 U.S. 243, 295 (2006).

208. *See, e.g.,* Chem. Mfrs. Ass'n, 470 U.S. at 125.

209. David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 525–26 (2011).

onto this view because “[a]n agency action is reasonable if it is consistent with the relevant statute and the available evidence, and if the agency has provided an adequate explanation of how it reasoned from the relevant statute and available evidence to reach its conclusions.”²¹⁰

All administrative lawyers are familiar with section 2001.174 of the Texas APA:

If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but: (1) may affirm the agency decision in whole or in part; and (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (A) in violation of a constitutional or statutory provision; (B) in excess of the agency’s statutory authority; (C) made through unlawful procedure; (D) affected by other error of law; (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (F) arbitrary or capricious or characterized by abuse or discretion of clearly unwarranted exercise of discretion.²¹¹

Imagine if it only said that the court may affirm the agency decision in whole or in part or reverse or remand if an agency’s “unreasonable” action prejudiced substantial rights.²¹² The skin of this simple word would capture all agency actions listed in (A)–(F).²¹³ But when or if courts use this one magic word to invalidate agency action, they should identify the specific action and specify why it was unreasonable. Agencies deciding contested cases must tell us “why” in findings and conclusions; agencies adopting notice and comment rules must tell us “why” the rule is a reasonable means to a legitimate objective; courts should tell us briefly and clearly “why” administrative interpretation of a statute is invalid or valid.²¹⁴

“Reasonable” is used in interesting ways. “In their full context, words mean what they conveyed to reasonable people at the time they were written”²¹⁵ The authors advocate a “fair reading” approach: “determining the application of a governing text to given facts on the basis of how a reasonable

210. JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 429 (5th ed. 2012) (quoting Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 *ADMIN. L. REV.* 77, 96 (2011)).

211. *TEX. GOV’T CODE ANN.* § 2001.174 (West 2008).

212. *See id.*

213. *See id.*

214. *See id.* §§ 2001.033 (West 2008), .141 (West 2008).

215. SCALIA & GARNER, *supra* note 38, at 16.

reader, fully competent in the language, would have understood the text at the time it was issued.”²¹⁶

2. “Reasonable”—In Two Senses

Some opinions hold a statute must be ambiguous to warrant resort to extrinsic aids or to canons of construction.²¹⁷ But is it not the better view that courts should use all appropriate canons to determine if legislative intent is plain or clear, or whether the statute is ambiguous; and if so, which interpretation is more consistent with the statute and therefore reasonable in the ultimate sense?

An agency interpretation may be reasonable enough initially to result in ambiguity, assuming another reasonable interpretation exists, but not reasonable ultimately in the sense that the agency’s interpretation is the better of two competing interpretations because it is more in harmony with the statute. Perhaps a better word for this initial determination would be that two “plausible” interpretations result in ambiguity.

“[W]hen two alternative, plausible explanations of the ‘plain language’ of a statute so conflict as to make the statute’s language ambiguous, we may consult extra-textual factors, such as the legislative history of the statute, to resolve the ambiguity.”²¹⁸ Plausible, like reasonable, is in the eye or mind of the beholder, e.g., each individual jurist. The Texas Supreme Court held in *Texas Citizen* that each of the competing interpretations had some merit, and in that situation it must defer to an agency’s reasonable interpretation.²¹⁹ The court also stated that “[b]ecause we only require an agency’s interpretation of a statute . . . to be reasonable and in accord with the statute’s plain language, we need not consider whether the [agency]’s construction is the only—or the best—interpretation in order to warrant our deference.”²²⁰ The statutory standard at issue in *Texas Citizen*, “public interest,” was not plain; the court held it was amorphous and ambiguous, and it selected the better (or best) of the competing interpretations to uphold by considering many aids to construction.²²¹

If the agency interpretation is the only one, there is no competing interpretation to create ambiguity. And if the court’s primary goal in construing a statute is ascertainment of legislative intent or meaning of the words used, why would it approve an agency interpretation that was not the best of competing interpretations?

216. *Id.* at 33.

217. *See, e.g.*, R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 628–29 (Tex. 2011).

