Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases

William N. Eskridge Jr.

Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
http://digitalcommons.law.yale.edu/fss_papers/3781

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
CHEVRON AS A CANON, NOT A PRECEDENT: AN EMPIRICAL STUDY OF WHAT MOTIVATES JUSTICES IN AGENCY DEFERENCE CASES

Connor N. Raso* and William N. Eskridge, Jr.**

Legal scholars and jurists believe that federal judges often defer to agency interpretations of statutes. Debate has focused on when judges should defer and how judges should operationalize a deference regime doctrinally, perhaps as a matter of stare decisis. Such normative debates about deference rest upon assumptions that have not been rigorously tested, however. Examining the entire population of Supreme Court cases where an agency interpretation was in play (1984–2006), our empirical study finds that the Justices do not generally give deference-regime precedents anything close to stare decisis effect, but that the policies underlying the major deference regimes do have a discernible effect at the Supreme Court level. We also find that judicial ideology affects the Justices’ applications of deference regimes. As a descriptive matter, we find that deference regimes are more like canons of statutory construction, applied episodically but reflecting deeper judicial commitments, than like binding precedents, faithfully applied, distinguished, or overruled.

As a prescriptive matter, this study provides empirical support for proposals to simplify the Supreme Court’s continuum of deference regimes and to characterize the Court’s deference decisions in the form of canons of statutory construction, and certainly not as precedents entitled to stare decisis effect. More broadly, the empirical analysis casts doubt on both the wisdom and the practicability of academic proposals to treat methodological opinions (such as Chevron) as precedents entitled to stare decisis. A jurisprudential reason for this skepticism, buttressed by the data in our study, is that statutory interpretation methodology (including deference) is inherently ad hoc and ought to be tailored to the circumstances of each statutory case, rather than bound to precommitted rules. Put another way, judicial deference to agency interpretations is a matter where bright-line rules will not necessarily yield greater predictability and law-like behavior among judges than context-saturated standards.

INTRODUCTION .................................................. 1728
I. AN INTRODUCTION TO THE SUPREME COURT’S DEFERENCE DOCTRINES AND PREVIOUS STUDIES OF THE COURT’S PRACTICE ............................................. 1735

* J.D., Yale Law School; Ph.D., Stanford University Department of Political Science.
** John Garver Professor of Jurisprudence, Yale Law School.

For most helpful comments, we are grateful to Andrew Martin, Al Klevorick, Alan Gerber, Christine Jolls, Terry Moe, Andrew Rutten, John Ferejohn,Josh Cohen, Daniel Ho, SusanRose-Ackerman, Beth Garrett, Matthew Spitzer, Jodi Short, Josh Fischman, Richard Posner, Henry Hansmann, Lauren Baer, Alex Tahk, Miguel de Figueredo, Jed Stiglitz, Jowei Chen, and participants at the 2009 Conference on Empirical Legal Studies and the 2009 Annual Meeting of the Midwest Political Science Association.
II. THEORY: WHAT DRIVES JUDICIAL DECISIONMAKING IN AGENCY DEFERENCE CASES? ........................................ 1741
A. The Rule of Law Model ..................................... 1742
B. The Attitudinal Model ...................................... 1745
C. The Strategic Model ........................................ 1748

III. PRELIMINARY EMPIRICAL ANALYSIS: DO JUSTICES GIVE STARE DECISIS EFFECT TO DEFERENCE DOCTRINE PRECEDENTS? ...... 1751

IV. SIMULTANEOUS EQUATION MODEL: WHAT INFLUENCES A JUSTICE'S WILLINGNESS TO FOLLOW AN AGENCY INTERPRETATION? ........................................ 1766
A. Problems Making Causal Inferences in Previous Studies ........................................ 1767
B. The Simultaneous Equation Model ...................... 1771
C. Applying the Simultaneous Equations Model to Suggest What Motivates the Justices in Agency Deference Cases .......................... 1774
1. Testing the Legal Model ................................. 1778
   a. Agency Interpretations of Its Own Rules ..... 1779
   b. Congressional Delegation of Lawmaking Authority to Agencies ...................... 1780
   c. Agency Interpretations That Are Longstanding or Involve Expertise ................ 1781
2. Testing the Attitudinal Model ......................... 1784
3. Testing the Strategic Model ....................... 1791

