

**Mixed Signals:
Reconsidering the Political Economy of Judicial Deference to Administrative
Agencies**

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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 statutes¹ or agency regulations,² to the adequacy of agency decision-making procedures and processes,³ to the sufficiency of the evidence on which agencies base their adjudicative decisions.⁴ 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 administrative decision-making. 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 inconsistent⁵ – in fact advance systematically a consistent political or normative agenda?

The goal of this paper is to examine not 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 adjusts 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 advanced the claim that broad patterns in deference doctrine are explicable as the Supreme Court’s deliberate transfers of decision-making

¹ See *Skidmore et al. v. Swift & Co.*, 323 U.S. 134 (1944); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 530 U.S. 218 (2001).

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

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

⁴ See *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 539 (1998); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

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

power back and forth between the executive agencies and the lower federal courts, depending on which decision-makers 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 paper describes the Cohen-Spitzer rational choice theory of Supreme Court 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 paper assesses the empirical support for the theory, both by re-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 my methodological approach for re-evaluating and extending the Cohen-Spitzer hypothesis. Specifically, Part II describes how I estimate the ideological orientation of the Supreme Court, the judges on the circuit courts of appeal, and the administrative agencies. This Part also explains how I selected, coded, and weighted the Supreme Court cases included in the study. Though I 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 my empirical re-assessment of Cohen and Spitzer's rational choice theory of Supreme Court deference doctrine. I find 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, my 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 my extension of the empirical analysis to the 1990-2002 period, my results are the

exact 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.

I also find 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 I compare how the Court treats cases on appeal from liberal and conservative circuits. However, there does appear to be some evidence that, even though the decisions of the Court 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, I consider two new tentative rational choice explanations for shifting patterns in Supreme Court deference doctrine. First, it may be that deference doctrine tends to expand in response to regulatory initiatives launched by a new presidential administration that differ substantially from those of the preceding administration (the “presidential mandate” hypothesis). Second, I suggest that the Supreme Court may have been ideologically moderate throughout 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 my 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.⁶ 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.⁷ Second, Cohen and Spitzer assume that lower court judges are constrained to some degree by the decisions of the Supreme Court – perhaps because of some sincere commitment to follow the Court's precedent that may sometimes outweigh ideological preferences, or perhaps because lower court judges want to avoid getting reversed on

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* 68 SO. CAL. L. REV. 431 (1996) [hereinafter Cohen & Spitzer, *Judicial Deference*]. This paper built on previous work in which Cohen and Spitzer sought to explain, in rational choice terms, the Supreme Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). 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." See RONALD DWORKIN, *LAW'S EMPIRE* 386 (1986). However, the idea that judges are influenced at least to some degree by their political inclinations is at this point well-established. See SEGAL & SPAETH, *supra*. Though this statement should not be confused with the claim that political attitudes are the exclusive or primary determinants of judicial behavior (the assumption is often limited to the more modest and defensible claim that political views have some effect), Cohen and Spitzer appear to take the stronger position that political/ideological considerations are sufficiently pre-eminent that their effect can be observed in Supreme Court decisions on deference questions even without controlling for other, uncorrelated factors.

appeal.⁸ 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.⁹ 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 specific issues raised by any particular case – should be the primary determinants of the Court’s doctrinal pronouncements.¹⁰

Taken together, these three assumptions imply that the Supreme Court should prescribe a higher level of judicial deference to administrative agencies when the Supreme 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 reliably conservative lower courts but a liberal Democratic administration would prefer a

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

⁹ See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 436-38.

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. 1003 (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 decision-making. See Ethan Bueno de Mesquita & Matthew C. Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AMER. POL. SCI. REV. 755 (2002).

lower level of judicial deference. The basic predictions of the Cohen-Spitzer rational choice model are shown below in Table 1.

[Table 1 about here]

B. The 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 hypothesis. 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.¹¹ 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 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.¹²

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

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.

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.¹³ And, the Supreme Court shifted rightwards as well, with the relatively conservative Sandra Day O'Connor replacing the more moderate Potter Stewart in 1981.¹⁴ However, the judges on the federal courts of appeals 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.¹⁵ Thus, the lower levels of pro-deference signals in the later years of the Cohen-Spitzer dataset

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, e.g. B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AMER. 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 47. Alternative coding methodologies yields somewhat different results for the Supreme Court's ideology, see *infra* TAN 30-37, but the basic story is the same in either case.

¹⁵ See *infra* note 75.

can be interpreted as a return to equilibrium – though 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 to them 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:

[i]n 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.¹⁶

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 1997-1999. 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, I attempt to reproduce Cohen and Spitzer's empirical assessment of the 1977-1990 period, and I 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 papers, I could not replicate their sample or their methods precisely. I therefore employed what seemed like the most sensible method for gathering and coding administrative law cases for their pro- or anti-deference content, consistent with the general theory Cohen and Spitzer lay out. While I attempt to replicate Cohen and Spitzer's method for weighting the cases (by counting reversals of lower court decisions as stronger signals than affirmances), I also employ an alternative influence-weighting method based on subsequent case citations. In addition, I follow Cohen and Spitzer in examining whether there are systematic differences in deference doctrine toward executive agencies as opposed to independent agencies. I also investigate whether there are systematic differences in how conservative and liberal *justices* decide cases raising a deference question – as the Cohen and Spitzer theory

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

presumably would predict – and whether the Court treats liberal and conservative *circuits* differently when issuing its rulings.

II. Methodology

In the interests of making my empirical evaluation of the Cohen-Spitzer hypothesis as transparent and replicable as possible, this Part discusses methodological issues in some detail. In particular, I first describe my 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. I then explain how I selected the cases for inclusion in my sample and how I coded these cases for their pro- or anti-deference content, and I describe the various weighting techniques I 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. Assessing the Players' Ideology

In order to operationalize the Cohen-Spitzer model for empirical testing, I must first 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 in order to maximize comparability between their study and mine. However, I take a different approach in some respects, particularly with regard to assessing the ideology of the Supreme Court. My 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, I assume that the political ideology of administrative agencies is determined primarily by the political ideology of the president. Thus, I assume that the agencies were 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.¹⁷ Inasmuch as operationalizing the Cohen-Spitzer hypothesis depends on correctly predicting the changes in agency ideology from year to year, therefore, using the president's party as a proxy ought to be sufficient.¹⁸

¹⁷ See, e.g. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001); Terry M. Moe, *An Assessment of the Positive Theory of "Congressional Dominance"*, 12 LEGIS. STUD. Q. 475 (1987); 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); Scott R. Furlong, *Political Influence on the Bureaucracy: The Bureaucracy Speaks*, 8 J. PUB. ADMIN. RES. & THEORY 39 (1998). However, this assumption is subject to a few important caveats and qualifications. First, 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., Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003); 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 even political appointees can sometimes "go native," seeking to advance the agency's agenda even when it diverges from the president's priorities. See, e.g., 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). For these reasons, the difference between the political ideology of agencies may vary less with the presidential administration than it might first appear. 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, then the analysis would be confounded. A shift from a Democratic to a Republican presidential administration in this example 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 obtains. 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, "Comparing Presidents, Senators, and Justices, 1946-2002" (2003) [unpublished draft, on file with author].

However, though the president has a great deal of authority over executive branch agencies, he has less direct control over independent agencies.¹⁹ Therefore, following Cohen and Spitzer, I test 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

I next must estimate the average political ideology of the U.S. Circuit Courts of Appeal. Here, I again follow Cohen and Spitzer's methodology.²⁰ 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.²¹ 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.²² Again following Cohen and Spitzer, I

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

²⁰ See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 445-47.

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

weight active status judges twice as heavily as senior status judges, to reflect the reduced caseload, and consequent reduced ideological influence, of the latter set of judges.²³

For each year from 1977 to 2002, I take the average ideology score for all the judges on the U.S. Circuit Courts of Appeal.²⁴ 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. However, by the late 1980s 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 about here]

[Figure 1 about here]

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. However, most observers and scholars 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 See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 445-47. See also 28 U.S.C. §371 (2000) (statutory provisions governing senior status retirement).

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.

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 assumed 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.²⁵ 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.²⁶ If 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 6 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, and conservative in 1991-1996 and in 2000-2001. It was moderate by my 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

²⁵ See Sheldon Goldman, *Reagan’s Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319-20 (1989); ANTONIN SCALIA, A MATTER OF INTERPRETATION 38-47 (1997). See also generally MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2000).

²⁶ See William E. Kovacic, *The Reagan Judiciary and Environmental Policy: The Impact of Appointments to the Federal Courts of Appeals*, 18 B.C. ENV’T L. AFF. L. REV. 669 (1991); Ronald Stidham et al., *The Voting Behavior of President Clinton’s Judicial Appointees*, 80 JUDICATURE 16 (1996); Stephen M. Griffin, *Legal Liberalism at Yale*, 14 CONST. COMMENTARY 535, 550 (1997).

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. I will consider below 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.²⁷

[Figure 2 about here]

[Figure 3 about here]

[Figure 4 about here]

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.²⁸ 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. I consider four possible proxies for Supreme Court justice ideology, and, for each one, I consider both the predicted ideology of the median justice and the mean ideology score for the whole Court.²⁹

²⁷ See Part III.B.2, *infra*.

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

The first of the four measures I consider is Cohen and Spitzer’s method, described above. Second, I examine the Segal-Cover scores.³⁰ These scores, which presume a unidimensional liberal-conservative measure of judicial ideology,³¹ 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.³² Third, I use estimated judicial ideal points from two recent studies, one by Michael Bailey,³³ the other by Andrew Martin and Kevin Quinn,³⁴ which employ sophisticated multidimensional scaling models to infer judicial ideal points from actual votes in decided cases.³⁵ 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 are 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 possible

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

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

³² See Segal & Cover, *supra* note 30, at 559-60.

³³ Michael Bailey, “Comparing Presidents, Senators, and Justices, 1946-2002” (Sept. 2002) [Unpublished manuscript, on file with author].

³⁴ Andrew D. Martin & Kevin M. Quinn, “Bayesian Learning about Ideal Points of U.S. Supreme Court Justices, 1953-1999” (July 9, 2001) [Unpublished manuscript, on file with author].

³⁵ These models generate more complex output than the simple Segal-Cover scores. I rely on the “posterior mean” ideal point calculated by Martin & Quinn, *see supra* note 34 at 33, and the “Theta” score for each justice calculated by Bailey, *see supra* note 33 at 23.

measure of Court ideology is shown below in Table 5. I also re-scale seven of the eight measures³⁶ 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.

[Table 3 about here]

[Table 4 about here]

[Figure 5 about here]

[Figure 6 about here]

The results for mean Supreme Court ideology (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 (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

³⁶ I do not rescale the median justice’s ideology score as measured by the Cohen-Spitzer method, because this measure does not vary throughout the sample period.

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’Conner replaced Stewart), and sharply more conservative in the early 1990s (when Thomas replaced Marshall).³⁷

For purposes of the subsequent discussion and analysis, I will concentrate on what I conclude, from 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.

B. Sample Selection

In order to test whether the ideological shifts discussed above had the predicted effect on Supreme Court deference decisions, I must identify the relevant cases in the sample period and code them 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 cases selection and coding techniques. However, Cohen and Spitzer’s dataset is not publicly available, and their paper does not provide a description of their techniques that is detailed enough to generate identical data.³⁸ I therefore employ my own method, making use of the search tools available through a number of existing on-line databases to compile the set of Supreme Court cases, decided between 1977 and

³⁷ Even here there are some important inconsistencies. First, while both Martin-Quinn and Bailey’s estimates 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.

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.

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.

I searched three on-line databases of Supreme Court opinions: Westlaw, Lexis, and USSCPlus,³⁹ using search assistant tools provided by each of these sources.⁴⁰ I also performed a supplemental Lexis keyword search,⁴¹ 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.⁴² I eliminated from the data set all those cases that did not involve some issue relating to the amount of deference that the judiciary ought to accord to an administrative agency's decision. My case selection procedure yielded 221 relevant cases in the 1977-2002 period, or an average of 8.5 cases per year.⁴³ A complete list of the 221 cases included in the analysis is provided in Appendix A.

There are three potentially important distinctions between my approach to sample selection and Cohen and Spitzer's approach. First, Cohen and Spitzer – at least in their first paper – claim to restrict their attention to statutory interpretation cases.⁴⁴ However,

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

⁴⁰ On Westlaw, I examined all cases listed in Westlaw's KeySearch service under the headings "Administrative Law – Judicial Review – Scope of Review" and "Administrative Law – Statutory Construction." On Lexis, I examined all cases listed in Lexis's Search Advisor under the heading "Administrative Law – Judicial Review – Standards of Review – Standards Generally." On USSCPlus, I examined all cases under the heading "Administrative Law." 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 I searched for any variant on the words "agency" or "commission" within five words of the word "interpretation."

⁴² I did this by 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 33 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 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 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 paper 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

my dataset includes cases where some issue regarding the degree of judicial control over agency decision-making 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. I took this approach for two reasons. 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, but that these patterns become clearer when evaluating all such 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 data set by doctrinal category is likely to make it too difficult to discern general patterns.⁴⁵

The second difference is that Cohen and Spitzer (at least in their latter 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 level, without filtering out those cases that raised no real issue of deference to an agency decision. Because I did not have access to Cohen and Spitzer's dataset, I cannot verify that this is the case, but it seems likely given

Chevron ... wherein the Supreme Court instructed appellate courts to defer to any 'reasonable' statutory interpretation offered by administrative agencies.") However, the numbers 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. Compare Cohen & Spitzer, *Puzzle*, *supra* note 6 at 103 Tab.7 with Cohen & Spitzer, *Judicial Deference*, *supra* note 6 at 459 Tab.3.

⁴⁵ On this point, the numbers of statutory interpretation cases that Cohen and Spitzer report seem too large. For example, they claim that in 1989, 13 Supreme Court cases dealt with an issue of deference to an agency statutory interpretation. See Cohen & Spitzer, *Puzzle*, *supra* note 6 at 103 Tab. 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, I cannot be sure how they arrived at 13 statutory interpretation cases, but it seems highly implausible that ten cases raising a *Chevron* issue would not cite *Chevron*.

their description of their methodology⁴⁶ and the puzzlingly high number of cases in their dataset relative to my attempt at replication.⁴⁷ 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 civil procedure in federal court,⁴⁸ attorneys’ fee awards,⁴⁹ 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, in this research project I do not examine denials of certiorari, nor do I examine patterns of deference at the lower court level in cases where the Supreme Court did not grant review.⁵⁰ Therefore, this study does not attempt to replicate all aspects of Cohen and Spitzer’s original empirical work, but only on those elements of their analysis that focused on the cases actually decided by the Supreme Court. I believe that this focus on actually 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 decision-making 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

⁴⁶ See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 456-57.

⁴⁷ See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 459 Tab. 3.

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 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 In this sense, my approach in this paper differs from several elements of the Cohen-Spitzer study. See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 462-65. Though this difference might explain the difference in our results, that would be the case only if cert denials sent a stronger signal to lower courts than would seem plausible.

decision-making patterns and Supreme Court cert 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.

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. Even this simple approach involves some problematic coding issues, however.

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*,⁵¹ 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 as not supported by a sufficient statement of reasons that this rule was related to the Act’s health and safety goals. Similarly, the Court in *NLRB v. Baptist Hospital*⁵² upheld one of the challenged National Labor Relations Board (NLRB) rules

⁵¹ 452 U.S. 490 (1981).

⁵² 442 U.S. 773 (1979).

relating to union solicitation in hospitals as supported by substantial evidence, but invalidated a related rule as too sweeping.

Second, the message sent by some cases 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*⁵³ upheld a decision by the Farmer’s Home Association (FmHA) 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, and in fact may happen more frequently. For instance, in *Lechmere, Inc. v. NLRB*,⁵⁴ 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. Relatedly, the Court sometimes upholds an agency action, and recites standard pro-deference language, yet reaches its conclusion without according special deference to the agency’s determination. This appears to what happened in *North Haven Board of Education v. Bell*,⁵⁵ 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.⁵⁶

⁵³ 476 U.S. 926 (1986).

