

The Future of Agency Deference

COMMISSIONER ARTHUR C. D'ANDREA
PUBLIC UTILITY COMMISSION OF TEXAS

PUBLIC UTILITY LAW SECTION OF THE STATE BAR
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Good Administrative Practice

“Imagine a utopia of legality in which all rules are perfectly clear, consistent with one another, known to every citizen, and never retroactive. In this utopia the rules remain constant through time, demand only what is possible, and are scrupulously observed by courts, police, and everyone else charged with their administration.”

-Lon L. Fuller, *The Morality of Law* (1969)



Enforcement of Good Administrative Practice

Unreasonable

Bad faith

Improper purpose

Ad hoc

Arbitrary and capricious



Agency Deference

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

R.R Comm'n of Tex. v. Tex. Citizens, 336 S.W.3d 619 (Tex. 2011)

Public Water Supply v. DiPasquale, 735 A.2d 378 (Del. 1999)





Chevron's Demise?

“Given the concerns raised by some members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”

- Justice Kennedy (Jun. 21, 2018)



Deference offends separation of powers.

“*Chevron* deference raises serious separation of-powers questions.”

- Justice Thomas, concurring

“Judge made doctrine for the abdication of judicial duty”

- Then-Judge Gorsuch, concurring

“The citizen confronting thousands of pages of regulations . . . can perhaps be excused for thinking that it is the agency really doing the legislating.”

- Chief Justice Roberts, dissenting



Deference makes agencies sloppy and lawless.

“From my more than five years at the White House, I can confidently say that *Chevron* encourages the Executive Branch to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints”

- Judge Brett Kavanaugh

“Executive Branch agencies often think they can take a particular action unless it is clearly forbidden.”

- Judge Brett Kavanaugh



Courts are too quick to find ambiguity.

“Not a rigid, black letter rule of law” that allows “agencies to fill every gap in every statutory provision.” Rather, it is a “rule of thumb, guiding courts in an effort to respect that leeway which Congress intended agencies to have.”

- Justice Breyer, dissenting



Deference is atextual.

“An atextual invention by the courts.”

- Judge Kavanaugh



Where to attack agency deference?

Only defer in area of agency's technical expertise.

Nearly all statutes have best readings. Ambiguity is rare and overstated.

Look for explicit intention to delegate question to agency policymaking.

Exception for “deep economic and political significance”

Agency change in position

Texas Attorney General – July 2018 Amicus

“Interpreting statutory text is primarily the role of courts, not administrative agencies.”

“The Court should overrule *Chevron* deference”

No. 17-1636

In the Supreme Court of the United States

CALIFORNIA SEA URCHIN COMMISSION, ET AL.,
PETITIONERS

v.

SUSAN COMBS, ACTING ASSISTANT SECRETARY FOR FISH,
WILDLIFE, AND PARKS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS,
ALABAMA, ARIZONA, ARKANSAS, KANSAS,
LOUISIANA, MAINE, MICHIGAN, MISSOURI,
MONTANA, NEBRASKA, OKLAHOMA, SOUTH
CAROLINA, UTAH, WEST VIRGINIA,
WISCONSIN, AND WYOMING AS AMICI
CURIAE IN SUPPORT OF PETITIONERS

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Texas Attorney General – Opinion (Oct. 2016)

“Constitutionally speaking, Texas courts will not lightly yield their constitutional role to interpret the law to the executive branch. Agency deference results in one branch of government wielding the power of two.”

“Now, the drum beat of a chorus of commentators and even federal appellate judges are calling into question whether *Chevron* is constitutional. As James Madison framed the issue in Federalist No. 47, no political truth is stamped with the authority of more enlightened patrons of liberty than the separation of powers.”

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