

# MIXED SIGNALS: RECONSIDERING THE POLITICAL ECONOMY OF JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCIES

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## INTRODUCTION

A central concern—some might say obsession—of American administrative law scholarship is the appropriate level of judicial deference to agency action. This issue arises in a number of different contexts—from agency interpretations of congressional statutes<sup>1</sup> or agency regulations,<sup>2</sup> to the adequacy of agency decisionmaking procedures and processes,<sup>3</sup> to the sufficiency of the evidence on which agencies base their adjudicative decisions.<sup>4</sup> Much of the academic legal literature considers the internal logic, normative justification, or practical effect of the Supreme Court's deference doctrine with respect to these different categories of

1. See *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

2. See *Lyng v. Payne*, 476 U.S. 926 (1986); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

3. See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

4. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

administrative decisionmaking. But what, if anything, can explain broader patterns in the Supreme Court's decisions in cases that raise issues of the appropriate level of judicial deference to administrative agencies? Do the Supreme Court's deference decisions—which some scholars have criticized as confusing and inconsistent<sup>5</sup>—in fact advance systematically a consistent political or normative agenda?

The goal of this paper is not to examine the “trees” (the internal logic of particular cases or doctrinal tests), but rather the “forest”—the broad patterns of Supreme Court deference to administrative agencies, and how the Court has adjusted the appropriate level of deference over time. In particular, this paper builds on, and critically re-evaluates, Linda Cohen and Matthew Spitzer's seminal work on the political economy of judicial deference. Cohen and Spitzer advance the claim that broad patterns in deference doctrine are explicable as the Supreme Court's deliberate transfers of decisionmaking power back and forth between the executive agencies and the lower federal courts, depending on which decisionmakers the Supreme Court finds more ideologically congenial at a given point in time. This perspective, Cohen and Spitzer claim, accounts for empirically observable shifts in deference doctrine that emerge when the outcomes of large numbers of Supreme Court cases are considered together.

Part I of this Article describes the Cohen-Spitzer rational choice theory of the Supreme Court's deference doctrine, lays out that theory's key assumptions, and summarizes the supporting empirical evidence Cohen and Spitzer present. Part I then explains how this article assesses the empirical support for the theory, both by evaluating the time period Cohen and Spitzer examine and by assessing whether their theory correctly predicts patterns in the Court's deference doctrine outside their original sample.

Part II describes in detail a methodological approach for re-evaluating and extending the Cohen-Spitzer hypothesis. Specifically, Part II describes a method for estimating the ideological orientation of the Supreme Court, the judges on the circuit courts of appeal, and the administrative agencies. This Part also explains the method used to select, code, and weight the Supreme Court cases included in the study. Though this article attempted to follow Cohen and Spitzer's approach in many respects, there are some important differences between this study and theirs with respect to sample selection and methodology; these differences are also discussed in Part II.

Part III presents the results of an empirical re-assessment of Cohen and Spitzer's rational choice theory of Supreme Court deference doctrine.

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5. See, e.g., Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986).

There is surprisingly little empirical support for their theory, at least in the strong form in which Cohen and Spitzer originally presented it. On the one hand, attempts to reproduce Cohen and Spitzer's results for the 1977-1990 period yielded evidence that, though somewhat inconsistent with the data Cohen and Spitzer report, is broadly compatible with their theory inasmuch as these results indicate an expansion of deference doctrine in the early 1980s. However, in extending the empirical analysis to the 1990-2002 period, the results are the opposite of what the Cohen-Spitzer theory predicts. Instead of a contraction of deference doctrine in the mid-1990s, the evidence indicates a significant expansion during this period, with a contraction only after 2000—a period when the Cohen-Spitzer theory would presumably predict an expansion.

There is also little or no support for the Cohen-Spitzer theory when the sample is restricted only to cases involving executive agencies (as opposed to independent commissions), or when comparing how the Court treats cases on appeal from liberal and conservative circuits. There does, however, appear to be some evidence that, even though the decisions of the Court as a whole do not seem consistent with the Cohen-Spitzer theory, the votes of individual Justices on opposite ends of the political spectrum (here, Stevens and Rehnquist) do seem consistent with the theory's general predictions.

Part IV considers the potential explanations for, and implications of, these somewhat surprising empirical findings. In particular, two possible alternative explanations for shifting patterns in the Supreme Court's deference doctrine are considered. First, it may be that deference doctrine tends to expand in response to regulatory initiatives launched by a new presidential administration (the "presidential mandate" hypothesis). Second, the Supreme Court may have been more ideologically moderate than the circuit courts throughout much of the relevant sample period, expanding deference doctrine whenever the circuit courts are too liberal or too conservative (the "goldilocks" hypothesis). Though both these alternative hypotheses appear to match the data in this sample somewhat better than the Cohen-Spitzer hypothesis, they generate divergent predictions for other periods. Thus, these alternatives, and more refined versions of the Cohen-Spitzer hypothesis, can and should be tested against new data.

I. THE POLITICAL ECONOMY OF DEFERENCE DOCTRINE: THEORY,  
EVIDENCE, AND PREDICTIONS

A. *The Cohen-Spitzer Rational Choice Theory*

In two important and influential articles, Linda Cohen and Matthew Spitzer propose a simple, elegant political explanation for the Supreme Court's shifting patterns of decisions regarding the appropriate level of judicial deference to administrative agencies.<sup>6</sup> Cohen and Spitzer's theory, which is grounded in the methodology of rational choice, makes three key assumptions about judicial behavior. First, Cohen and Spitzer assume that Supreme Court Justices and lower court judges have ideological preferences that can be characterized as "liberal" or "conservative" in the traditional sense, and that these preferences influence judges' decisions in the cases that come before them.<sup>7</sup> Second, Cohen and Spitzer assume that lower court judges are constrained to some degree by the decisions of the Supreme Court—perhaps because of a sincere commitment to follow the Court's precedent, or perhaps because lower court judges want to avoid getting reversed on appeal.<sup>8</sup> Third, Cohen and Spitzer assume that the Supreme Court is primarily concerned with how the deference doctrine it announces will influence the resolution of the vast majority of cases that are decided by the lower courts without a hearing in the Supreme Court.<sup>9</sup> This assumption is critical. If the Supreme Court could review all cases, manipulation of deference doctrine would be irrelevant, as the Court could resolve all controversial cases on appeal. But, in an environment of limited resources, the Court will presumably fashion its doctrine so as to influence the resolution of future cases, and this consideration—rather than the

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6. The fully-developed version of the theory is presented in Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and An Empirical Test*, 69 S. CAL. L. REV. 431 (1996) [hereinafter Cohen & Spitzer, *Judicial Deference*]. This paper is built on previous work in which Cohen and Spitzer sought to explain, in rational choice terms, the Supreme Court's decision in *Chevron*. See Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994) [hereinafter Cohen & Spitzer, *Puzzle*].

7. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 441, 444. This assumption, though fairly standard in the political science literature, see, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002), is still quite controversial among traditional legal scholars. Ronald Dworkin, for example, questions whether the "distinction between conservative and liberal Justices is a useful distinction at all." RONALD DWORIN, *LAW'S EMPIRE* 358 (1986). The idea that judges are influenced at least to some degree by their political inclinations, however, is at this point well-established. See, e.g., SEGAL & SPAETH, *supra* note 7. Cohen and Spitzer appear to take the position that political/ideological considerations are sufficiently strong that their effect can be observed in Supreme Court decisions on deference questions even without controlling for other factors.

8. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 435-39, 452-55.

9. See *id.* at 436-38.

specific issues raised by any particular case—should be the primary determinants of the Court’s doctrinal pronouncements.<sup>10</sup>

Taken together, these three assumptions imply that the Supreme Court should prescribe a higher level of judicial deference to administrative agencies when the Court’s political preferences are more closely aligned with those of the administrative agencies than with those of the federal appellate courts. In contrast, the Supreme Court is expected to call for a reduction in the overall level of deference due to administrative agencies when the Court believes its preferences are more closely aligned with those of the lower courts than with those of the agencies. Thus, a conservative Supreme Court facing liberal courts of appeal and a Republican administration should favor a relatively high degree of deference, while a conservative Supreme Court with relatively conservative lower courts but a liberal Democratic administration would prefer a lower level of judicial deference. The basic predictions of the Cohen-Spitzer rational choice model are shown below in Table 1.

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10. The argument that the Supreme Court’s deference doctrine is shaped by its need to guide the decisions of lower courts in the hierarchical federal system has been articulated most forcefully and influentially by Peter Strauss. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). For additional empirical evidence supporting this general point about hierarchical control in a different doctrinal context, see John Gruhl, *The Supreme Court’s Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502 (1980). Similarly, the practice of stare decisis can be interpreted as partly reflecting the Supreme Court’s need to influence lower court behavior through roughly consistent patterns of decisionmaking. See Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755 (2002).

TABLE 1

	Supreme Court Ideology	Circuit Court Ideology	Executive Agency Ideology	Expected Deference Doctrine	Expected Policy/Case Outcomes
1	Conservative	Conservative	Conservative	?	Conservative
2	Conservative	Liberal	Liberal	Low deference	Conservative
3	Conservative	Conservative	Liberal	Low deference	Conservative
4	Conservative	Liberal	Liberal	<i>Depends:</i> High deference if courts are more liberal than agencies; Low deference if agencies are more liberal than courts	Liberal
5	Liberal	Liberal	Liberal	?	Liberal
6	Liberal	Conservative	Liberal	High deference	Liberal
7	Liberal	Liberal	Conservative	Low deference	Liberal
8	Liberal	Conservative	Conservative	<i>Depends:</i> Low deference if courts are more liberal than agencies; High deference if agencies are more liberal than courts	Conservative

*B. Evidence for the Cohen-Spitzer Theory:  
The 1980s Deference Expansion*

The Cohen-Spitzer rational choice explanation for the Court's deference doctrine would be a valuable theoretical contribution in its own right. But Cohen and Spitzer go further. They claim that empirical data on Supreme Court administrative law decisions between 1977 and 1990 support the predictions of their theory. In particular, they argue that an examination of case outcomes during this time period shows an increase in the level of judicial deference advocated by the Supreme Court in the early to mid-1980s, and a gradual tapering off in the later 1980s.<sup>11</sup> Cohen and Spitzer interpret this pattern as follows.

In the late 1970s, the Supreme Court was relatively moderate, with some staunch conservatives (Chief Justice Burger and Justice Rehnquist), some passionate liberals (Justices Brennan and Marshall), and a core of moderately conservative centrists (e.g., Justices Powell and Stewart). Even though the Supreme Court at this time could not, perhaps, be deemed "conservative" in a strong sense, it was nonetheless probably more

11. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 464-66.

conservative than Carter administration executive agencies. It was certainly more conservative than the federal courts of appeals, which were still filled primarily with Democratic appointees, many of whom were unapologetic liberal judicial activists.<sup>12</sup> This situation corresponds roughly to row 4 in Table 1. Whether the Court should advocate high or low levels of deference in these circumstances depends on whether the circuits are more liberal than the agencies (which would imply higher deference), or whether they are more conservative (implying lower deference). In either case, the effect on deference doctrine is expected to be muted compared to what happened next.

In the early 1980s, following Ronald Reagan's election, the executive agencies lurched sharply to the right.<sup>13</sup> The Supreme Court shifted to the right as well, with the relatively conservative Sandra Day O'Connor replacing the more moderate Potter Stewart in 1981.<sup>14</sup> The judges on the federal courts of appeals, however, remained quite liberal overall. Thus, the situation in the early-to-mid 1980s corresponded to row 2 in Table 1, implying that the Supreme Court should signal to the lower courts that they ought to be more deferential to executive branch agencies. This, according to Cohen and Spitzer, is precisely what one finds in the data.

Cohen and Spitzer further find that pro-deference signals from the Supreme Court appeared to decline in the late 1980s. Here, Cohen and Spitzer rightly point out that the *absolute* deference signal is less important than the trend, i.e., whether the Court is signaling to lower courts that they should increase or decrease their deference relative to the status quo. As the circuit courts adjusted to the Supreme Court's new, more pro-deference doctrine, the Court had less need to send strong pro-deference signals.<sup>15</sup> Thus, the lower levels of pro-deference signals in the later years of the Cohen-Spitzer dataset can be interpreted as a return to equilibrium—though

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12. The most prominent and influential of these liberal judges were probably three D.C. Circuit judges—David Bazelon, Skelly Wright, and Harold Leventhal—whose opinions were often at odds with the more conservative Supreme Court. See Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599 (2002); see also Roy W. McLeese III, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048 (1984).

13. This intuitive point has been validated empirically by examinations of changes in agency policy after President Reagan's election. See generally B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213 (1988).

14. In Cohen and Spitzer's analysis, the Supreme Court's ideological position did not shift with this or any other appointment in the relevant time period because the median Justice under their coding methodology was always moderately conservative (appointed by a Republican President and confirmed by a Democratic Senate). See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 447. Alternative coding methodologies yields somewhat different results for the Supreme Court's ideology, see *infra* text accompanying notes 30-37, but the basic story is the same in either case.

15. See *infra* note 77.



a new equilibrium in which the circuit courts are more deferential to administrative agency decisions than they had been under the old 1970s equilibrium. Another interpretation, also consistent with the general pattern Cohen and Spitzer claim to observe, is that by the late 1980s the courts of appeal were considerably more conservative than they had been in the early 1980s, since Reagan and Bush appointees had replaced Carter, Johnson, and Kennedy appointees. Thus, the situation by the late 1980s may have corresponded more to the situation described in row 1 of Table 1, where all three relevant players are conservative, and therefore the prediction as to deference doctrine is more ambiguous, but probably lower than what the Court would have demanded in the earlier period, where it had a more adversarial political relationship with the lower courts.

*C. Out-of-Sample Predictions: Extending the Cohen-Spitzer Theory to the Clinton Administration and Beyond*

The Cohen-Spitzer study is exemplary in part because the theory it develops, besides being consistent with the data the authors had available at the time, generates clear, falsifiable predictions that can be tested against data outside of the original sample. And, as luck would have it, recent political history provides an ideal opportunity for testing the robustness of the Cohen-Spitzer rational choice theory against new data. Recall that the theory implies an unambiguous prediction about what ought to happen when the Supreme Court and the lower federal courts are conservative, but the agencies are liberal. This situation, which corresponds to row 3 in Table 1, predicts a doctrine calling for relatively lower levels of judicial deference to administrative agencies. And, this political alignment—a relatively conservative Supreme Court and courts of appeals, but relatively liberal executive agencies—corresponds to the conditions that prevailed under the Clinton administration, at least in its early years. Thus, deference doctrine should have contracted in the mid-1990s. Cohen and Spitzer make such a prediction explicitly, arguing that:

In the Clinton Presidency, one would expect administrative agencies to move significantly to the left . . . . But the majority of Justices and judges on both the Supreme Court and courts of appeals will probably remain conservative; it will take a while for Clinton's appointments to move these two institutions. Assuming that the Justices on the Supreme Court are not so enamored of deference that it swamps their preferences for conservative policy outcomes, the Supreme Court will most likely signal courts of appeals to give less deference to administrative agencies.<sup>16</sup>

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16. Cohen & Spitzer, *Puzzle*, *supra* note 6, at 108-09.

If the Cohen-Spitzer theory is correct, then we ought to observe a contraction of judicial deference doctrine around 1992-1995, and a gradual return to equilibrium sometime in the late 1990s—say, around 1996-1999. In order to test this hypothesis, and to explore alternative or complementary explanations for changes in patterns of the Supreme Court's deference doctrine over time, this Article attempts to reproduce Cohen and Spitzer's empirical assessment of the 1977-1990 period, and then extend the analysis to cover the 1991-2002 period. Unfortunately, because Cohen and Spitzer's case coding methodology is not clearly explained in their articles, neither their sample nor their methods could be replicated precisely. While this Article attempts to replicate Cohen and Spitzer's method for weighting the cases (by counting reversals of lower court decisions as stronger signals than affirmances), it also employs an alternative influence-weighting method based on subsequent case citations. In addition, this Article follows Cohen and Spitzer in examining whether there are systematic differences in the Supreme Court's treatment of executive agencies and independent agencies. This article also investigates whether there are systematic differences in how conservative and liberal *Justices* decide cases raising a deference question, as the Cohen and Spitzer theory presumably would predict, and whether the Court treats liberal and conservative *circuits* differently when issuing its rulings.

## II. METHODOLOGY

In the interests of making the empirical analysis in this article as transparent and replicable as possible, this Part discusses methodological issues in some detail. In particular, it describes assumptions about the relative ideological positions of the Supreme Court, circuit courts, and federal agencies at different points in the sample period, and the evidence supporting these assumptions. This Part then explains the method of selecting cases for the sample and coding them for their pro- or anti-deference content, and describes the various weighting techniques employed for aggregating the cases to produce an overall annual deference signal for each year in the sample. Readers who are less interested in these methodological details may prefer to skim this Part and focus on the subsequent discussion of results and implications in Parts III and IV.

### *A. Measuring Ideology*

To operationalize the Cohen-Spitzer model for empirical testing, it is necessary to characterize the political ideology of the Supreme Court, the circuit courts, and the executive agencies. For the most part, I follow Cohen and Spitzer's methodology to maximize comparability between their study and this one. However, this study takes a different approach in some

respects, particularly with regard to assessing the ideology of the Supreme Court. Assumptions about the political preferences of the agencies, the circuit courts, and the Supreme Court are discussed in turn.

### 1. Agency Ideology

Like Cohen and Spitzer, this study assumes that the political ideology of administrative agencies is determined primarily by the political ideology of the President. Thus, agencies are assumed to have been liberal in 1977-1980 and 1993-2000, and conservative in 1981-1992 and 2001-2002. This assumption is generally reasonable, given the strong evidence of presidential influence over agency policy.<sup>17</sup> Inasmuch as operationalizing the Cohen-Spitzer hypothesis depends on correctly predicting the changes in agency ideology from year to year, using the President's party as a proxy ought to be sufficient.<sup>18</sup>

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17. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001); Scott R. Furlong, *Political Influence on the Bureaucracy: The Bureaucracy Speaks*, 8 J. PUB. ADMIN. RES. & THEORY 39 (1998); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119 (1996); Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475 (1987). However, this assumption is subject to a few important caveats and qualifications. First, other political actors—for example, the Senate (which must confirm many agency leaders) and congressional subcommittees (with oversight and appropriations power)—also influence agency policy, and these other actors may not share the President's political ideology. See, e.g., J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); Anne M. Joseph, *Called to Testify: Congressional Oversight of Presidential Appointees and the Administrative State* (Feb. 7, 2003) (unpublished manuscript, on file with author). Second, agencies have their own culture and sense of mission, and political appointees can sometimes “go native,” seeking to advance the agency's agenda even when it diverges from the President's priorities. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 700-01 (2000); HAROLD SEIDMAN & ROBERT GILMOUR, *POLITICS, POSITION, AND POWER* (1986). Third, Presidents may sometimes appoint agency heads with divergent ideologies in order to improve the credibility of their commitments to certain policies. See Daniel F. Spulber & David Besanko, *Delegation, Commitment, and the Regulatory Mandate*, 8 J.L. ECON. & ORG. 126, 135-37 (1992). Nonetheless, as a comparative matter, it still seems fair to say that administrative agencies are much more conservative under Republican administrations than under Democratic administrations.

18. This would not be the case, though, if the ideologies of the agencies and those of the courts were on very different scales. For instance, if for some reason administrative agencies under Republican Presidents were more liberal than judges appointed by Democratic Presidents, this would confound the analysis. In this example, a shift from a Democratic to a Republican presidential administration would not change the fact that a Supreme Court dominated by Republican appointees would prefer low levels of deference. However, there is no a priori reason to suppose that this extreme divergence in judicial ideology and agency ideology actually occurs. Moreover, there is some evidence indicating that in fact the ideologies of Senators, Presidents, and Supreme Court Justices vary within a similar range. See Michael Bailey, *Bridging Institutions and Time: Common Space Preference Estimates for Presidents, Senators, and Justices, 1946-2002*, available at <http://www.law.nyu.edu/clep/documents/Bailey03.pdf>.

However, though the President has a great deal of authority over executive branch agencies, he has less direct control over independent agencies.<sup>19</sup> Therefore, following Cohen and Spitzer, this study tests for noticeable differences between cases involving executive branch agencies and those involving independent agencies. If the Cohen-Spitzer theory is correct, then shifts in deference doctrine—both expansions and contractions—ought to be more pronounced for executive agencies than for independent agencies.

## 2. Circuit Court Ideology

For each year from 1977 to 2002, I calculate the average ideology score for all the judges on the U.S. Circuit Courts of Appeal.<sup>20</sup> Each judge on the federal courts of appeal receives an ideology score of +1 (conservative) if that judge was appointed by a Republican President and confirmed by a Republican Senate, and gets an ideology score of -1 (liberal) if the judge was appointed by a Democratic President with a Democratic Senate. Judges appointed by a Republican President with a Democratic Senate, or appointed by a Democratic President with a Republican Senate, are assigned ideology scores of +0.7 and -0.7, respectively. The choice of 0.7 is admittedly arbitrary, and is intended to reflect the greater—but not absolute—power that the President has over the ideology of the judges he appoints.<sup>21</sup> As long as that assumption is reasonable, the choice of 0.7 is justifiable. But, choosing some other number between 0 and 1 would not substantially change the qualitative results.<sup>22</sup> Again following Cohen and Spitzer, active status judges are weighted twice as heavily as senior status judges, to reflect the reduced caseload, and consequent reduced ideological influence, of the latter set of judges.<sup>23</sup>

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19. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 447-51.

20. See *id.* at 445-47.

21. See Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1651 (1998); see also William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 1021 (1994); Jeffrey A. Segal et al., *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992).

22. If one believed that the President and the Senate had equal influence over the ideology of judicial appointees, then all judges whose appointing President and confirming Senate are of different parties should get an ideology score of 0. If one believed that the Senate actually exerted more influence over the ideology of judicial appointees than the President, then the sign would reverse, such that a judge appointed by a Republican President with a Democratic Senate would be coded as more liberal than a judge appointed by a Democratic President with a Republican Senate. Most observers and scholars, however, have generally concluded that the President has greater, though not absolute, control over the ideology of judicial appointees. See *supra* note 21. Thus, the Cohen-Spitzer coding rules seem appropriate.

23. Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 445. See also 28 U.S.C. § 371 (2000) (statutory provisions governing senior status).

For each year from 1977 to 2002, this study averages ideology scores for all the judges on the U.S. Circuit Courts of Appeal.<sup>24</sup> The average circuit court ideology for each year is shown below in Table 2 and depicted graphically in Figure 1. The circuit courts tended, on the whole, to be quite liberal through the mid-1980s. By the late 1980s, however, and through the early 1990s, the circuits became progressively more conservative, as Presidents Reagan and Bush replaced retiring Democratic judicial appointees with more conservative successors. Under Clinton, the trend reversed, but the circuits did not become anywhere near as liberal as they had been under Carter and in the early Reagan years. By the end of the Clinton administration in 2000, the average circuit ideology score was about where it was in 1987—approximately zero. Using 0.1 and -0.1 as arbitrary cut-off points, we can say that, of the years considered in the sample, the federal circuit courts were liberal from 1977 until about 1985, conservative from 1990 to 1996, and relatively moderate in the 1986-1989 and the 1997-2002 periods.