⁵⁴ 502 U.S. 527 (1992).

⁵⁵ 456 U.S. 512 (1982).

⁵⁶ *Bell*, 456 U.S. at 522 n.12.

These potential problems turn out not to be as severe as one might expect, however. 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. When coding the ambiguous cases, I adhered to the following principles. First, where one aspect of the holding appeared considerably more important than the others, I used the deference signal sent on the more important element of the case. Second, where there were multiple aspects of the Court's holding that seemed equally important, but one 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 that 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 I could not confidently categorize them; these cases (only four out of the 221 in the dataset) were assigned a deference score of 0. My coding decisions obviously involve debatable judgment calls. For that reason, and in the general interests of transparency, I have listed what I considered to be ambiguous cases, and my coding decisions, in Appendix B.

Another potentially problematic issue is whether to include those 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. Since 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 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 data set 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 difficulty, more significant and more conceptual, 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 – that is, 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 – that is, each year's aggregate deference signal divided by the number of cases decided that year.

On the 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 the signal the Court sent in a year with 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 real, the actual number of Supreme Court cases decided per year declined substantially between 1977 and 2002.⁵⁷ 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.⁵⁸ I take 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 I employ. I assign a score of +1 to every case where the Supreme Court indicated that deference to

⁵⁷ See *infra* Table 6 and Figure 14.

⁵⁸ See *infra* note 76.

administrative agencies was appropriate, and a score of –1 to every case where the Supreme Court endorsed more aggressive judicial scrutiny of agency decisions.

However, the simple case-counting approach implies a strong and implausible assumption: that every case that 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*⁵⁹ and *Community Television of Southern California v. Gottfried*⁶⁰ 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 the simple case-counting method are possible. I therefore employ, in addition to the equal-weighting approach, two alternative weighting methods. First, I follow Cohen and Spitzer’s method of weighting Supreme Court reversals more heavily than affirmances. Second, I develop an alternative, and I believe superior, method of weighting cases by their influence, measured as a function of citations per month.

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.

⁵⁹ 467 U.S. 837 (1984).

⁶⁰ 459 U.S. 498 (1983).

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 affirms, the case is coded as a “+1”.⁶¹ The rationale is that lower court judges don’t like getting reversed, and so they treat reversals as more salient signals.⁶²

The evidence that lower court judges don’t like to be reversed notwithstanding, 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’s 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,⁶³ *affirmances* may send an especially strong signal. After all, why would the Supreme Court grant cert to a case that it views as correctly decided, if not to signal to other courts the proper resolution of a particular legal issue?

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 doesn’t

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

⁶² See Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, J. ECON. BEHAV. & ORG. 23 (1994); 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. LEG. 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 (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 two (0.9%) involved a sufficiently divided holding that they could not be satisfactorily classified as either, and so were given a score of 0 under this weighting methodology.

address the problem illustrated by the *Chevron/Gottfried* comparison noted above.⁶⁴

Nonetheless, while I am skeptical of the Cohen-Spitzer emphasis on whether the Supreme Court decision was a reversal or an affirmance, in the interests of comparability I code all the cases in the sample 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 the scariness to lower courts of any reversal implied by the weighting theory, I coded these cases as reversals.

c. Citation-Weighted Influence Scores

An alternative approach to weighting the cases in the sample is to use citation counts as a proxy for influence. Such an approach is obviously imperfect, especially since simple citation counts don't 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.⁶⁵ 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." I calculate the influence factor by, first, finding the Westlaw KeyCite headnote for each case that most closely corresponds to the deference signal. If multiple headnotes appeared relevant, I chose the one for which the case was more often cited. I then 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 function" for each case is a function of the number

⁶⁴ See *supra* TAN 59-60.

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

of citations and the number of months since the case was decided.⁶⁶ The 221 cases in the sample ranged from a maximum influence factor of 4.85 (*Chevron*), to a minimum of 0.14 (*Mohasco Corp. v. Silver*⁶⁷), 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 are, in descending order of influence, *Chevron*, *Motor Vehicles Manufacturer's Association v. State Farm*,⁶⁸ *Heckler v. Campbell*,⁶⁹ *Bowen v. Georgetown University Hospital*,⁷⁰ and *INS v. Cardoza-Fonseca*.⁷¹ The weighting system also seems to do a reasonably good job in assigning high scores both to influential recent cases – *Christensen v. Harris County*⁷² and *U.S. v. Mead*⁷³ rank 21st and 35th with respective influence factors of 3.48 and 2.94 – and to influential older cases – *Vermont Yankee v. NRDC*,⁷⁴ for instance, comes in 32nd on the list with a score of 3.02.

The influence-weighted scores, for all their imperfections, thus seem to offer distinct advantages over weighting cases by whether they were affirmances or reversals, or counting all cases equally. Nonetheless, I consider all six measures of deference signal

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. I add one to the citation count in the numerator because otherwise recent cases with no citations would be counted as having zero influence. I use a natural log function of months in the denominator of the fraction inside the parentheses 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. A straight division would therefore underweight the influence that older cases had in their immediate aftermath. I take the natural log of the whole function inside the parentheses because I assume a decreasing marginal significance of additional case citations.

⁶⁷ 447 U.S. 807 (1980).

⁶⁸ 463 U.S. 29 (1983).

⁶⁹ 461 U.S. 458 (1983).

⁷⁰ 488 U.S. 204 (1988).

⁷¹ 480 U.S. 421 (1987).

⁷² 529 U.S. 576 (2000).

⁷³ 533 U.S. 218 (2001).

⁷⁴ 435 U.S. 519 (1979).

strength (aggregate and average yearly scores for each of the three weighting methods) in the subsequent analysis.

III. Results

Following the various coding and weighting methodologies described above, I assess the 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 rational choice theory predicts. Although the patterns in the 1977-1990 period are roughly consistent with the theory, even here there are some significant differences between the data Cohen and Spitzer report and what I find. In particular, in terms of aggregate deference signal, I find high degrees of deference demanded in the late 1970s under Carter, whereas Cohen and Spitzer found relatively low levels.

Much more importantly, I find 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 – most versions of 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, and then a relatively steady decline until 2000. These 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, I find 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.

However, consistent with the Cohen-Spitzer theory, I do find noticeable differences, of the sort the theory would predict, 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. However, though 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 spike in the early to mid-1980s – where the Court appeared to send much stronger pro-deference signals – 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.⁷⁵

Below I present graphically the results of my attempt to replicate and extend Cohen and Spitzer's analysis.⁷⁶ Figure 7 shows the results, for the 1977-2002 period,

⁷⁵ Cite Cohen Spitzer paper. As noted above, *supra* TAN 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).

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. However, 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. (However, as Cohen and Spitzer note, 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.) 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.

⁷⁶ However, as noted above, this is not an exact replication, for two reasons. First, Cohen and Spitzer weight their deference signals with a certain number of cert denials, coded as 0. That is, they use the

when using the aggregate reversal-weighted annual deference score, while Figure 8 uses the average reversal-weighted deference score. Of the versions of the analysis that I present, these are the one that seeks to replicate, as faithfully as possible, Cohen and Spitzer's original case-weighting methodology.

[Figure 7 about here]

[Figure 8 about here]

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.

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, I show the aggregate and average deference scores separately. However, in the interests of greater comparability, I also calculated the average deference score “deflated” by presumed cert denials. Here I use the maximum number of cases decided in any year in my sample – 16 – 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 9 about here]

The inconsistency of Cohen and Spitzer’s findings with my attempt at replication is puzzling. Clearly, the difference in results arises from differences in what we chose to include in our sample, and in the differences in signal aggregation methodology. However, because Cohen and Spitzer’s data is not publicly available, I cannot ascertain the exact reasons for this divergence.

I next consider 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 about here]

[Figure 11 about here]

The unweighted scores do not reveal any particularly striking patterns. However, 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 about here]

[Figure 13 about here]

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 about here]

[Figure 14 about here]

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.⁷⁷ More generally, both the aggregate and average deference signals that I find are fundamentally inconsistent with Cohen and Spitzer's theory, and their own predictions about patterns of deference doctrine in the Clinton years.

B. Additional Tests: Different Agencies, Different Circuits, Different Justices

1. Executive agencies vs. 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

⁷⁷ See *infra* Part IV.B.

the president than are the independent agencies, which tend to be more insulated.⁷⁸ 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 and Spitzer claim to find in the data.⁷⁹ 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, it's worth noting a potential theoretical problem with this prediction. 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*⁸⁰ raised an issue of how much deference was due the FCC, an independent agency, but the case relied on the framework established by *Chevron*, which involved deference to an executive agency – the Environmental Protection Agency (EPA). 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.⁸¹ 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

⁷⁸ See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 447, 450-51.

⁷⁹ See Cohen & Spitzer, *Judicial Deference*, *supra* note 6, at 460-66.

⁸⁰ 535 U.S. 467 (2002).

⁸¹ See, e.g., *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003) (applying *Vermont Yankee* to INS); *Puerto Rico Aqueduct & Sewer Auth. v. U.S. EPA*, 35 F.3d 600, 606 (1st Cir. 1994) (applying *Vermont Yankee* to EPA); *Guitard v. U.S. Sec. of Navy*, 967 F.2d 737, 742 (2nd Cir. 1992) (applying *Vermont Yankee* to Navy).

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.⁸² These are depicted below in Figure 15 and Figure 16.

[Figure 15 about here]

[Figure 16 about here]

These figures provide little support for the Cohen-Spitzer hypothesis that their rational choice 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. However, in 1981-1982, 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 deference signal associated with cases involving executive agencies was also consistently stronger than the 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.

⁸² Though I only report the influence-weighted score results, I checked the unweighted and reversal-weighted annual and aggregate scores as well. No significant patterns appeared.

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 National Labor Relations Board (NLRB) (27 cases) or the Federal Labor Relations Authority (FLRA) (six 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."⁸³

⁸³ 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. ??, ?? (2003). Interestingly, decisions involving agencies that deal with employees' rights (both individually and collectively) appear to get 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).

Another potential explanation, explored in greater detail below,⁸⁴ 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 an 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

⁸⁴ See *infra* Part IV.B.1.

As discussed above, although there are general national trends in the ideological composition of the federal appellate bench, there is considerably inter-circuit ideological variation as well.⁸⁵ Therefore, it may be that the Supreme Court sends different signals about the appropriate 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 courts than conservative courts 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 circuit on the opposite end of the political spectrum.

To test the hypothesis that the ideology of the circuit of origin makes a difference, I subdivided the original 221 cases 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

⁸⁵ See *supra* TAN 27.

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 judicial deference issue does not appear until 1985. Similarly, no circuit other than the 11th Circuit was liberal from 1990 to 1996, and so no liberal circuit cases appear in the sample in the 1991-1995 period. I therefore 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 are 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.⁸⁶ 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 to agencies after the election of George W. Bush – again exactly the opposite of what the Cohen-Spitzer theory predicts.

⁸⁶ Supreme Court appears to send somewhat different signals in 1997-1998, but this result may be driven by a single case, *Dunn v. CFTC*. 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 21 about here]

[Figure 22 about here]

[Figure 23 about here]

3. Individual Justices: Stevens vs. Rehnquist

The preceding attempts to reproduce and extend Cohen and Spitzer's test of their rational choice 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 rational choice 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.

I conduct a preliminary test of this alternative version of the hypothesis 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 greater judicial deference to agency decisions during the Reagan and Bush administrations, but more likely to call for more 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.⁸⁷ 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 citation-weighting methodology described above, I calculated Chief Justice Rehnquist's average influence-weighted deference signal, using only the cases where he and Justice Stevens disagreed, for each of the 26 years in the sample.⁸⁸ 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 rational choice hypothesis. As is clear from Figure 24, Figure 25, and Figure 26 below – which show,

⁸⁷ For the most part, these cases are those in which one of the two justices joins the majority while the other one dissents. However, in some cases one of the two concurred but resolved the deference issue differently. These cases were included in the set of cases where the two 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.

⁸⁸ Where Rehnquist dissented on the deference issue, I reversed the sign on the influence score that the case otherwise would have received. So, for example, *US v. O'Hagan* (1997) (with Justice Stevens in the majority) came out pro-deference with an 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.

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 1979-1987, and Stevens consistently voted for more deference than Rehnquist from about 1994-2000.⁸⁹

[Figure 24 about here]

[Figure 25 about here]

[Figure 26 about here]

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 judges, the hypothesized effect is 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 broader issues of appropriate deference. That is, Rehnquist may vote the pro-deference line in the 1980s because the cases that come up involve conservative agencies doing conservative things, but he votes anti-deference in the 1990s because the cases involve liberal agency policy choices.⁹⁰

IV. Discussion

⁸⁹ The pattern in the 1988-1993 period, and in 2001-2002, is more ambiguous.

⁹⁰ 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 the norm. Such additional tests would be extremely valuable, but they are beyond the scope of the present study.

A. Accounting for a Null Finding

The analysis above yields few clear-cut conclusions. Indeed, the strongest result is a null finding – I generally do not observe the patterns that Cohen and Spitzer predict, 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 Supreme Court-circuit court administrative agency 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 inasmuch as it might prompt additional research – especially by legal scholars interested in social scientific analysis of judicial behavior – into alternative explanations for the Supreme Court’s decisions on cases that raise issues of judicial deference to administrative agencies.⁹¹

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 I 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

⁹¹ It is worth stressing that such a conclusion would not necessarily entail a rejection of applying rational choice theory to Supreme Court decision-making 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.

sample selection and measurement. While I have endeavored to explain as clearly as possible the rationale and justification for my decisions on these methodology issues, other scholars may find my choices problematic. I therefore leave open the possibility that the predicted effect does not emerge because I have not correctly calculated the Court's deference signal, though this possibility seems to me an unlikely explanation for the apparent lack of confirmation of the Cohen-Spitzer hypothesis.⁹²

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. Both Cohen and Spitzer and I 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 sufficiently quickly that no clear Supreme Court signal is observable in data of the sort examined here.⁹³

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 potentially important variables. Neither Cohen and Spitzer's original studies, nor my attempts at re-evaluation and extension, perform a multivariate analysis that controls for other potential influences on Supreme Court deference doctrine. The main reason for this is that the hypothesis as

⁹² 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.

⁹³ It is also possible that lower courts might over-estimate as well as under-estimate the amount of change in deference doctrine the Supreme Court desires. This could further confound the results, in that increases in deference doctrine might actually indicate a period when the Court wants less deference than it did in an earlier period. However, though such overreactions are conceptually possible, they seem unlikely.

originally advanced by Cohen and Spitzer implied that the effect would be strong enough to determine the pattern of 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. Nonetheless, though 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: What Explains the “Double Hump”?

The main conclusions of this study are negative – though 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 are in fact disconfirmatory to some degree. However, some patterns do seem to appear in the data, and, though not especially robust, these patterns invite preliminary attempts at explanation. The most interesting such 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. 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.⁹⁴ 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 than the Cohen-Spitzer hypothesis about the Supreme Court’s preferences. The “presidential

⁹⁴ 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 may be able to 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.

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 increasingly anti-deference signals into 2008. If a Democrat wins the 2004 election, we would expect strongly 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 perhaps a spike in the Carter administration as well – though the fact that Carter was only a one-term president might make the pattern harder to discern.

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 are similarly moderate, the Court contracted the level of judicial deference, authorizing more vigorous judicial scrutiny. But, when the circuit courts tended to be ideologically 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 the latter part of 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, would be 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 a Democrat wins in 2008, 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 sharply divergent predictions about what ought to happen in the next several years. 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 a Democrat wins the 2004 election, we would also expect relatively strong pro-deference signals in this period. If the Supreme Court centrism theory is correct, we should expect the Court to maintain the low-deference signals during this period, 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 leave the Court). In contrast, the goldilocks hypothesis would predict continuing low-deference signals if a Democrat takes office in 2004.