218. *Nguyen v. State*, 359 S.W.3d 636, 642 (Tex. Crim. App. 2012).

219. *Tex. Citizens*, 336 S.W.3d at 628.

220. *Id.*

221. *Id.* at 628–29.

In *City of Plano v. Public Utilities Commission of Texas*, the Austin Court of Appeals held: “Indeed, if the statute can reasonably be read as the agency has ruled, and that reading is in harmony with the rest of the statute, then the court is bound to accept that interpretation even if other reasonable interpretations exist.”²²²

Professor Beal has taken exception to the holding that the court is bound to accept the agency interpretation even if other reasonable interpretations exist, contending this reasoning applies to judicial review of an agency’s substantive rule and not to mere construction of a statute in other circumstances.²²³ The agency interpretation in *City of Plano* originated in the course of a contested case hearing.²²⁴ Professor Beal contends that courts will give serious consideration to agency interpretations of statutes and will ordinarily uphold them as in *Stanford* if within the agency’s area of expertise, but a court is never bound when it believes that another reasonable interpretation better fulfills the legislative intent.²²⁵ *TGS-NOPEC* supports this view.²²⁶

Courts have used interesting language to describe the relationship between the courts and agencies.²²⁷ In *Quick*, the Texas Supreme Court chose to state that an agency interpretation was not “controlling” even though it coincided with the court’s construction or interpretation: “Finally, we note that our holding is consistent with the Commission’s interpretation of the statute. While not controlling, the contemporaneous construction of a statute by the administrative agency charged with its enforcement is entitled to great weight.”²²⁸

In light of the analysis to this point, a look at *Chevron*’s and other “steps” is warranted.²²⁹

XI. STEPS

A. *Step One*

Chevron step one posits that if the legislative body has spoken directly to the precise question at issue and legislative intent “is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”²³⁰ Courts may use numerous aids to or canons of statutory construction to ascertain if that intent is clear.

222. *City of Plano v. Pub. Util. Comm’n of Tex.*, 953 S.W.2d 416, 421 (Tex. App.—Austin 1997, no writ) (citation omitted).

223. Amicus Letter at 6, *Fin. Comm’n of Tex. v. ACORN*, No. 10–0121, 2010 WL 2797856 (Tex. 2010).

224. *City of Plano*, 953 S.W.2d at 418–20.

225. Amicus Letter, *supra* note 223, at 6.

226. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

227. *See, e.g., Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998).

228. *Id.* (citations omitted).

229. *See* discussion *infra* Part XI.

230. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

B. Step Two

Chevron step two posits that when “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s [interpretation] is based on a permissible construction of the statute.”²³¹ The Court held further that when the legislative body has explicitly delegated authority to the agency, the agency’s interpretations “are given [deference and] controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”²³² If the legislative delegation is implicit, *Chevron* indicates the agency interpretation is controlling if it is reasonable.²³³

In *Texas Citizens*, the Texas Supreme Court stated it had never expressly adopted the *Chevron* doctrine but held it “will generally uphold an agency’s interpretation of a statute it is charged by the [l]egislature with enforcing, “so long as the construction is reasonable and does not contradict the plain language of the statute.””²³⁴ The court also stated that when “a statutory scheme is subject to multiple interpretations, we must uphold the enforcing agency’s construction if it is reasonable and in harmony with the statute.”²³⁵ If this is not *Chevron* it seems very close.

XII. THE TEXAS NO STEP

Under recent Texas cases, courts may lack jurisdiction to consider agency informal interpretations, also known as interpretive rules, under *Chevron*’s steps one or two.

The Texas APA was based primarily on the 1961 Revised Model State Administrative Procedure Act (MSAPA) and defined “rule” in terms similar to that of the MSAPA:

“Rule”: (A) means a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency; (B) includes the amendment or repeal of a prior rule; and (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.²³⁶

The Administrative Procedure and Texas Register Act (APTRA) “patterned its procedure for adoption of rules after the 1961 MSAPA”: “No rule hereafter

231. *Id.* at 843.

232. *Id.* at 844.

233. *Id.*

234. R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 625 (Tex. 2011) (quoting First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 632 (Tex. 2008)).