TABLE 2

Year	Average Circuit Judge Ideology	Year	Average Circuit Judge Ideology
1977	-0.15	1990	+0.11
1978	-0.23	1991	+0.14
1979	-0.27	1992	+0.19
1980	-0.43	1993	+0.21
1981	-0.46	1994	+0.16
1982	-0.35	1995	+0.13
1983	-0.31	1996	+0.11
1984	-0.25	1997	+0.09
1985	-0.17	1998	+0.05
1986	-0.04	1999	+0.04
1987	-0.01	2000	-0.02
1988	+0.04	2001	-0.03
1989	+0.07	2002	-0.00

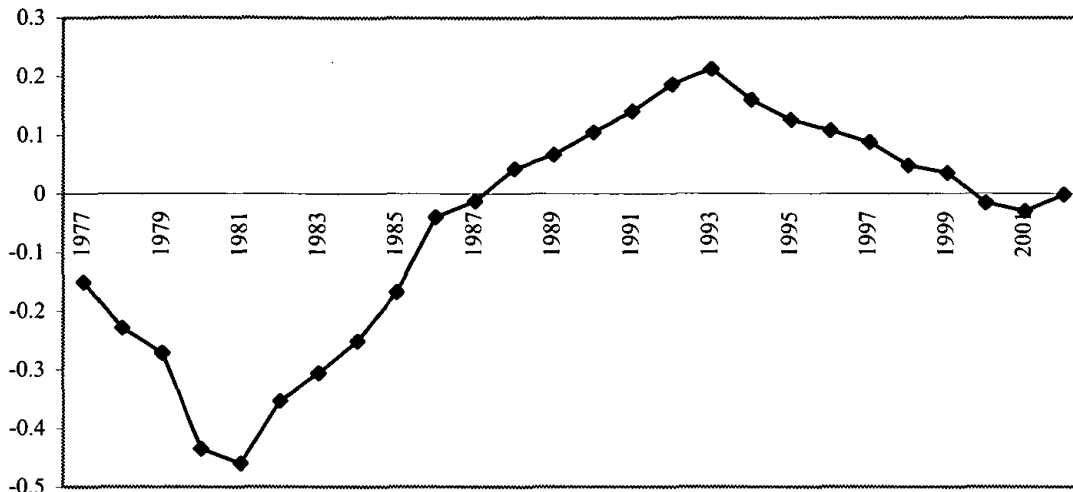
24. Formally, the ideology score for each year is equal to:

$$\frac{(N^{A_{RR}} - N^{A_{DD}}) + (0.7)(N^{A_{RD}} - N^{A_{DR}}) + (0.5)(N^{S_{RR}} - N^{S_{DD}}) + (0.35)(N^{S_{RD}} - N^{S_{DR}})}{N^{A_{RR}} + N^{A_{DD}} + N^{A_{RD}} + N^{A_{DR}} + (0.5)(N^{S_{RR}} + N^{S_{DD}} + N^{S_{RD}} + N^{S_{DR}})}$$

where  $N$  indicates the number of judges in each category, the superscript on  $N$  denotes active status ( $A$ ) or senior status ( $S$ ), the first subscript denotes the party of the appointing President – Democrat ( $D$ ) or Republican ( $R$ ) – and the second subscript denotes the party of the confirming Senate.

FIGURE 1

Average Circuit Judge Ideology



The foregoing assessment is subject to two important qualifications. First, this coding methodology assumes that the partisan effects on judicial ideology are constant across administrations. Thus, for example, the analysis assumes that Clinton nominees are ideologically similar to Carter or Truman nominees, that Reagan nominees are ideologically similar to Eisenhower or Nixon nominees. This assumption is open to question. Some believe that the appointment process has become more ideological over time.<sup>25</sup> If this is the case, then more recent appointees should have ideological scores with larger absolute values. Also, party positions may have shifted; many might argue, for instance, that Clinton's judicial nominees were systematically more conservative than those of his Democratic predecessors, and that Reagan and Bush's nominees were also more conservative than those of previous Republican administrations.<sup>26</sup> If

25. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 47 (1997) (condemning the "new phenomenon of selecting and confirming federal judges . . . on the basis of their views regarding a whole series of proposals for constitutional evolution"); Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 *JUDICATURE* 318, 319-20 (1989) ("Arguably, the Reagan administration was engaged in the most systematic judicial philosophical screening of judicial candidates ever seen in the nation's history."). See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000).

26. See Stephen M. Griffin, *Legal Liberalism at Yale*, 14 *CONST. COMMENT.* 535, 550 (1997) (book review) (finding a lack of emphasis on ideology in the Clinton administration's judicial nominations); Ronald Stidham et al., *The Voting Behavior of President Clinton's Judicial Appointees*, 80 *JUDICATURE* 16 (1996) (finding Clinton appointees generally do not exhibit an especially strong liberal ideology); William E. Kovacic, *The Reagan Judiciary and Environmental Policy: The Impact of Appointments to*

this is true, then the quantitative results above understate the conservative shift in the 1980s and early 1990s, and exaggerate the subsequent liberal reversal. More refined measurements of circuit court ideology are deferred for future research, but the foregoing caveat should be kept in mind when interpreting the results.

The second qualification to the results presented in Table 2 and Figure 1 is that the average ideology scores of all the circuits taken together obscure important inter-circuit ideological variation. For example, the D.C. Circuit—by far the most important circuit for resolving issues involving the power of administrative agencies—was quite liberal up until 1985, was conservative in 1991-1996 and in 2000-2001, and was moderate by this article's classification standard (i.e., the absolute value of its average ideology score was below 0.1) in 1986-1990, 1997-1999, and 2002 (see Figure 2). In contrast, the Ninth Circuit was liberal in 1978-1986 and in 1999-2002; in all other years it was moderate (see Figure 3). Meanwhile, the Seventh Circuit was liberal until 1981, moderate from 1982 to 1984, and consistently conservative thereafter (see Figure 4). Thus, generalizations about nationwide trends toward “liberal” or “conservative” courts of appeal, though meaningful, obscure some important differences between circuits. Below, this study considers if there are observable variations in the deference doctrine the Supreme Court tends to articulate when dealing with an appeal from a more liberal circuit as compared to what it does when hearing an appeal from a more conservative circuit.<sup>27</sup>

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*the Federal Courts of Appeals*, 18 B.C. ENVTL. AFF. L. REV. 669 (1991) (noting extreme conservatism of Reagan's judicial appointees).

27. See *infra* Part III.B.2.

FIGURE 2

Average Circuit Judge Ideology: D.C. Circuit

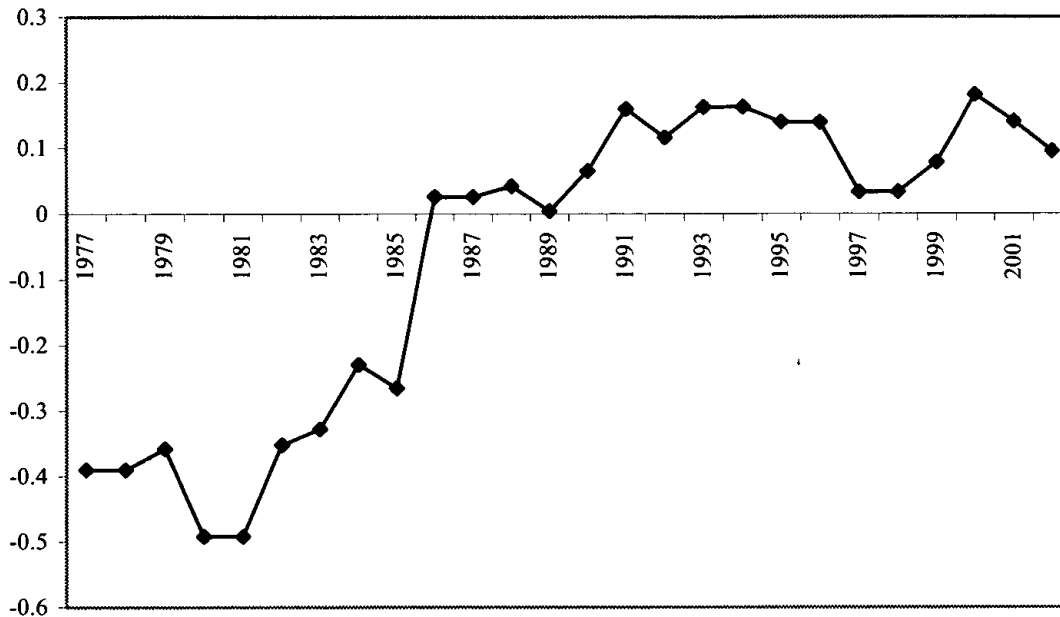


FIGURE 3

Average Circuit Judge Ideology: 9th Circuit

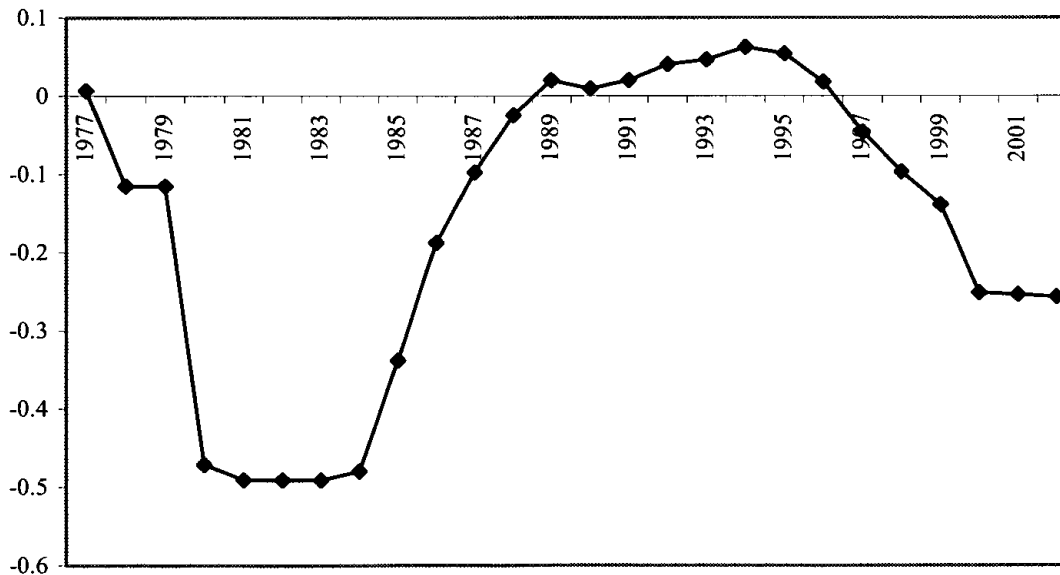
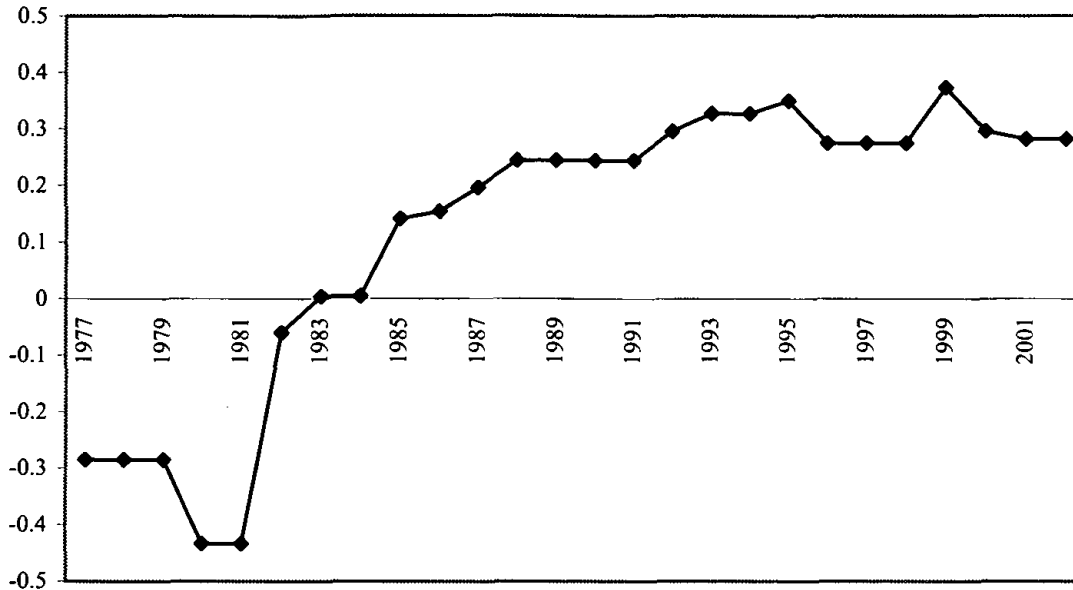




FIGURE 4

Average Circuit Judge Ideology: 7th Circuit



### 3. Supreme Court Ideology

Cohen and Spitzer use the same methodology for determining ideology of Supreme Court Justices that they use to calculate the ideology of circuit court judges, and they presume that the ideology of the Supreme Court can be represented by the ideology of the median Justice.<sup>28</sup> But there are other methods for estimating the ideological preferences of Supreme Court Justices, several of which have been employed to generate estimated ideal points for all the Justices on the Court in the sample period studied here. Four possible proxies for Supreme Court Justice ideology are considered, and, for each one, both the predicted ideology of the median Justice and the mean ideology score for the whole Court are considered.<sup>29</sup>

The first of the four measures is Cohen and Spitzer's method, described above. The second is the Segal-Cover score for each Justice.<sup>30</sup> These

28. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 447.

29. The argument for using the median Justice to measure the Court's ideology would be that the swing voter (i.e., the median) can always get an outcome at her ideal point in a majority-rule voting system with a one-dimensional policy space. However, an exclusive focus on the median Justice may be misleading inasmuch as the actual process of forming a majority coalition and drafting the language of the opinion involves a more complicated bargaining process. Using the mean ideology score better reflects the influence that more ideologically extreme Justices may have on final outcomes.

30. See Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); see also Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

scores, which presume a one-dimensional liberal-conservative measure of judicial ideology,<sup>31</sup> are derived from newspaper editorials written about the Justices between the time that they were nominated to the Court and the time that they were confirmed.<sup>32</sup> Third, I use estimated judicial ideal points from two recent studies, one by Michael Bailey,<sup>33</sup> the other by Andrew Martin and Kevin Quinn,<sup>34</sup> which employ sophisticated multidimensional scaling models to infer judicial ideal points from actual votes in decided cases.<sup>35</sup> Of these four measures, the Bailey and Martin-Quinn calculations appear preferable on methodological grounds, as they are derived from more, and more reliable, data about each Justice's revealed preferences. They also appear more consistent with widely held intuitions about the ideology of the individual Justices, e.g., that Justice Stevens is more liberal than Justice O'Connor and that Justice Brennan was more liberal than Justice White.

The ideology score for each Justice, as derived from each of these four measures, is shown in Table 3, and the mean and median ideology score for each Court is shown in Table 4. The numerical values in each column are not directly comparable, because the measures are scaled differently. However, the directional movements at each major transition point (where one Justice departs the Court and is replaced by another) can be compared, and the direction of ideological change, if any, according to each measure of Court ideology is shown below in Table 5. Seven of the eight measures<sup>36</sup> are re-scaled on a unit interval, where the "0" value is assigned to the period where, according to that measure, the Court was most liberal, and the "1" is assigned to the period where the Court was most conservative. These values, depicted in Figure 5 and Figure 6, are still not directly comparable, but they are useful in showing which transition points represented the most significant ideological shifts according to each measure.

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31. See Segal & Cover, *supra* note 30, at 559.

32. See *id.* at 559-60.

33. Bailey, *supra* note 18.

34. Andrew D. Martin & Kevin M. Quinn, *Bayesian Learning about Ideal Points of U.S. Supreme Court Justices, 1953-1999* (Jul. 23, 2001), available at <http://www.csss.washington.edu/Papers/wp16.pdf>.

35. These models generate more complex outputs than the simple Segal-Cover scores. I rely on the "posterior mean" ideal point calculated by Martin & Quinn, *id.* at 33, and the "Theta" score for each Justice calculated by Bailey, *supra* note 18, at 23.

36. The median Justice's ideology score is not re-scaled as measured by the Cohen-Spitzer method, because this measure does not vary throughout the sample period.

TABLE 3

Justice	IDEOLOGY SCORE*			
	Cohen-Spitzer	Segal-Cover	Bailey	Martin-Quinn
Marshall	-1 (1)	-1.00 (1)	-0.503 (1)	-2.002 (1)
Brennan	0.7 (5)	-1.00 (1)	-0.405 (2)	-1.643 (2)
Stevens	0.7 (5)	0.50 (10)	-0.312 (3)	-0.553 (3)
Ginsburg	-1 (1)	-0.36 (4)	-0.270 (4)	-0.227 (4)
Breyer	-1 (1)	0.05 (6)	-0.229 (5)	-0.180 (5)
Blackmun	0.7 (5)	0.77 (13)	-0.053 (7)	-0.073 (6)
Souter	0.7 (5)	0.34 (9)	-0.204 (6)	0.209 (7)
Stewart	0.7 (5)	-0.50 (3)	0.099 (8)	0.403 (8)
White	-1 (1)	0.00 (5)	0.145 (9)	0.407 (9)
Powell	0.7 (5)	0.67 (11)	0.203 (11)	0.809 (10)
Kennedy	0.7 (5)	0.27 (8)	0.203 (11)	1.293 (11)
O'Connor	1 (15)	0.17 (7)	0.191 (10)	1.309 (12)
Burger	0.7 (5)	0.77 (13)	0.354 (14)	1.468 (13)
Scalia	1 (15)	1.00 (16)	0.317 (13)	2.433 (14)
Rehnquist	0.7 (5)	0.91 (15)	0.427 (16)	2.914 (15)
Thomas	0.7 (5)	0.68 (12)	0.372 (15)	3.909 (16)

\* First number represents cardinal ideology score. Number in parentheses represents ordinal ideological ranking, from most liberal to most conservative. Sign on Segal-Cover scores are opposite of those in original source, so that for all four measures higher numbers indicate more conservative ideology.

TABLE 4

Court	MEDIAN (MEAN) SUPREME COURT IDEOLOGY SCORE			
	Cohen-Spitzer	Segel-Cover	Bailey	Martin-Quinn
1977-1981	0.7 (0.322)	0.5 (0.124)	0.099 (-0.005)	0.403 (0.192)
<i>Stewart departs July 3, 1981; O'Connor sworn in Sept. 25, 1981</i>				
1982-1986	0.7 (0.356)	0.5 (0.199)	0.145 (0.005)	0.407 (0.293)
<i>Burger departs Sept. 26, 1986; Scalia sworn in Sept. 26, 1986</i>				
1987	0.7 (0.389)	0.5 (0.224)	0.145 (0.001)	0.407 (0.400)
<i>Powell departs June 26, 1987; Kennedy sworn in Feb. 18, 1988</i>				
1988-1990	0.7 (0.389)	0.27 (0.18)	0.145 (0.001)	0.407 (0.454)
<i>Brennan departs July 20, 1990; Souter sworn in Oct. 9, 1990</i>				
1991	0.7 (0.389)	0.34 (0.329)	0.145 (0.023)	0.407 (0.660)
<i>Marshall departs Oct. 1, 1991; Thomas sworn in Oct. 23 1991</i>				
1992-1993	0.7 (0.578)	0.5 (0.516)	0.191 (0.121)	1.293 (1.316)
<i>White departs June 28, 1993; Ginsburg sworn in Aug. 10, 1993</i>				
1994	0.7 (0.578)	0.5 (0.476)	0.191 (0.075)	1.293 (1.246)
<i>Blackmun departs Aug. 3, 1994; Breyer sworn in Aug. 3, 1994</i>				
1995-2002	0.7 (0.389)	0.34 (0.400)	0.191 (0.055)	1.293 (1.234)

TABLE 5

Transition Point	EFFECT ON SUPREME COURT IDEOLOGY*							
	Median ideology score from:				Mean ideology score from:			
	Cohen-Spitzer	Segal-Cover	Bailey	Martin-Quinn	Cohen-Spitzer	Segal-Cover	Bailey	Martin-Quinn
1981-1982	0	0	+	+	+	+	+	+
1986-1987	0	0	0	0	+	+	-	+
1987-1988	0	-	0	0	0	-	0	+
1990-1991	0	+	0	0	0	+	+	+
1991-1992	0	+	+	+	+	+	+	+
1993-1994	0	0	0	0	0	-	-	-
1995-2002	0	-	0	0	-	-	-	-

\* A "+" indicates that the Supreme Court became more conservative at this transition point, according to the specified indicator. A "-" indicates that the Court became more liberal at this transition point, according to the indicator. A "0" indicates that the indicator finds no change in the Court's ideology.

The results for mean Supreme Court ideology (see Figure 5) are broadly consistent across all four measures. The 1977-1981 period was the most liberal Court in the sample. The Court became somewhat more conservative in the 1982-1990 period, and it became sharply more conservative from 1991 to 1993—the most conservative Court in the sample. The Court became somewhat more liberal in the 1994-2002 period, but was not as liberal as it had been in 1991 or before.

The results for the ideology of the median Justice (see Figure 6) are less consistent across indicators, and generally more difficult to interpret. First, the ideology of the median Justice according to the Cohen-Spitzer party-based technique is 0.7—the score associated with a Justice appointed by a Republican President and confirmed by a Democratic Senate—in every year in the sample. Second, the Segal-Cover median scores indicate that the Court shifted to the left in 1988-1991 (with Kennedy replacing Powell and Souter replacing Brennan), which seems intuitively wrong based on what we know about the political ideologies of these Justices. Restricting the focus to the Bailey and Martin-Quinn measures reveals a more sensible pattern, and one broadly consistent with the pattern observed for mean ideology scores: the Court became somewhat more conservative in the early 1980s (when O'Connor replaced Stewart), and sharply more conservative in the early 1990s (when Thomas replaced Marshall).<sup>37</sup>

37. Even here there are some important inconsistencies. First, while both Martin and Quinn's results and Bailey's results show the Court becoming more conservative in 1981-82, Bailey estimates that this was a relatively large change (about as large as the in 1991 shift), but Martin and Quinn estimate that it was an extraordinarily small change—almost imperceptible when compared to the 1991 change. Second, considering only the median, rather than the mean, indicates no significant change in Supreme Court ideology from 1992 to 2002, whereas the mean ideology shifted to the left in this period.

For purposes of the subsequent discussion and analysis, this Article concentrates on what, based on the foregoing data, are the two most important and relevant shifts in Supreme Court ideology in the sample period: a first rightward shift in 1981-82, and a second, somewhat more pronounced rightward shift in 1991-92.

FIGURE 5

Supreme Court Mean Ideology Score: Four Measures

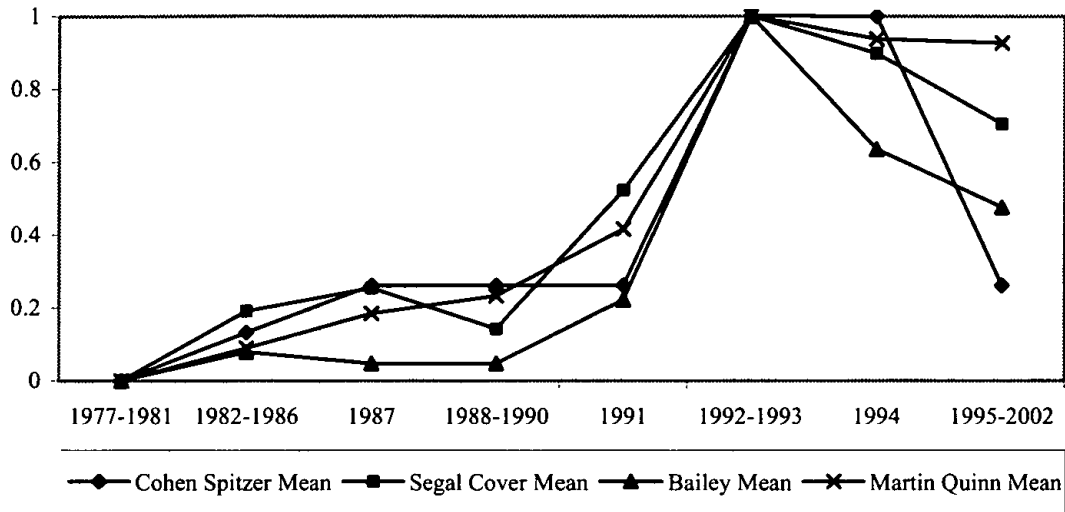
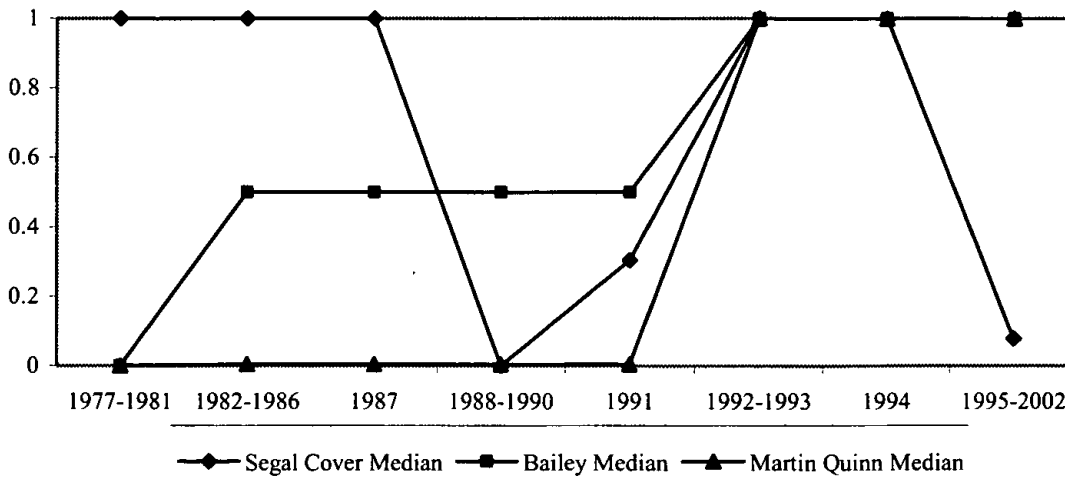


FIGURE 6

Supreme Court Median Justice Ideology: Three Measures



### B. Sample Selection

In order to test whether the ideological shifts discussed above had the predicted effect on Supreme Court deference decisions, the relevant cases in the sample period must be identified and coded for the strength and direction of the deference signal they send. Ideally, this research would replicate the Cohen-Spitzer project by employing, at least initially, identical case selection and coding techniques. Cohen and Spitzer's dataset, however, is not publicly available, and their paper does not provide a description of their techniques that is detailed enough to generate identical data.<sup>38</sup> Therefore, this article's method makes use of the search tools available through a number of existing online databases to compile the set of Supreme Court cases decided between 1977 and 2002 in which a significant portion of the opinion dealt with the issue of how much deference reviewing courts ought to accord to agency decisions.