CONCLUSION

Shifting patterns in Supreme Court pronouncements regarding the appropriate level of judicial scrutiny of administrative agency actions presents a puzzle for legal scholars and social scientists interested in judicial behavior. 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.

In this paper, I attempt to advance 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. I find little evidence to support the Cohen-Spitzer hypothesis, at least in the strong form in which Cohen and Spitzer originally presented it. 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 decision-making in the Supreme Court.

I consider two possible alternative theories that are more consistent with the data I report 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 – perhaps 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 my 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 papers 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.

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	Conservative	High deference	Conservative
3	Conservative	Conservative	Liberal	Low deference	Conservative
4	Conservative	Liberal	Liberal	<i>Depends:</i> <ul style="list-style-type: none"> - 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> <ul style="list-style-type: none"> - Low deference if courts are more liberal than agencies - High deference if agencies are more liberal than courts 	Conservative

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

Table 3

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

First number represents cardinal ideology score. Number in parentheses represents ordinal ideological ranking, with (1) meaning most liberal justice of the sixteen, and (16) meaning most conservative justice. More than one number in parentheses indicates multiple judges with the same cardinal score.

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 as measured by –							
	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 Supreme Court became more liberal at this transition point, according to the specified indicator.

A “0” indicates that the specified indicator finds no change in the Supreme Court’s ideology, according to the specified indicator.

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)