V. IMPLICATIONS FOR THE SUPREME COURT'S CONTINUUM OF DEFERENCE .................................................. 1794
A. Lowering the Stakes of the Deference Debate ........ 1796
B. Simplifying and Canonizing the Court's Continuum of Deference ............................. 1800
C. What is the Best Way to Assure Judicial Deference to Agency Interpretations? ........ 1805

VI. JURISPRUDENTIAL IMPLICATIONS .......................... 1806
A. Difficulty of Giving Stare Decisis Effect to Methodological Reasoning .................. 1807
B. Rules Versus Standards: Practical Constraints on the Justices' Discretion ............... 1812

CONCLUSION: NORMS MATTER ................................... 1815

INTRODUCTION

In 1998, Jackson, Mississippi adopted a pay raise plan in order to retain its municipal employees who were tempted to leave for better-paying jobs elsewhere. The schedule provided higher raises to employees with fewer than five years of experience; the planners believed that this was the group where existing salary levels were least sufficient to retain
needed personnel. Older employees sued the city for violating the Age Discrimination in Employment Act of 1967 (ADEA). Although the plan did not violate the Act’s disparate treatment rule, because it did not treat employees differently because of age, the plaintiffs argued that the schedule had a disparate impact upon older employees, few of whom had fewer than five years of service with the city. The lower courts ruled that the ADEA, unlike Title VII, does not provide a cause of action for disparate impact claims; only disparate treatment can be the basis for an age discrimination claim. In Smith v. City of Jackson, the United States Supreme Court reversed and held that the ADEA outlaws some employer policies that have a disparate impact upon older workers.

City of Jackson is an important employment law precedent, but for our purposes the key debate among the Justices was what weight to accord the views of the Equal Employment Opportunity Commission (EEOC), the agency charged with implementing the statute and authorized by Congress to adopt substantive rules to fill in details of the ADEA. Applying a policy followed by the Department of Labor (the agency originally charged with implementing the ADEA), the EEOC promulgated a rule disapproving non-age employment practices having “an adverse impact on individuals within the protected age group,” unless the employer can demonstrate a “business necessity” for such practice. A plurality of the Court joined the opinion of Justice John Paul Stevens, who invoked the EEOC’s regulation as additional “support” for an interpretation he derived from the statutory text, structure, precedent, history, and purpose. Concurring in the plurality’s judgment, Justice Antonin Scalia found this an “absolutely classic case for deference.” He would have simply applied the Court’s Chevron jurisprudence: Because the statute does not directly address the disparate impact issue and the agency interpretation is reasonable, the Court should defer to the agency, without offering the Court’s own interpretation that would thereafter be binding on the agency. Speaking separately for three, Justice Sandra Day O’Connor accorded the EEOC’s rule “no weight” whatsoever, because it was an inter-

---

1. For a summary of the factual background, see Smith v. City of Jackson, 544 U.S. 228, 231–32 (2005).
4. 544 U.S. at 240.
5. Originally created by the Civil Rights Act of 1964, the EEOC also has authority to promulgate substantive rules implementing the ADEA. 29 U.S.C. § 628.
7. City of Jackson, 544 U.S. at 233–40 (Stevens, J., plurality opinion). Justices Souter, Ginsburg, and Breyer joined this part of Justice Stevens’s opinion. Id.
8. Id. at 243 (Scalia, J., concurring in part and concurring in the judgment).
pretation of the statute's reasonable factors other than age defense, and not its provisions creating employer liability.\footnote{Id. at 262–67 (O'Connor, J., concurring in the judgment). Justice O'Connor's opinion was joined by Justices Kennedy and Thomas. Id. Chief Justice Rehnquist did not participate in this case.}