Three online databases of Supreme Court opinions were searched: Westlaw, Lexis, and USSCPlus,<sup>39</sup> using search assistant tools provided by each of these sources.<sup>40</sup> I also performed a supplemental Lexis keyword search<sup>41</sup> and used Westlaw's KeyCite subject headings to check for additional cases on the same legal topics that did not come up in the other searches.<sup>42</sup> Cases that did not involve an issue relating to the amount of deference that the judiciary ought to accord to an administrative agency's decision were eliminated from the dataset. This case selection procedure yielded 221 relevant cases in the 1977-2002 period, an average of 8.5 cases per year.<sup>43</sup> A complete list of the 221 cases included in the analysis is provided in Appendix A.

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38. I contacted Professors Cohen and Spitzer requesting either their original data or a detailed description of their coding methodology, but unfortunately they were unable to provide this information.

39. All the searches were conducted December 23-25, 2002.

40. On Westlaw, all cases listed in Westlaw's KeySearch service under the headings "Administrative Law-Judicial Review-Scope of Review" and "Administrative Law-Statutory Construction" were examined. On Lexis, all cases listed in Lexis's Search Advisor under the heading "Administrative Law-Judicial Review-Standards of Review-Standards Generally" were examined. On USSCPlus, all cases under the heading "Administrative Law" were examined. The use of these on-line search assistants may be justified not only because they are convenient for the researcher but also because inclusion of a case in such a directory is likely to correlate strongly with whether that case would be viewed by lower courts as an important signal of the Supreme Court's views.

41. This search included any variant on the words "agency" or "commission" within five words of the word "interpretation."

42. This entailed checking the Westlaw KeyCite headnotes for each case found through the initial searches, identifying those headnotes that were most relevant to the issue of judicial deference to agency decisions, and using Westlaw's "Most Cited Cases" function to identify all other Supreme Court cases that raised the same legal issue. If any of these cases raised an issue of judicial deference to an agency decision, I added the case to the dataset. This procedure identified an additional thirty-three cases for inclusion in the dataset.

43. It is worth noting the relatively high degree of variance in the number of cases decided in different years. The year in the dataset with the most cases is 1981. Sixteen

There are three potentially important distinctions between this approach to sample selection and Cohen and Spitzer's approach. First, Cohen and Spitzer, at least in their first article, claim to restrict their attention to statutory interpretation cases.<sup>44</sup> The dataset analyzed in this Article, however, includes all cases where an issue regarding the degree of judicial control over agency decisionmaking came up; the cases are not limited to statutory interpretation (i.e., *Chevron*) cases, nor are the cases distinguished according to the doctrinal categories into which lawyers and legal scholars would normally sort them. There are two reasons for this approach. The first and more substantive reason is that the hypothesis under consideration—that the Supreme Court shifts power to its ideological allies—does not differentiate, as lawyers arguing a case might, between different types of agency action and the different tests or verbal formulations that courts employ. One might press this point further by suggesting that the ordinary doctrinal classifications may obscure the degree to which the Supreme Court shifts power between agencies and reviewing courts, and that these patterns become clearer when evaluating doctrinally distinct cases together. The second reason for considering doctrinally distinct cases in one dataset is that, given the relatively small number of cases—only 221 total—subdividing the dataset by doctrinal category is likely to make it too difficult to discern general patterns.<sup>45</sup>

The second difference is that Cohen and Spitzer (at least in their later paper) appear to consider all cases in which the Supreme Court heard an appeal from a case involving an administrative agency, looking at whether the government won or lost at the circuit court level and the Supreme Court

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decisions that year involved some issue of the appropriate level of judicial deference to agency decisions. In contrast, 1993 saw only three such cases—the lowest number for any year in the sample. The variance of the number of cases decided per year is 12.1, and the standard deviation is 3.48.

44. See Cohen & Spitzer, *Puzzle*, *supra* note 6, at 103 (stating that their dataset contains “administrative appeals that required a decision on statutory interpretation”). The later article also appears at the outset to focus exclusively on deference to agency statutory interpretations. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 433 (“We consider specifically the doctrine of judicial deference, elucidated in *Chevron* . . . wherein the Supreme Court instructed appellate courts to defer to any ‘reasonable’ statutory interpretation offered by administrative agencies.”). Compare Cohen & Spitzer, *Puzzle*, *supra* note 6, at 103 tbl.7, with Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 459 tbl.3 (noting that the number of Supreme Court cases per year reported in the second paper are considerably higher than the number reported in the first paper, suggesting that the dataset used for the later work included additional cases).

45. On this point, the number of statutory interpretation cases that Cohen and Spitzer report seems too large. For example, according to Cohen and Spitzer, thirteen Supreme Court cases in 1989 dealt with an issue of deference to an agency's statutory interpretation. See Cohen & Spitzer, *Puzzle*, *supra* note 6, at 103 tbl.7. However, a Westlaw search revealed only three cases that year that even cited *Chevron*. Again, because Cohen and Spitzer's case selection method is not explicit, it is unclear how they arrived at thirteen statutory interpretation cases, but it seems highly implausible that ten cases raising a *Chevron* issue would not cite *Chevron*.

level, without filtering out those cases that raised no real issue of deference to an agency decision. Because Cohen and Spitzer's dataset was not accessible, I cannot verify this is the case, but it seems likely given their description of their methodology<sup>46</sup> and the puzzlingly high number of cases in their dataset relative to my attempt at replication.<sup>47</sup> But not all lawsuits between an agency and a private party—not even in cases that involve some statutory interpretation issue—involve the issues of judicial deference to agency action with which the Cohen-Spitzer hypothesis is concerned. Some such cases, for instance, only raise questions of federal civil procedure,<sup>48</sup> attorneys' fee awards,<sup>49</sup> or other issues peripheral to the question of the validity of agency decisions. I screened out such cases, which may explain why my case count is considerably lower than Cohen and Spitzer's for the years where our samples overlap.

Third, unlike Cohen and Spitzer, this research project does not examine denials of certiorari, nor does it examine patterns of deference at the lower court level in cases where the Supreme Court did not grant review.<sup>50</sup> Therefore, this study does not attempt to replicate all aspects of Cohen and Spitzer's original empirical work but only those elements of their analysis that focused on the cases actually decided by the Supreme Court. This focus on decided cases is substantively justified given the nature of the Cohen-Spitzer hypothesis, which emphasizes the signals that the Supreme Court sends to lower courts. It seems more plausible that the Supreme Court would influence lower court decisionmaking through its express holdings rather than through patterns of cert grants and cert denials; the former are easily observable by the lower courts, whereas the latter are not. Therefore, while analysis of lower court decisionmaking patterns and Supreme Court certiorari decisions would enrich the analysis, the main hypothesis under investigation can be assessed, at least as a preliminary matter, by focusing on whether and how the Supreme Court shapes deference doctrine through the Court's written opinions.

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46. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 456-57 (examining cases where circuit courts upheld or reversed the government's position).

47. See *id.* at 459 tbl.3 (listing outcomes in cases reviewing agency action from 1978-89).

48. See, e.g., *Sullivan v. Finkelstein*, 496 U.S. 617 (1990) (reviewing whether a district court's order to the Secretary of the Department of Health and Human Services was a "final order" sufficient to confer appellate jurisdiction on the court of appeals but not reaching the substantive question of whether the Secretary's determination was legally valid).

49. See, e.g., *Sullivan v. Hudson*, 490 U.S. 877 (1989) (holding that the Equal Access to Justice Act allows courts to award attorneys' fees to a Social Security claimant for representation before an administrative proceeding following a judicial remand to the Secretary of Health and Human Services).

50. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 462-65.



### C. Generating an Annual Deference Signal: Coding and Weighting

#### 1. Coding: Pro-deference or Anti-deference?

After identifying the set of cases in which the Supreme Court arguably sent a message to the lower courts regarding the appropriate level of deference to administrative agency decisions, the next issue involves how to evaluate and weight the relative strength of those messages. As a first step, I attempted to classify all cases as pro-deference or anti-deference. But even this simple approach involves some problematic coding issues.

First, some cases have mixed holdings; that is, the Supreme Court called for deference to the agency as to one portion of its decision but refused deference on some other element of the case. For example, in *American Textiles Manufacturing Institute v. Donovan*,<sup>51</sup> the Court upheld the Secretary of Labor's decision not to use cost-benefit analysis when setting cotton dust standards under the Occupational Safety and Health Act (OSHA), but invalidated another OSHA regulation related to wage guarantees for transferred employees because the relationship between the regulation and OSHA's health and safety goals was not supported by a sufficient statement of reasons. Similarly, the Court in *NLRB v. Baptist Hospital*<sup>52</sup> upheld one of the challenged National Labor Relations Board (NLRB) rules relating to union solicitation in hospitals as supported by substantial evidence, but invalidated a related rule as too sweeping.

Second, the message some cases send is ambiguous because, while the Court upholds the agency action, it does so using language, often cited in future cases, that seems to stand for the proposition that courts should scrutinize certain types of agency action quite carefully. For instance, *Lyng v. Payne*<sup>53</sup> upheld a decision by the Farmers Home Administration as consistent with the agency's regulatory requirements, but noted that an agency's authority is no greater than that conferred by Congress—a proposition, cited in a few subsequent cases, that suggests limits on agency discretion. The opposite can occur as well. For instance, in *Lechmere, Inc. v. NLRB*,<sup>54</sup> the Court invalidated an NLRB decision as inconsistent with established precedent and held further that the stare decisis principle trumped the normal deference that would be accorded that sort of agency decision. But, though the outcome of the *Lechmere* case is anti-deference, the opinion's language regarding the judicial deference that NLRB opinions are ordinarily due was cited in several subsequent cases to support pro-deference outcomes. Similarly, the Court sometimes upholds an

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51. 452 U.S. 490 (1981).

52. 442 U.S. 773 (1979).

53. 476 U.S. 926 (1986).

54. 502 U.S. 527 (1992).

agency action and recites standard pro-deference language, yet reaches its conclusion without according special deference to the agency's determination. This appears to be what happened in *North Haven Board of Education v. Bell*,<sup>55</sup> where the Court upheld anti-discrimination regulations promulgated by the Department of Health, Education, and Welfare (HEW) and noted that agency interpretations are normally entitled to great deference, but asserted that the ordinary level of deference was not appropriate in that particular case.<sup>56</sup>

But these potential problems turn out to be less severe than one might expect. For the overwhelming number of cases in the dataset, the outcome of the particular case and the most-cited legal propositions articulated in that case point in the same pro-deference or anti-deference direction. Coding of ambiguous cases adhered to the following principles. First, where one aspect of the holding appeared considerably more important than the others, the deference signal sent on the more important element of the case was used. Second, where there were multiple aspects of the Court's holding that seemed equally important, but one aspect was cited significantly more often than the others in subsequent cases, I generally presumed that the more-cited provision was the more relevant aspect of the Court's holding. Third, because anti-deference signals are so much rarer in the data, in close cases I erred on the side of coding mixed or ambiguous cases as anti-deference if the anti-deference portion of the holding appeared significant. For a few cases, it was sufficiently difficult to classify the holding as pro- or anti-deference (i.e., cases where separate portions of the holding pointed in different directions or where the general legal principle that the Court stressed appeared at odds with the outcome in the particular case) that the cases could not confidently be categorized; these cases (only 4 out of the 221 in the dataset) were assigned a deference score of zero. These coding decisions obviously involve debatable judgment calls. For that reason, and in the general interests of transparency, coding decisions for ambiguous cases are listed in Appendix B.

Another potentially problematic issue concerns whether to include cases that involve Supreme Court review of state supreme court decisions, direct review of federal district court decisions, or exercises of the Supreme Court's original jurisdiction. Because the main question at issue is the degree to which the Supreme Court influences the behavior of federal appellate courts, one might reasonably question whether decisions not involving review of federal appellate court decisions are relevant to the analysis. I believe that they are. The Supreme Court can communicate its

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55. 456 U.S. 512 (1982).

56. See *id.* at 522 n.12 (relating to Title IX regulations).

deference doctrine through its holdings regardless of which lower court's decision it is reviewing. Indeed, fundamental to the Cohen-Spitzer hypothesis is the premise that Supreme Court decisions matter not only to the particular court whose decision is appealed, but more broadly as a signal of the Court's preferences to all lower courts. Again, this potential problem turns out to be marginal in practice, as only fourteen cases in the dataset do not involve review of a federal circuit court decision. These cases are listed in Appendix C, and their exclusion does not fundamentally affect the results.

There is another more significant and more conceptual difficulty with assessing the overall deference signal that the Supreme Court sends to lower federal courts in any given year. This is the question of whether the relevant variable is the annual *aggregate* deference signal (the total number of pro-deference cases decided in a given year net the number of anti-deference cases decided in the same year), or the annual *average* deference signal (each year's aggregate deference signal divided by the number of cases decided that year).

On one hand, one might suppose that the total number of cases that the Court chooses to hear is itself an important aspect of the message that it sends to the lower courts. Thus, a year in which the Court issued nine pro-deference cases and no anti-deference cases ought to be considered as a year when the Court sent a stronger pro-deference signal than a year in which the Court decided three pro-deference cases and no anti-deference cases. Or, to take a starker example, what if the Court in Year X decides nine pro-deference cases and one anti-deference case and in Year Y decides only one case but issues a pro-deference holding in that case? Taking the average signal would suggest a stronger pro-deference signal in Year Y than in Year X (1.0 vs. 0.9), but that conclusion might seem suspect.

On the other hand, the number of cases per year is small, and a number of other factors may influence the number of cases on the Court's docket that happen to raise a deference issue. Assigning too much weight to the aggregate deference signal may obscure the Court's actual attitude toward the appropriate level of judicial deference to agency decisions. For instance, suppose in Year X the Court issues two pro-deference holdings and one anti-deference holding, and in Year Y the Court issues ten pro-deference holdings and five anti-deference holdings. Here, the proportion is constant, but looking at the aggregate signal would suggest that the pro-deference signal in Year Y is much stronger than in Year X. But if there is enough random fluctuation in the number of cases, that conclusion might be seriously misleading. Turning from the hypothetical to the actual, the number of Supreme Court cases decided per year with written opinions

declined substantially between 1977 and 2002.<sup>57</sup> The aggregate signal is therefore likely to exaggerate the signal sent in the earlier years of the sample relative to the later years.

The theory of Supreme Court signaling to lower courts is too underdeveloped to decide conclusively between these alternatives. Cohen and Spitzer approach the problem by estimating, based on the average number of decided cases, the rate at which the Supreme Court denied cert in deference cases and “deflating” the average deference signal accordingly.<sup>58</sup> This study takes a different approach, reporting both the aggregate deference signal and the average deference signal.

## 2. Case Weighting—Three Approaches

### a. Equal Weighting

The simplest way to generate an annual deference signal is to add up or average the pro- and anti-deference cases in each year, and that is the first approach employed here. Every case where the Supreme Court indicated that deference to administrative agencies was appropriate is assigned a score of +1; every case where the Supreme Court endorsed more aggressive judicial scrutiny of agency decisions is assigned a score of -1.

The simple case-counting approach, however, implies a strong and implausible assumption: that every case the Supreme Court decides sends just as strong a signal to the lower courts as every other case. This leads to some bizarre coding results. According to the simple case-counting approach, *Chevron v. NRDC*<sup>59</sup> and *Community Television of Southern California v. Gottfried*<sup>60</sup> both get a “+1” pro-deference score even though the former is perhaps the most significant and widely-cited administrative law decision of the last century while the latter stands only for a relatively obscure proposition about Federal Communications Commission (FCC) licensing authority. This problem raises serious questions about the validity of any results derived using an equal-weighting method. Unfortunately, there is no easy, objective way to validly and reliably weight Supreme Court cases by their importance, i.e., their subsequent influence on the decisions of lower courts. But measures more refined than simple case-counting are possible. Therefore, this study employs two alternative weighting techniques. The first follows Cohen and Spitzer’s method of weighting Supreme Court reversals more heavily than affirmances. The second employs an alternative method of weighting cases

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57. See *infra* Table 6 and Figure 13.

58. See *infra* note 78 (comparing the two different methodologies).

59. 467 U.S. 837 (1984).

60. 459 U.S. 498 (1983).

by their influence measured as a function of the frequency of subsequent citations.

*b. The Cohen-Spitzer Method: Double-Weighting Reversals*

Cohen and Spitzer weight those cases where the Supreme Court reverses a lower court decision twice as heavily as cases where the Supreme Court affirms the lower court. Thus, if the lower court did not defer to the agency but the Supreme Court reversed, the case is coded as a "+2," but if the lower court deferred and the Supreme Court affirmed, the case is coded as a "+1".<sup>61</sup> The rationale is that lower court judges do not like getting reversed, so they treat reversals as more salient signals.<sup>62</sup>

Notwithstanding the evidence that lower court judges do not like to be reversed, the assumption that reversals send a signal twice as strong as affirmances is problematic. The key dynamic involved in the theoretical framework Cohen and Spitzer elaborate is the signal that a Supreme Court decision sends to all lower courts. Even if judges are particularly averse to having their own decisions overturned, it is not clear why the signal sent by the Supreme Court in a given case to other lower courts depends on whether the lower court in that case got reversed. In fact, there is at least a plausible argument that, because most of the cases that the Supreme Court takes are cases it wants to reverse,<sup>63</sup> affirmances may send an especially strong signal.

Even if one thinks that reversals are, on average, stronger signals than affirmances, the Cohen-Spitzer weighting system is still not entirely satisfactory. First, the choice of a 2:1 ratio of signal strength is an arbitrary but potentially potent assumption. Why not 3:1? Or 1.5:1? Because the methodology involves counting cases, these numbers have cardinal as opposed to purely ordinal meaning, and the results are not likely to be robust to alternative weightings. Also, this weighting system still does not address the problem illustrated by the *Chevron/Gottfried* comparison noted above.<sup>64</sup> Nonetheless, while the Cohen-Spitzer emphasis on whether the Supreme Court decision was a reversal or an affirmance is questionable, in

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61. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 464.

62. See Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decisionmaking*, 23 J. ECON. BEHAV. & ORG. 31 (1994); see also Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 128-32 (1983). But see Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980).

63. See John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335, 335 (1990). Reversals were indeed more common than affirmances in my sample of 221 cases, though not by as much as one might expect. Of the 221 cases, 132 (59.7%) were coded as reversals, 87 (39.4%) were affirmances, and 2 (0.9%) involved a sufficiently divided holding that they could not be satisfactorily classified as either and were given a score of zero under this weighting methodology.

64. See *supra* text accompanying notes 59-60.

the interests of comparability all cases in this sample are coded using this methodology. For some cases, the Supreme Court reversed in part and affirmed in part, and both parts of the decision were either pro- or anti-deference. Cohen and Spitzer's discussion of their methodology does not explain how they coded such cases. Because of the emphasis on lower courts' fear of any reversal implied by the weighting theory, these cases are coded as reversals.

### *c. Citation-Weighted Influence Scores*

An alternative approach is to use citation counts as a proxy for influence. Such an approach is obviously imperfect, especially since simple citation counts do not reveal whether a given citing case relies on the cited case for the outcome-determinative legal test or whether the cited case is merely listed in a string cite buried in a footnote.<sup>65</sup> Nonetheless, citation counts are a reasonable proxy for case influence and importance.

I weight each case in the sample by multiplying its raw deference score (+1 or -1) by an "influence factor." The influence factor is calculated by, first, finding the Westlaw KeyCite headnote for each case that most closely corresponds to the deference signal. If multiple headnotes appeared relevant, the one for which the case was more often cited was chosen. Then, I used Westlaw's "Most Cited Cases" function to count the number of times the case had been cited for the relevant proposition by federal courts of appeal as of December 26, 2002. The "influence factor" for each case is a function of the number of citations and the number of months since the case was decided.<sup>66</sup> The 221 cases in the sample ranged from a maximum influence factor of 4.85 (*Chevron*)<sup>67</sup> to a minimum of 0.14 (*Mohasco Corp. v. Silver*)<sup>68</sup> with a mean value of 1.94 and a median of 1.88.

A cursory scan of the cases ranked by their influence factor (provided in Appendix D) suggests that this measure is generally consistent with legal scholars' intuitions about which of the Supreme Court's administrative law decisions have been most important. According to this weighting technique, the top five most influential cases out of the 221 in the sample

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65. It would be theoretically possible, but far too time consuming, to check the context of each case citation.

66. The precise influence function calculation is  $f(c, m) = \ln\left(1 + \frac{1+c}{1+\ln(m)}\right)$ , where  $c$  is the total number of citations and  $m$  is the total number of months. A natural log function of months in the denominator of the fraction inside the parentheses is used because of the assumption that cases are cited frequently in the few years after they are first decided but (with a few exceptions) less frequently in the more distant future. Taking the natural log of the function inside the parentheses captures the assumption of decreasing marginal significance of additional case citations.

67. 467 U.S. 837 (1984).

68. 447 U.S. 807 (1980).

are, in descending order of influence, *Chevron*,<sup>69</sup> *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,<sup>70</sup> *Heckler v. Campbell*,<sup>71</sup> *Bowen v. Georgetown University Hospital*,<sup>72</sup> and *INS v. Cardoza-Fonseca*.<sup>73</sup> The weighting system also seems to do a reasonably good job in assigning high scores both to influential recent cases, including *Christensen v. Harris County*<sup>74</sup> and *United States v. Mead Corp.*,<sup>75</sup> which rank 21st and 35th with respective influence factors of 3.48 and 2.94, and to influential older cases, such as *Vermont Yankee Nuclear Power Corp. v. NRDC*,<sup>76</sup> which comes in 32nd on the list with a score of 3.02.

Thus, the influence-weighted scores, for all their imperfections, seem to offer distinct advantages over weighting cases by whether they were affirmances or reversals, or counting all cases equally. Nonetheless, all six measures of deference signal strength (aggregate and average yearly scores for each of the three weighting methods) are considered in the subsequent analysis.

### III. RESULTS

Following the various coding and weighting methodologies described above, this section presents the observed trends in judicial deference doctrine for the 1977-2002 period. This simple empirical analysis, like the original Cohen and Spitzer papers, does not attempt to control for other factors. This is not only because such an analysis would be methodologically difficult given the nature of the problem and the small number of cases, but also because the Cohen-Spitzer result under investigation is not merely a marginal comparative statics hypothesis, but rather a strong claim that observable trends in deference doctrine can be predicted *solely* from relative political alignments of courts and agencies.

The results are somewhat surprising. First, the patterns of deference doctrine in the Supreme Court's decisions do not seem to match what Cohen and Spitzer's theory predicts. Although the patterns in the 1977-1990 period are roughly consistent with the theory, even here there are some significant differences between my findings and the data Cohen and Spitzer report. In particular, in terms of aggregate deference signal, I find

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69. 467 U.S. 837 (1984).  
70. 463 U.S. 29 (1983).  
71. 461 U.S. 458 (1983).  
72. 488 U.S. 204 (1988).  
73. 480 U.S. 421 (1987).  
74. 529 U.S. 576 (2000).  
75. 533 U.S. 218 (2001).  
76. 435 U.S. 519 (1978).

high degrees of deference demanded in the late 1970s, whereas Cohen and Spitzer found relatively low levels.

Much more importantly, there is no evidence that the Supreme Court signaled a contraction of deference doctrine in the early to mid-1990s, as the Cohen-Spitzer theory would predict. Quite the opposite. Though the trend is not completely clear—and shows a worrying lack of robustness to different specifications—the data seem to indicate a significant *spike* in the average level of judicial deference called for by the Supreme Court from about 1993-94 to about 1996-97, followed by a relatively steady decline until 2000. My results are hard to square with the Cohen-Spitzer theory, since the conservative Supreme Court appears to be shifting power from relatively conservative appellate judges to Clinton's more liberal executive agencies.