235. *Id.* at 629.

236. TEX. GOV’T CODE ANN. § 2001.003(6) (West 2008). The Texas APA was enacted initially as part of The Administrative Procedure and Texas Register Act as Art. 6252-13a in 1975.

adopted is valid unless adopted in substantial compliance with this [s]ection.”²³⁷ Compare that with Texas APA section 2001.035(a): “A rule is voidable unless a state agency adopts it in substantial compliance with [s]ections 2001.0225 through 2001.034.”²³⁸

The Commissioners’ Comment to section 3 of the 1961 MSAPA notes that the MSAPA goes beyond the Federal APA by requiring notice prior to the promulgation of “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice”²³⁹ The Federal APA exempts the quoted items from the notice and comment requirements.²⁴⁰ Since the 1961 MSAPA and the APTRA do not contain comparable exemptions, “agency statements” coming within the rule definition now found in Texas APA section 2001.003(6) and not adopted in substantial compliance with Texas APA procedures are open to challenges from parties affected by the statements.²⁴¹ The 1981 MSAPA recognized the lack of an exemption in the 1961 MSAPA and relaxed, to some extent, the notice and comment requirements:

An agency need not follow the provisions of Sections 3-103 through 3-108 in the adoption of a rule that only defines the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with its definition.²⁴²

The Texas legislature has not made a comparable change to the Texas APA. The issues raised by numerous cases and articles are how to identify the agency statements that qualify as interpretive rules, whether the statements may be challenged in court, and if so, how the judiciary reviews agency substantial compliance, *vel non*, with the Texas APA’s procedural requirements. If the agency statement is a “rule” within the Texas APA definition—and not within the exemptions of section 2001.003(6)(c)—it may be challenged under section 2001.035 for failure to comply substantially with the procedural requirements of sections 2001.0225 through 2001.034.²⁴³ In some instances, an agency statement may be successfully challenged under the Uniform Declaratory Judgment Act (UDJA).²⁴⁴

In *Combs v. Entertainment Publications, Inc.*, the comptroller had issued, in a 2007 letter ruling (Accession No. 200704926L), guidelines for determining whether a fundraising firm or a school organization was a “seller” for purposes

237. Dudley D. McCalla, *Comments on Interpretive Rules, Agency Interpretations and Reasoned Justifications*, UTCLE, 2011 Advanced Texas Administrative Law Seminar, 2 (2011) (quoting MODEL STATE ADMIN. PROCEDURE ACT 3(c) (1961) (amended 2010)).

238. GOV’T § 2001.035(a) (West 2008).

239. MODEL STATE ADMIN. PROCEDURE ACT § 3 cmt. A (1961) (amended 2010).

240. 5 U.S.C. § 553 (2006).

241. *See id.*; GOV’T § 2001.003(6).

242. MODEL STATE ADMIN. PROCEDURE ACT § 3-109 (1981).

243. *See* GOV’T §§ 2001.003(6)(c), .0225–.035 (West 2008).

244. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.002 (West 2008).

of collecting sales tax.²⁴⁵ In March and April of 2008, the comptroller issued two letters essentially changing the import or interpretation of the 2007 letter.²⁴⁶

Plaintiff filed suit for injunctive relief against enforcement of the changed interpretation, sought declaratory relief under section 2001.038 of the Texas APA that the rule embodied in the 2008 letters was invalid, and sought declaratory relief “under the UDJA that the [c]omptroller exceeded her statutory authority under section 151.024 of the tax code in adopting the rule and applying section 151.024 to [the plaintiff].”²⁴⁷

The Austin Court of Appeals affirmed the district court ruling that it had jurisdiction under section 2001.038 of the Texas APA and that the 2008 letters were invalid because of failure to comply with the notice and comment procedural requirements of the Texas APA.²⁴⁸ The court of appeals also affirmed the trial court’s injunction directing “the [c]omptroller to ‘desist and refrain from implementing and enforcing the [n]ew [r]ule . . . unless and until the [c]omptroller properly enact[ed] the [n]ew [r]ule according to the procedural requirements of the APA’ or until the [c]ourt renders its final judgment.”²⁴⁹