Decisions such as City of Jackson reflect the reality that statutory interpretation has long been dominated by agencies. The bulk of our federal law now derives from agency rules, guidances, opinion letters, manuals, and websites.\footnote{See, e.g., Peter L. Strauss, Comment, The Rulemaking Continuum, 41 Duke L.J. 1463, 1469 (1992) (providing evidence of volume of guidance documents and legislative rules).} As a result, understanding whether deference regimes constrain Justices helps us better understand the operation of law in the modern administrative state.\footnote{A number of empirical studies of deference effectively ignore deference doctrine and analyze deference purely in terms of whether agency decisions are upheld or overturned. See, e.g., Linda R. Cohen & Matthew L. Spitzer, Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test, 69 S. Cal. L. Rev. 431 (1996); Joseph L. Smith, Presidents, Justices, and Deference to Administrative Action, 23 J.L. Econ. & Org. 346 (2007); Matthew C. Stephenson, Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies, 56 Admin. L. Rev. 657 (2004) [hereinafter Stephenson, Mixed Signals]. Our paper examines whether such studies analyze the correct dependent variable.} The main issue judges confront, then, is how often and how much to defer to agency interpretations.\footnote{See, e.g., John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 614–17 (1996) (discussing unsettled nature of Supreme Court jurisprudence on deference to agency interpretation); Kenneth W. Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283, 283 (1986) (highlighting varying standards of deference federal courts have given agencies' statutory interpretations).} Chevron alone has been cited in over five thousand law review articles.\footnote{Lexis search, August 10, 2008. For prominent exemplars of this literature, see, e.g., Richard J. Pierce, Jr., Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta, 57 U. Chi. L. Rev. 481, 483 (1990) (arguing Chevron demonstrates the proper "understanding of the boundary between appropriate political control and impermissible bias"); Peter H. Schuck & E. Donald Elliot, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 996–1054 (examining changing nature of administrative law, including impact of Chevron on judicial review).} These articles have usually argued the normative merits of different approaches to deference. Supporters of broad judicial deference to agency interpretations cite the legitimacy, expertise, and rule of law advantages of following centralized agency rules as presumptive law on any federal statutory topic.\footnote{Chevron itself famously outlines the accountability and expertise rationales. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 865 (1984) (arguing that because "[j]udges are not experts in the field, and are not part of either political branch of the Government," judges should defer to reasonable agency rules unless Congress has directly spoken to the issue); see also Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 [hereinafter Scalia, Judicial Deference] (arguing Chevron's clear deference rule allows Congress to better anticipate
ence would encourage agency turf grabbing, exacerbate agency capture, and compromise judges' traditional supremacy in declaring the law.16

The contending positions in these normative debates rest upon assumptions that have not been rigorously tested. Indeed, the intensity of the debate itself rests upon heroic (and substantially untested) assumptions. Thus, many advocates of a broad reading of Chevron seem to assume that judges will follow Justice Scalia’s concurring opinion in City of Jackson and treat the Chevron regime as a matter of precedent, citing the case when appropriate and then applying its now famous two-step framework.17 Justice Scalia’s concurring opinion in City of Jackson treats Chevron as a binding precedent that the Court is required to apply and follow as a matter of stare decisis or something akin to it.18 Justice Scalia’s position has recently attracted support from some legal scholars.19 In a parallel fashion, some critics assume that judges will follow Justice O’Connor’s separate opinion in City of Jackson, and argue that while Chevron is precedent, it does not apply to a case’s specific set of facts, which can be distinguished.20 Yet others assume judges will follow Justice Stevens, and argue


17. E.g., United States v. Mead Corp., 533 U.S. 218, 256–57 (2001) (Scalia, J., dissenting) (insisting Court should follow “the original formulation of Chevron” and “[the Court’s] precedents” applying Chevron); Starr, supra note 13, at 284, 288–99 (arguing Chevron is a “landmark case” that was by 1986 “firmly entrenched in the body of [American] law”).

18. Thus, Justice Scalia deemed the EEOC’s interpretation of the ADEA in that case to be “an absolutely classic case for deference to agency interpretation,” even under the “unduly constrained standards of agency deference” announced in Mead. Smith v. City of Jackson, 544 U.S. 228, 243–45 (2005) (Scalia, J., concurring in the judgment). Noting his dissent in Mead, Justice Scalia continued to insist that the pre-Mead formulation of Chevron should be applied. Id. at 245 (citing Mead, 533 U.S. at 252 (Scalia, J., dissenting)).