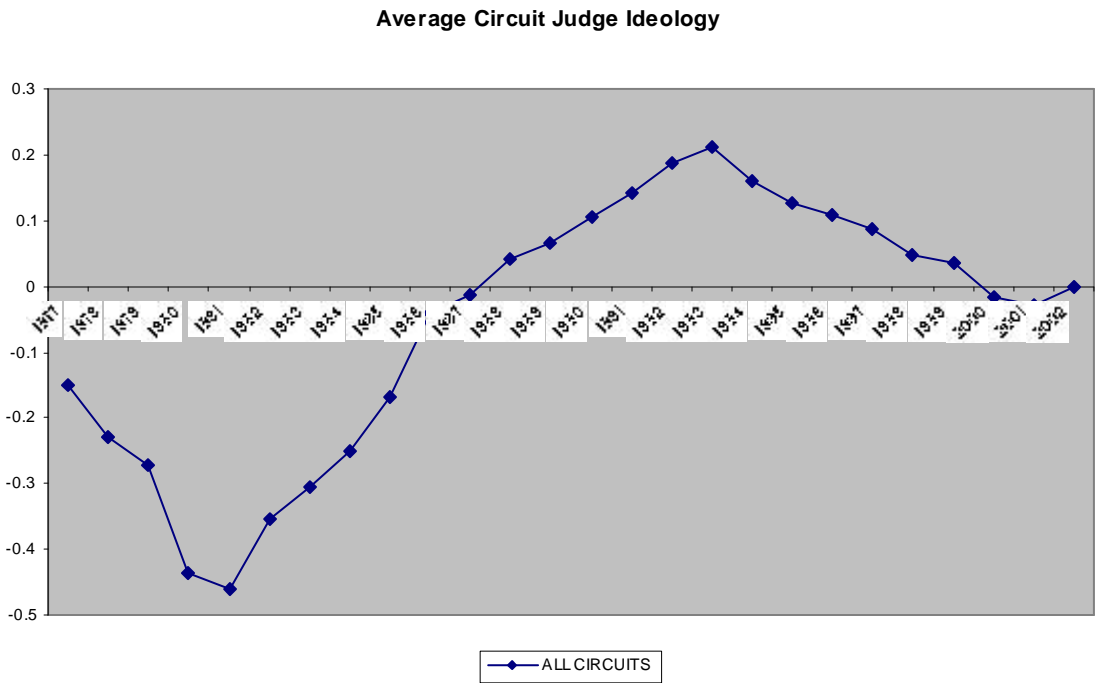


Figure 1

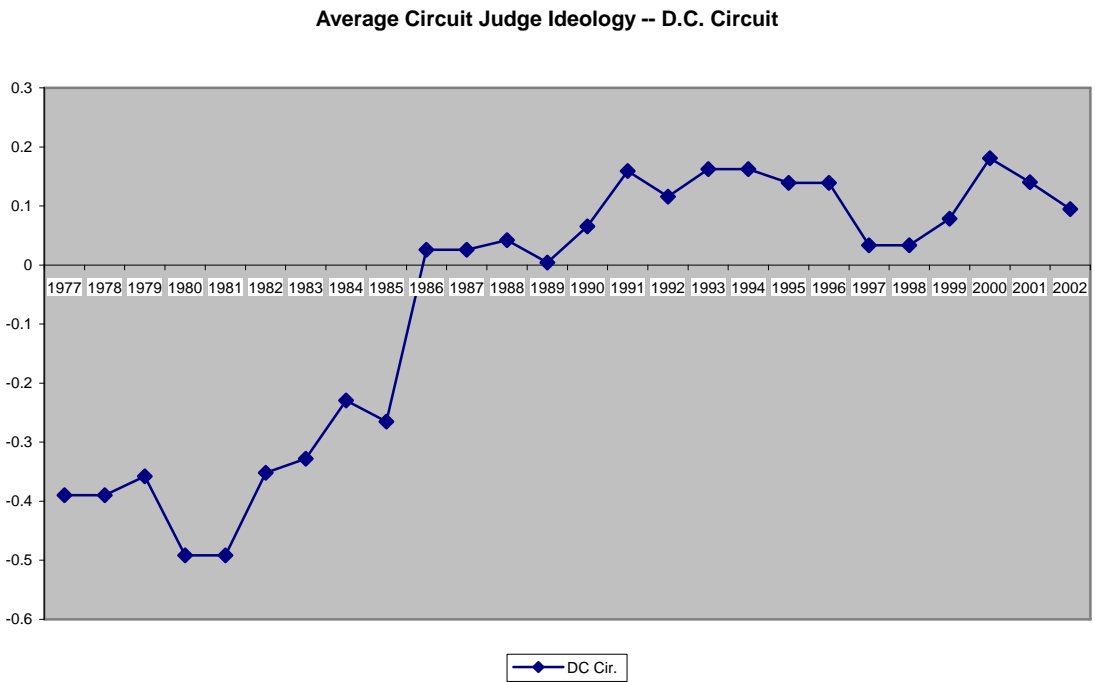


Figure 2

Average Circuit Judge Ideology -- 9th Circuit

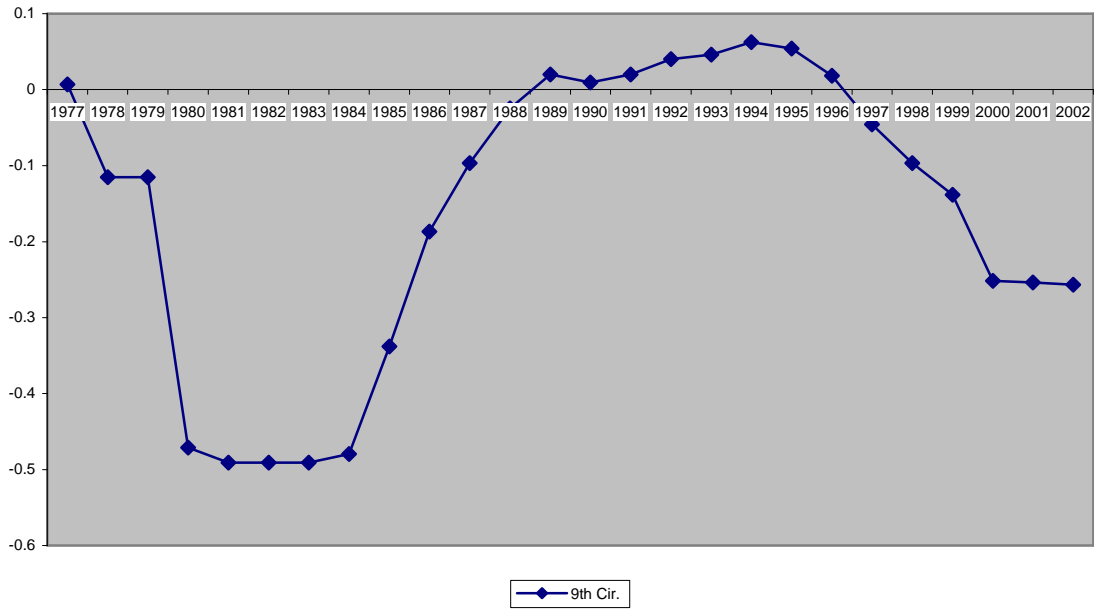


Figure 3

Average Circuit Judge Ideology -- 7th Circuit

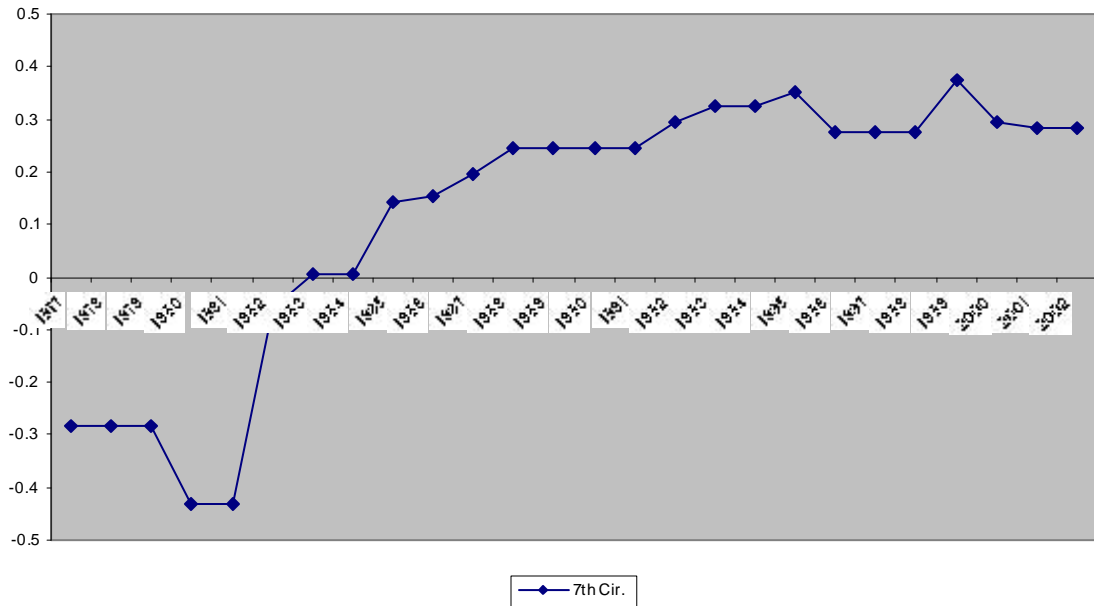


Figure 4

Supreme Court Mean Ideology Score -- Four Measures

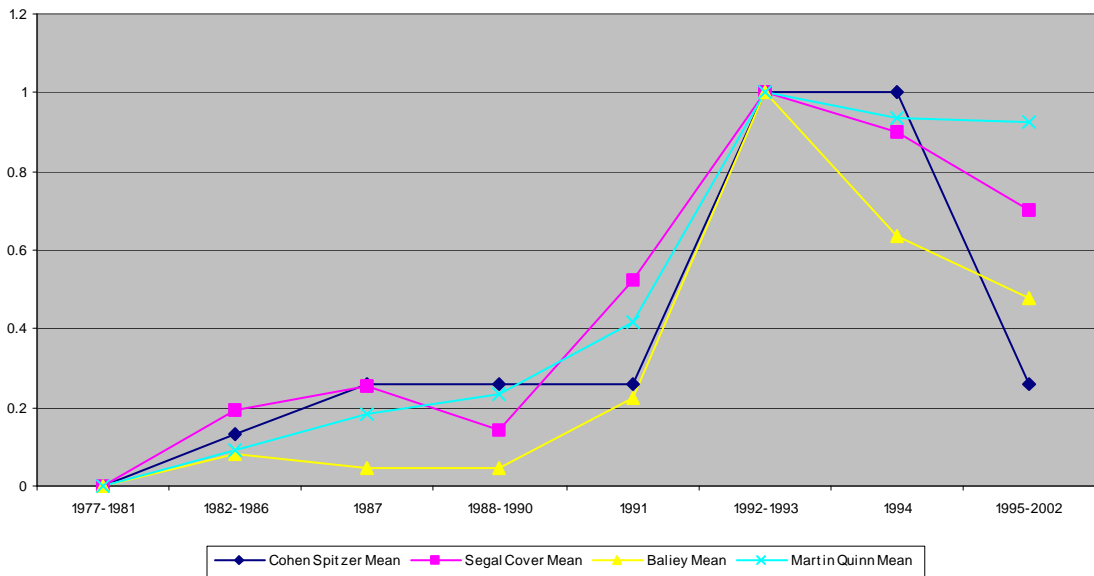


Figure 5

Supreme Court Median Justice Ideology -- Three Measures

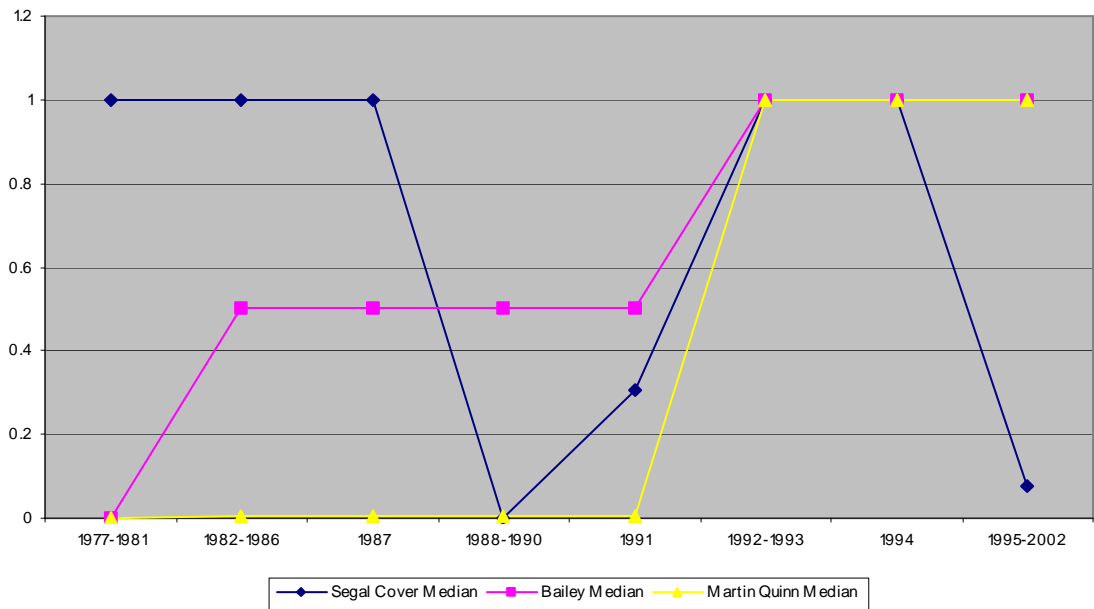


Figure 6

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

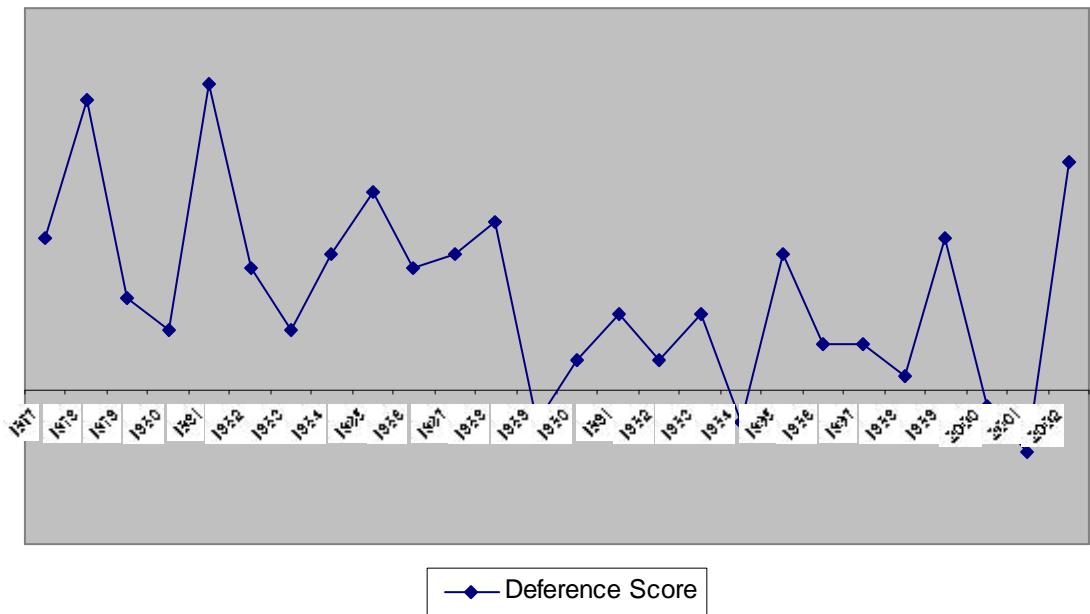


Figure 7

Reversal-Weighted Average Deference Score

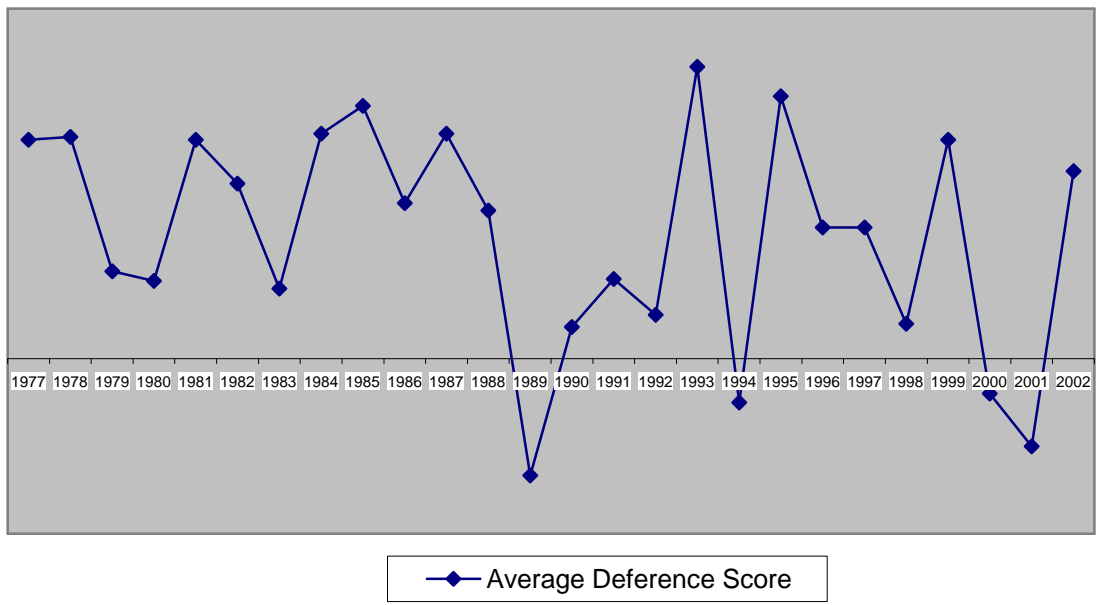


Figure 8

Reversal-Weighted Average Deference Score - with and without deflation by number of cert denials

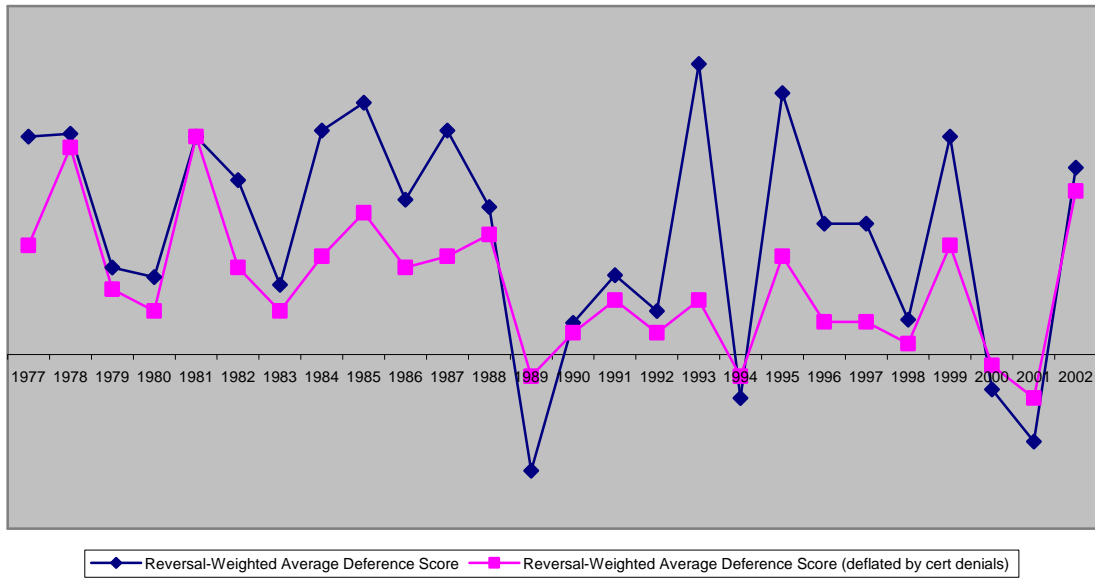


Figure 9

Annual Aggregate Deference Score

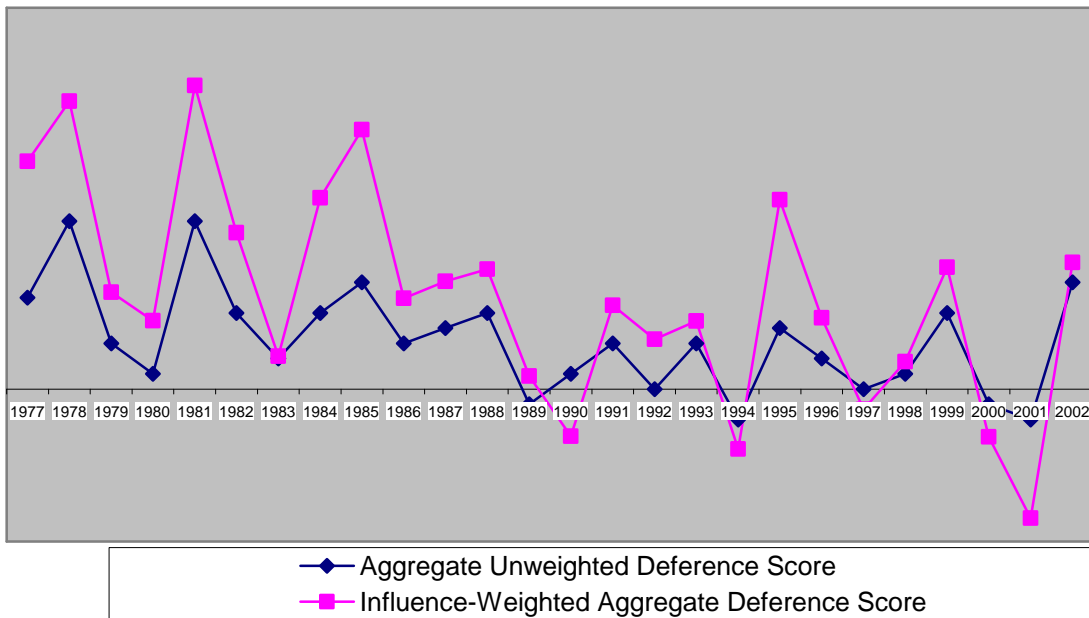


Figure 10

Annual Average Deference Score

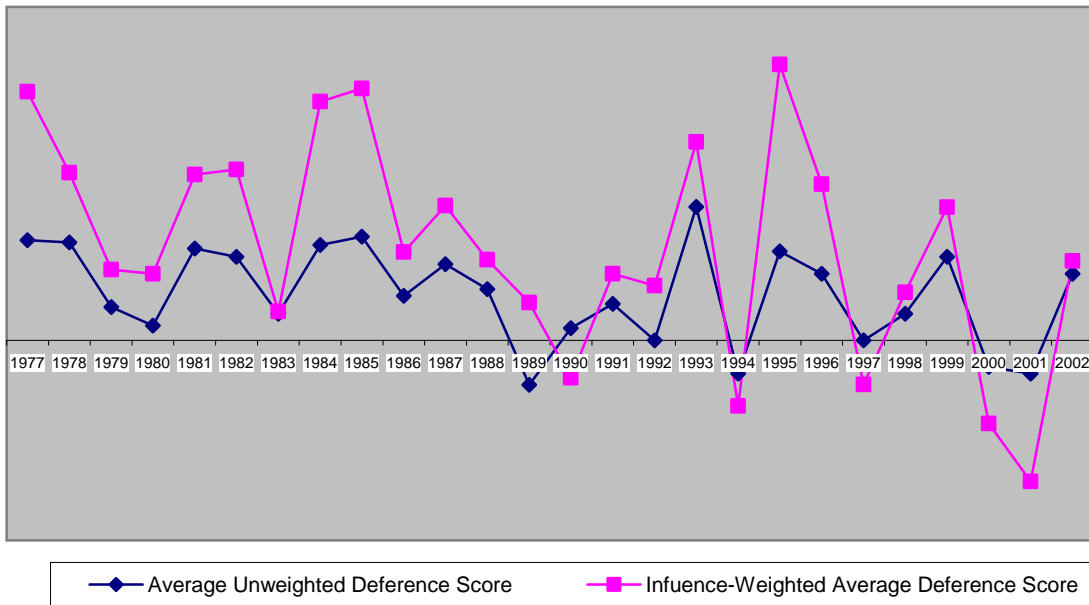


Figure 11

Aggregate Influence-Weighted Deference Score [Moving Averages]

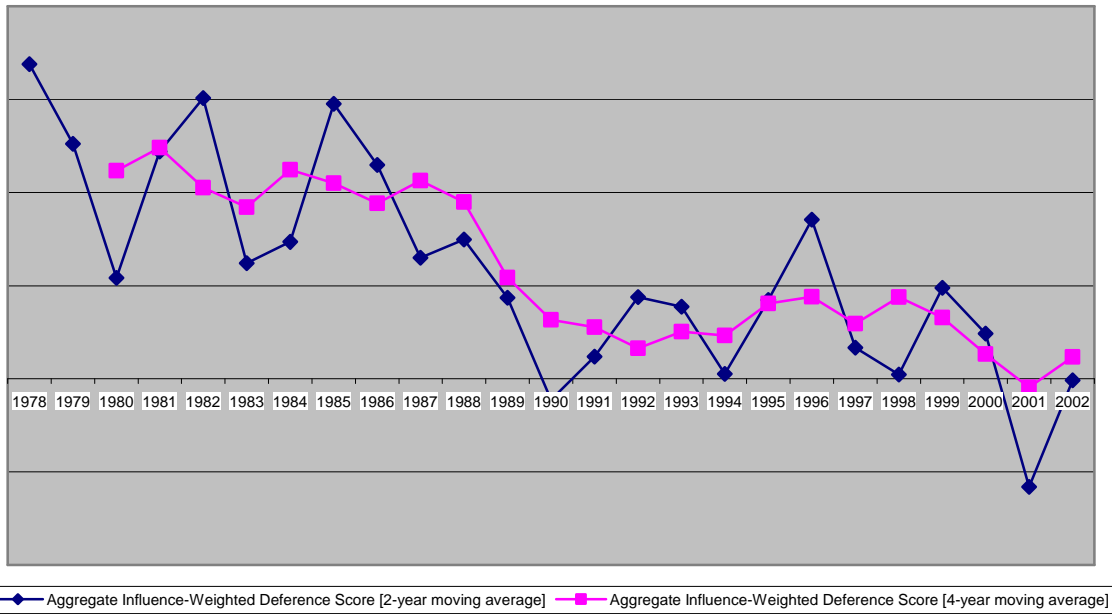


Figure 12

Average Influence-Weighted Deference Score [Moving Average]