Also contrary to Cohen and Spitzer's results, these results do not find the predicted difference between the Supreme Court's treatment of executive and independent agencies. Though the independent agencies tended to receive less deference throughout the sample period, this was the case not only under Reagan (where the Cohen-Spitzer theory would predict such a difference) but also under Clinton (where the Cohen-Spitzer theory would predict the opposite). Nor did investigation of whether the Court treated appeals from liberal circuits differently than appeals from conservative circuits yield any discernable distinctions. In those years when the mix of cases was sufficient to allow a comparison, the Court appeared to send a very similar deference signal in cases from both liberal and conservative circuits. This additional evidence casts further doubt on Cohen and Spitzer's political explanation for changing patterns of deference doctrine.

Consistent with the Cohen-Spitzer theory, however, there are noticeable differences in the voting patterns of the conservative Chief Justice Rehnquist and the liberal Justice Stevens, both of whom were on the Court throughout the entire sample period. Rehnquist was more prone than Stevens to take a pro-deference line when Reagan was in office, but during the Clinton years Rehnquist was considerably *less* likely to defer to agencies than Stevens. But although these results suggest that something like the Cohen-Spitzer theory may have some influence on Justices' voting behavior, that influence appears more marginal than Cohen and Spitzer's earlier results implied. Stevens and Rehnquist diverged in the predicted manner, but this divergence occurred in barely more than a third of the cases in the sample; Cohen and Spitzer's predicted effect is likely to be even more muted with respect to the more centrist swing Justices.



*A. Changes in the Court's Deference Signal, 1977-2002*

Recall that Cohen and Spitzer claim that their data, weighted according to their method, shows relatively low deference signals in the late 1970s, then a pro-deference spike in the early to mid-1980s, and then a decline in the late 1980s. They interpret this pattern as the result of a conservative Supreme Court's reaction to the rightward shift of the agencies in the early 1980s. The Court reined in the more liberal appellate courts by issuing a series of strongly pro-deference rulings, but once equilibrium was restored, the overall deference signal reverted to more or less where it had been before.<sup>77</sup>

Below are the graphical results of an attempt to replicate and extend Cohen and Spitzer's analysis.<sup>78</sup> Figure 7 shows the results for the 1977-

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77. As noted above, *supra* note 15, Cohen and Spitzer rightly stress that the variable of interest is not the absolute magnitude of the Supreme Court's deference signal, but rather the change in that signal over time. In equilibrium, circuit court judges will take the Supreme Court's preference into account when deciding cases—i.e., circuit judges will consider their utility from deciding the case the way they want, their disutility from being reversed (and from deviating from announced Supreme Court doctrine), and the probability that the Supreme Court will reverse their decision. When the Supreme Court's preferred level of deference is known, therefore, circuit court judges will adjust their behavior and the absolute deference signal, whatever it may be, will remain relatively constant. This phenomenon is closely related to the well-known finding that changes in the underlying liability standard have no long-term effect on plaintiff win-rates at trial, because the parties adjust their behavior to take the new standard into account. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J.L. STUD. 1 (1984) (discussing the relationships between fully litigated disputes and those settled either before or during litigation).

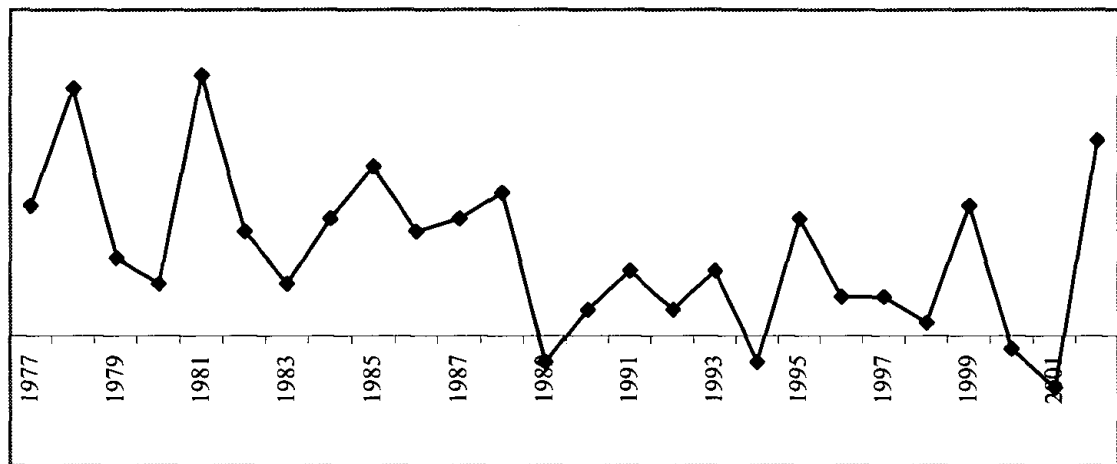
If litigants and circuit court judges could anticipate and perfectly adjust to changes in Supreme Court preferences with regard to the appropriate level of deference to agencies, then shifts in Supreme Court deference doctrine would never have an observable effect on the deference signal contained in the cases the Court actually decides. Such perfect and instantaneous adjustment is unlikely in the real world, for a few reasons. First, appeals sometimes take some time to get through the system, so that some appeals may be decided before a shift in Supreme Court doctrine has become clear. As Cohen and Spitzer note, however, in the kinds of public law cases at issue here, the appeals process is often much more rapid than it is in other contexts. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 460 n.60 (retracting a claim from a previous article that claimed a deference signal would not be issued until several years after the preference changes). Second, if circuit courts are uncertain about whether a particular Supreme Court case (or set of cases) really represents a shift in deference doctrine, the circuit courts' estimate of the Supreme Court's preferred deference level will be somewhere in between the old standard and the new one. This means that circuit court decisions will shift, but, at least initially, will not shift enough to satisfy the Supreme Court. Therefore, when the Supreme Court changes deference doctrine, the pattern of case decisions is expected to be a sustained directional shift in the deference signal for some period of time, until the lower courts have internalized the new standard, after which the average deference signal ought to return to its "natural" equilibrium level.

78. As noted above, this is not an exact replication. First, Cohen and Spitzer weight their deference signals with a certain number of cert denials, coded as 0. That is, they use the average deference signal, but "deflate" it by assuming a constant number of certiorari "slots" per year. Those slots that are not filled—because the total number of cases decided is less than the number of slots—are assigned a value of 0 when taking the average. Instead of following this method, the aggregate and average deference scores are shown separately.

2002 period using the aggregate reversal-weighted annual deference score, while Figure 7 uses the average reversal-weighted deference score. Of the versions of the analysis presented, these seek to replicate, as faithfully as possible, Cohen and Spitzer's original case-weighting methodology.

FIGURE 7

Reversal-Weighted Aggregate Deference Score (Cohen-Spitzer Method)



In the interests of greater comparability, the average deference score is “deflated” by presumed cert denials, using the maximum number of cases decided in any year (sixteen) as the ceiling. (Cohen and Spitzer instead use two standard deviations above the average number of cases decided per year, but because, as they note, this ceiling is never exceeded in the actual sample, the choice of ceiling makes no difference except with respect to the (already arbitrary) absolute magnitude of the signal values.) Figure 9 compares the average deference score—using the Cohen-Spitzer weighting scheme—with the deference score when the values are “deflated” by dividing the aggregate signal not by the number of cases decided, but by 16—the maximum number of cases decided in any given year.

FIGURE 8

Reversal-Weighted Average Deference Score

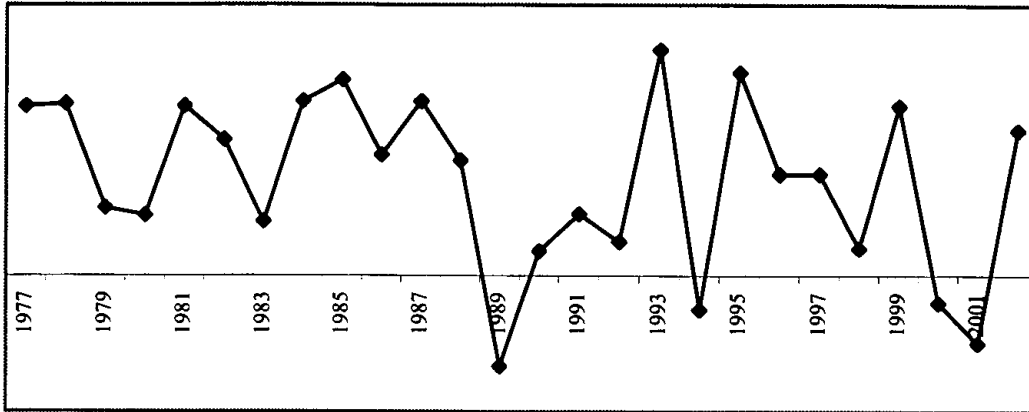
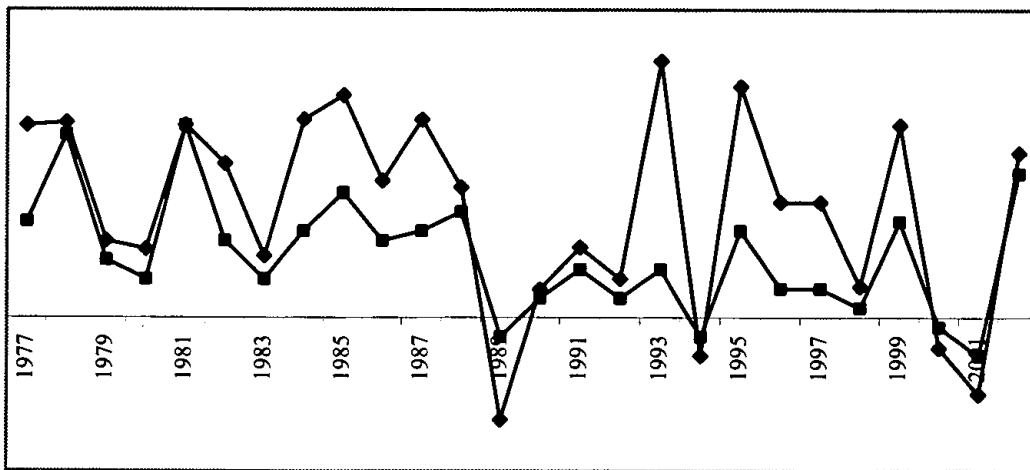


FIGURE 9

Reversal-Weighted Average Deference Score: With and Without Deflation by Number of Cert Denials



- ◆ Reversal-Weighted Average Deference Score
- Reversal-Weighted Average Deference Score (deflated by cert denials)

The results in Figure 7 do not look much like what Cohen and Spitzer report, nor do they appear terribly consistent with the theory. For instance, there is a sharp pro-deference spike in 1978, approximately equal in magnitude to the strong pro-deference signal of 1981. Even more puzzling, there is a two-year decline in the strength of the deference signal from 1981 to 1983, exactly the period where Cohen and Spitzer's theory, and the data they report, say we should see a progressively stronger deference signal. Overall, though the deference signal post-1990 seems on average weaker than the pre-1990 deference signal, there is no clearly discernible pattern or trend in the data sufficient to support any strong conclusions about changing patterns of deference doctrine.

Figure 8, showing the average (as opposed to aggregate) deference score, also reveals no clear pattern. The average deference signal appears somewhat more volatile after 1989 than beforehand, and there appears to be a significant dip in the 1989-1992 period, but otherwise there is no indication of systematic changes in deference doctrine.

The inconsistency of Cohen and Spitzer's findings with this attempt at replication is puzzling. Clearly, the difference in results arises from differences in what was included in the sample, and from differences in signal aggregation methodology. Because Cohen and Spitzer's data is not publicly available, however, the exact reasons for this divergence are unknown.

Next, I present the results for the the annual deference score when applying the unweighted and influence-weighted methods. These results are presented graphically in Figure 10 and Figure 11. Figure 10 presents the results for the aggregate score, while Figure 11 presents the average annual deference signal.

FIGURE 10

Annual Aggregate Deference Score

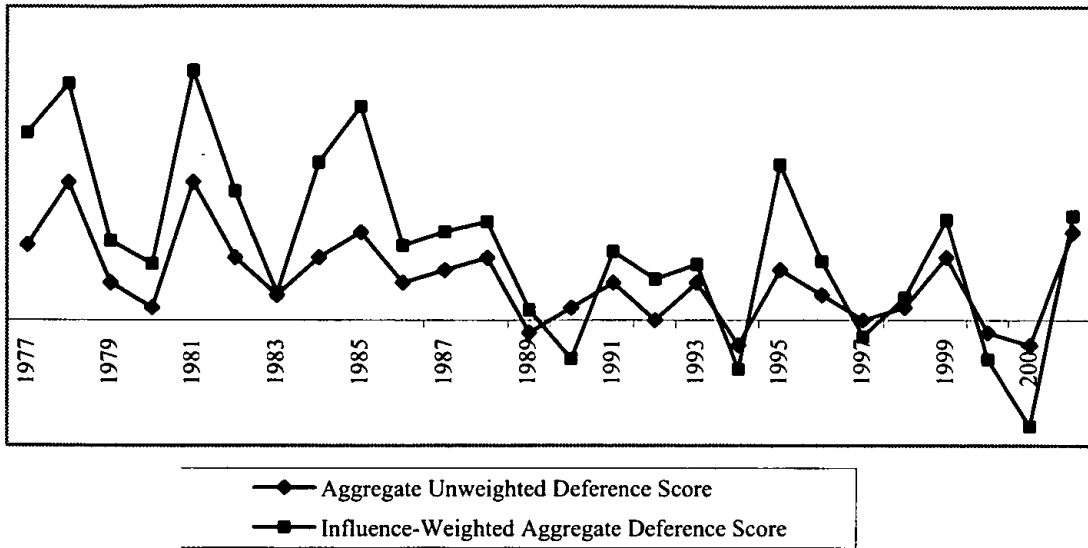
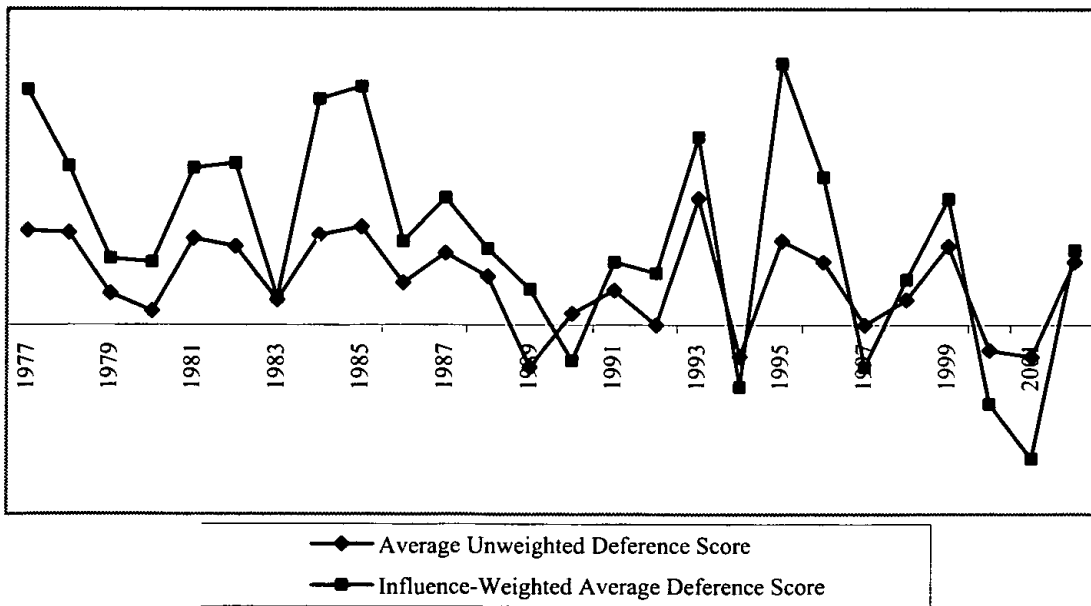


FIGURE 11

Annual Average Deference Score



The unweighted scores do not reveal any particularly striking patterns. But the influence-weighted scores do suggest some potentially interesting trends. First, although there is a lot of noise in the data, the annual aggregate influence-weighted score—like the aggregate reversal-weighted score—appears to show a stronger pro-deference signal in the 1977-1988 period than in the 1989-2002 period. Second, and perhaps most interestingly, the average annual influence-weighted deference score suggests the following pattern: a decline in the late 1970s, an increase from about 1981 to about 1985, a decrease from 1985 to 1990, another increase from 1990 to about 1995, and then another decrease from 1995 to 2001. These two patterns—a drop and level-off in the aggregate deference signal and a “double hump” in the average deference signal—are somewhat easier to see by taking a multi-year moving average of the influence-weighted deference signal. Two and four-year moving averages are depicted for the aggregate and average influence-weighted deference signals in Figure 12 and Figure 13.

FIGURE 12

Aggregate Influence-Weighted Deference Score (Moving Average)

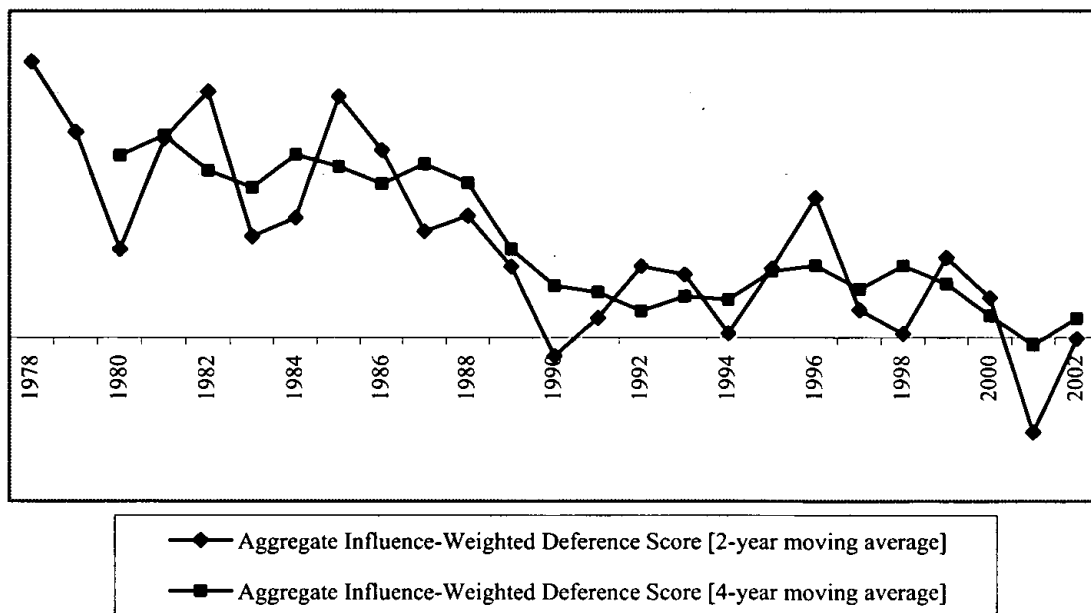
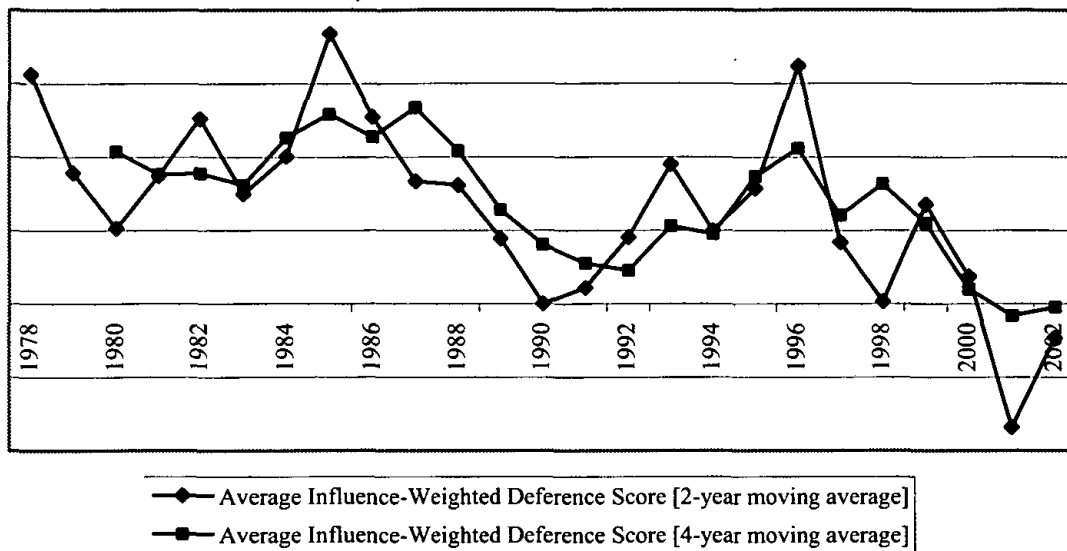


FIGURE 13

Average Influence-Weighted Deference Score (Moving Average)



The drop and level-off in the aggregate deference signal may have more to do with a decline in the total number of cases heard by the Supreme Court than anything else. As Table 6 and Figure 14 demonstrate, the number of cases heard by the Court each term has dropped substantially. Any methodology that implicitly presumes a roughly constant number of potential slots on the Court's docket, as both the aggregate signal method and Cohen and Spitzer's deflation method do, is therefore likely to exaggerate the strength of the signal in the early years in the sample relative to the later years.

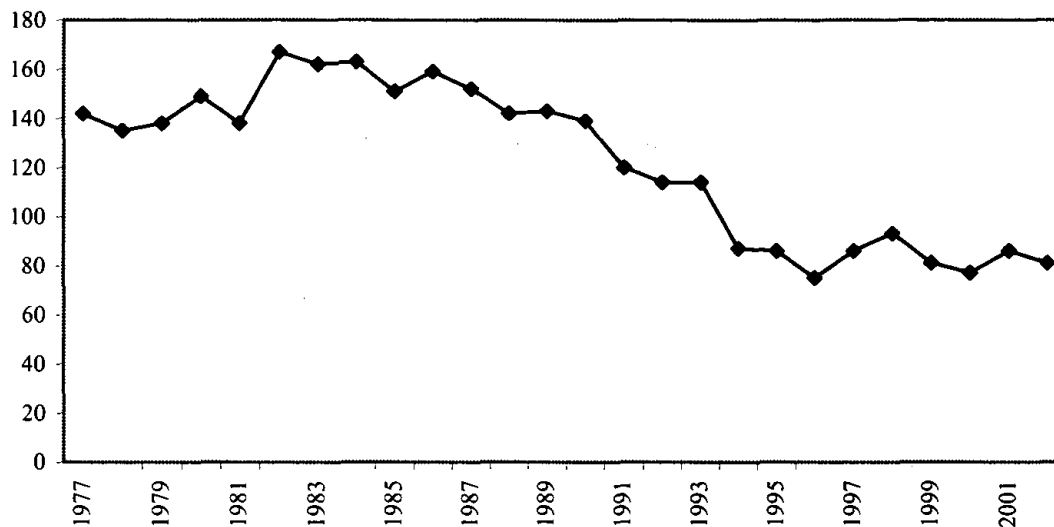
TABLE 6

Year	Number of Supreme Court Cases with Full Written Opinion*	Year	Number of Supreme Court Cases with Full Written Opinion
1977	142	1990	139
1978	135	1991	120
1979	138	1992	114
1980	149	1993	114
1981	138	1994	87
1982	167	1995	86
1983	162	1996	75
1984	163	1997	86
1985	151	1998	93
1986	159	1999	81
1987	152	2000	77
1988	142	2001	86
1989	143	2002	81

\* Source: *Harvard Law Review*, annual Supreme Court statistics.

FIGURE 14

Number of Cases (with Full Opinion)



The “double hump” evident in the average deference signal is therefore the more interesting and intriguing pattern in the data, and potential explanations for this phenomenon will be considered below.<sup>79</sup> More generally, both the aggregate and average deference signals are fundamentally inconsistent with Cohen and Spitzer’s theory and predictions about patterns of deference doctrine in the Clinton years.

### B. Additional Tests

#### 1. Executive Agencies versus Independent Agencies

According to the Cohen-Spitzer theory, politically-motivated changes in Supreme Court deference doctrine ought to be more pronounced with respect to executive branch agencies than with respect to independent agencies. The reason, as Cohen and Spitzer explain, is that executive branch agencies are more responsive to the political ideology of the President than are the independent agencies, which tend to be more insulated.<sup>80</sup> Thus, in the early to mid-1980s, the theory would predict that the Supreme Court would send stronger pro-deference signals where executive agencies were involved; the pro-deference stance vis-à-vis independent agencies ought to be (relatively) weaker. This is what Cohen

79. See *infra* Part IV.B.

80. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 450-51 (commenting further on possible ideological control of Congress over independent agencies).



and Spitzer claim to find in the data.<sup>81</sup> Moreover, in the Clinton years, Cohen and Spitzer's predicted contraction of deference doctrine ought to manifest itself primarily in cases involving executive agencies.