20. E.g., Thomas W. Merrill & Kristin E. Hickman, Chevron’s Domain, 89 Geo. L.J. 833, 833–35 (2001) (treating Chevron as precedent and analyzing its possible applications in detail). Justice O’Connor accepted Justice Scalia’s baseline (Chevron must be followed
it is far from clear that *Chevron* is or should be treated as a precedent entitled to stare decisis effect.\(^{21}\) Indeed, Justice Stevens’s plurality opinion in *City of Jackson* failed to cite or discuss *Chevron* (an opinion Justice Stevens himself wrote), a move virtually unthinkable if *Chevron*’s holding were binding as a matter of stare decisis.\(^{22}\) By failing to cite *Chevron* and by treating deference as a “plus” factor for the result reached in his opinion, Justice Stevens seemed to treat agency deference doctrine as a canon of statutory construction, rather than as binding precedent.

What motivates Supreme Court Justices in these agency interpretation cases? Do *Chevron* and other deference regime decisions operate as precedents the Justices rigorously follow as a matter of stare decisis? If so, *City of Jackson* should be read as a serious debate about the relevance and proper application of *Chevron*, where Justices consider not only the domain covered by *Chevron*, but also how it should be applied (as binding precedent or as a canon). Or are the Justices simply voting their ideological preferences, either favoring agency views they find politically congenial or following a more subtle but still result-oriented strategy? For example, did moderately conservative Justice O’Connor (joined by two other conservative Republican Justices) refuse to apply *Chevron* because the agency had adopted a liberal reading of the ADEA? And did liberal Justice Stevens decline to apply *Chevron* so that he could hardwire his own liberal interpretation into the ADEA? (If the Court agrees with the agency—that is, the agency wins at *Chevron* step one—rather than defers to it—at *Chevron* step two—the EEOC would not have the liberty to revoke its rule that was embraced by the Court in *City of Jackson*, since it would be part of the meaning of the statute.)

It is true that such a simple ideological account does not explain why arch-conservative Justice Scalia followed *Chevron* to allow the agency discretion to adopt a very liberal rule for the ADEA. But it is possible that his willingness to go along with a liberal result in this case might be part of a larger conservative strategy in the general run of cases. Thus, Justice Scalia has been a champion of a broad reading of *Chevron* since the Reagan era.\(^{23}\) His enthusiasm might be explained as a political judgment that conservative Republicans would be more successful controlling the

---

where applicable) but distinguished *Chevron* under the facts of *City of Jackson* and invoked other precedents to support her conclusion that the agency’s views should not be considered when they have not been publicly announced to address the issue in question. See *City of Jackson*, 544 U.S. at 264–66 (O’Connor, J., concurring in the judgment).


22. Though ignoring *Chevron*, Justice Stevens’s opinion carefully analyzed possible ADEA and even Title VII precedents, including some tangentially bearing on the issue at hand. *City of Jackson*, 544 U.S. at 230–43 (Stevens, J., plurality opinion).

23. E.g., *Mead*, 533 U.S. at 256–57 (Scalia, J., dissenting) (advocating broad application of *Chevron*); Scalia, Judicial Deference, supra note 15, at 512 (stating *Chevron* "applies with full force" in controversies of statutory interpretation).
presidency than the legislature, and therefore, in the long term, a deferential approach would be the best strategy for a conservative Justice—especially if combined with a refusal to consider legislative materials, another plank in the platform of his new textualism. Justice Stevens may be following the reverse logic: Deferral to agencies combined with the diminished role of legislative history would marginalize Congress and advantage the President in ways that would skew the law in a conservative direction.

Simply reading the Justices' opinions in *City of Jackson* does not tell us which of these accounts is the more astute reading of that case or others. A single case cannot give us enough information to distinguish among the competing hypotheses about the judicial application of deference doctrines. To answer these questions, we need to look at more decisions.

As Part I of this Article demonstrates, scholars have already carried out valuable empirical work. This work suggests that *Chevron* and other deference regimes do not constrain Supreme Court Justices but may have some effect on lower court judges. Unfortunately, however, no study has been able to subject these hypotheses to large scale empirical testing. Nor have previous analyses provided empirical evidence touching on the deeper institutional question: What considerations motivate judicial behavior when evaluating agency interpretations of federal statutes? Do judges seek to apply deference doctrine sincerely? Do they view it as merely instrumental in achieving their ideological preferences? Or do they neglect it altogether?