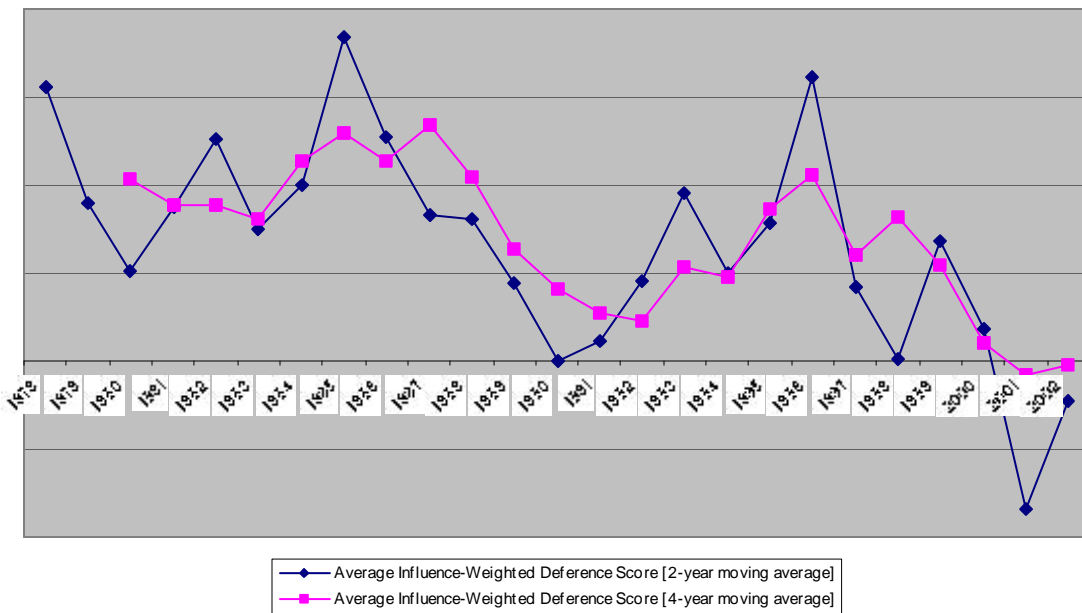


Figure 13

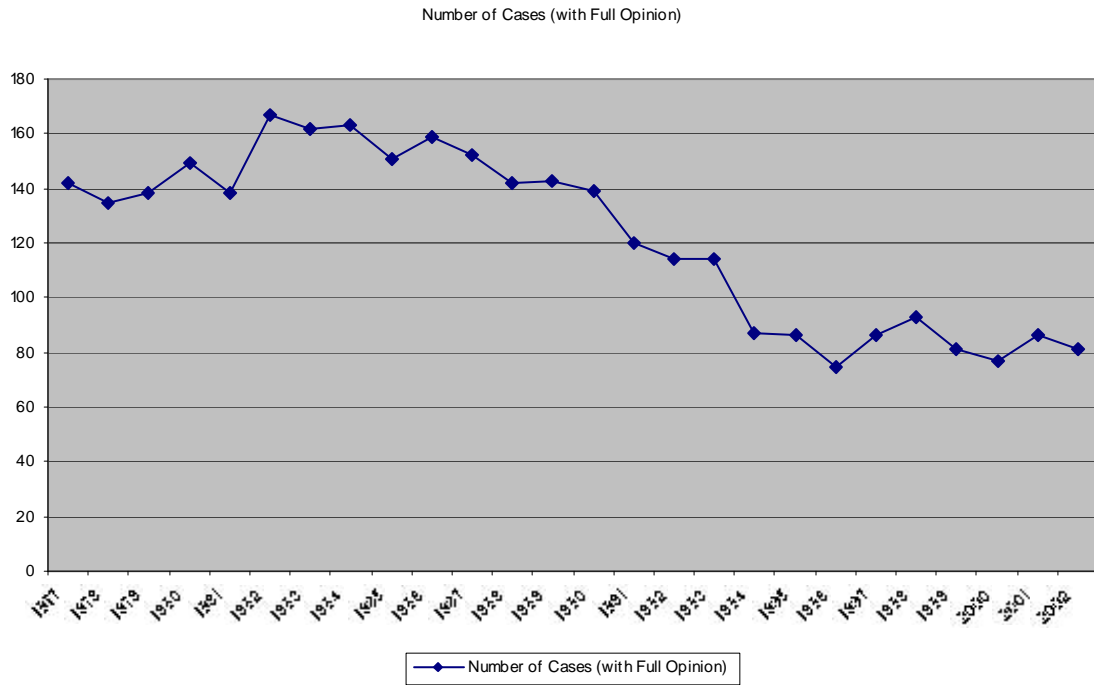


Figure 14

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

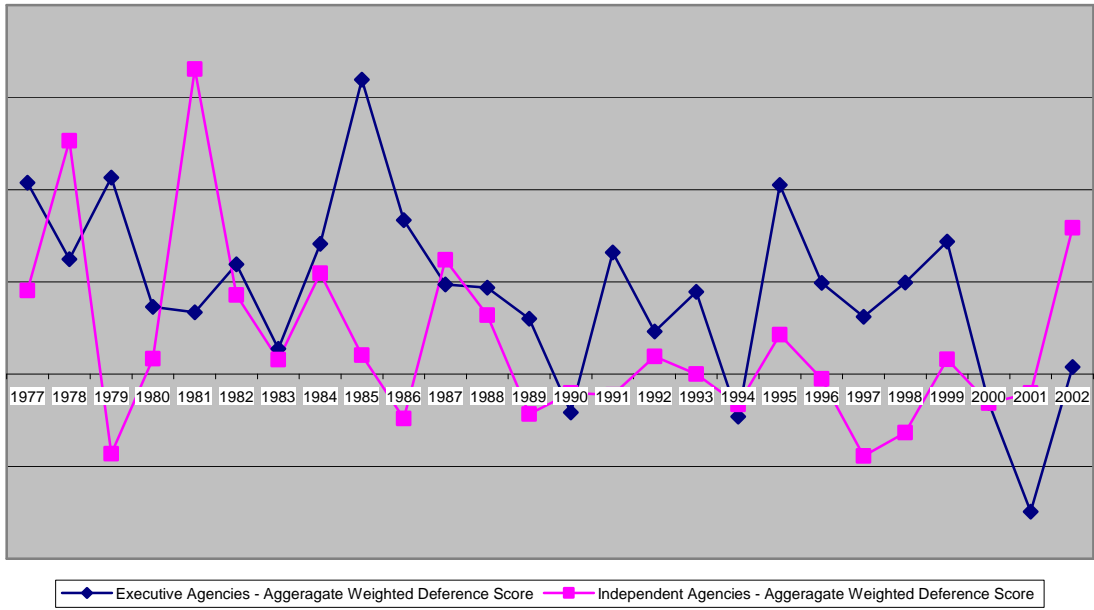


Figure 15

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

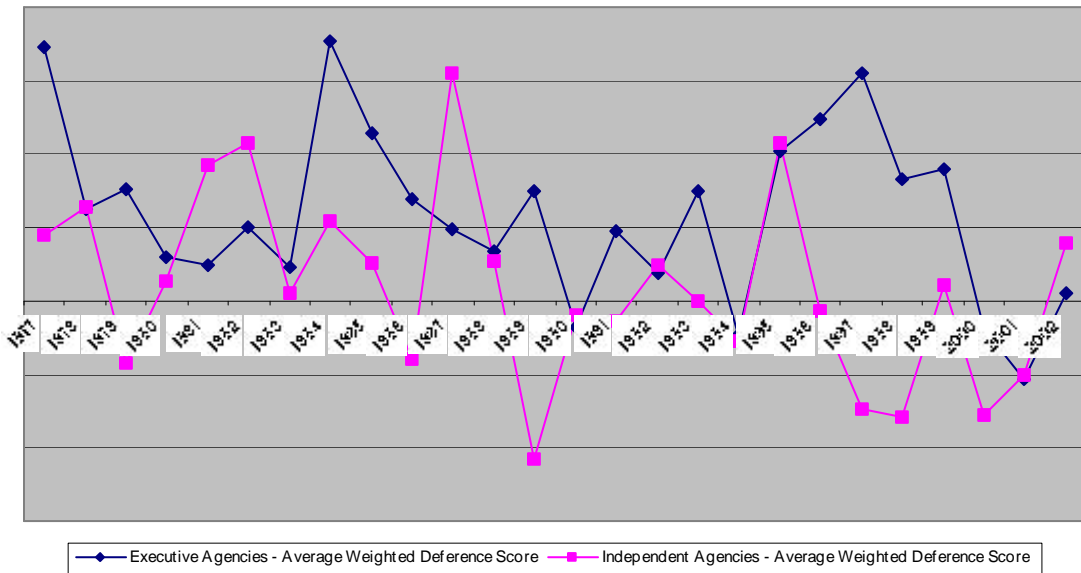


Figure 16

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

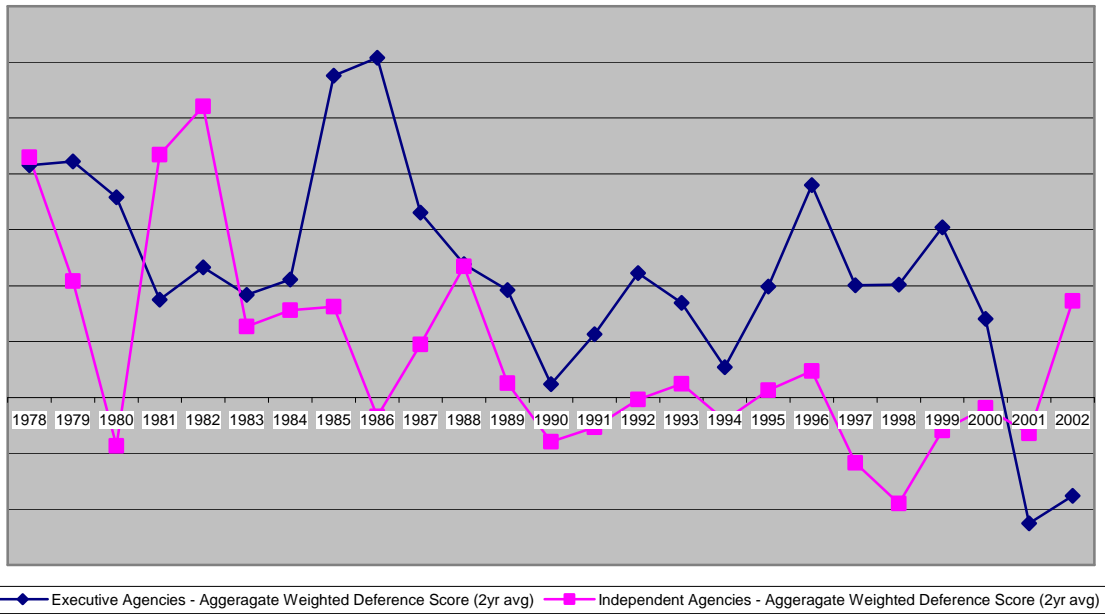


Figure 17

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

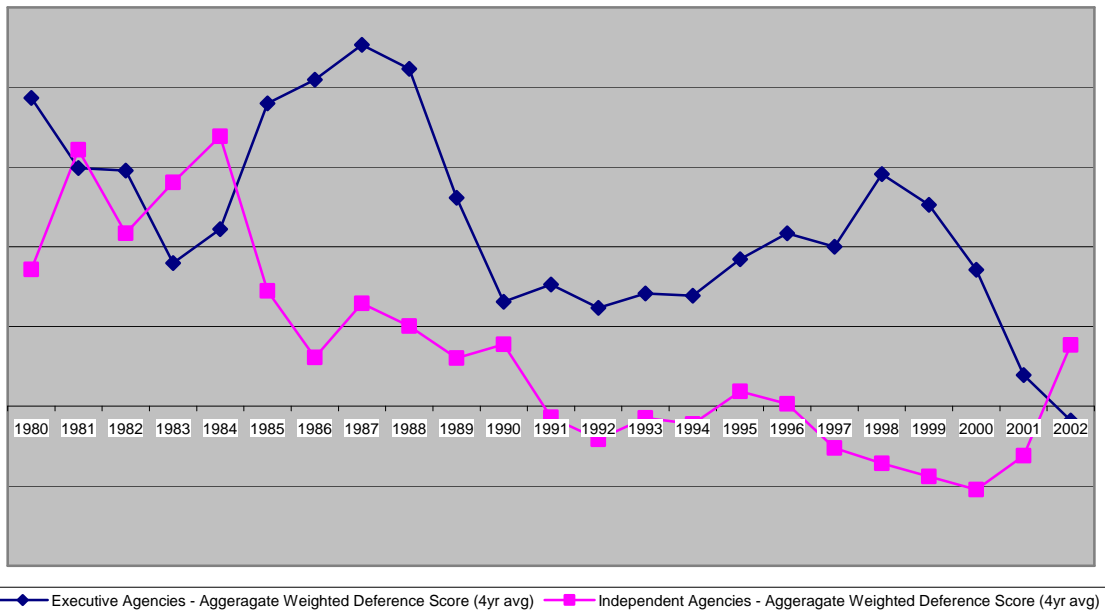


Figure 18

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

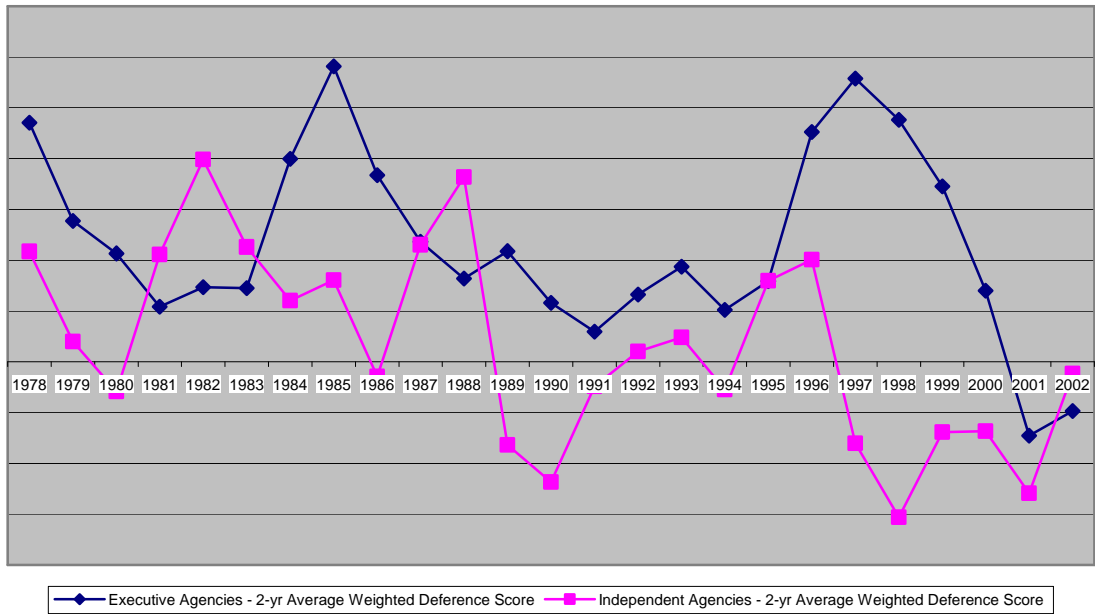


Figure 19

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

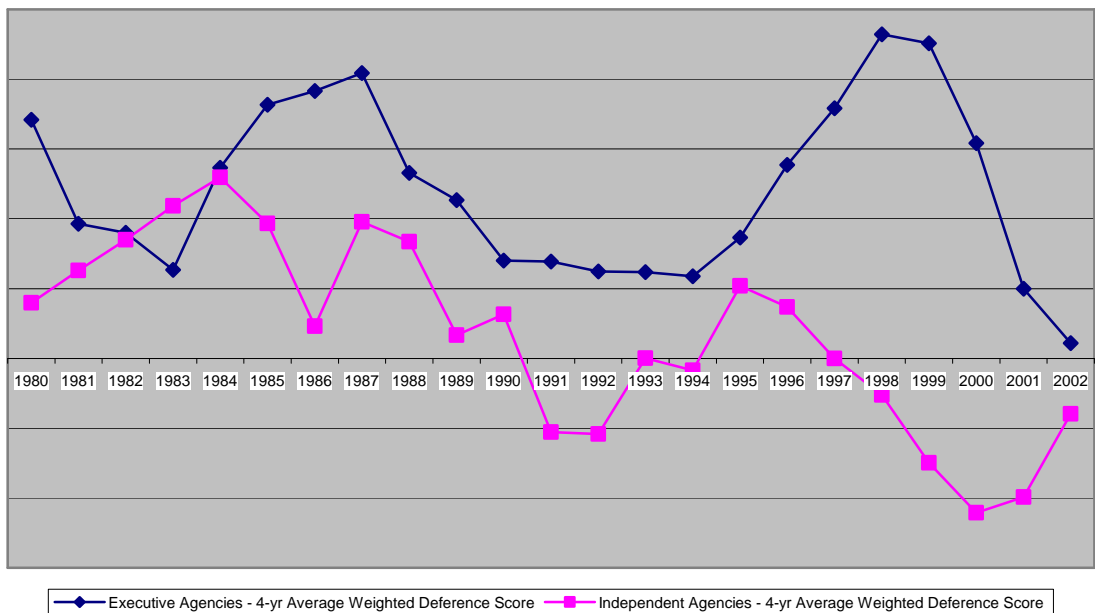


Figure 20

Liberal v. Conservative Circuits, 1985-1991

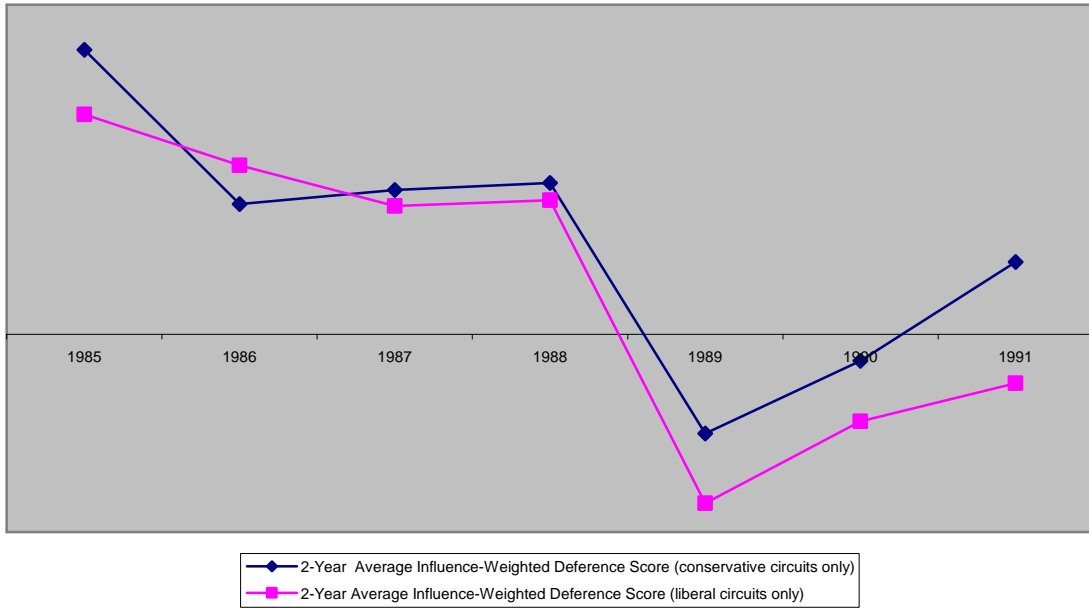


Figure 21

Liberal v. Conservative Circuits, 1996-2002

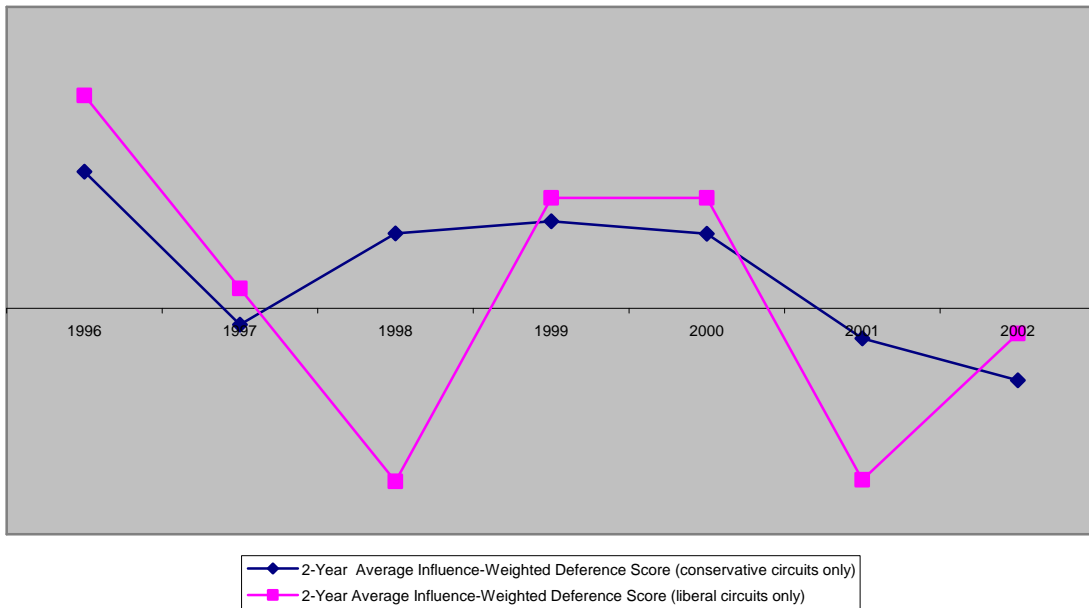


Figure 22

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

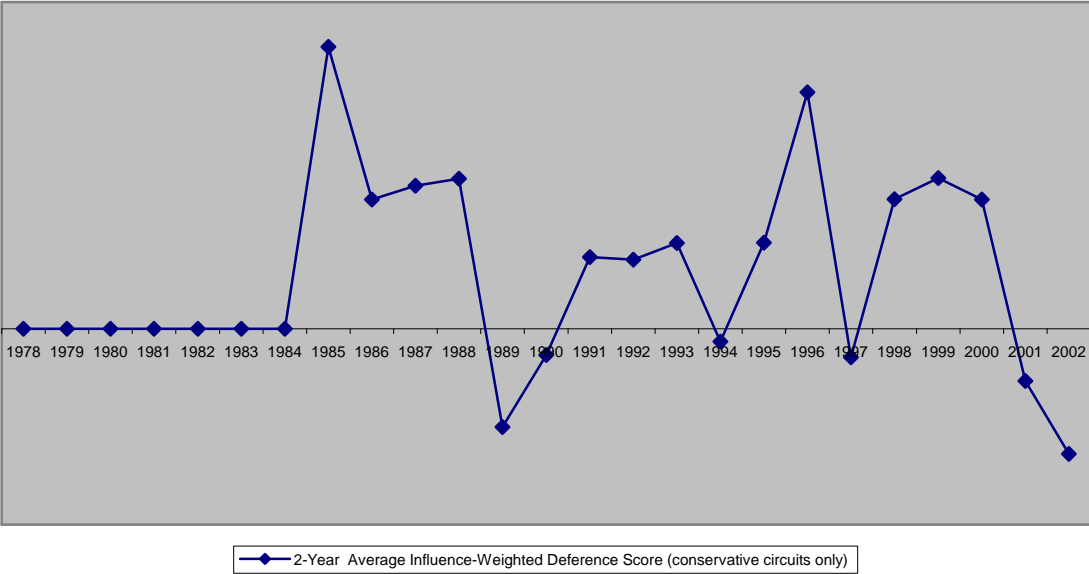


Figure 23

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

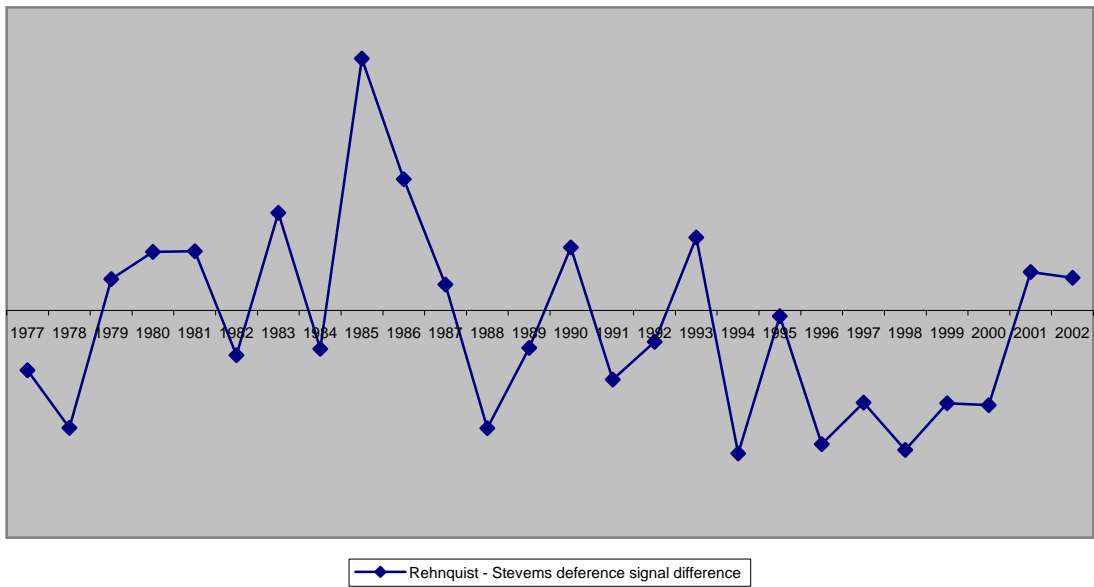


Figure 24

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

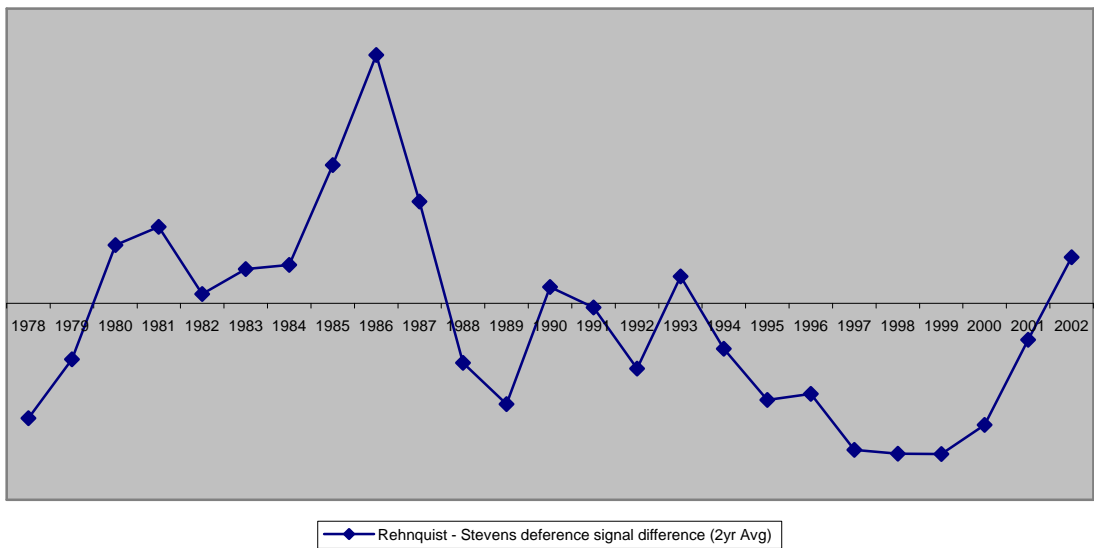


Figure 25

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

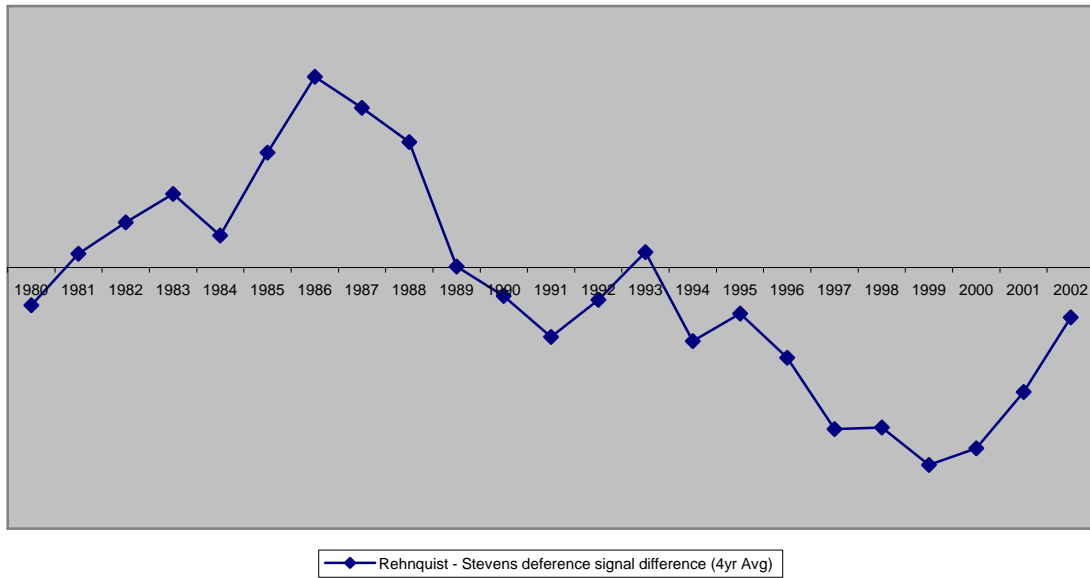


Figure 26

APPENDIX A: Complete List of Cases Included in the Sample

2001 TERM

Yellow Transp v. Michigan	123 S.Ct. 371
INS v. Ventura	123 S.Ct. 353
US v. Fior D'Italia	536 U.S. 238
National RR Corp v. Morgan	536 U.S. 101
Chevron v. Echazabal	536 U.S. 73
SEC v. Zandford	535 U.S. 813
Verizon v. FCC	535 U.S. 467
Barnhart v. Walton	535 U.S. 212
Ragsdale v. Wolverine WW	535 U.S. 81
Edelman v. Lynchberg College	535 U.S. 106
New York v. FERC	535 U.S. 1
Wis. Dep of Health v. Blumer	534 U.S. 473
Barnhart v. Sigmon Coal	534 U.S. 438
Nat'l Cable & Telecom v. Gulf Power	534 U.S. 327

2000 TERM

Zadvydas v. Davis	533 U.S. 678
INS v. St. Cyr	533 U.S. 289
US v. Mead	533 U.S. 218