The Austin Court of Appeals held the statements in the 2008 letters constituted a rule under the Texas APA and invalidated them for failure to follow APA procedures.²⁵⁰ Although the Austin Court of Appeals stated it need not place a label of “interpretive rule” on the 2008 letters, it noted the letters satisfied the elements of a four-part test expressed by Professor Beal:

- (1) it is issued by an agency board, commissioner, executive director or other officer vested with the power to act on behalf of the agency; (2) it is issued with the intent of the agency to notify persons or entities that are similarly situated or within a class described in general terms; (3) it is issued to notify those persons or entities of the agency’s interpretation of a statutory provision [or substantive rule] that has been crystallized following reflective examination in the course of the agency’s interpretive process; and (4) such interpretation was not labeled as tentative or otherwise qualified by arrangement for consideration at a later date.²⁵¹

245. *Combs v. Entm’t Publ’ns, Inc.*, 292 S.W.3d 712, 717 (Tex. App.—Austin 2009, no pet.). The court in *Entertainment Publications* did not discuss whether this 2007 ruling qualified as an “interpretive” rule. *See id.*

246. *See id.* Whether these letters were given Accession numbers is not shown in the opinion. *See id.*

247. *Id.* at 718.

248. *See id.* at 719. “The validity or applicability of a rule . . . may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff.” GOV’T § 2001.038(a) (West 2008).

249. *Entm’t Publ’ns*, 292 S.W.3d at 719.

250. *See id.* at 723.

251. *Id.* at 723 n.6; Ron Beal, *A Miry Bog Part II: UDJA and APA Declaratory Judgment Actions and Agency Statements Made Outside a Contested Case Hearing Regarding the Meaning of the Law*, 59 BAYLOR L. REV. 267, 270 (2007); *see* Ron Beal, *The APA and Rulemaking: Lack of Uniformity Within a Uniform System*, 56 BAYLOR L. REV. 1 (2004). Professor Beal on occasion includes the bracketed words in (3). If a

In challenges to interpretive rules, a critical question is whether the agency intends to or applies the rule to a designated class of persons in a manner that has adverse or prescriptive effect or impact.²⁵² Absent this requirement, courts do not have jurisdiction to consider the validity of the agency statement because to do so would be an advisory opinion violating the separation of powers doctrine in that the alleged harm rested on speculation, contingency, and uncertainty.²⁵³

In *Brinkley v. Texas Lottery Commission*, plaintiffs contended letters issued by the Texas Lottery Commission were rules, as defined in the Texas APA, and were invalid because their adoption was not pursuant to the APA procedures.²⁵⁴ Plaintiff also sought a declaratory judgment that “eight-liners” were not “gambling devices” under the Texas Penal Code.²⁵⁵ For the UDJA claim, the court of appeals held the request called for an advisory opinion, which would violate the separation of powers doctrine because plaintiffs alleged harm rested on speculation, contingency, and uncertainty.²⁵⁶ The court held the letters were not rules within the APA definition.²⁵⁷

XIII. TWO SCHOOLS OF THOUGHT

The court of appeals’ holding in *Entertainment Publications* that the 2008 letters constituted an interpretive rule, subjecting it (or them) to mandatory APA notice and comment process, differs from other approaches to this issue.²⁵⁸ As noted, the Federal APA exempts interpretive rules from the notice and comment requirement of that act.²⁵⁹ The 1961 MSAPA did not.²⁶⁰ Section

validly promulgated substantive rule has the force and effect of law, an agency statement amending that rule would seem to require APA procedure. See *El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm’n*, 247 S.W.3d 709 (Tex. 2008).

252. See GOV’T § 2001.038(a) (allowing “an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff”).

253. *Brinkley v. Tex. Lottery Comm’n*, 986 S.W.2d 764, 767 (Tex. App.—Austin 1999, no writ).

254. *Id.* at 766–67.

255. *Id.*

256. *Id.* at 767–68.