Before proceeding to the empirical results, a potential theoretical problem with this prediction is worth noting. The doctrinal formulations in most of the cases under consideration are not specific to one type of agency or another. Legal principles and tests established in cases involving executive agencies are frequently applied in subsequent cases involving independent agencies, and vice versa. For example, *Verizon v. FCC*<sup>82</sup> raised an issue of how much deference was due to the FCC, an independent agency, but the case relied on the framework established by *Chevron*, which involved deference to the Environmental Protection Agency, an executive agency. And, the *Vermont Yankee* case involved judicial review of the decisions of an independent agency—the Atomic Energy Commission—but the important principle established by *Vermont Yankee* (that federal courts may not impose procedural requirements on agencies beyond those established by the Administrative Procedure Act) was subsequently cited in numerous cases involving executive agencies.<sup>83</sup> Inasmuch as the Cohen-Spitzer theory stresses the signals the Supreme Court sends to lower courts about how circuit judges ought to resolve *future* cases, the hypothesis of a significant difference between how the Supreme Court treats executive agencies and independent agencies turns on an implicit and contestable proposition that the lower courts can discern different standards applied to each by the Supreme Court, even when the Court does not make such discrimination explicit.

In order to test the hypothesis that changes in Supreme Court deference doctrine manifest themselves primarily in cases involving executive agencies, I bifurcated my sample into two groups based on the status of the agency involved. Of the 221 cases in the sample, 125 involved executive agencies, and the other 96 involved independent agencies. Using the influence-weighted deference scores—which, for reasons described above, I believe are the most reliable—I calculated the annual aggregate and average deference scores.<sup>84</sup> These are depicted below in Figure 15 and

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81. *See id.* at 460-66.

82. 535 U.S. 467 (2002).

83. *See, e.g.,* Gonzalez-Oropeza v. United States Att'y Gen., 321 F.3d 1331, 1333 (11th Cir. 2003) (applying *Vermont Yankee* to the INS); Puerto Rico Aqueduct & Sewer Auth. v. United States EPA, 35 F.3d 600, 606 (1st Cir. 1994) (applying *Vermont Yankee* to the EPA); Guitard v. United States Sec'y of Navy, 967 F.2d 737, 742 (2d Cir. 1992) (applying *Vermont Yankee* to the Navy).

84. Though only the influence-weighted score results are reported, I checked the unweighted and reversal-weighted annual and aggregate scores as well. No significant patterns appeared.

Figure 16. Also, Figures 17-20 depict two- and four-year moving averages for the aggregate and average deference scores, respectively.

FIGURE 15

Executive v. Independent Agencies: Annual Aggregate Influence-Weighted Deference Score

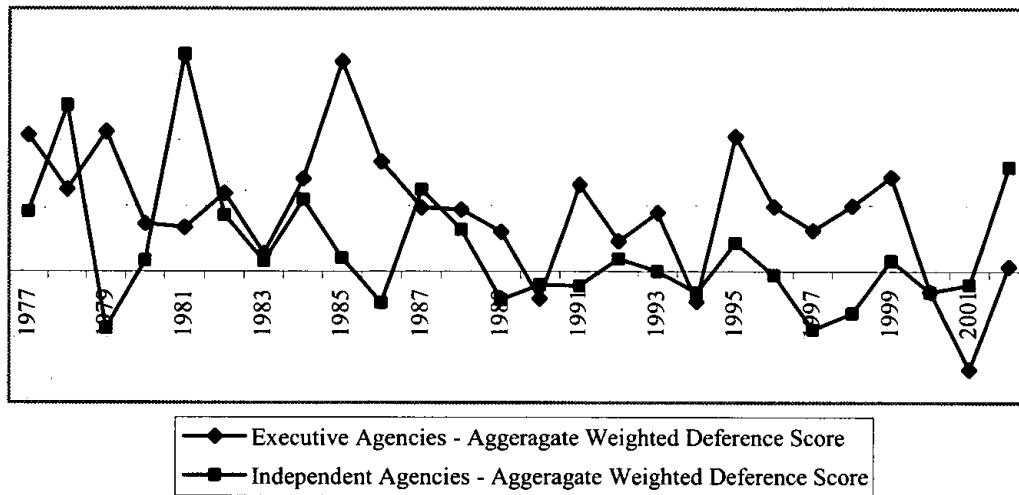


FIGURE 16

Executive v. Independent Agencies: Average Annual Influence-Weighted Deference Score

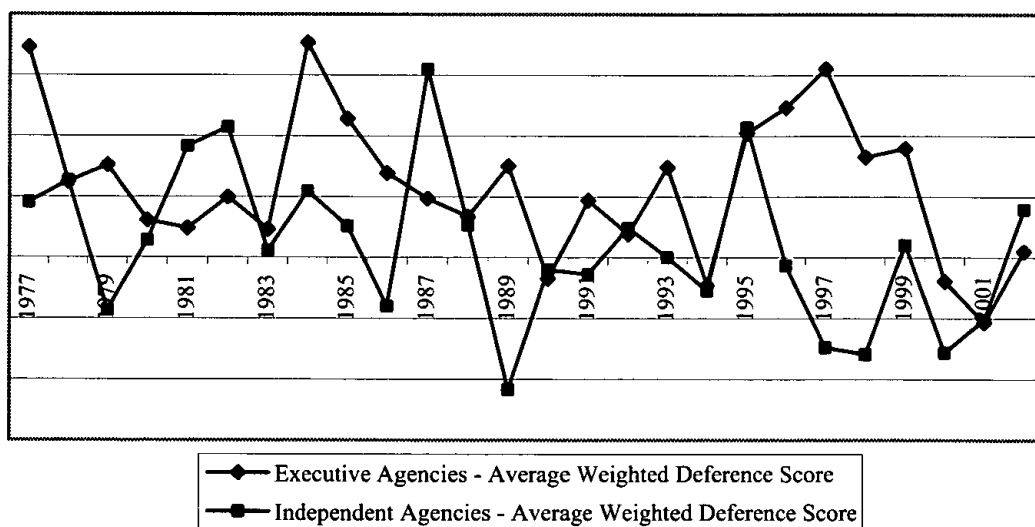


FIGURE 17

Executive v. Independent Agencies:  
Aggregate (2-Year Moving Average)

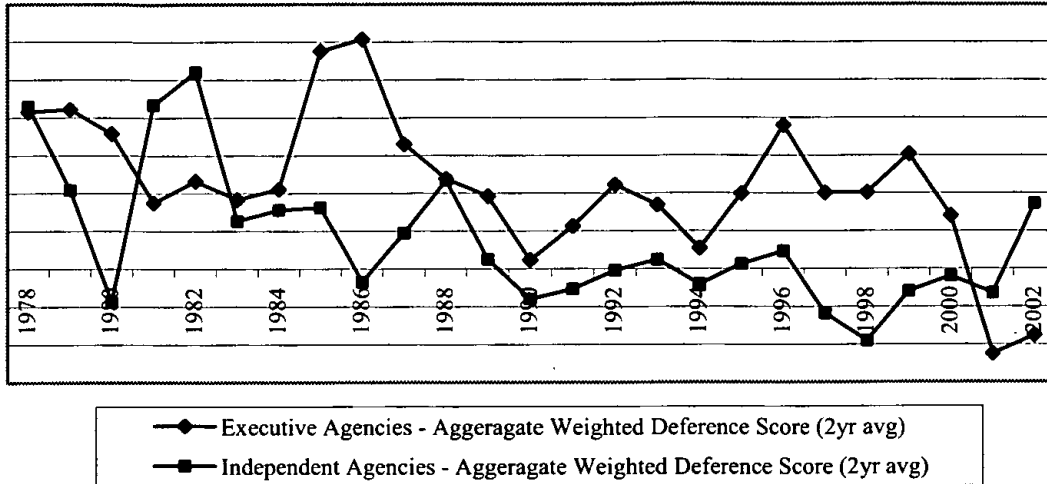


FIGURE 18

Executive v. Independent Agencies:  
Aggregate (4-Year Moving Average)

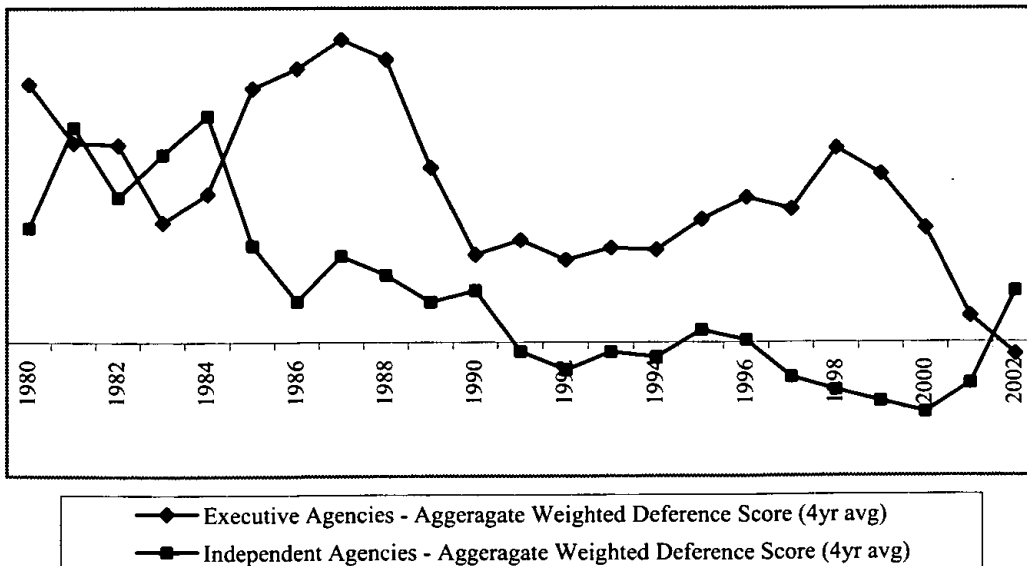


FIGURE 19

Executive v. Independent Agencies:  
Average (2-Year Moving Average)

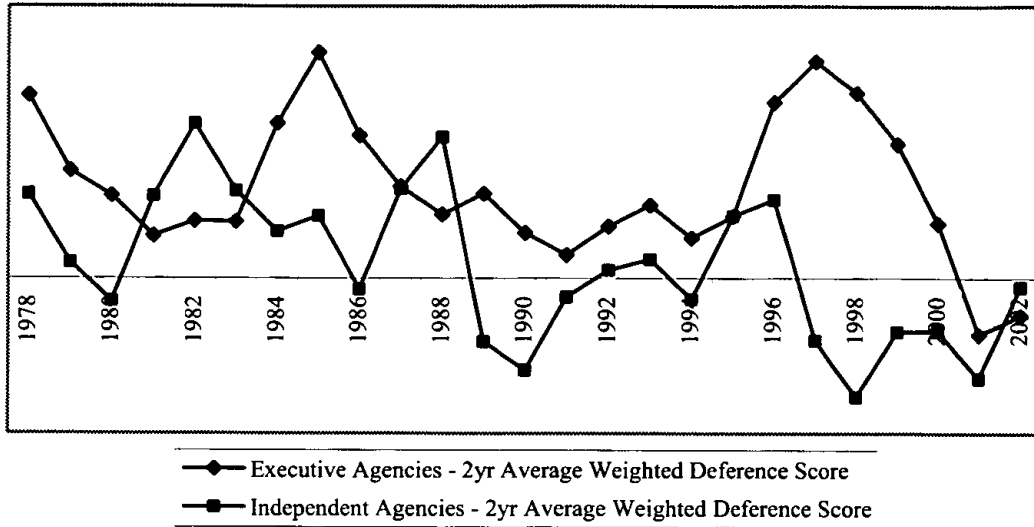
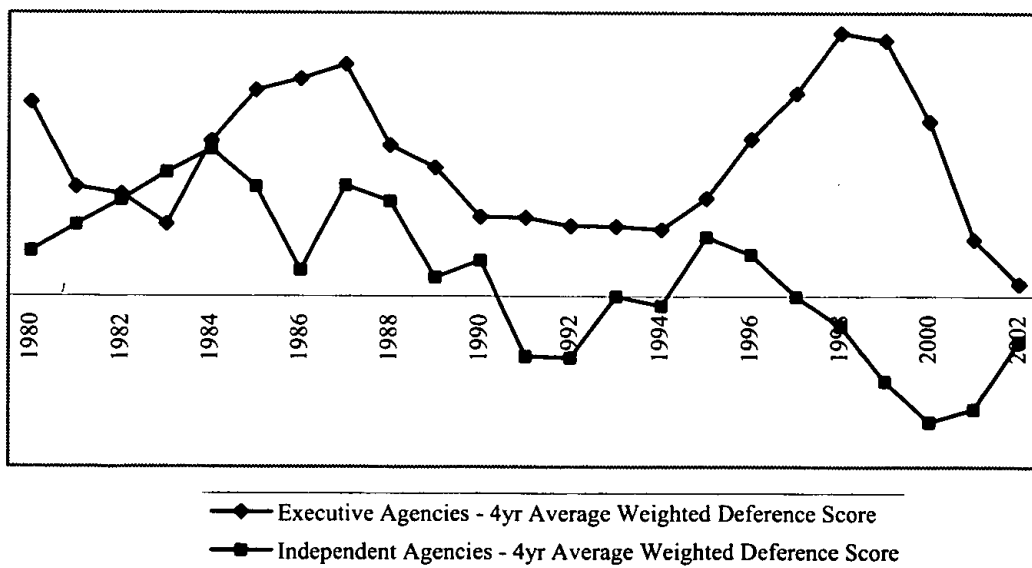


FIGURE 20

Executive v. Independent Agencies:  
Average (4-Year Moving Average)



These figures provide little support for the Cohen-Spitzer hypothesis that their theory of deference doctrine obtains primarily with respect to executive agencies and is more muted with respect to independent agencies. It is true that the level of deference (both aggregate and average) accorded executive agencies was greater than that accorded independent agencies in 1983-1986. In 1981-1982, however, the average deference signal was actually greater for independent agencies than executive agencies, contrary to what the theory would predict. More importantly, in the Clinton years, the pro-deference signal associated with cases involving executive agencies was also consistently stronger than the pro-deference signal associated with independent agency cases. Indeed, the results suggest that the overall pattern of change in deference doctrine observed in the Clinton years is driven primarily by cases demanding greater deference to executive agencies—in stark contrast to what the Cohen-Spitzer theory would predict.

The finding that, on the whole, the Court appears to accord less deference in cases involving independent agencies than it does in cases involving executive agencies may seem counterintuitive. After all, independent agencies are presumably more ideologically moderate than agencies under the President's control, and thus courts might be expected to be more aggressive when reviewing executive agency action and more deferential to the independent commissions. There are several possible reasons why the opposite appears to be the case.

First, the apparent “independent agency effect” (i.e., lower average deference in independent agency cases) may arise from the subject matter of the independent agency cases—in particular, it may have to do with labor and employment law. Over one-third of the independent agency cases in the sample (33 of 96) involved either the NLRB (27 cases) or the Federal Labor Relations Authority (FLRA) (6 cases). The second and third-place independent agencies, by total number of cases raising a deference issue, were the FCC (16 cases) and the Equal Employment Opportunity Commission (EEOC) (11 cases); no other independent agency appears in the data set more than six times. Therefore, if there is something about labor and employment law cases—either in terms of their politics or the doctrinal posture in which deference issues tend to arise in such cases—that is conducive to lower levels of judicial deference, the apparent “independent agency effect” may in fact be a “labor law effect.”<sup>85</sup>

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85. According to Elizabeth Garrett, a number of scholars have “noted that the National Labor Relations Board seems to be given less deference [than other agencies], in part because of its preference to make policy through adjudication and not rulemaking but also because its reputation makes it suspect in some quarters.” Elizabeth Garret, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2650-51 (2003). Interestingly, decisions involving agencies that deal with employees' rights (both individually and collectively) appear to get

Another potential explanation, explored in greater detail below,<sup>86</sup> is that lower courts tend systematically to underestimate the amount of deference that they ought to accord to new presidential initiatives. That is, it may be that when new Presidents pursue dramatic policy changes through executive agency decisions, lower courts are too quick (from the Supreme Court's point of view) to invalidate those actions. In contrast, lower courts may be better at estimating the appropriate level of deference due to independent agencies, and so the Supreme Court need not send as many strong pro-deference signals. On this point, note that the data showing a consistently weaker pro-deference signal in independent agency cases does not necessarily indicate that the Supreme Court wants the circuit courts to apply a lower absolute level of scrutiny to independent agencies than to executive agencies. Instead, the argument is that lower courts are better at estimating and applying the appropriate level of deference to independent agencies, and therefore strong signals from the Supreme Court are not as necessary.

Whatever the explanation, the results regarding executive and independent agencies suggest that Cohen and Spitzer's finding that the deference spike in the early 1980s was considerably more pronounced with respect to executive agencies than independent agencies, even if accurate as an empirical matter, does not necessarily support their explanation for changes in Supreme Court deference doctrine. Instead, it appears that pro-deference signals in independent agency cases are generally weaker throughout the sample period, and the spike in deference during the Clinton years—the strongest empirical evidence against the Cohen-Spitzer hypothesis—is actually *stronger* when only executive agency cases are considered.

## 2. Circuit Court Ideology

As discussed above, although there are general national trends in the ideological composition of the federal appellate bench, there is considerable inter-circuit ideological variation as well.<sup>87</sup> Therefore, it may be that the Supreme Court sends different signals about the appropriate

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less judicial deference than other agency decisions, independent of whether the agencies are independent or under presidential control. Of the agencies in the sample, seven were involved in ten or more Supreme Court cases in which the Court sent a signal as to the appropriate level of judicial deference—HHS/HEW, EPA (and Council on Environmental Quality (CEQ)), FCC, Treasury, NLRB, EEOC, and Labor (including OSHA and OWCP). The proportion of cases in which the Court sent a pro-deference signal for each of these agencies are: 82.8% for HHS (24 of 29 cases); 80% for EPA (8 of 10 cases); 76.9% for FCC (10 of 13 cases); 71.4% for Treasury (10 of 14 cases); 61.5% for NLRB (16 of 26 cases); 50% for EEOC (6 of 12 cases); and 38.5% for Labor (5 of 13 cases).

86. See *infra* Part IV.B.1.

87. See *supra* text accompanying note 27.

level of judicial deference to different circuits. In particular, a hypothesis consistent with the Cohen-Spitzer theory—though not a hypothesis advanced by Cohen and Spitzer themselves—is that a conservative Supreme Court in a Republican administration will send stronger pro-deference signals in cases from liberal circuits than it will in cases from conservative circuits, while under a Democratic administration, a conservative Supreme Court will send stronger anti-deference signals to the conservative circuits. Thus, the hypothesis would predict that the Supreme Court should send stronger pro-deference signals to liberal circuits than conservative circuits throughout the sample period.

This hypothesis makes a number of assumptions. First, as seems likely, the ideological predilections of the different circuits must be known both to the judges on the different circuits and to the Justices of the Supreme Court. Second, the hypothesis assumes not only that the Supreme Court's doctrinal pronouncements, though purportedly universal, vary depending on the lower court's political leanings, but also that lower court judges are sensitive enough to this phenomenon to react more markedly to a pro- or anti-deference signal sent to the judge's own circuit, or to an ideologically similar circuit, than to a similar signal sent to a circuit on the opposite end of the political spectrum.

To test the hypothesis that the ideology of the circuit of origin makes a difference, the original 221 cases were subdivided into those decisions involving a "liberal" circuit (defined as a circuit with a mean judicial ideology score of -0.1 or below), those involving a "conservative" circuit (mean judicial ideology of 0.1 or above), and those involving either a moderate circuit, a district court, a state supreme court, or Supreme Court original jurisdiction. Of the 221 cases in the original sample, 96 (43.4%) reviewed a decision by a liberal circuit, 59 (26.7%) reviewed a conservative circuit decision, and the remaining 66 (29.9%) fell into the residual category.

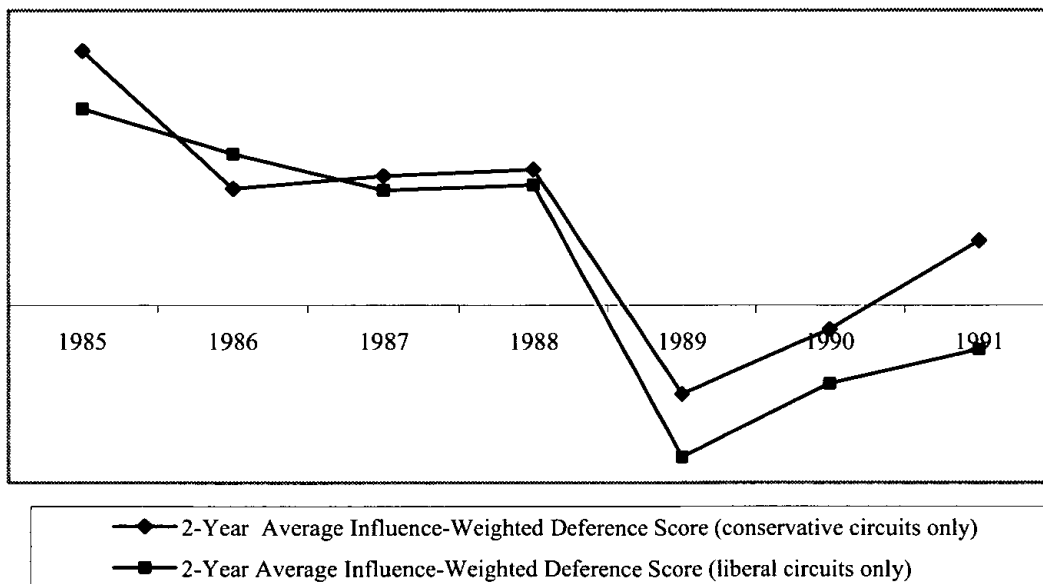
Unfortunately (at least from a research perspective), the liberal and conservative circuit court cases cluster in different time periods. For instance, none of the circuit courts were conservative (by my calculation) until the mid-1980s, and so the first review of a conservative circuit's decision on a deference issue does not appear until 1985. Similarly, no circuit other than the Eleventh Circuit was liberal from 1990 to 1996, and so no liberal circuit cases appear in the sample in the 1991-1995 period. Therefore, I concentrate on the deference signal sent in those years in the sample when there was the most inter-circuit ideological variation—1985-1991 and 1996-2002. This is obviously problematic, since the two most important transition periods—Reagan and Clinton's first terms—are omitted. Nonetheless, the data is suggestive and provides little support for

the hypothesis that the Supreme Court treats liberal and conservative circuits differently.

As Figure 21 and Figure 22 demonstrate, the average deference signal sent by the Court to liberal and conservative circuits tends to track almost exactly.<sup>88</sup> Moreover, precisely because there were hardly any liberal circuit court decisions to review in the 1991-1995 period, the spike in judicial deference during that period is partially attributable to pro-deference signals sent to *conservative* circuits, in apparent contradiction to the Cohen-Spitzer hypothesis. Figure 23 confirms that the Supreme Court sent strong pro-deference signals, with a generally increasing trend, to conservative circuits throughout the 1990s. The Supreme Court only shifted to signaling less deference in cases from conservative circuits after the election of George W. Bush—again, exactly the opposite of what the Cohen-Spitzer theory predicts.

FIGURE 21

Liberal v. Conservative Circuits, 1985-1991



88. The Supreme Court appears to send different signals in 1997-1998, but this result may be driven by a single case, *Dunn v. FTC*, 519 U.S. 465 (1997). This case was the only one in the 1997-1998 period that involved an appeal from a liberal circuit, and it called for less judicial deference.