NLRB v. KY River Comm. Care	532 U.S. 706
US v. Cleveland Indians	532 U.S. 200
Whitman v. American Trucking	531 U.S. 457
Lopez v. Davis	531 U.S. 230
Sol. Waste Agy v. Army Corps of Eng.	531 U.S. 159

1999 TERM

Geier v. American Honda	529 U.S. 861
Christensen v. Harris County	529 U.S. 576
Norfolk Southern v. Shanklin	529 U.S. 344
FDA v. Brown & Williamson Tobacco	529 U.S. 120
Shalala v. Ill Council on Longterm Care	529 U.S. 1

1998 TERM

Sutton v. United Air	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
US v. Haggard Apparel	526 U.S. 380
Natl Fed of Fed Empl v. Dep of Inter.	526 U.S. 86
Your Home Nursing v. Shalala	525 U.S. 449
AT&T v. Iowa Utilities Board	525 U.S. 366

1997 TERM

Bragdon v. Abbott	524 U.S. 624
Atlantic Mut Ins Co v. C.I.R.	523 U.S. 382
Nat'l Credit Union v. 1st Nat'l Bank	522 U.S. 479

Regions Hospital v. Shalala	522 U.S. 448
Allentown Mack Sales v. NLRB	522 U.S. 359

1996 TERM

US v. O'Hagan	521 U.S. 642
US v. LaBonte	520 U.S. 751
Dunn v. CFTC	519 U.S. 465
Auer v. Robbins	519 U.S. 452

1995 TERM

Medtronic v. Lohr	518 U.S. 470
Smiley v. Citibank	517 U.S. 735
Holly Farms v. NLRB	517 U.S. 392
Neal v. US	516 U.S. 284

1994 TERM

NLRB v. Town & Country Electric	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. Hosp.	514 U.S. 87
NationsBank v. Variable Annuity	513 U.S. 251

1993 TERM

Brown v. Gardner	513 U.S. 115
Thomas Jefferson U. v. Shalala	512 U.S. 504
OWCP v. Greenwich Collieries	512 U.S. 267
MCI v. AT&T	512 U.S. 218
PUD No. 1 v. Wash Dep of Ecol	511 U.S. 700
NLRB v. Health Care & Retirement Co	511 U.S. 571
Chicago v. Environmental Def Fund	511 U.S. 328
ABF Freight v. NLRB	510 U.S. 317

1992 TERM

Good Samaritan Hosp. v. Shalala	508 U.S. 402
Lincoln v. Vigil	508 U.S. 182
Reno v. Flores	507 U.S. 292

1991 TERM

Estate of Cowart v. Niklos Drilling	505 U.S. 469
US v. Thompson/Center Arms Co.	504 U.S. 505
US v. Alaska	503 U.S. 569
Natl RR Passenger v. Boston & Maine	503 U.S. 407
Arkansas v. Oklahoma	503 U.S. 91
Presley v. Etowah County	502 U.S. 491
Lechmere v. NLRB	502 U.S. 527
INS v. Elias-Zacarias	502 U.S. 478