257. *Id.* at 771. For cases reaching essentially similar results, see *Keeton v. Tex. Racing Comm’n*, No. 03–03–00049–CV, 2003 WL 21939996 (Tex. App.—Austin 2003, pet. denied) (mem. op.); *Tex. Dep’t of Pub. Safety v. Salazar*, 304 S.W.3d 896 (Tex. App.—Austin 2009, no pet.); *Tex. Mut. Ins. Co. v. Vista Cmty. Med. Ctr., LLP*, 275 S.W.3d 538 (Tex. App.—Austin 2008, pet. denied); *Grocers Supply Co. v. Sharp*, 978 S.W.2d 638 (Tex. App.—Austin 1998, pet. denied). For cases in which courts took jurisdiction and invalidated interpretive rules, see *Tex. Alcoholic Beverage Comm’n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651 (Tex. App.—Austin 1999, pet. dismissed w.o.j.); *Tex. Lottery Comm’n v. Scientific Games Int’l, Inc.*, 99 S.W.3d 376 (Tex. App.—Austin 2003, pet. denied); *Tex. Dep’t of Ins., Div. of Workers’ Comp. v. Lumbermens Mut. Cas. Co.*, 212 S.W.3d 870 (Tex. App.—Austin 2006, pet. denied); *Tex. Dep’t of Transp. v. Tex. Weekly Advocate*, No. 03–09–00159–CV, 2010 WL 323075 (Tex. App.—Austin 2010, no pet.) (mem. op.); *El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm’n*, 247 S.W.3d 709 (Tex. 2008).

258. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008).

259. See discussion *supra* Part VI.C.

260. MODEL STATE ADMIN. PROCEDURE ACT § 3 cmt. (1961) (amended 2010).

3-109(a) of the 1981 MSAPA exempted interpretive rules from only the mandatory advance published notice and public participation requirements for rules, not from publication or other requirements.²⁶¹ In addition, the comment to section 3-109 notes that “in all cases involving the validity of interpretive rules issued without benefit of public participation, [section 3-109] requires the courts to review the agency’s interpretation of the law construed by the rule wholly *de novo*, with no deference of any sort to the agency construction.”²⁶²

The National Conference of Commissioners on Uniform State Laws adopted the 2010 MSAPA in July 2010.²⁶³ It takes a new and interesting approach to interpretive rules, calling them “guidance documents” in section 311 of the 2010 MSAPA.²⁶⁴ The definition of “rule” does not include a guidance document.²⁶⁵ Some aspects of section 311 of the 2010 MSAPA are familiar: the guidance documents lack the force of law and they are exempt from the full range of rulemaking procedures.²⁶⁶

An article in the Winter 2011 issue of the *Administrative & Regulatory Law News* discusses and explains the rationale for and operation of section 311.²⁶⁷ The article concludes with the observations that “[h]ow well [s]ection 311 will work remains to be seen” and that “it should prove to be an interesting experiment, with potential applicability at the federal level if the experiment should prove successful.”²⁶⁸ Whether the experiment will take root in Texas remains to be seen. Note again the provision that guidance documents are exempt specifically from rulemaking procedures, as are interpretive rules under the Federal APA.²⁶⁹ The Texas APA contains no such exception.²⁷⁰ The article notes that “[a]bout half the states require that agencies use notice-and-comment procedures to promulgate guidance documents.”²⁷¹ Does *Entertainment Publications* put Texas in that group?²⁷² In any event, the article noted above and the lengthy comment to section 311 of the 2010 MSAPA make for interesting reading for those concerned with this area of administrative law.²⁷³

Many writers state justification for exempting interpretive rules from notice and comment requirements:

261. *Id.* § 3-109(a) cmt. (1981) (amended 2010).

262. *Id.* (emphasis removed).

263. See MODEL STATE ADMIN. PROCEDURE ACT (2010).

264. *Id.* § 311.

265. *Id.* § 102(30)(F).

266. *Id.* § 311 cmt.

267. See Ronald M. Levin, *Rulemaking Under the 2010 Revised Model State Administrative Procedure Act*, 36 ADMIN. & REG. L. NEWS 4 (2011).

268. *Id.* at 28.