FIGURE 22

Liberal v. Conservative Circuits, 1996-2002

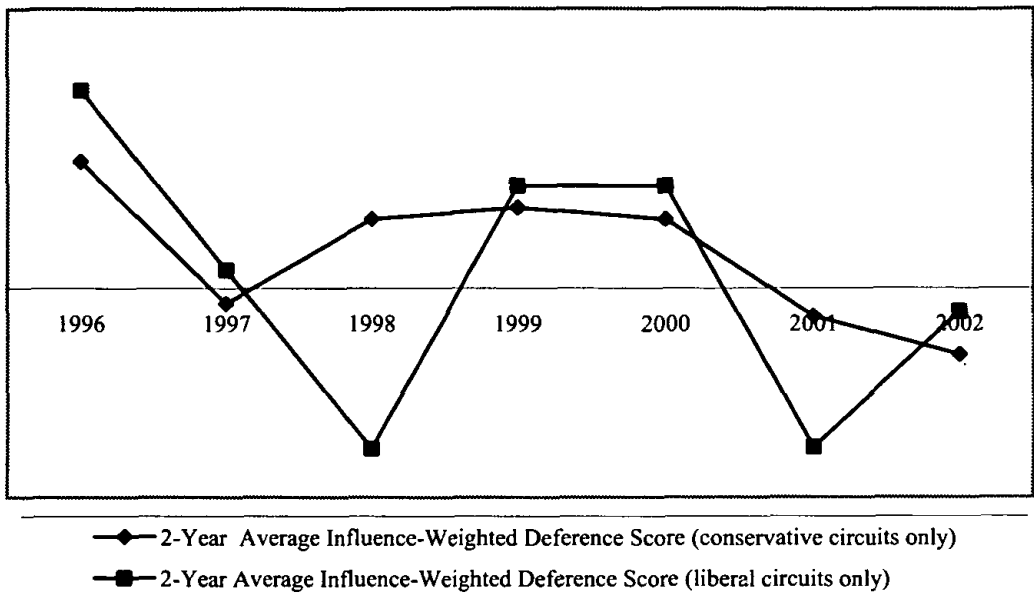
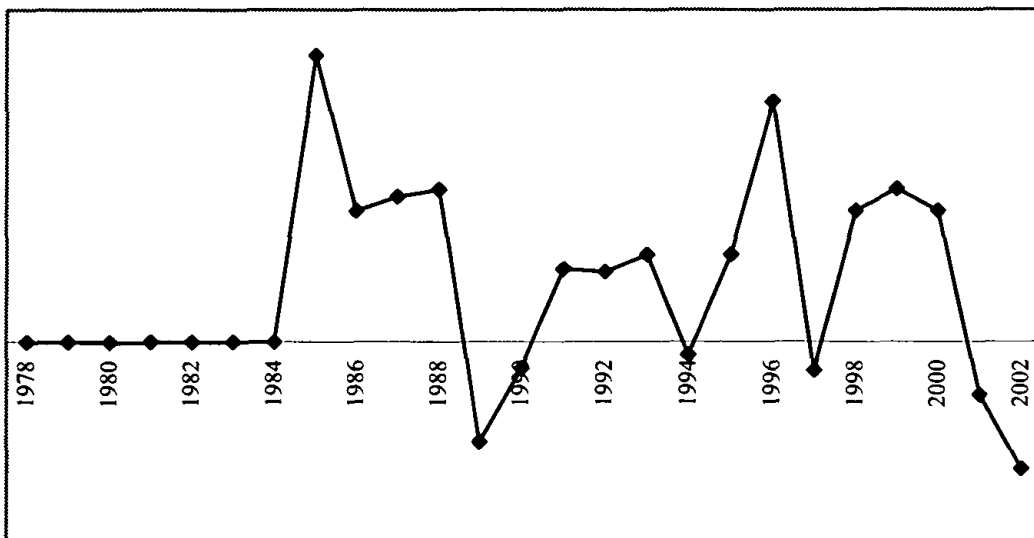


FIGURE 23

Two-Year Influence-Weighted Average Deference Score (Conservative Circuits Only)



### 3. *Individual Justices: Stevens versus Rehnquist*

The preceding attempts to reproduce and extend Cohen and Spitzer's test of their theory of judicial deference yielded results apparently inconsistent with that theory. The relatively high levels of deference conferred on Carter-era administrative agencies make the pro-deference cases decided in the early 1980s seem like less of a dramatic shift in deference doctrine than the Cohen-Spitzer hypothesis implied. And, under Clinton, the level of deference called for by the Supreme Court appears to have expanded (or at least held steady), in apparent contradiction of the Cohen-Spitzer model's prediction.

However, even if the predicted effect is not apparent with respect to the Court's collective decisions, it may be discernable in the votes of individual Justices. That is, it may be that the swing voters on the Court (e.g., Stewart, Powell, O'Connor, Kennedy) are sufficiently centrist that political calculations of the sort Cohen and Spitzer describe have little or no influence on their votes, but that the more ideologically extreme members of the Court are likely, as per the Cohen-Spitzer theory, to vote to expand deference doctrine when the circuit courts are less politically congenial than the agencies, and to contract deference doctrine when the situation is reversed.

A preliminary test of this alternative version of the hypothesis is conducted by looking at the difference in voting patterns of Justice Stevens and Chief Justice Rehnquist. Both of these Justices were on the Court throughout the entire sample period, and they are generally considered to occupy opposite ends of the ideological spectrum. The Cohen-Spitzer hypothesis would predict that the conservative Chief Justice Rehnquist would be more likely than the liberal Justice Stevens to call for judicial deference to agency decisions during the Reagan and Bush administrations, but more likely to call for aggressive judicial scrutiny of agency decisions under Carter and Clinton.

In order to evaluate this hypothesis, I examined a subset of the original dataset containing only those cases in which Justices Stevens and Rehnquist reached different conclusions about the degree of deference due to an administrative agency.<sup>89</sup> Of the original 221 cases, 80 (36.2%) involved significant differences of opinion between Rehnquist and Stevens on the deference question. These 80 cases, along with how each of the two Justices voted on the deference issue, are listed in Appendix E. Using the

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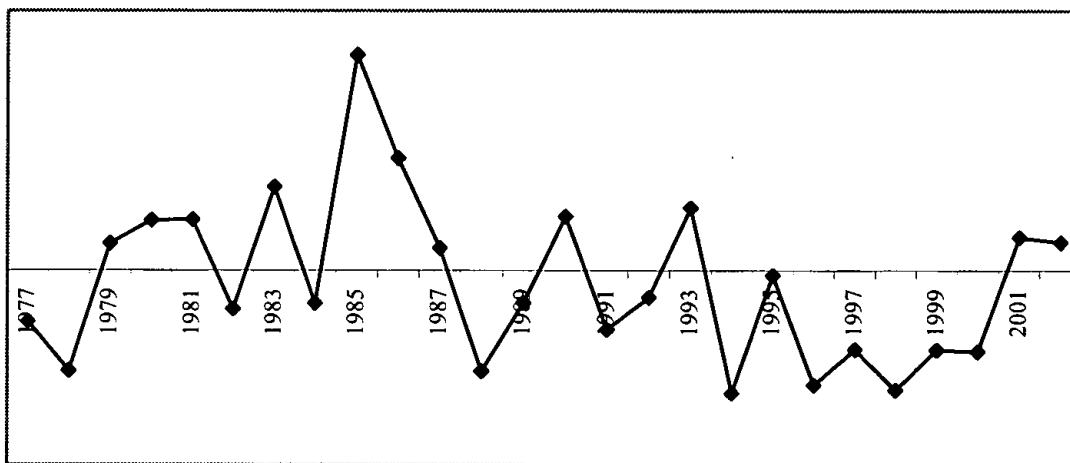
89. For the most part, these cases involve one of two Justices who joins the majority while the other one dissents. In some cases, however, one of the two concurred but resolved the deference issue differently. These cases were included in the set of cases where the two Justices diverged. In other cases the dissenting Justice dissented on some point unrelated to the deference issue; these cases were not included in the subset of divergent cases.

citation-weighting methodology described above, Chief Justice Rehnquist's average influence-weighted deference signal is calculated, using only the cases where he and Justice Stevens disagreed, for each of the 26 years in the sample.<sup>90</sup> This value represents the difference between Justice Rehnquist's pro-deference signal and Justice Stevens' pro-deference signal, with positive numbers indicating that, in the cases where they diverged, Rehnquist was more likely to call for high levels of deference than Stevens, and negative numbers indicating that Stevens was the more deferential of the two.

In contrast to the results for the Court as a whole, the results of a comparison of Stevens and Rehnquist are strongly supportive of the Cohen-Spitzer hypothesis. As is clear from Figure 24, Figure 25, and Figure 26—which show, respectively, the annual, two-year, and four-year average difference between Rehnquist's and Stevens' influence-weighted deference signal—Rehnquist consistently voted for more deference than Stevens from about 1979 to 1987, and Stevens consistently voted for more deference than Rehnquist from about 1994 to 2000.<sup>91</sup>

FIGURE 24

Difference in Deference Signal: Rehnquist v. Stevens  
(Annual Citation-Weighted Average)



90. Where Rehnquist dissented on the deference issue, the sign on the influence score that the case otherwise would have received is reversed. So, for example, *United States v. O'Hagan*, 521 U.S. 642 (1997) (with Justice Stevens in the majority) came out pro-deference with a citation-weighted influence factor of 0.456. Since Rehnquist was in dissent, I assign the case a value of  $-0.456$  when calculating the pro-deference signal of Rehnquist's voting behavior.

91. The pattern in the 1988-1993 period, and in 2001-2002, is more ambiguous.

FIGURE 25

Difference in Deference Signal: Rehnquist v. Stevens  
(Two-Year Citation-Weighted Average)

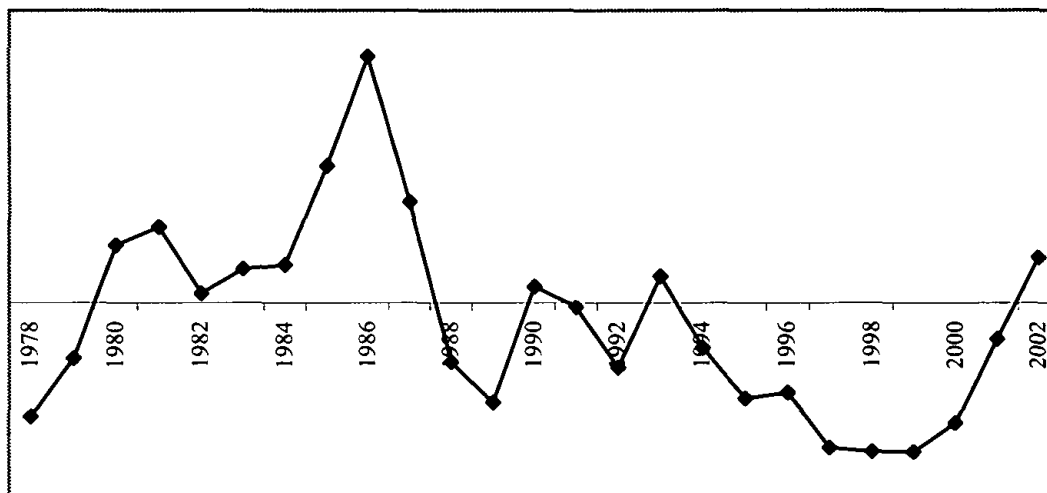
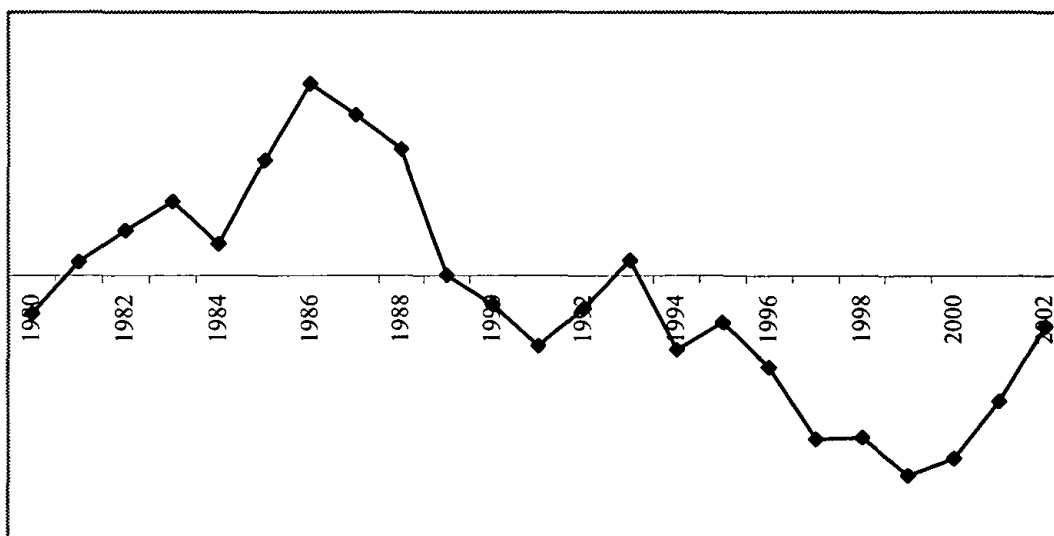


FIGURE 26

Difference in Deference Signal: Rehnquist v. Stevens  
(Four-Year Citation-Weighted Average)



Though these results are consistent with the Cohen-Spitzer hypothesis, their strength as evidence is mitigated by a number of considerations. First, as noted above, Rehnquist and Stevens disagreed in only about a third of the cases in the sample, meaning that even for relatively more extreme Justices, the effect on voting behavior is apparently small. For the more centrist swing voters, the effect is likely to be even weaker. Second, Rehnquist and Stevens may not be representative of conservative and liberal Justices more generally; a more thorough assessment will require the examination of the votes of other Justices, beyond the scope of this study. Third, Rehnquist and Stevens may simply be voting on individual case outcomes, rather than the broader issues of the appropriate level of deference. That is, Rehnquist may vote the pro-deference line in the 1980s because the cases involve conservative agencies doing conservative things, but vote anti-deference in the 1990s because the cases involve liberal agency policy choices.<sup>92</sup>

#### IV. DISCUSSION

##### *A. Accounting for a Null Finding*

The analysis above yields few clear-cut conclusions. Indeed, the strongest result is a null finding. Generally, the patterns that Cohen and Spitzer predict are not observed, especially in the period outside their original sample. Moreover, there is a great deal of “noise” in the results and considerable inconsistency between different techniques for measuring the strength of the deference signal in different years. This lack of robustness further calls Cohen and Spitzer’s original findings into question.

One possible explanation of these null findings is that the Cohen-Spitzer hypothesis—that shifting ideological alignments influence deference doctrine because the Supreme Court seeks to maximize its policy satisfaction, though logical, parsimonious, and intuitively appealing in many respects, is simply incorrect as an empirical matter. The Supreme Court’s deference doctrine may instead be determined by other factors, it may reflect normative or doctrinal commitments independent of short-term policy results, or it may be as confused and inconsistent as some observers have charged. Thus, the null finding reported here may be useful in prompting additional research—especially by legal scholars interested in social scientific analysis of judicial behavior—into alternative explanations

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92. Indeed, one might make this point more broadly about Cohen and Spitzer’s results. The best way to test the hypothesis would be to find cases where the agency action under review was ideologically divergent from what one would expect under the prevailing circumstances. Such additional tests would be extremely valuable, but they are beyond the scope of the present study.

for the Supreme Court's decisions on cases that raise issues of judicial deference to administrative agencies.<sup>93</sup>

Another possibility is that the Cohen-Spitzer hypothesis is basically correct, but the postulated effect cannot be observed by looking at the simple trend lines that Cohen and Spitzer and this study report. There are at least three reasons why this might be the case. First, the predicted patterns may not be discernible because of methodological errors in sample selection and measurement. While this article has endeavored to explain as clearly as possible the rationale and justification for decisions on these issues, others may find these choices problematic. Therefore, there is the possibility that the predicted effect does not emerge because the Court's deference signal has not been correctly calculated, though this possibility seems to be an unlikely explanation for the apparent lack of confirmation of the Cohen-Spitzer hypothesis.<sup>94</sup>

Second, recall that the deference signal sent by the Supreme Court should be relatively constant in equilibrium because Supreme Court preferences are anticipated by litigants and lower court judges, who adjust their behavior accordingly. The Cohen-Spitzer study and this article assume that this adjustment will not be instantaneous, and that there will therefore be a period of a few years when the Supreme Court will have to intensify its signals in one direction or another in order to induce the return to equilibrium. But it is theoretically possible that the lower court's adjustment occurs instantaneously, or at least quickly enough that no clear Supreme Court signal is observable in data of the sort examined here.<sup>95</sup>

Third, it might be the case that political calculations of the sort Cohen and Spitzer hypothesize are only one influence among many, and so cannot be detected by looking at simple trends in the deference signal independent of other important variables. Neither Cohen and Spitzer's original studies,

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93. It is worth stressing that such a conclusion would not necessarily entail a rejection of applying rational choice theory to Supreme Court decisionmaking as such. Rather, it may be that the rational choice framework remains the most useful approach to analyzing Court behavior, but presumptions about judicial utility functions and institutional context must be re-examined.

94. Another type of measurement problem may arise if my assumptions about agency ideology, circuit court ideology, and Supreme Court ideology are incorrect. For instance, agencies may be more responsive to congressional control than presidential control, or their behavior may be relatively insensitive to changes in presidential administration. Or, the measurement of circuit court ideology may be sufficiently inaccurate that, contrary to my assumptions, the circuit courts were not much more liberal in the 1980s than they were in the 1990s. These possibilities seem highly unlikely, but they cannot be ruled out entirely.

95. It is also possible that lower courts might overestimate the amount of change in deference the Supreme Court desires. This could further confound the results, in that pro-deference signals might actually indicate a period when the Court wants less deference than it did in an earlier period if the circuit courts correctly perceived the direction the Supreme Court wanted them to move but went too far in that direction. Although such overreactions are conceptually possible, they seem unlikely.

nor this Article's attempts at re-evaluation and extension, perform a multivariate analysis that controls for other potential influences on Supreme Court deference doctrine. The hypothesis as originally advanced by Cohen and Spitzer implied that the effect would be strong enough to determine the pattern of the Supreme Court deference doctrine without controlling for other variables. It may be the case that such a prediction grossly exaggerated the strength of the predicted effect, but that the hypothesized influence of political alignments is nonetheless valid at the margins and would be observable through a more rigorous multivariate empirical test. Such a multivariate analysis would be challenging because of the small number of cases, the difficulty of correctly specifying the model, and the potentially large number of candidate control variables. Although such a study is beyond the scope of this paper, it is an important item on the future research agenda.

### *B. Accounting for Apparent Patterns*

The main conclusions of this study are negative. Although the different coding, weighting, and aggregation methods yield somewhat different results, none of them clearly confirms the Cohen-Spitzer hypothesis, and almost all of them in fact disconfirm their hypothesis to some degree. Some patterns, however, do appear in the data, and, though not especially robust, these patterns invite preliminary attempts at explanation. The most interesting pattern is the apparent "double hump" in the average deference signal over the 1977-2002 period: there appears to be a spike in the early 1980s and a decline in the mid-to-late 1980s, and a second spike in the early-to-mid 1990s, with a decline in the late 1990s. While remaining duly mindful that this apparent "pattern" may be a coincidence or the result of flawed aggregation techniques, it is nonetheless useful to consider some potential reasons such a pattern might appear, and the additional hypotheses that such explanations would imply.

#### *1. The "Presidential Mandates" Hypothesis—Regulatory Reversals and Circuit Court Overreactions*

The most striking aspect of the "double hump" pattern is that the deference spikes occur primarily in the first presidential term following a change in the partisan control of the executive branch. That is, the data suggests that, after the election of a new President of a new political party, the Supreme Court tends to send increasingly pro-deference signals for several years, with the trend reversing in the latter half of the President's time in office. Why might this be the case?

It may be that the Supreme Court has relatively constant preferences with regard to the appropriate level of judicial deference, but the circuit

courts consistently underestimate the degree to which they ought to defer to administrative decisions that appear to represent dramatic changes in policy.<sup>96</sup> If agency actions that appear to represent significant departures from past practice are more prone to invalidation at the circuit court level, but the Supreme Court is not significantly more likely to desire invalidation of such actions, then the election of a new President with a new regulatory agenda is especially likely to trigger instructions from the Supreme Court that the lower courts should treat agency action more deferentially. That is, the Supreme Court may be more willing than the circuit courts to recognize a presidential “mandate” to effect substantial changes in regulatory policy. This result is not necessarily inconsistent with a rational choice perspective on deference doctrine, but it makes different assumptions about the Supreme Court’s preferences. The “presidential mandate” theory has the additional advantage of better explaining the findings regarding the difference in the Court’s treatment of executive and independent agency cases.

The “presidential mandate” hypothesis implies a clear prediction for what ought to happen under George W. Bush: there ought to be another deference spike between about 2002-2004. If Bush wins a second term, the trend would then be expected to reverse, with progressively less deferential signals into 2008. If John Kerry wins the 2004 election, we would expect strong pro-deference signals in the 2005-2008 period. The presidential mandate hypothesis also implies clear out-of-sample predictions for earlier periods. For example, one ought to observe a spike in deference during the first Nixon administration, a decline under Ford, and a spike under Carter.

## 2. *The “Goldilocks” Hypothesis—Supreme Court Centrism and Circuit Court Extremism*

Another possible explanation for the double hump pattern suggested by the data is that the Cohen-Spitzer hypothesis is generally correct about the Supreme Court’s instrumentalist, policy-oriented strategy, but errs with regard to its assumptions about the Court’s political preferences. It may be that the Supreme Court was relatively moderate throughout the relevant sample period. When the circuit courts were similarly moderate, the Court contracted the level of judicial deference, authorizing more vigorous judicial scrutiny. But, when the circuit courts were ideologically

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96. There may be rationalist explanations as to why circuit court judges would consistently misestimate the Supreme Court’s preferences in this way, or it may reflect some kind of cognitive limitation. Or, it may be that only a minority of circuit court judges behave in this way, but plaintiffs challenging controversial administrative action engage in forum shopping, increasing the chances that these cases will be heard before circuit judges who are more prone than their brethren on other circuits or the Supreme Court to strike down the agency action in question.



extreme—in *either* direction—the Supreme Court signaled the need for greater judicial deference to administrative agency decisions.

This hypothesis may find some support in the observation that the two periods when the Supreme Court appeared to send the most anti-deference signals—1989-1992 and 1999-2002—correspond to roughly similar average circuit court judge ideology scores (+0.128, for 1989-1992; -0.025 for 1999-2002). These numbers are highly inexact measurements of true ideology, so extreme caution ought to be exercised in their interpretation. More qualitatively, the trends with regard to circuit court ideology suggest that in the 1989-1992 period, the circuits had recently become relatively moderate after a sustained period of marked liberalism, and in the 1999-2002 period the circuits had again become relatively moderate, this time after several years of being quite conservative. While hardly conclusive, this evidence is suggestive support for the hypothesis of a relatively centrist Supreme Court (or swing Justices), willing to contract deference doctrine when the circuit courts are relatively centrist as well, but likely to expand deference doctrine whenever the circuit courts are anything other than a roughly equal mix of liberals and conservatives. Thus, the circuit courts in the early Reagan years were too liberal, the circuit courts in the early Clinton years were too conservative, but during both Bush administrations, the courts were (ideologically) just right. This hypothesis has the additional attractive feature of being able to account for why the Cohen-Spitzer theory seems to do a better job explaining the divergence in Rehnquist and Stevens' votes than it does explaining the voting patterns of the Court as a whole.

Discerning the predictions of this hypothesis for George W. Bush's presidency requires making some assumptions about how rapidly Bush will be able to shift the ideology of the circuit courts. If, as seems likely, it will take some time before the circuits become substantially more conservative, then the hypothesis would predict no significant expansion in deference doctrine during Bush's first term. The predictions for a second Bush term, if it comes to pass, are more ambiguous. On the one hand, the circuits by then may have become too conservative for the Supreme Court's liking, which might imply increasingly pro-deference signals. On the other hand, the Court's own ideological preferences may have shifted by then, since it is almost certain that some members of the current Court will be replaced before 2008. Also, even if the circuit courts become more conservative under Bush, they might still be ideologically closer to the Supreme Court than the Bush executive agencies, which would imply that the Court would continue to favor less judicial deference. If John Kerry wins the 2004 election, then, presuming this partisan alternation keeps the balance in the

circuit courts roughly even, we would expect the Supreme Court to continue to send relatively weak deference signals.

The foregoing discussion indicates that the two most plausible explanations for the “double hump” deference pattern that emerges in the data imply divergent predictions about what ought to happen in the post-2002 period. If the presidential mandates theory is correct, we would expect to see a notable expansion in deference signals in 2003-2004, and perhaps into the early years of a second Bush term, if there is one. If John Kerry wins the 2004 election, we would also expect relatively strong pro-deference signals throughout this period. If the Supreme Court centrism theory is correct, we should expect the Court to maintain low-deference signals, especially during Bush’s first term. Stronger pro-deference signals would be expected in a second Bush term unless Bush is able to move the ideology of the Supreme Court markedly to the right (say, if O’Connor or Stevens leaves the Court). The Supreme Court centrism would predict continuing low-deference signals if John Kerry takes office in 2004.