To address some of these topics more systematically, we started with the database of 1,014 (later reduced to 667) Supreme Court cases involving agency interpretations of federal statutes between *Chevron* (1984) and *Hamdan* (2006). We enriched the database in ways that allowed us to track the deference voting patterns of individual Justices, and then we subjected those patterns to empirical methodologies that have recently been developed by political scientists. This is described in Part II.

Parts III and IV present our findings. Systematically examining the voting patterns of individual Justices, we found that none of the Justices maintains a coherent voting pattern consistent with the practice of treating *Chevron* and other deference regimes as precedents entitled to stare decisis effect. Recall that Justice O'Connor considered but rejected the application of the *Chevron* regime to the EEOC's interpretation in *City of Jackson*; we found that this stance was not representative of her overall voting record, which was eclectic. That is, sometimes Justice O'Connor

---


25. See supra note 10 and accompanying text.
zealously applied or distinguished *Chevron* or joined opinions that did so, while other times she ignored it even though its regime was clearly relevant. Perhaps surprisingly, the same is true of both Justice Stevens, a critic of broad interpretations of his own *Chevron* decision, and Justice Scalia, the vocal cheerleader for a near universal application of *Chevron*’s framework. These empirical findings deepen the suggestion of our previous statistical study, that the Court does not apply its announced deference regimes predictably and that those regimes do not operate as a formal constraint on the Justices. Stated doctrinally, our empirical evidence falsifies the proposition that any of the Justices treats *Chevron* and the Court’s other announced deference regimes as precedents strictly binding on them as a matter of stare decisis. Especially with regard to Justice Scalia, who is a fan of both *Chevron* and stare decisis (and apparently believes that *Chevron* ought to be followed as a matter of stare decisis), this finding is most surprising.26

If formal deference regimes do not drive the Justices’ voting in agency interpretation cases, what does? Our empirical analysis finds that ideological concerns influence application of deference doctrine. Justices are significantly less deferential toward agency policies with which they disagree. On the other hand, we also find that the Court’s announced policies justifying deference (namely, congressional delegation of lawmaking authority and consistency of agency interpretations over time) significantly influence the Justices’ willingness to go along with agency interpretations. This is perhaps our most striking finding from a political science perspective, as most political scientists assume or believe that rule-of-law considerations play no discernible role in judicial behavior. Quite the contrary, we show that they do play a role—though the legal bite of deference regimes is ad hoc and not entirely predictable, much as one would expect if the regimes operated like canons of statutory construction rather than like binding precedents. Also contrary to much conventional wisdom among political scientists, we find that the preferences of the President and Congress seem to influence the Court’s application of deference doctrine.

Part V discusses doctrinal implications of these results. We conclude that commentators have frequently overstated the importance of the deference doctrine debate. The Justices treat deference regimes like canons of statutory construction, rather than as precedents formally binding on future Courts. Like the canons and unlike binding substantive precedents, deference regimes are episodically rather than systematically applied and are important more for their underlying policies than for their precise legal rules. Ultimately, deference regimes operate mostly as presumptions or balancing factors evaluated by the Justices in combination

---

26. For an example where Justice Scalia followed precedents he surely considers misguided, see Gonzales v. Raich, 545 U.S. 1, 33–42 (2005) (Scalia, J., concurring in the judgment) (voting to uphold Congress’s power under Commerce Clause to apply Controlled Substances Act to personal medical use of marijuana).
with a variety of considerations. In other words, Justice Stevens's opinion in *City of Jackson* is a better barometer of how the Justices actually apply *Chevron* and other deference regimes than is his more formal-sounding opinion in *Chevron*, especially as Justice Scalia has expansively interpreted that opinion. We argue that scholars are being unrealistic when they demand that the Supreme Court adopt and consistently apply formal deference regimes that will "constrain" the Justices in future cases. The Justices will not follow such regimes—and sooner or later lower court judges will not either. The better path for reform is to simplify the deference regimes and tie them more tightly to their policy rationales, in the manner that the Court has done for substantive canons of statutory construction. Canonizing deference regimes may have as much or even more "constraining" influence on Supreme Court Justices than trying to make them binding as a matter of stare decisis. We also offer some institutional thoughts for how to ensure that courts actually defer to agencies.