269. See discussion *supra* Part VI.C.

270. See TEX. GOV’T CODE ANN. §§ 2001.001–.005 (West 2008).

271. Levin, *supra* note 267, at 5.

272. See *Combs v. Entm’t Publ’ns, Inc.*, 292 S.W.3d 712 (Tex. App.—Austin 2009, no pet.).

273. See Levin, *supra* note 267; MODEL STATE ADMIN. PROCEDURE ACT § 311 cmt. (2010).

The point is that agencies should be encouraged to issue as many interpretive rules as possible in order to give the public full and fair notice of the specific content of the law they administer. But requiring agencies to follow usual procedures for interpretive rules will discourage rather than encourage their issuance.²⁷⁴

In *Brinkley*, the Austin Court of Appeals surmised “[a]gencies would be reduced to impotence . . . if bound to express their views as to ‘law,’ ‘policy,’ and procedural ‘requirements’ through contested-case decisions or formal rules exclusively; and they could not under such a theory exercise powers explicitly delegated to them by the legislature.”²⁷⁵ Justice Powers noted the valuable role advisory opinions serve in agency administrations.²⁷⁶ “[T]o permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions than any possible gain.”²⁷⁷

The 1961 MSAPA required notice prior to promulgation of interpretive rules “although it may involve a certain amount of administrative inconvenience in its application [in certain agencies].”²⁷⁸ Professor Beal’s response is that “notice and comment rulemaking, the entire process, can be completed in 30 days. In addition, that 30-day period can be avoided if there is a need for an emergency rule.”²⁷⁹ Agencies contemplating adoption of an emergency rule should consider Judge Scott McCown’s opinion in volume one of the Texas Administrative Law Journal and Professor Beal’s discussion of it in section 3.7 of Texas Administrative Practice and Procedure.²⁸⁰

XIV. CONCLUSION

In a recent comment in this Journal, Manuel H. Hernandez presents cogent arguments against adoption of *Chevron* by Texas courts.²⁸¹ Gary Lawson and Stephen Kam conclude their article in the *Administrative Law Review* thusly: “We do not propose any particular method for resolving questions about *Chevron* methodology. We simply point out that the *Chevron* decision itself is a dead end. We think it ought to be a dead letter as well.”²⁸² Legislative bodies

274. ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING 289 (1986).

275. *Brinkley v. Tex. Lottery Comm’n*, 986 S.W.2d 764, 769 (Tex. App.—Austin 1999, no pet.).

276. *Id.* at 770 n.9.

277. *Id.* (quoting *Tex. Comm’n of Licensing & Regulation v. Model Search Am., Inc.*, 953 S.W.2d 289, 292 n.3 (Tex. App.—Austin 1997, no writ)).

278. BEAL, *supra* note 118, at § 2.3.4.

279. *Id.* (citations omitted).

280. *See id.*; Judge Scott McCown, *Judicial Review of Agency Action in Travis County*, 1 TEX. ADMIN. L.J. 11 (1992).

281. *See* Manuel H. Hernandez, Comment, *Running Out of Gas: Why Texas Must Distance Itself Completely from the Chevron Doctrine of Administrative Deference*, 14 TEX. TECH ADMIN. L.J. 225 (2012).

282. Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 75 (2013).

will continue to enact statutes of the type described by James Madison.²⁸³ They will continue to create or add duties to administrative agencies charged with interpreting and implementing those statutes.²⁸⁴ Those agencies will do so acting in their legislative, executive, and judicial capacities.²⁸⁵

The controlling general principle that emerges from the opinions and articles cited above is that it is emphatically the province and duty of the judicial department to decide what the law is and whether agency interpretations of statutes are reasonable and in conformity with those statutes.²⁸⁶ Courts will make these decisions by use of a host of aids to or canons of statutory construction, including serious consideration of agency interpretations.²⁸⁷ The degree of consideration given will range from great weight to little or no weight depending on many factors.²⁸⁸

283. See discussion *supra* Part II.

284. See discussion *supra* Part VI.

285. See discussion *supra* Part VI.

286. See discussion *supra* Part III.

287. See discussion *supra* Part X.

288. See discussion *supra* Part VII.