#### CONCLUSION

Shifting patterns in Supreme Court pronouncements regarding the appropriate level of judicial scrutiny of administrative agency actions present a puzzle for legal scholars and social scientists. Why is it that at certain times the Court appears to stress the importance of judicial deference and restraint, but at other points the Court’s opinions seem more sympathetic to aggressive judicial review of agency decisions? Linda Cohen and Matthew Spitzer, drawing on the methodology of rational choice and the literature on judicial politics, developed a simple, compelling explanation for the Court’s behavior: the Court seeks to ensure favorable policy outcomes by calling for deference when the agencies are more closely ideologically aligned with the Supreme Court than the lower federal courts, but the Court calls for more searching judicial review when the circuit courts are more ideologically similar to the Supreme Court than the agencies are. Considerations of relative political alignment, Cohen and Spitzer implicitly claimed, could explain observable shifts in deference doctrine, even without controlling for other factors.

This article advances the research agenda on this topic by re-assessing the Cohen-Spitzer theory, in particular by testing their explicit out-of-sample predictions about deference doctrine during the Clinton administration. There is little evidence to support the Cohen-Spitzer hypothesis, at least in its strong form. Rather than a contraction of deference doctrine in the 1990s, there seems to be a significant expansion, comparable to the expansion that took place in the mid-1980s. While this observation does not necessarily refute the Cohen-Spitzer hypothesis, it

invites deep skepticism and demonstrates the need for reexamination of our assumptions and theories about the politics of administrative law decisionmaking in the Supreme Court.

There are at least two possible alternative theories that are more consistent with the data reported here than the original version of the Cohen-Spitzer thesis. First, it may be that spikes in deference tend to correspond with the election of a new President of a different party, because shifts in partisan control of the executive tend to generate cases of the type where lower federal courts are excessively likely (from the Supreme Court's perspective) to invalidate agency action. Second, it may be that spikes in deference correspond to periods when the circuit courts become ideologically extreme in either direction, but the Supreme Court contracts deference doctrine when the circuits are more moderate, reflecting the relatively centrist position of the Supreme Court. These two hypotheses (which are by no means exhaustive) imply different predictions for what is likely to happen in the years after this sample period ends. If the presidential mandates theory is correct, deference should expand in 2003-2004. If the Supreme Court centrism theory is correct, then deference should probably stay at about the same low level as in 2001-2002.

The most important objective of this paper is to re-open a line of inquiry that many considered more or less closed after Cohen and Spitzer published their influential articles on the subject. Future research should make use of more sophisticated methodological techniques than those employed here, and should explore more nuanced hypotheses, in order to better understand the political, ideological, and institutional forces that shape Supreme Court deference doctrine.

## APPENDIX A: CASES INCLUDED IN THE SAMPLE

Case	Citation
<b>2002</b>	
Yellow Transp., Inc. v. Michigan	537 U.S. 36
INS v. Ventura	537 U.S. 12
United States v. Fior D'Italia	536 U.S. 238
Nat'l R.R. Passenger v. Morgan	536 U.S. 101
Chevron U.S.A. v. Echazabal	536 U.S. 73
SEC v. Zandford	535 U.S. 813
Verizon Communications, Inc. v. FCC	535 U.S. 467
Barnhart v. Walton	535 U.S. 212
Ragsdale v. Wolverine World Wide, Inc.	535 U.S. 81
Edelman v. Lynchberg Coll.	535 U.S. 106
New York v. FERC	535 U.S. 1
Wis. Dep't of Health v. Blumer	534 U.S. 473
Barnhart v. Sigmon Coal Co.	534 U.S. 438
Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.	534 U.S. 327
<b>2001</b>	
Zadvydas v. Davis	533 U.S. 678
INS v. St. Cyr	533 U.S. 289
United States v. Mead Corp.	533 U.S. 218
NLRB v. Ky. River Cmty. Care, Inc.	532 U.S. 706
United States v. Cleveland Indians Baseball Co.	532 U.S. 200
Whitman v. Am. Trucking Ass'n	531 U.S. 457
Lopez v. Davis	531 U.S. 230
Solid Waste Agency v. Army Corps of Eng'r	531 U.S. 159
<b>2000</b>	
Geier v. Am. Honda Motor Co.	529 U.S. 861
Christensen v. Harris County	529 U.S. 576
Norfolk S. Ry. Co. v. Shanklin	529 U.S. 344
FDA v. Brown & Williamson Tobacco Corp.	529 U.S. 120
Shalala v. Ill. Council on Longterm Care	529 U.S. 1

<b>1999</b>	
Sutton v. United Air Lines, Inc.	527 U.S. 471
NASA v. FLRA	527 U.S. 229
Dickinson v. Zurko	527 U.S. 150
INS v. Aguirre-Aguirre	526 U.S. 415
United States v. Hagggar Apparel Co.	526 U.S. 380
Nat'l Fed'n of Fed. Employees v. Dep't of Interior	526 U.S. 86
Your Home Visiting Nurse Serv. v. Shalala	525 U.S. 449
AT&T Corp. v. Iowa Util. Bd.	525 U.S. 366
<b>1998</b>	
Bragdon v. Abbott	524 U.S. 624
Atl. Mut. Ins. Co. v. Comm'r	523 U.S. 382
Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.	522 U.S. 479
Regions Hosp. v. Shalala	522 U.S. 448
Allentown Mack Sales & Serv., Inc. v. NLRB	522 U.S. 359
<b>1997</b>	
United States v. O'Hagan	521 U.S. 642
United States v. LaBonte	520 U.S. 751
Dunn v. CFTC	519 U.S. 465
Auer v. Robbins	519 U.S. 452
<b>1996</b>	
Medtronic, Inc. v. Lohr	518 U.S. 470
Smiley v. Citibank	517 U.S. 735
Holly Farms Corp. v. NLRB	517 U.S. 392
Neal v. United States	516 U.S. 284
<b>1995</b>	
NLRB v. Town & Country Elec., Inc.	516 U.S. 85
Miller v. Johnson	515 U.S. 900
Babbitt v. Sweet Home Chapter	515 U.S. 687
Reno v. Koray	515 U.S. 50
Shalala v. Guernsey Mem'l Hosp.	514 U.S. 87
NationsBank v. Variable Annuity Life Ins. Co.	513 U.S. 251
<b>1994</b>	
Brown v. Gardner	513 U.S. 115
Thomas Jefferson Univ. v. Shalala	512 U.S. 504

OWCP v. Maher Terminals, Inc.	512 U.S. 267
MCI Telecomm. Corp. v. AT&T Co.	512 U.S. 218
PUD No. 1 v. Wash Dep't of Ecology	511 U.S. 700
NLRB v. Health Care & Ret. Corp.	511 U.S. 571
Chicago v. Env'tl. Def. Fund	511 U.S. 328
ABF Freight Sys., Inc. v. NLRB	510 U.S. 317
<b>1993</b>	
Good Samaritan Hosp. v. Shalala	508 U.S. 402
Lincoln v. Vigil	508 U.S. 182
Reno v. Flores	507 U.S. 292
<b>1992</b>	
<i>In re</i> Estate of Cowart v. Niklos Drilling Co.	505 U.S. 469
United States v. Thompson/Center Arms Co.	504 U.S. 505
United States v. Alaska	503 U.S. 569
Nat'l R.R. Passenger v. Boston & Me. Corp.	503 U.S. 407
Arkansas v. Oklahoma	503 U.S. 91
Presley v. Etowah County Comm'n	502 U.S. 491
Lechmere v. NLRB	502 U.S. 527
INS v. Elias-Zacarias	502 U.S. 478
<b>1991</b>	
INS v. Nat'l Ctr. for Immigrants' Rights	502 U.S. 183
Pauley v. BethEnergy Mines, Inc.	501 U.S. 680
Gregory v. Ashcroft	501 U.S. 452
Litton Fin. Printing Div. v. NLRB	501 U.S. 190
Rust v. Sullivan	500 U.S. 173
American Hosp. Ass'n v. NLRB	499 U.S. 606
Cottage Sav. Ass'n v. Comm'r	499 U.S. 554
EEOC v. Arabian Am. Oil Co.	499 U.S. 244
Martin v. OHS Rev. Comm'n	499 U.S. 144
Mobil Oil v. United Distrib. Co.	498 U.S. 211
Demarest v. Manspeaker	498 U.S. 184
<b>1990</b>	
Metro Broad., Inc. v. FCC	497 U.S. 547
Maislin Indus. v. Primary Steel, Inc.	497 U.S. 116
PBGC v. LTV Corp.	496 U.S. 633
Fort Stewart Sch. v. FLRA	495 U.S. 641

Davis v. United States	495 U.S. 472
Dep't of Treasury, IRS v. FLRA	494 U.S. 922
NLRB v. Curtin Matheson Scientific Corp.	494 U.S. 775
Adams Fruit Co. v. Barrett	494 U.S. 638
Dole v. United Steelworkers of Am.	494 U.S. 26
Sullivan v. Everhart	494 U.S. 83
Sullivan v. Zebley	493 U.S. 521
<b>1989</b>	
PERS of Ohio v. Betts	492 U.S. 158
Mead Corp. v. Tilley	490 U.S. 714
Marsh v. Or. Nat'l Res. Council	490 U.S. 360
<b>1988</b>	
Bowen v. Georgetown Univ. Hosp.	488 U.S. 204
Miss. Power & Light Co. v. Mississippi	487 U.S. 354
Webster v. Doe	486 U.S. 592
Huffman v. Western Nuclear, Inc.	486 U.S. 663
K Mart Corp. v. Cartier, Inc.	486 U.S. 281
FERC v. Martin Exploration Mgmt. Co.	486 U.S. 204
City of New York v. FCC	486 U.S. 57
EEOC v. Commercial Office Prod. Co.	486 U.S. 107
DeBartolo v. Fl. Gulf Coast Bldg. & Constr. Trades Council	485 U.S. 568
Traynor v. Turnage	485 U.S. 535
Gardebring v. Jenkins	485 U.S. 415
FLRA v. Aberdeen Proving Ground	485 U.S. 409
Bethesda Hosp. Ass'n v. Bowen	485 U.S. 399
<b>1987</b>	
NLRB v. United Food & Comm. Workers Union	484 U.S. 112
Mullins Coal Co. v. OWCP	484 U.S. 135
Fall River Dyeing & Finishing Corp. v. NLRB	482 U.S. 27
INS v. Cardoza-Fonseca	480 U.S. 421
Lukhard v. Reed	481 U.S. 368
Pleasant Grove v. United States	479 U.S. 462
Bowen v. Yuckert	482 U.S. 137
<b>1986</b>	
CFTC v. Schor	478 U.S. 833

United States DOT v. Paralyzed Veterans of Am.	477 U.S. 597
Atkins v. Rivera	477 U.S. 154
Young v. Cmty. Nutrition Inst.	476 U.S. 974
Lyng v. Payne	476 U.S. 926
Bowen v. Amer. Hosp. Ass'n	476 U.S. 610
La. Pub. Serv. Comm'n v. FCC	476 U.S. 355
United States v. City of Fulton	475 U.S. 657
Bd. of Gov. of Fed. Reserve v. Dimension Fin. Corp.	474 U.S. 361
<b>1985</b>	
United States v. Riverside Bayview Homes, Inc.	474 U.S. 121
Pattern Makers' League v. NLRB	473 U.S. 95
United States v. Nat'l Bank of Commerce	472 U.S. 713
Mountain States Tel. & Tel. Co. v. Pueblo	472 U.S. 237
Conn. Dep't of Income Maint. v. Heckler	471 U.S. 524
NLRB v. Int'l Longshoremans Ass'n	473 U.S. 61
Heckler v. Chaney	470 U.S. 821
Chemical Mfr's Ass'n v. NRDC	470 U.S. 116
Lawrence County v. Lead-Deadwood Sch. Dist.	469 U.S. 256
<b>1984</b>	
ICC v. Am. Trucking Ass'n	467 U.S. 354
Securities Indus. Ass'n v. Fed. Reserve	468 U.S. 137
Sure-Tan, Inc. v. NLRB	467 U.S. 883
Chevron, U.S.A. v. NRDC	467 U.S. 837
Capital Cities Cable, Inc. v. Crisp	467 U.S. 691
Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.	467 U.S. 380
EEOC v. Shell Oil Co.	466 U.S. 54
<b>1983</b>	
BATF v. FLRA	464 U.S. 89
Pub. Serv. Comm'n of N.Y. v. Mid-La. Gas Co.	463 U.S. 319
Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.	463 U.S. 29
Nat'l Ass'n Greeting Card Publishers v. USPS	462 U.S. 810



Baltimore Gas & Elec. Co. v. NRDC	462 U.S. 87
Bill Johnson's Rest., Inc. v. NLRB	461 U.S. 731
Bob Jones Univ. v. United States	461 U.S. 574
Heckler v. Campbell	461 U.S. 458
Am. Paper Inst. v. Am. Elec. Power Serv. Corp.	461 U.S. 402
Comm. Television of S. Cal. v. Gottfried	459 U.S. 498
<b>1982</b>	
Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta	458 U.S. 141
Schweiker v. Hogan	457 U.S. 569
Blum v. Bacon	457 U.S. 132
N. Haven Bd. of Educ. v. Bell	456 U.S. 512
Herweg v. Ray	455 U.S. 265
United States v. Vogel Fertilizer Co.	455 U.S. 16
United States v. Clark	454 U.S. 555
Bonanno Linen Serv., Inc. v. NLRB	454 U.S. 404
<b>1981</b>	
NLRB v. Hendricks County Rural Elec. Membership Corp.	454 U.S. 170
FEC v. Democratic Senatorial Campaign Comm.	454 U.S. 27
CBS v. FCC	453 U.S. 367
Haig v. Agee	453 U.S. 280
Schweiker v. Gray Panthers	453 U.S. 34
Am. Textile Mfr's Inst. v. Donovan	452 U.S. 490
Howe v. Smith	452 U.S. 473
Anderson Bros. Ford v. Valencia	452 U.S. 205
St. Martin Evangelical Lutheran Church v. South Dakota	451 U.S. 772
Rowan Companies v. United States	452 U.S. 247
FCC v. WNCN Listeners Guild	450 U.S. 582
Comm'r. v. Portland Cement Co.	450 U.S. 156
Steadman v. SEC	450 U.S. 91
Bd. of Gov. of Fed. Reserve v. Inv. Co. Inst.	450 U.S. 46
Consol. Rail Corp. v. Nat'l Ass'n Recycling Indus.	449 U.S. 609
EEOC v. Associated Dry Goods Corp.	449 U.S. 590

<b>1980</b>	
Potomac Elec. Power Co. v. OWCP	449 U.S. 268
EPA v. Nat'l Crushed Stone Ass'n	449 U.S. 64
Indus. Union Dep't v. Am. Petroleum Inst.	448 U.S. 607
Mohasco Corp. v. Silver	447 U.S. 807
Whirlpool Corp. v. Marshall	445 U.S. 1
United States v. Euge	444 U.S. 707
Ford Motor Credit Co. v. Milhollin	444 U.S. 555
NLRB v. Yeshiva Univ.	444 U.S. 672
Strycker's Bay Neighborhood Council v. Karlen	444 U.S. 223
<b>1979</b>	
NLRB v. Baptist Hosp.	442 U.S. 773
United States v. Rutherford	442 U.S. 544
Andrus v. Sierra Club	442 U.S. 347
S.E. Cmty. Coll. v. Davis	442 U.S. 397
Ford Motor Co. v. NLRB	441 U.S. 488
Gladstone Realtors v. Bellwood	441 U.S. 91
FCC v. Midwest Video Corp.	440 U.S. 689
NLRB v. Catholic Bishop of Chicago	440 U.S. 490
Nat'l Muffler Dealers Ass'n v. United States	440 U.S. 472
Miller v. Youakim	440 U.S. 125
Int'l Bhd. of Teamsters v. Daniel	439 U.S. 551
Thor Power Tool Co. v. Comm'r	439 U.S. 522
<b>1978</b>	
Bd. of Governors of Fed. Reserve v. First Lincolnwood Corp.	439 U.S. 234
FCC v. Pacifica Found.	438 U.S. 726
California v. United States	438 U.S. 645
Eastex v. NLRB	437 U.S. 556
Beth Israel Hosp. v. NLRB	437 U.S. 483
Zenith Radio Corp. v. United States	437 U.S. 443
FCC v. Nat'l Citizens Comm. for Broad.	436 U.S. 775
<i>In re</i> Trans. Ala. Pipeline Rate Cases	436 U.S. 631
Quern v. Mandley	436 U.S. 725
California v. Southland Royalty Co.	436 U.S. 519
SEC v. Sloan	436 U.S. 103

Vt. Yankee Nuclear Power Corp. v. NRDC	435 U.S. 519
United States v. Bd. of Comm'rs of Sheffield	435 U.S. 110
NLRB v. Local 103, Int'l Ass'n of Bridge Workers	434 U.S. 335
Adamo Wrecking Co. v. United States	434 U.S. 275
<b>1977</b>	
Batterton v. Francis	432 U.S. 416
Beal v. Doe	432 U.S. 438
TWA v. Hardison	432 U.S. 63
E.I. Du Pont de Nemours & Co. v. Collins	432 U.S. 46
United States v. Larionoff	431 U.S. 864
E.I. Du Pont de Nemours & Co. v. Train	430 U.S. 112
Piper v. Chris-Craft Indus.	430 U.S. 1
NLRB v. Enter. Ass'n	429 U.S. 507

## APPENDIX B: CODING OF AMBIGUOUS CASES

Case	Citation	Coding Problem & My Assessment
Nat'l R.R. Passenger v. Morgan	536 U.S. 101	Court affirmed in part and reversed in part. Deference issue apparently arose only with respect to point on which the Court reversed, and only specific discussion of deference issue held <i>Chevron</i> inapplicable. Therefore, this case was coded as <b>anti-deference</b> .
Verizon Communications, Inc. v. FCC	535 U.S. 467	Court deferred on some issues but not on others. The issues on which the Court granted deference were the most important issues, while the other issues were largely peripheral, so this case was coded as <b>pro-deference</b> .
United States v. Mead Corp.	533 U.S. 218	Court reversed lower court's ruling that tariff classification was not entitled to <i>any</i> deference, but held that <i>Skidmore</i> rather than <i>Chevron</i> deference applied. Coded as <b>anti-deference</b> because the case is most often cited for the proposition that certain agency actions are not entitled to full <i>Chevron</i> deference.
Whitman v. Am. Trucking Ass'n	531 U.S. 457	Court deferred on some issues but not on others. The issues on which the Court granted deference appear to be the most important issues, while the other issues were largely peripheral, so this case was coded as <b>pro-deference</b> .
AT&T Corp. v. Iowa Util. Bd.	525 U.S. 366	Court deferred on some issues but not others. The issues seemed comparable in importance, and the pro- and Anti-deference portions of the holding were cited with approximately the same frequency, so this case was coded as <b>ambiguous</b> .
Good Samaritan Hosp. v. Shalala	508 U.S. 402	Court deferred to agency, but used language cited in subsequent cases indicating deference would be limited when the agency changes its position. Because the case also contains Pro-deference language and ultimately defers to the agency, the case was coded as <b>pro-deference</b> .

Lechmere v. NLRB	502 U.S. 527	Court holds that <i>stare decisis</i> principle trumps <i>Chevron</i> , but uses general language about how agency actions are normally entitled to deference. Because the Court does not defer, and the most important part of the holding appears to be the limitation on deference, the case was coded as <b>anti-deference</b> .
Martin v. OHS Rev. Comm'n	499 U.S. 144	Court held that when Secretaries of Labor and Commerce issue conflicting interpretations of ambiguous OSHA regulation, courts should defer to Labor. Because the case is most widely cited for its strong language explaining the policy rationale for judicial deference, the case was coded as <b>pro-deference</b> .
K Mart Corp. v. Cartier, Inc.	486 U.S. 281	The Court (in a fractured opinion) deferred to some customs service regulations but held others conflicted with the language of the statute. Because the case was overwhelmingly cited, in subsequent cases, for its Pro-deference language, the case was coded as <b>pro-deference</b> .
Lyng v. Payne	476 U.S. 926	The Court deferred to the agency, but used language, cited in a few subsequent cases, suggesting limits to agency discretion. Because the outcome of the case and most of the opinion is predominantly supportive of agency decisionmaking on the relevant point, the case was coded as <b>pro-deference</b> .
NLRB v. Int'l Longshoremen Ass'n	473 U.S. 61	The Court refused to enforce an NLRB order that the Court held was inconsistent with the statute, but made some general statements, cited in subsequent cases, about the deference normally due NLRB interpretations of that statute. Because of the outcome of the case and the language on limits to the deference due the NLRB, the decision was coded as <b>anti-deference</b> .
Securities Indus. Ass'n v Fed. Reserve	468 U.S. 137	The Court used some general language about the deference normally due to Fed interpretations of the relevant statute, but the Court also stressed limits on that deference and invalidated the Fed's action in this case. Thus, the decision was coded as <b>anti-deference</b> .

Pub. Serv. Comm'n of N.Y. v. Mid-La. Gas Co.	463 U.S. 319	The Court held that a FERC rule was inconsistent with the relevant statute, but the Court reversed part of the lower court opinion in order to give FERC discretion to make certain policy choices on remand. However, the overall tone of the case, and the propositions for which it is most cited, stress limitations on agency authority, so the case was coded as <b>anti-deference</b> .
N. Haven Bd. of Educ. v. Bell	456 U.S. 512	The Court upheld anti-discrimination regulations promulgated by HEW, and noted that agency interpretations are normally entitled to great deference, but asserted that the ordinary level of deference was not appropriate in that particular case. This case was therefore coded as <b>ambiguous</b> .
Am. Textiles Mfr's Inst. v. Donovan	452 U.S. 490	The Court upheld one agency decision but invalidated another. Because the pro- and Anti-deference portions of the case appeared equally important, this case was coded as <b>ambiguous</b> .
NLRB v. Baptist Hosp.	442 U.S. 773	The Court upheld one agency decision but invalidated another. Because the pro- and Anti-deference portions of the case appeared equally important, this case was coded as <b>ambiguous</b> .