1990 TERM

INS v. Natl Center for Immigrants Rts	502 U.S. 183
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Pauley v. BethEnergy Mines	501 U.S. 680	Lukhard v. Reed	481 U.S. 368
Gregory v. Ashcroft	501 U.S. 452	Pleasant Grove v. U.S.	479 U.S. 462
Litton Financial Printing v. NLRB	501 U.S. 190	Bowen v. Yuckert	482 U.S. 137
Rust v. Sullivan	500 U.S. 173	1985 TERM	
American Hosp Assn v. NLRB	499 U.S. 606	CFTC v. Schor	478 U.S. 833
Cottage Savings v. CIR	499 U.S. 554	US DOT v. Paralyzed Veterans	477 U.S. 597
EEOC v. Arabian American Oil	499 U.S. 244	Atkins v. Rivera	477 U.S. 154
Martin v. OHS Review Comm'n	499 U.S. 144	Young v. Community Nutrition Inst.	476 U.S. 974
Mobil Oil v. United Distribution	498 U.S. 211	Lyng v. Payne	476 U.S. 926
Demarest v. Manspeaker	498 U.S. 184	Bowen v. Amer. Hosp. Ass'n	476 U.S. 610
1989 TERM		LA Public Service Com'n v. FCC	476 U.S. 355
Metro Broadcasting v. FCC	497 U.S. 547	US v. City of Fulton	475 U.S. 657
Maislin Industries v. Primary Steel	497 U.S. 116	Bd of Gov of Fed v. Dimension	474 U.S. 361
PBGC v. LTV Corp.	496 U.S. 633	1984 TERM	
Fort Stewart Schools v. FLRA	495 U.S. 641	US v. Riverside Bayview Homes	474 U.S. 121
Davis v. US	495 U.S. 472	Pattern Makers League v. NLRB	473 U.S. 95
Dept of Treasury, IRS v. FLRA	494 U.S. 922	US v. Nat'l Bank of Commerce	472 U.S. 713
NLRB v. Curtiss Matheson Scientific	494 U.S. 775	Mountain States T&T v. Pueblo	472 U.S. 237
Adams Fruit v. Barrett	494 U.S. 638	CT Dept of Income Maintenance v. Heckler	471 U.S. 524
Dole v. United Steelworkers	494 U.S. 26	NLRB v. Int'l Longshoremans Assn	473 U.S. 61
Sullivan v. Everhart	494 U.S. 83	Heckler v. Chaney	470 U.S. 821
Sullivan v. Zebley	493 U.S. 521	Chemical Mnfrs Assn v. NRDC	470 U.S. 116
1988 TERM		Lawrence Cnty v. Lead-Deadwood	469 U.S. 256
PERS of Ohio v. Betts	492 U.S. 158	1983 TERM	
Mead Corp. v. Tilly	490 U.S. 714	ICC v. American Trucking Assn	467 U.S. 354
Marsh v. Oregon Nat. Res. Council	490 U.S. 360	Securities Ind Assn v. Fed Reserve	468 U.S. 137
1987 TERM		Sure-Tan v. NLRB	467 U.S. 883
Bowen v. Georgetown Hospital	488 U.S. 204	Chevron v. NRDC	467 U.S. 837
Mississippi Power & Light v. Mississippi	487 U.S. 354	Capital Cities Cable v. Crisp	467 U.S. 691
Webster v. Doe	486 U.S. 592	Aluminum Co v. Central Lincoln	467 U.S. 380
Huffman v. Western Nuclear	486 U.S. 663	EEOC v. Shell Oil	466 U.S. 54
K Mart v. Cartier	486 U.S. 281	1982 TERM	
FERC v. Martin Exploration	486 U.S. 204	BATF v. FLRA	464 U.S. 89
New York v. FCC	486 U.S. 57	Pub Serv Cmmn of NY v. Mid-LA Gas	463 U.S. 319
EEOC v. Commercial Office Products	486 U.S. 107	Motor Veh. Mfrs Assn v. State Farm	463 U.S. 29
DeBartolo v. FL Gulf Coast Building	485 U.S. 568	Nat Asn Greeting Card Pubs v. USPS	462 U.S. 810
Traynor v. Turnage	485 U.S. 535	Baltimore Gas & Elec. v. NRDC	462 U.S. 87
Gardebring v. Jenkins	485 U.S. 415	Bill Johnson's Restaurants v. NLRB	461 U.S. 731
FLRA v. Aberdeen Proving Ground	485 U.S. 409	Bob Jones Univ. v. US	461 U.S. 574
Bethesda Hosp. v. Bowen	485 U.S. 399	Heckler v. Campbell	461 U.S. 458
1986 TERM		Am. Paper Inst. v. Am. Elec Pwr Svc	461 U.S. 402
NLRB v. United Food & Comm. Wrkrs.	484 U.S. 112	Comm Tel of So Cal v. Gottfried	459 U.S. 498
Mullins Coal v. OWCP	484 U.S. 135	1981 TERM	
Fall River Dyeing v. NLRB	482 U.S. 27	Fidelity Fed Sav & Loan v. de la Cuesta	458 U.S. 141
INS v. Cardoza-Fonseca	480 U.S. 421	Schweiker v. Hogan	457 U.S. 569

Blum v. Bacon	457 U.S. 132	Andrus v. Sierra Club	442 U.S. 347
N Haven Bd of Ed v. Bell	456 U.S. 512	SE Comm College v. Davis	442 U.S. 397
Herweg v. Ray	455 U.S. 265	Ford Motor Co. v. NLRB	441 U.S. 448
US v. Vogel Fertilizer	455 U.S. 16	Gladstone v. Bellwood	441 U.S. 91
US v. Clark	454 U.S. 555	FCC v. Midwest Video Corp	440 U.S. 689
Bonanno Linen Service v. NLRB	454 U.S. 404	NLRB v. Catholic Bishops of Chicago	440 U.S. 490
1980 TERM		Nat Muffler Dealers Assn v. US	440 U.S. 472
NLRB v. Hendricks Cnty Rural Elec	454 U.S. 170	Miller v. Youakim	440 U.S. 125
FEC v. Dem. Senate Camp. Comm	454 U.S. 27	Int Broth of Teamsters v. Daniel	439 U.S. 551
CBS v. FCC	453 U.S. 367	Thor Power Tools v. CIR	439 U.S. 522
Haig v. Agee	453 U.S. 280	1977 TERM	
Schweiker v. Gray Panthers	453 U.S. 34	Federal Reserve v. 1st Lincolnwood	439 U.S. 234
Am Textile Mfrs Inst v. Donovan	452 U.S. 490	FCC v. Pacifica	438 U.S. 726
Howe v. Smith	452 U.S. 273	California v. U.S.	438 U.S. 645
Anderson Bros Ford v. Valencia	452 U.S. 205	Eastex v. NLRB	437 U.S. 556
St. Martin's Evangelical Lutheran v. SD	451 U.S. 772	Beth Israel Hosp v. NLRB	437 U.S. 483
Rowan Companies v. US	452 U.S. 247	Zenith Radio v. US	437 U.S. 443
FCC v. WNCN Listeners Guild	450 U.S. 582	FCC v. Nat Citzns Com for Brdcasting	436 U.S. 775
Com of IRS v. Portland Cement Co.	450 U.S. 156	In re Trans Alska Pipeline Rate Cases	436 U.S. 631
Steadman v. SEC	450 U.S. 91	Quern v. Mandley	436 U.S. 725
Brd of Gov of Fed v. Invest. Co. Inst.	450 U.S. 46	California v. Southland Royalty	436 U.S. 519
Conrail v. Natl Assn Recycling Inds.	449 U.S. 609	SEC v. Sloan	436 U.S. 103
EEOC v. Assoc. Dry Goods	449 U.S. 590	Vermont Yankee v. NRDC	435 U.S. 519
1979 TERM		US v. Bd of Comrs of Sheffield, Ala	435 U.S. 110
Potomac Electric Power v. OWCP	449 U.S. 268	NLRB v. Local Union No.103	434 U.S. 335
EPA v. Nat'l Crushed Stone	449 U.S. 64	Adamo Wrecking Co v. US	434 U.S. 275
Indus. Union Dep. v. Amer. Petr. Inst.	448 U.S. 607	1976 TERM	
Mohasco Corp v. Silver	447 U.S. 807	Batterton v. Francis	432 U.S. 416
Whirlpool Corp. v. Marshall	445 U.S. 1	Beal v. Doe	432 U.S. 438
US v. Euge	444 U.S. 707	TWA v. Hardison	432 U.S. 63
Ford Motor Credit Co v. Milhollin	444 U.S. 555	E.I. Du Pont de Nemours v. Collins	432 U.S. 46
NLRB v. Yeshiva University	444 U.S. 672	U.S. v. Larionoff	431 U.S. 864
Stryker's Bay Neighborhood v. Karlen	444 U.S. 223	E.I. Du Pont de Nemours v. Train	430 U.S. 112
1978 TERM		Piper v. Chris-Craft	430 U.S. 1
NLRB v. Baptist Hospital	442 U.S. 773	NLRB v. Enterprise Assn	429 U.S. 507
US v. Rutherford	442 U.S. 544		

APPENDIX B Coding of Ambiguous Cases

Case	Citation	Coding Problem & My Assessment
Nat'l RR Corp. v. Morgan	536 U.S. 101	Court affirmed in part and reversed in part. Deference issue arose 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 anti-deference .
Verizon 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 pro-deference .
U.S. v. Mead	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 anti-deference 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. American Trucking	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 pro-deference .
AT&T v. Iowa Utilities Board	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 ambiguous .
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 pro-deference .
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 anti-deference .
Martin v. OHS Review 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 pro-deference .
K Mart v. Cartier	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 pro-deference .
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 supporting of agency decision-making on the relevant point, the case was coded as pro-deference .
NLRB v. Int'l Longshoremen Assn	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 anti-deference .

Securities Ind. Assn. v Federal 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 anti-deference .
Public Service Comm'n of NY v. Mid-Louisiana Gas	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, the case was coded as anti-deference .
North Haven Bd. of Ed. 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 ambiguous .
Amer. Textiles Mfr. 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 ambiguous .
NLRB v. Baptist Hospital	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 ambiguous .

APPENDIX C: Cases Not Involving Review of a Federal Appellate Decision

Case	Citation	Case Origin
Yellow Transp. v. Michigan	123 S.Ct. 371	Michigan Supreme Court
Wisconsin Dept. 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. Washington Dept. of Ecology	511 U.S. 700	Washington Supreme Court
U.S. v. Alaska	503 U.S. 569	Original jurisdiction
Presley v. Etowah County	502 U.S. 491	Fed District, M.D. Alabama
Mississippi Power & Light v. Mississippi	487 U.S. 354	Mississippi Supreme Court
Pleasant Grove v. U.S.	479 U.S. 462	Fed District, D.C.
Atkins v. Rivera	477 U.S. 154	Massachusetts Supreme Judicial Court
Federal Fidelity Sav. & Loan v. de la Cuesta	458 U.S. 141	California Court of Appeals
Schweiker v. Hogan	457 U.S. 569	Fed District, Massachusetts
St. Martins v. South Dakota	451 U.S. 772	South Dakota Supreme Court
U.S. v. Bd. Of Commissioners of Sheffield	435 U.S. 110	Fed District, Alabama

Appendix D: Cases Ranked By Influence Score

Rank	Case	Cite	Score	Rank	Case	Cite	Score
1	Chevron v. NRDC	467 U.S. 837	4.85	33	Chemical Mnfrs Assn v. NRDC	470 U.S. 116	3.01
2	Motor Veh. Mnfrs Assn v. State Farm	463 U.S. 29	4.67	34	Potomac Electric Power v. OWCP	449 U.S. 268	2.99
3	Heckler v. Campbell	461 U.S. 458	4.6	35	US v. Mead	533 U.S. 218	2.94
4	Bowen v. Georgetown Hospital	488 U.S. 204	4.51	36	Ford Motor Co. v. NLRB	441 U.S. 448	2.92
5	INS v. Cardoza-Fonseca	480 U.S. 421	4.34	37	Baltimore Gas & Elec. v. NRDC	462 U.S. 87	2.88
6	Marsh v. Oregon Nat. Res. Council	490 U.S. 360	4.26	38	Rust v. Sullivan	500 U.S. 173	2.84
7	Heckler v. Chaney	470 U.S. 821	4.03	39	US v. Nat'l Bank of Commerce	472 U.S. 713	2.84
8	Bowen v. Yuckert	482 U.S. 137	3.99	40	Beal v. Doe	432 U.S. 438	2.83
9	K Mart v. Cartier	486 U.S. 281	3.89	41	Medtronic v. Lohr	518 U.S. 470	2.83
10	U.S. v. Larionoff	431 U.S. 864	3.81	42	BATF v. FLRA	464 U.S. 89	2.82
11	Thomas Jefferson U. v. Shalala	512 U.S. 504	3.8	43	Arkansas v. Oklahoma	503 U.S. 91	2.82
12	Batterton v. Francis	432 U.S. 416	3.75	44	Bonanno Linen Service v. NLRB	454 U.S. 404	2.81
13	Ford Motor Credit Co v. Milhollin	444 U.S. 555	3.71	45	Reno v. Koray	515 U.S. 50	2.8
14	Mullins Coal v. OWCP	484 U.S. 135	3.7	46	Com of IRS v. Portland Cement Co.	450 U.S. 156	2.79
15	Martin v. OHS Review Comm'n	499 U.S. 144	3.66	47	Blum v. Bacon	457 U.S. 132	2.76
16	FEC v. Dem. Senate Camp. Comm	454 U.S. 27	3.65	48	INS v. Aguirre-Aguirre	526 U.S. 415	2.74
17	NLRB v. Catholic Bishops of Chicago	440 U.S. 490	3.63	49	NLRB v. Yeshiva University	444 U.S. 672	2.73
18	Nat Muffler Dealers Assn v. US	440 U.S. 472	3.57	50	Bd of Gov of Fed v. Dimension	474 U.S. 361	2.7
19	NLRB v. United Food & Comm. Wrkrs.	484 U.S. 112	3.54	51	Pauley v. BethEnergy Mines	501 U.S. 680	2.69
20	Maislin Industries v. Primary Steel	497 U.S. 116	3.49	52	Babbitt v. Sweet Home Chapter	515 U.S. 687	2.68
21	Christensen v. Harris County	529 U.S. 576	3.48	53	Shalala v. Guernsey Mem. Hosp.	514 U.S. 87	2.68
22	Sure-Tan v. NLRB	467 U.S. 883	3.27	54	Fall River Dyeing v. NLRB	482 U.S. 27	2.66
23	OWCP v. Greenwhich Collieries	512 U.S. 267	3.27	55	NLRB v. Local Union No.103	434 U.S. 335	2.65
24	Sullivan v. Zebley	493 U.S. 521	3.25	56	US v. Rutherford	442 U.S. 544	2.62
25	Stryker's Bay Neighborhood v. Karlen	444 U.S. 223	3.16	57	US v. Vogel Fertilizer	455 U.S. 16	2.62
26	INS v. Elias-Zacarias	502 U.S. 478	3.16	58	US v. LaBonte	520 U.S. 751	2.59
27	Zenith Radio v. US	437 U.S. 443	3.16	59	Dole v. United Steelworkers	494 U.S. 26	2.58
28	Zadvydas v. Davis	533 U.S. 678	3.15	60	Gardebring v. Jenkins	485 U.S. 415	2.55
29	Auer v. Robbins	519 U.S. 452	3.11	61	EEOC v. Commercial Office Products	486 U.S. 107	2.5
30	EEOC v. Arabian American Oil	499 U.S. 244	3.1	62	PBGC v. LTV Corp.	496 U.S. 633	2.5
31	Young v. Community Nutrition Inst.	476 U.S. 974	3.06	63	Allentown Mack Sales v. NLRB	522 U.S. 359	2.49
32	Vermont Yankee v. NRDC	435 U.S. 519	3.02	64	Am. Paper Inst. v. Am. Elec Pwr Svc	461 U.S. 402	2.46