APPENDIX C: CASES NOT INVOLVING REVIEW OF A  
FEDERAL APPELLATE DECISION

<b>Case</b>	<b>Citation</b>	<b>Case Origin</b>
Yellow Transp., Inc. v. Michigan	537 U.S. 36	Michigan Supreme Court
Wis. Dep't of Health v. Blumer	534 U.S. 473	Wisconsin Court of Appeals
Smiley v. Citibank	517 U.S. 735	California Supreme Court
Miller v. Johnson	515 U.S. 900	Fed District, S.D. Georgia
PUD No. 1 v. Wash. Dep't of Ecology	511 U.S. 700	Washington Supreme Court
United States v. Alaska	503 U.S. 569	Original jurisdiction
Presley v. Etowah County Comm'n	502 U.S. 491	Fed District, M.D. Alabama
Miss. Power & Light Co. v. Mississippi	487 U.S. 354	Mississippi Supreme Court
Pleasant Grove v. United States	479 U.S. 462	Fed District, D.C.
Atkins v. Rivera	477 U.S. 154	Massachusetts Supreme Judicial Court
Fed. Fidelity Sav. & Loan Ass'n v. de la Cuesta	458 U.S. 141	California Court of Appeals
Schweiker v. Hogan	457 U.S. 569	Fed District, Massachusetts
St. Martin Evangelical Lutheran Church v. South Dakota	451 U.S. 772	South Dakota Supreme Court
United States v. Bd. of Comm'rs of Sheffield	435 U.S. 110	Fed District, Alabama

## APPENDIX D: CASES RANKED BY INFLUENCE SCORE

Rank	Case	Cite	Score
1	Chevron v. NRDC	467 U.S. 837	4.85
2	Motor Vehicle Mfr. Ass'n v. State Farm	463 U.S. 29	4.67
3	Heckler v. Campbell	461 U.S. 458	4.60
4	Bowen v. Georgetown Univ. Hosp.	488 U.S. 204	4.51
5	INS v. Cardoza-Fonseca	480 U.S. 421	4.34
6	Marsh v. Or. Nat'l Res. Council	490 U.S. 360	4.26
7	Heckler v. Chaney	470 U.S. 821	4.03
8	Bowen v. Yuckert	482 U.S. 137	3.99
9	K Mart Corp. v. Cartier, Inc.	486 U.S. 281	3.89
10	United States v. Larionoff	431 U.S. 864	3.81
11	Thomas Jefferson Univ. v. Shalala	512 U.S. 504	3.80
12	Batterton v. Francis	432 U.S. 416	3.75
13	Ford Motor Credit Co. v. Milhollin	444 U.S. 555	3.71
14	Mullins Coal Co. v. OWCP	484 U.S. 135	3.70
15	Martin v. OHS Rev. Comm'n	499 U.S. 144	3.66
16	FEC v. Democratic Senatorial Campaign Comm.	454 U.S. 27	3.65
17	NLRB v. Catholic Bishop of Chicago	440 U.S. 490	3.63
18	Nat'l Muffler Dealers Ass'n v. United States	440 U.S. 472	3.57
19	NLRB v. United Food & Comm. Workers Union	484 U.S. 112	3.54
20	Maislin Indus. v. Primary Steel, Inc.	497 U.S. 116	3.49
21	Christensen v. Harris County	529 U.S. 576	3.48
22	Sure-Tan, Inc. v. NLRB	467 U.S. 883	3.27
23	OWCP v. Maher Terminals, Inc.	512 U.S. 267	3.27
24	Sullivan v. Zebley	493 U.S. 521	3.25
25	Strycker's Bay Neighborhood Council v. Karlen	444 U.S. 223	3.16
26	INS v. Elias-Zacarias	502 U.S. 478	3.16
27	Zenith Radio Corp. v. United States	437 U.S. 443	3.16
28	Zadvydas v. Davis	533 U.S. 678	3.15
29	Auer v. Robbins	519 U.S. 452	3.11
30	EEOC v. Arabian Am. Oil Co.	499 U.S. 244	3.10
31	Young v. Cmty. Nutrition Inst.	476 U.S. 974	3.06
32	Vt. Yankee Nuclear Power Corp. v. NRDC	435 U.S. 519	3.02



33	Chemical Mfr's Ass'n v. NRDC	470 U.S. 116	3.01
34	Potomac Elec. Power Co. v. OWCP	449 U.S. 268	2.99
35	United States v. Mead Corp.	533 U.S. 218	2.94
36	Ford Motor Co. v. NLRB	441 U.S. 488	2.92
37	Baltimore Gas & Elec. Co. v. NRDC	462 U.S. 87	2.88
38	Rust v. Sullivan	500 U.S. 173	2.84
39	United States v. Nat'l Bank of Commerce	472 U.S. 713	2.84
40	Beal v. Doe	432 U.S. 438	2.83
41	Medtronic, Inc. v. Lohr	518 U.S. 470	2.83
42	BATF v. FLRA	464 U.S. 89	2.82
43	Arkansas v. Oklahoma	503 U.S. 91	2.82
44	Bonanno Linen Serv. v. NLRB	454 U.S. 404	2.81
45	Reno v. Koray	515 U.S. 50	2.80
46	Comm'r v. Portland Cement Co.	450 U.S. 156	2.79
47	Blum v. Bacon	457 U.S. 132	2.76
48	INS v. Aguirre-Aguirre	526 U.S. 415	2.74
49	NLRB v. Yeshiva Univ.	444 U.S. 672	2.73
50	Bd. of Gov. of Fed. Reserve v. Dimension Fin. Corp.	474 U.S. 361	2.70
51	Pauley v. BethEnergy Mines, Inc.	501 U.S. 680	2.69
52	Babbitt v. Sweet Home Chapter	515 U.S. 687	2.68
53	Shalala v. Guernsey Mem'l Hosp.	514 U.S. 87	2.68
54	Fall River Dyeing & Finishing Corp. v. NLRB	482 U.S. 27	2.66
55	NLRB v. Local 103, Int'l Ass'n of Bridge Workers	434 U.S. 335	2.65
56	United States v. Rutherford	442 U.S. 544	2.62
57	United States v. Vogel Fertilizer Co.	455 U.S. 16	2.62
58	United States v. LaBonte	520 U.S. 751	2.59
59	Dole v. United Steelworkers of Am.	494 U.S. 26	2.58
60	Gardebring v. Jenkins	485 U.S. 415	2.55
61	EEOC v. Commercial Office Prod. Co.	486 U.S. 107	2.50
62	PBGC v. LTV Corp.	496 U.S. 633	2.50
63	Allentown Mack Sales & Serv., Inc. v. NLRB	522 U.S. 359	2.49
64	Am. Paper Inst. v. Am. Elec. Power Serv. Corp.	461 U.S. 402	2.46
65	SEC v. Sloan	436 U.S. 103	2.45
66	Nat'l R.R. Passenger v. Boston & Me. Corp.	503 U.S. 407	2.45

67	Schweiker v. Gray Panthers	453 U.S. 34	2.44
68	NationsBank v. Variable Annuity Life Ins. Co.	513 U.S. 251	2.41
69	Int'l Bhd. of Teamsters v. Daniel	439 U.S. 551	2.38
70	Webster v. Doe	486 U.S. 592	2.34
71	Sullivan v. Everhart	494 U.S. 83	2.33
72	United States v. Riverside Bayview Homes, Inc.	474 U.S. 121	2.32
73	Adams Fruit Co. v. Barrett	494 U.S. 638	2.31
74	Dunn v. CFTC	519 U.S. 465	2.30
75	Solid Waste Agency v. Army Corps of Eng'r	531 U.S. 159	2.27
76	Rowan Companies v. United States	452 U.S. 247	2.27
77	Andrus v. Sierra Club	442 U.S. 347	2.26
78	S.E. Cmty. Coll. v. Davis	442 U.S. 397	2.26
79	Anderson Bros. Ford v. Valencia	452 U.S. 205	2.26
80	Schweiker v. Hogan	457 U.S. 569	2.21
81	Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.	467 U.S. 380	2.21
82	Miller v. Youakim	440 U.S. 125	2.18
83	Am. Textile Mfr's Inst. v. Donovan	452 U.S. 490	2.17
84	PERS of Ohio v. Betts	492 U.S. 158	2.17
85	Geier v. Am. Honda Motor Co.	529 U.S. 861	2.16
86	NLRB v. Town & Country Elec., Inc.	516 U.S. 85	2.14
87	Atkins v. Rivera	477 U.S. 154	2.14
88	Smiley v. Citibank	517 U.S. 735	2.11
89	ICC v. Am. Trucking Ass'n	467 U.S. 354	2.08
90	NLRB v. Health Care & Ret. Co.	511 U.S. 571	2.07
91	Beth Israel Hosp. v. NLRB	437 U.S. 483	2.06
92	CFTC v. Schor	478 U.S. 833	2.06
93	Lincoln v. Vigil	508 U.S. 182	2.05
94	Litton Fin. Printing Div. v. NLRB	501 U.S. 190	2.03
95	Securities Indus. Ass'n v. Fed. Reserve	468 U.S. 137	2.02
96	Steadman v. SEC	450 U.S. 91	2.02
97	TWA v. Hardison	432 U.S. 63	2.00
98	E.I. Du Pont de Nemours & Co. v. Collins	432 U.S. 46	1.98
99	Indus. Union Dep't v. Am. Petroleum Inst.	448 U.S. 607	1.98
100	N. Haven Bd. of Educ. v. Bell	456 U.S. 512	1.97
101	NLRB v. Curtin Matheson Scientific Corp.	494 U.S. 775	1.97
102	Conn. Dep't of Income Maint. v. Heckler	471 U.S. 524	1.94

103	AT&T Corp. v. Iowa Util. Bd.	525 U.S. 366	1.94
104	United States v. Clark	454 U.S. 555	1.94
105	United States v. Euge	444 U.S. 707	1.93
106	United States DOT v. Paralyzed Veterans of Am.	477 U.S. 597	1.93
107	Piper v. Chris-Craft Indus.	430 U.S. 1	1.92
108	Good Samaritan Hosp. v. Shalala	508 U.S. 402	1.88
109	Brown v. Gardner	513 U.S. 115	1.88
110	California v. Southland Royalty Co.	436 U.S. 519	1.88
111	Dickinson v. Zurko	527 U.S. 150	1.87
112	EPA v. Nat'l Crushed Stone Ass'n	449 U.S. 64	1.87
113	Capital Cities Cable, Inc. v. Crisp	467 U.S. 691	1.87
114	Neal v. United States	516 U.S. 284	1.85
115	Chicago v. Env'tl. Def. Fund	511 U.S. 328	1.84
116	<i>In re</i> Estate of Cowart v. Niklos Drilling Co.	505 U.S. 469	1.81
117	Quern v. Mandley	436 U.S. 725	1.81
118	FCC v. WNCN Listeners Guild	450 U.S. 582	1.80
119	Pub. Serv. Comm'n of N.Y. v. Mid-La. Gas Co.	463 U.S. 319	1.78
120	Regions Hosp. v. Shalala	522 U.S. 448	1.78
121	ABF Freight Sys., Inc. v. NLRB	510 U.S. 317	1.78
122	Atl. Mut. Ins. Co. v. Comm'r	523 U.S. 382	1.75
123	La. Pub. Serv. Comm'n v. FCC	476 U.S. 355	1.75
124	Edelman v. Lynchberg Coll.	535 U.S. 106	1.74
125	United States v. Bd. of Comm'rs of Sheffield	435 U.S. 110	1.73
126	City of New York v. FCC	486 U.S. 57	1.71
127	Bethesda Hosp. Ass'n v. Bowen	485 U.S. 399	1.71
128	Demarest v. Manspeaker	498 U.S. 184	1.71
129	Herweg v. Ray	455 U.S. 265	1.67
130	Whirlpool Corp. v. Marshall	445 U.S. 1	1.66
131	St. Martin Evangelical Lutheran Church v. South Dakota	451 U.S. 772	1.63
132	Fed. Reserve v. First Lincolnwood Corp.	439 U.S. 234	1.62
133	Traynor v. Turnage	485 U.S. 535	1.62
134	EEOC v. Assoc. Dry Goods Corp.	449 U.S. 590	1.60
135	Holly Farms Corp. v. NLRB	517 U.S. 392	1.59
136	Fort Stewart Sch. v. FLRA	495 U.S. 641	1.57
137	Dep't of Treasury, IRS v. FLRA	494 U.S. 922	1.57

138	FDA v. Brown & Williamson Tobacco Corp.	529 U.S. 120	1.56
139	FERC v. Martin Exploration Mgmt. Co.	486 U.S. 204	1.55
140	Your Home Visiting Nurse Serv. v. Shalala	525 U.S. 449	1.51
141	Barnhart v. Walton	535 U.S. 212	1.49
142	Lechmere v. NLRB	502 U.S. 527	1.48
143	Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta	458 U.S. 141	1.48
144	NLRB v. Hendricks County Rural Elec. Membership Corp.	454 U.S. 170	1.47
145	Consol. Rail Corp. v. Nat'l Ass'n Recycling Indus.	449 U.S. 609	1.47
146	NLRB v. Baptist Hosp.	442 U.S. 773	1.46
147	Bob Jones Univ. v. United States	461 U.S. 574	1.45
148	Bragdon v. Abbott	524 U.S. 624	1.44
149	Cottage Sav. Ass'n v. Comm'r	499 U.S. 554	1.43
150	INS v. St. Cyr	533 U.S. 289	1.41
151	FLRA v. Aberdeen Proving Ground	485 U.S. 409	1.41
152	Presley v. Etowah County Comm'n	502 U.S. 491	1.40
153	Chevron U.S.A. v. Echazabal	536 U.S. 73	1.35
154	Bowen v. Am. Hosp. Ass'n	476 U.S. 610	1.35
155	MCI v. AT&T	512 U.S. 218	1.35
156	Ragsdale v. Wolverine World Wide, Inc.	535 U.S. 81	1.34
157	DeBartolo v. Fla. Gulf Coast Bldg.	485 U.S. 568	1.32
158	United States v. Thompson/Center Arms Co.	504 U.S. 505	1.32
159	Gladstone Realtors v. Bellwood	441 U.S. 91	1.31
160	United States v. City of Fulton	475 U.S. 657	1.31
161	Pattern Makers' League v. NLRB	473 U.S. 95	1.30
162	E.I. Du Pont de Nemours & Co. v. Train	430 U.S. 112	1.30
163	CBS v. FCC	453 U.S. 367	1.28
164	Lyng v. Payne	476 U.S. 926	1.27
165	Davis v. United States	495 U.S. 472	1.25
166	Mead Corp. v. Tilley	490 U.S. 714	1.24
167	FCC v. Midwest Video Corp.	440 U.S. 689	1.23
168	Verizon Communications, Inc. v. FCC	535 U.S. 467	1.22
169	NLRB v. Enter. Ass'n	429 U.S. 507	1.17
170	FCC v. Nat'l Citizens Com. for Broad.	436 U.S. 775	1.13
171	United States v. Cleveland Indians Baseball Co.	532 U.S. 200	1.10

172	United States v. Haggar Apparel Co.	526 U.S. 380	1.06
173	Haig v. Agee	453 U.S. 280	1.04
174	Wis. Dep't of Health v. Blumer	534 U.S. 473	1.04
175	FCC v. Pacifica Found.	438 U.S. 726	1.03
176	Adamo Wrecking Co. v. United States	434 U.S. 275	1.03
177	NLRB v. Ky. River Cmty. Care, Inc.	532 U.S. 706	1.02
178	Bill Johnson's Rest. v. NLRB	461 U.S. 731	0.99
179	Howe v. Smith	452 U.S. 473	0.99
180	Bd. of Gov. of Fed. Reserve v. Inv. Co. Inst.	450 U.S. 46	0.98
181	Thor Power Tool Co. v. Comm'r	439 U.S. 522	0.98
182	Mountain States T&T Co. v. Pueblo	472 U.S. 237	0.95
183	<i>In re</i> Trans Alaska Pipeline Rate Cases	436 U.S. 631	0.91
184	PUD No. 1 v. Wash. Dep't of Ecology	511 U.S. 700	0.88
185	Lawrence County v. Lead-Deadwood Sch. Dist.	469 U.S. 256	0.88
186	United States v. Alaska	503 U.S. 569	0.86
187	Pleasant Grove v. United States	479 U.S. 462	0.82
188	New York v. FERC	535 U.S. 1	0.81
189	Nat'l Fed'n of Fed. Employees v. Dep't of Interior	526 U.S. 86	0.81
190	Eastex v. NLRB	437 U.S. 556	0.79
191	INS v. Nat'l Ctr. for Immigrants' Rights	502 U.S. 183	0.78
192	Mobil Oil v. United Distrib. Co.	498 U.S. 211	0.78
193	Norfolk S. Ry. Co. v. Shanklin	529 U.S. 344	0.75
194	SEC v. Zandford	535 U.S. 813	0.73
195	Yellow Transp. Inc. v. Michigan	537 U.S. 36	0.69
196	INS v. Ventura	537 U.S. 12	0.69
197	Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.	522 U.S. 479	0.69
198	Lopez v. Davis	531 U.S. 230	0.68
199	Lukhard v. Reed	481 U.S. 368	0.67
200	Nat'l Ass'n Greeting Card Publishers v. USPS	462 U.S. 810	0.57
201	California v. United States	438 U.S. 645	0.56
202	Whitman v. Am. Trucking Ass'n	531 U.S. 457	0.55
203	United States v. Fior D'Italia	536 U.S. 238	0.54
204	Reno v. Flores	507 U.S. 292	0.53
205	Metro Broad. Ass'n v. FCC	497 U.S. 547	0.51
206	Shalala v. Ill. Council on Longterm Care	529 U.S. 1	0.51

207	Huffman v. Western Nuclear, Inc.	486 U.S. 663	0.50
208	Comm. Tel. of S. Cal. v. Gottfried	459 U.S. 498	0.48
209	Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.	534 U.S. 327	0.46
210	United States v. O'Hagan	521 U.S. 642	0.46
211	Miller v. Johnson	515 U.S. 900	0.31
212	Nat'l R.R. Passenger v. Morgan	536 U.S. 101	0.31
213	Am. Hosp. Ass'n v. NLRB	499 U.S. 606	0.29
214	NLRB v. Int'l Longshoremans Ass'n	473 U.S. 61	0.27
215	EEOC v. Shell Oil Co.	466 U.S. 54	0.27
216	Barnhart v. Sigmon Coal	534 U.S. 438	0.26
217	Sutton v. United Air Lines, Inc.	527 U.S. 471	0.19
218	NASA v. FLRA	527 U.S. 229	0.19
219	Gregory v. Ashcroft	501 U.S. 452	0.16
220	Miss. Power & Light Co. v. Mississippi	487 U.S. 354	0.15
221	Mohasco Corp. v. Silver	447 U.S. 807	0.14

APPENDIX E: CASES WHERE REHNQUIST AND STEVENS DIVIDED ON THE  
DEFERENCE ISSUE

Case	Citation	Rehnquist Vote	Stevens Vote
<b>2002</b>			
Nat'l R.R. Passenger v. Morgan	536 U.S. 101	Pro-deference	Anti-deference
Wis. Dep't of Health v. Blumer	534 U.S. 473	Pro-deference	Anti-deference
Barnhart v. Sigmon Coal Co.	534 U.S. 327	Anti-deference	Pro-deference
<b>2001</b>			
Zadvydas v. Davis	533 U.S. 678	Pro-deference	Anti-deference
INS v. St. Cyr	533 U.S. 289	Pro-deference	Anti-deference
NLRB v. Ky. River Cmty. Care, Inc.	532 U.S. 706	Anti-deference	Pro-deference
Solid Waste Agency v. Army Corps of Eng'rs	531 U.S. 159	Anti-deference	Pro-deference
<b>2000</b>			
Geier v. Am. Honda Motor Co.	529 U.S. 861	Pro-deference	Anti-deference
Christensen v. Harris County	529 U.S. 576	Anti-deference	Pro-deference
Norfolk S. Ry. Co. v. Shanklin	529 U.S. 344	Anti-deference	Pro-deference
FDA v. Brown & Williamson Tobacco Corp.	529 U.S. 120	Anti-deference	Pro-deference
Shalala v. Ill. Council on Longterm Care	529 U.S. 1	Pro-deference	Anti-deference
<b>1999</b>			
Sutton v. United Air	527 U.S. 471	Anti-deference	Pro-deference
NASA v. FLRA	527 U.S. 229	Anti-deference	Pro-deference
Dickinson v. Zurko	527 U.S. 150	Anti-deference	Pro-deference
Nat'l Fed'n of Fed. Employees v. Dep't of Interior	526 U.S. 86	Anti-deference	Pro-deference
<b>1998</b>			
Bragdon v. Abbott	524 U.S. 624	Anti-deference	Pro-deference
Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.	522 U.S. 479	Anti-deference	Pro-deference
Allentown Mack Sales & Serv., Inc. v. NLRB	522 U.S. 359	Anti-deference	Pro-deference

1997			
United States v. O'Hagan	521 U.S. 642	Anti-deference	Pro-deference
United States v. LaBonte	520 U.S. 751	Anti-deference	Pro-deference
1996			
Medtronic, Inc. v. Lohr	518 U.S. 470	Anti-deference	Pro-deference
Holly Farms Corp. v. NLRB	517 U.S. 392	Anti-deference	Pro-deference
1995			
Miller v. Johnson	515 U.S. 900	Anti-deference	Pro-deference
Babbitt v. Sweet Home Chapter	515 U.S. 687	Anti-deference	Pro-deference
Reno v. Koray	515 U.S. 50	Pro-deference	Anti-deference
1994			
Thomas Jefferson Univ. v. Shalala	512 U.S. 504	Pro-deference	Anti-deference
OWCP v. Maher Terminals, Inc.	512 U.S. 267	Anti-deference	Pro-deference
MCI v. AT&T	512 U.S. 218	Anti-deference	Pro-deference
NLRB v. Health Care & Ret. Co.	511 U.S. 571	Anti-deference	Pro-deference
Chicago v. Env'tl. Def. Fund	511 U.S. 328	Anti-deference	Pro-deference
1993			
Good Samaritan Hosp. v. Shalala	508 U.S. 402	Pro-deference	Anti-deference
Reno v. Flores	507 U.S. 292	Pro-deference	Anti-deference
1992			
United States v. Thompson/Center Arms Co.	504 U.S. 505	Anti-deference	Pro-deference
Presley v. Etoway County Comm'n	502 U.S. 491	Anti-deference	Pro-deference
Lechmere v. NLRB	502 U.S. 478	Anti-deference	Pro-deference
INS v. Elias-Zacarias	502 U.S. 478	Pro-deference	Anti-deference
1991			
Litton Fin. Printing Div. v. NLRB	501 U.S. 190	Anti-deference	Pro-deference
Rust v. Sullivan	500 U.S. 173	Pro-deference	Anti-deference
EEOC v. Arabian Am. Oil Co.	499 U.S. 244	Anti-deference	Pro-deference
1990			
Metro Broad., Inc. v. FCC	497 U.S. 547	Anti-deference	Pro-deference
PBGC v. LTV Corp.	496 U.S. 633	Pro-deference	Anti-deference
IRS v. FLRA	494 U.S. 922	Anti-deference	Pro-deference



Dole v. United Steelworkers of Am.	494 U.S. 26	Pro-deference	Anti-deference
Sullivan v. Everhart	494 U.S. 83	Pro-deference	Anti-deference
Sullivan v. Zebley	493 U.S. 521	Anti-deference	Pro-deference
<b>1989</b>			
Mead Corp. v. Tilley	490 U.S. 714	Anti-deference	Pro-deference
<b>1988</b>			
K Mart Corp. v. Cartier, Inc.	486 U.S. 281	Anti-deference	Pro-deference
<b>1987</b>			
Fall River Dyeing & Finishing Corp. v. NLRB	482 U.S. 27	Anti-deference	Pro-deference
INS v. Cardoza-Fonseca	480 U.S. 421	Pro-deference	Anti-deference
Pleasant Grove v. United States	479 U.S. 462	Anti-deference	Pro-deference
<b>1986</b>			
Young v. Cmty. Nutrition Inst.	476 U.S. 974	Pro-deference	Anti-deference
Lyng v. Pane	476 U.S. 926	Pro-deference	Anti-deference
<b>1985</b>			
Pattern Makers' League v. NLRB	473 U.S. 95	Pro-deference	Anti-deference
United States v. Nat'l Bank of Commerce	472 U.S. 713	Pro-deference	Anti-deference
NLRB v. Int'l Longshoremen Ass'n	473 U.S. 61	Pro-deference	Anti-deference
Chemical Mfr's Ass'n v. NRDC	470 U.S. 116	Pro-deference	Anti-deference
Lawrence County v. Lead-Deadwood Sch. Dist.	469 U.S. 256	Pro-deference	Anti-deference
<b>1984</b>			
ICC v. Am. Trucking Ass'n	467 U.S. 354	Pro-deference	Anti-deference
Securities Ind. Ass'n v. Fed. Reserve	468 U.S. 137	Anti-deference	Pro-deference
Sure-Tan, Inc. v. NLRB	467 U.S. 883	Anti-deference	Pro-deference
Aluminum Co. v. Cent. Lincoln Peoples' Util. Dist.	467 U.S. 380	Pro-deference	Anti-deference
EEOC v. Shell Oil Co.	466 U.S. 54	Anti-deference	Pro-deference
<b>1983</b>			
Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.	463 U.S. 29	Pro-deference	Anti-deference

Bob Jones Univ. v. United States	461 U.S. 574	Anti-deference	Pro-deference
<b>1982</b>			
Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta	458 U.S. 141	Anti-deference	Pro-deference
<b>1981</b>			
NLRB v. Hendricks County Rural Elec. Membership Corp.	454 U.S. 170	Anti-deference	Pro-deference
Schweiker v. Gray Panthers	453 U.S. 34	Pro-deference	Anti-deference
Howe v. Smith	452 U.S. 473	Pro-deference	Anti-deference
<b>1980</b>			
United States v. Euge	444 U.S. 707	Pro-deference	Anti-deference
<b>1979</b>			
Gladstone Realtors v. Bellwood	441 U.S. 91	Anti-deference	Pro-deference
FCC v. Midwest Video Corp.	440 U.S. 689	Anti-deference	Pro-deference
Nat'l Muffler Dealers Ass'n v. United States	440 U.S. 472	Pro-deference	Anti-deference
<b>1978</b>			
Eastex v. NLRB	437 U.S. 556	Anti-deference	Pro-deference
Beth Israel Hosp. v. NLRB	437 U.S. 483	Anti-deference	Pro-deference
Adamo Wrecking Co. v. United States	434 U.S. 275	Anti-deference	Pro-deference
<b>1977</b>			
Batterton v. Francis	432 U.S. 416	Pro-deference	Anti-deference
United States v. Larionoff	431 U.S. 864	Anti-deference	Pro-deference
Piper v. Chris-Craft Indus.	430 U.S. 1	Anti-deference	Pro-deference