65	SEC v. Sloan	436 U.S. 103	2.45	98	E.I. Du Pont de Nemours v. Collins	432 U.S. 46	1.98
66	Natl RR Passenger v. Boston & Maine	503 U.S. 407	2.45	99	Indus. Union Dep. v. Amer. Petr. Inst.	448 U.S. 607	1.98
67	Schweiker v. Gray Panthers	453 U.S. 34	2.44	100	N Haven Bd of Ed v. Bell	456 U.S. 512	1.97
68	NationsBank v. Variable Annuity	513 U.S. 251	2.41	101	NLRB v. Curtis Matheson Scientific	494 U.S. 775	1.97
69	Int Broth of Teamsters v. Daniel	439 U.S. 551	2.38	102	CT Dept of Income Maintenance v. Heckler	471 U.S. 524	1.94
70	Webster v. Doe	486 U.S. 592	2.34	103	AT&T v. Iowa Utilities Board	525 U.S. 366	1.94
71	Sullivan v. Everhart	494 U.S. 83	2.33	104	US v. Clark	454 U.S. 555	1.94
72	US v. Riverside Bayview Homes	474 U.S. 121	2.32	105	US v. Euge	444 U.S. 707	1.93
73	Adams Fruit v. Barrett	494 U.S. 638	2.31	106	US DOT v. Paralyzed Veterans	477 U.S. 597	1.93
74	Dunn v. CFTC	519 U.S. 465	2.3	107	Piper v. Chris-Craft	430 U.S. 1	1.92
75	Sol. Waste Agy v. Army Corps of Eng.	531 U.S. 159	2.27	108	Good Samaritan Hosp. v. Shalala	508 U.S. 402	1.88
76	Rowan Companies v. US	452 U.S. 247	2.27	109	Brown v. Gardner	513 U.S. 115	1.88
77	Andrus v. Sierra Club	442 U.S. 347	2.26	110	California v. Southland Royalty	436 U.S. 519	1.88
78	SE Comm College v. Davis	442 U.S. 397	2.26	111	Dickinson v. Zurko	527 U.S. 150	1.87
79	Anderson Bros Ford v. Valencia	452 U.S. 205	2.26	112	EPA v. Nat'l Crushed Stone	449 U.S. 64	1.87
80	Schweiker v. Hogan	457 U.S. 569	2.21	113	Capital Cities Cable v. Crisp	467 U.S. 691	1.87
81	Aluminum Co v. Central Lincoln	467 U.S. 380	2.21	114	Neal v. US	516 U.S. 284	1.85
82	Miller v. Youakim	440 U.S. 125	2.18	115	Chicago v. Environmental Def Fund	511 U.S. 328	1.84
83	Am Textile Mfrs Inst v. Donovan	452 U.S. 490	2.17	116	Estate of Cowart v. Niklos Drilling	505 U.S. 469	1.81
84	PERS of Ohio v. Betts	492 U.S. 158	2.17	117	Quern v. Mandley	436 U.S. 725	1.81
85	Geier v. American Honda	529 U.S. 861	2.16	118	FCC v. WNCN Listeners Guild	450 U.S. 582	1.8
86	NLRB v. Town & Country Electric	516 U.S. 85	2.14	119	Pub Serv Cmmn of NY v. Mid-LA Gas	463 U.S. 319	1.78
87	Atkins v. Rivera	477 U.S. 154	2.14	120	Regions Hospital v. Shalala	522 U.S. 448	1.78
88	Smiley v. Citibank	517 U.S. 735	2.11	121	ABF Freight v. NLRB	510 U.S. 317	1.78
89	ICC v. American Trucking Assn	467 U.S. 354	2.08	122	Atlantic Mut Ins Co v. C.I.R.	523 U.S. 382	1.75
90	NLRB v. Health Care & Retirement Co	511 U.S. 571	2.07	123	LA Public Service Com'n v. FCC	476 U.S. 355	1.75
91	Beth Israel Hosp v. NLRB	437 U.S. 483	2.06	124	Edelman v. Lynchberg College	535 U.S. 106	1.74
92	CFTC v. Schor	478 U.S. 833	2.06	125	US v. Bd of Comrs of Sheffield, Ala	435 U.S. 110	1.73
93	Lincoln v. Vigil	508 U.S. 182	2.05	126	New York v. FCC	486 U.S. 57	1.71
94	Litton Financial Printing v. NLRB	501 U.S. 190	2.03	127	Bethesda Hosp. v. Bowen	485 U.S. 399	1.71
95	Securities Ind Assn 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				

128	Demarest v. Manspeaker	498 U.S. 184	1.71	160	US v. City of Fulton	475 U.S. 657	1.31
129	Herweg v. Ray	455 U.S. 265	1.67	161	Pattern Makers League v. NLRB	473 U.S. 95	1.3
130	Whirlpool Corp. v. Marshall	445 U.S. 1	1.66	162	E.I. Du Pont de Nemours v. Train	430 U.S. 112	1.3
131	St. Martin's Evangelical Lutheran v. SD	451 U.S. 772	1.63	163	CBS v. FCC	453 U.S. 367	1.28
132	Federal Reserve v. 1st Lincolnwood	439 U.S. 234	1.62	164	Lyng v. Payne	476 U.S. 926	1.27
133	Traynor v. Turnage	485 U.S. 535	1.62	165	Davis v. US	495 U.S. 472	1.25
134	EEOC v. Assoc. Dry Goods	449 U.S. 590	1.6	166	Mead Corp. v. Tilly	490 U.S. 714	1.24
135	Holly Farms v. NLRB	517 U.S. 392	1.59	167	FCC v. Midwest Video Corp	440 U.S. 689	1.23
136	Fort Stewart Schools v. FLRA	495 U.S. 641	1.57	168	Verizon v. FCC	535 U.S. 467	1.22
137	Dept of Treasury, IRS v. FLRA	494 U.S. 922	1.57	169	NLRB v. Enterprise Assn	429 U.S. 507	1.17
138	FDA v. Brown & Williamson Tobacco	529 U.S. 120	1.56	170	FCC v. Nat Citzns Com for Brdcasting	436 U.S. 775	1.13
139	FERC v. Martin Exploration	486 U.S. 204	1.55	171	US v. Cleveland Indians	532 U.S. 200	1.1
140	Your Home Nursing v. Shalala	525 U.S. 449	1.51	172	US v. Haggar Apparel	526 U.S. 380	1.06
141	Barnhart v. Walton	535 U.S. 212	1.49	173	Haig v. Agee	453 U.S. 280	1.04
142	Lechmere v. NLRB	502 U.S. 527	1.48	174	Wis. Dep of Health v. Blumer	534 U.S. 473	1.04
143	Fidelity Fed Sav & Loan v. de la Cuesta	458 U.S. 141	1.48	175	FCC v. Pacifica	438 U.S. 726	1.03
144	NLRB v. Hendricks Cnty Rural Elec	454 U.S. 170	1.47	176	Adamo Wrecking Co v. US	434 U.S. 275	1.03
145	Conrail v. Natl Assn Recycling Inds.	449 U.S. 609	1.47	177	NLRB v. KY River Comm. Care	532 U.S. 706	1.02
146	NLRB v. Baptist Hospital	442 U.S. 773	1.46	178	Bill Johnson's Restaurants v. NLRB	461 U.S. 731	0.99
147	Bob Jones Univ. v. US	461 U.S. 574	1.45	179	Howe v. Smith	452 U.S. 273	0.99
148	Bragdon v. Abbott	524 U.S. 624	1.44	180	Brd of Gov of Fed v. Invest. Co. Inst.	450 U.S. 46	0.98
149	Cottage Savings v. CIR	499 U.S. 554	1.43	181	Thor Power Tools v. CIR	439 U.S. 522	0.98
150	INS v. St. Cyr	533 U.S. 289	1.41	182	Mountain States T&T v. Pueblo	472 U.S. 237	0.95
151	FLRA v. Aberdeen Proving Ground	485 U.S. 409	1.41	183	In re Trans Alska Pipeline Rate Cases	436 U.S. 631	0.91
152	Presley v. Etowah County	502 U.S. 491	1.4	184	PUD No. 1 v. Wash Dep of Ecol	511 U.S. 700	0.88
153	Chevron v. Echazabal	536 U.S. 73	1.35	185	Lawrence Cnty v. Lead- Deadwood	469 U.S. 256	0.88
154	Bowen v. Amer. Hosp. Ass'n	476 U.S. 610	1.35	186	US v. Alaska	503 U.S. 569	0.86
155	MCI v. AT&T	512 U.S. 218	1.35	187	Pleasant Grove v. U.S.	479 U.S. 462	0.82
156	Ragsdale v. Wolverine WW	535 U.S. 81	1.34	188	New York v. FERC	535 U.S. 1	0.81
157	DeBartolo v. FL Gulf Coast Building	485 U.S. 568	1.32	189	Natl Fed of Fed Empl v. Dep of Inter.	526 U.S. 86	0.81
158	US v. Thompson/Center Arms Co.	504 U.S. 505	1.32	190	Eastex v. NLRB	437 U.S. 556	0.79
159	Gladstone v. Bellwood	441 U.S. 91	1.31	191	INS v. Natl Center for Immigrants Rts	502 U.S. 183	0.78
				192	Mobil Oil v. United Distribution	498 U.S. 211	0.78

193	Norfolk Southern v. Shanklin	529 U.S. 344	0.75	208	Comm Tel of So Cal v. Gottfried	459 U.S. 498	0.48
194	SEC v. Zandford	535 U.S. 813	0.73	209	Nat'l Cable & Telecom v. Gulf Power	534 U.S. 327	0.46
195	Yellow Transp v. Michigan	123 S.Ct. 371	0.69	210	US v. O'Hagan	521 U.S. 642	0.46
196	INS v. Ventura	123 S.Ct. 353	0.69	211	Miller v. Johnson	515 U.S. 900	0.31
197	Nat'l Credit Union v. 1st Nat'l Bank	522 U.S. 479	0.69	212	National RR Corp v. Morgan	536 U.S. 101	0.31
198	Lopez v. Davis	531 U.S. 230	0.68	213	American Hosp Assn v. NLRB	499 U.S. 606	0.29
199	Lukhard v. Reed	481 U.S. 368	0.67	214	NLRB v. Int'l Longshoremans Assn	473 U.S. 61	0.27
200	Nat Asn Greeting Card Pubs v. USPS	462 U.S. 810	0.57	215	EEOC v. Shell Oil	466 U.S. 54	0.27
201	California v. U.S.	438 U.S. 645	0.56	216	Barnhart v. Sigmon Coal	534 U.S. 438	0.26
202	Whitman v. American Trucking	531 U.S. 457	0.55	217	Sutton v. United Air	527 U.S. 471	0.19
203	US v. Fior D'Italia	536 U.S. 238	0.54	218	NASA v. FLRA	527 U.S. 229	0.19
204	Reno v. Flores	507 U.S. 292	0.53	219	Gregory v. Ashcroft	501 U.S. 452	0.16
205	Metro Broadcasting v. FCC	497 U.S. 547	0.51	220	Mississippi Power & Light v. Mississippi	487 U.S. 354	0.15
206	Shalala v. Ill Council on Longterm Care	529 U.S. 1	0.51	221	Mohasco Corp v. Silver	447 U.S. 807	0.14
207	Huffman v. Western Nuclear	486 U.S. 663	0.5				

**APPENDIX E: Cases where Rehnquist and Stevens Divided on the Deference Issue
(boldface indicates which way the case came out)**

CASE	Citation	Rehnquist Vote	Stevens Vote
<i>2001 Term</i>			
National RR Corp 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	534 U.S. 327	Anti-deference	Pro-deference
<i>2000 Term</i>			
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 Comm. Care	532 U.S. 706	Anti-deference	Pro-deference
Solid Waste Agcy. V. Army Corps of Engineers	531 U.S. 159	Anti-deference	Pro-deference
<i>1999 Term</i>			
Geier v. Amer. Honda	529 U.S. 861	Pro-deference	Anti-deference
Christensen v. Harris County	529 U.S. 576	Anti-deference	Pro-deference
Norfolk Southern v. Shanklin	529 U.S. 344	Anti-deference	Pro-deference
FDA v. Brown & Williamson Tocacco	529 U.S. 120	Anti-deference	Pro-deference
Shalala v. Ill. Council on Longterm Care	529 U.S. 1	Pro-deference	Anti-deference
<i>1998 Term</i>			
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. of Fed. Empl. v. Dep. of Interior	526 U.S. 86	Anti-deference	Pro-deference
<i>1997 Term</i>			
Bragdon v. Abbott	524 U.S. 624	Anti-deference	Pro-deference
Nat'l Credit Union v. 1 st Nat'l Bank	522 U.S. 479	Anti-deference	Pro-deference
Allentown Mack Sales v. NLRB	522 U.S. 359	Anti-deference	Pro-deference
<i>1996 Term</i>			
US v. O'Hagan	521 U.S. 642	Anti-deference	Pro-deference
US v. LaBonte	520 U.S. 751	Anti-deference	Pro-deference
<i>1995 Term</i>			
Medtronic v. Lohr	518 U.S. 470	Anti-deference	Pro-deference
Holly Farms v. NLRB	517 U.S. 392	Anti-deference	Pro-deference
<i>1994 Term</i>			
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
<i>1993 Term</i>			
Thomas Jefferson Univ. v. Shalala	512 U.S. 504	Pro-deference	Anti-deference
OWCP v. Greenwich Collieries	512 U.S. 267	Anti-deference	Pro-deference
MCI v. AT&T	512 U.S. 218	Anti-deference	Pro-deference
NLRB v. Health Care & Retirement Co.	511 U.S. 571	Anti-deference	Pro-deference
Chicago v. Env. Def. Fund	511 U.S. 328	Anti-deference	Pro-deference
<i>1992 Term</i>			
Good Samaritan Hosp. v. Shalala	508 U.S. 402	Pro-deference	Anti-deference
Reno v. Flores	507 U.S. 292	Pro-deference	Anti-deference
<i>1991 Term</i>			
US v. Thompson/Center Arms Co.	504 U.S. 505	Anti-deference	Pro-deference
Presley v. Etoway County	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
<i>1990 Term</i>			
Litton Financial Planning v. NLRB	501 U.S. 190	Anti-deference	Pro-deference
Rust v. Sullivan	500 U.S. 173	Pro-deference	Anti-deference
EEOC v. Arabian American Oil	499 U.S. 244	Anti-deference	Pro-deference
<i>1989 Term</i>			
Metro Broadcasting 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	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
<i>1988 Term</i>			
Mead Corp. v. Tilly	490 U.S. 714	Anti-deference	Pro-deference
<i>1987 Term</i>			
K Mart v. Cartier	486 U.S. 281	Anti-deference	Pro-deference
<i>1986 Term</i>			
Fall River Dyeing 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. US	479 U.S. 462	Anti-deference	Pro-deference
<i>1985 Term</i>			
Young v. Community Nutrition Inst.	476 U.S. 974	Pro-deference	Anti-deference
Lyng v. Pane	476 U.S. 926	Pro-deference	Anti-deference
<i>1984 Term</i>			
Pattern Makers League v. NLRB	473 U.S. 95	Pro-deference	Anti-deference
US v. Nat'l Bank of Commerce	472 U.S. 713	Pro-deference	Anti-deference
NLRB v. Int'l Longshoremans Ass'n	473 U.S. 61	Pro-deference	Anti-deference
Chemical Mfrs. Ass'n v. NRDC	470 U.S. 116	Pro-deference	Anti-deference
Lawrence City v. Lead-Deadwood	469 U.S. 256	Pro-deference	Anti-deference
<i>1983 Term</i>			
ICC v. American 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 v. NLRB	467 U.S. 883	Anti-deference	Pro-deference
Aluminum Co. v. Central Lincoln	467 U.S. 380	Pro-deference	Anti-deference
EEOC v. Shell Oil	466 U.S. 54	Anti-deference	Pro-deference
<i>1982 Term</i>			
Motor Veh. Mnfrs. Ass'n v. State Farm	463 U.S. 29	Pro-deference	Anti-deference
Bob Jones Univ. v. US	461 U.S. 574	Anti-deference	Pro-deference
<i>1981 Term</i>			
Fidelity Fed. Sav. & Loan v. de la Cuesta	458 U.S. 141	Anti-deference	Pro-deference
<i>1980 Term</i>			
NLRB v. Hendricks County Rural Elec.	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. 273	Pro-deference	Anti-deference
<i>1979 Term</i>			
US v. Euge	444 U.S. 707	Pro-deference	Anti-deference
<i>1978 Term</i>			
Gladstone 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. US	440 U.S. 472	Pro-deference	Anti-deference

<i>1977 Term</i>			
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. US	434 U.S. 275	Anti-deference	Pro-deference
<i>1976 Term</i>			
Batterton v. Francis	432 U.S. 416	Pro-deference	Anti-deference
US v. Larionoff	431 U.S. 864	Anti-deference	Pro-deference
Piper v. Chris-Craft	430 U.S. 1	Anti-deference	Pro-deference