Part VI concludes with some jurisprudential implications of our analysis. Taking our findings as a starting point, we discuss the general difficulty of giving stare decisis effect to methodological precedents generally and *Chevron* in particular. Deference doctrine illustrates the inherent challenge in treating interpretative methodology as binding precedent. And *Chevron* is particularly inapt for stare decisis treatment, because this process-based precedent would undermine the reliance interests the regulated community has in the Court's substantive precedents. We also apply our results to the debate over the relative efficacy of rules and standards. Our analysis of deference illustrates that standards may in some instances be as binding as rules, perhaps sometimes more so. Hence, our proposal for overthrowing the formalist rule-like approaches (like *Chevron*27) in favor of a standards-like approach (similar to *Skidmore v. Swift & Co.*28) does not necessarily sacrifice the rule of law. We conclude by noting that norms also influence how the Justices apply interpretative methodology.

I. AN INTRODUCTION TO THE SUPREME COURT'S DEFERENCE DOCTRINES AND PREVIOUS STUDIES OF THE COURT'S PRACTICE

Doctrinally, there is a difference between a judge's *deferring* to an agency interpretation and a judge's *agreeing* with that interpretation. In *City of Jackson*, you might *agree* with the EEOC's views, based upon the standard sources judges apply when interpreting a statute (statutory text and structure, legislative history and purpose, statutory precedents)—the EEOC, in your opinion, got the answer right. Or you might *defer* to the EEOC's interpretation, either without taking a position on what you

---

27. *Chevron*, 467 U.S. at 837.
think the statute means (as Justice Scalia did in *City of Jackson*\textsuperscript{29}) or with some exploration of what you believe the statute means and referencing the EEOC’s interpretation as confirmation or as a reason to end your inquiry (as Justice Stevens did in that case\textsuperscript{30}). Justice O’Connor neither agreed nor deferred: The EEOC’s view in this case was expressed in an amicus brief filed by the Solicitor General; Justice O’Connor did not consider such a brief entitled to deference, and she did not agree with the EEOC’s reading of the legal materials either.\textsuperscript{31}

Consider a further distinction, between applying a deference regime and actually deferring to an agency interpretation:\textsuperscript{32} Deference regimes are doctrinal frameworks used to evaluate agency decisions. When the Justices apply a more deferential regime in a case, the Court (theoretically) defers to a larger subset of agency policy decisions in the face of an unclear statute. Put differently, the “window” of acceptable agency policy decisions expands when the Justices apply a more deferential regime. A judge who applied a weakly deferential regime such as *Skidmore* would therefore uphold a smaller range of agency policies than the same judge would uphold if she applied the apparently more deferential regime represented by *Chevron*.

<table>
<thead>
<tr>
<th>TABLE 0: DEERENCE REGIME</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defer to Agency</td>
</tr>
<tr>
<td>Nondeferential Regime</td>
</tr>
<tr>
<td>Deferential Regime (e.g., <em>Chevron</em>)</td>
</tr>
</tbody>
</table>

But applying a deference regime does not require a judge to defer. On the one hand, the judge may find that the statute is clear, so clear that it does not matter what the agency’s view is. For instance, agencies do not receive deference in cases decided at *Chevron* Step One.\textsuperscript{33} In *City of Jackson*, Justice O’Connor would not have “deferred” to the EEOC even if she had applied the *Chevron* “regime,” because she would have decided the case at *Chevron* Step One: The plain meaning of the statute did not allow disparate impact liability for age discrimination defendants.\textsuperscript{34} On the other hand, the judge may find the statute ambiguous, but the agency’s interpretation outside the range of reasonable applications of that ambiguous statute. For instance, an agency interpretation based

---

\textsuperscript{29} Smith v. City of Jackson, 544 U.S. 228, 243 (2005) (Scalia, J., concurring in part and concurring in the judgment).

\textsuperscript{30} Id. at 239-40 (Stevens, J., plurality opinion).

\textsuperscript{31} Id. at 262-67 (O’Connor, J., concurring in the judgment).

\textsuperscript{32} See infra Table 0.


\textsuperscript{34} *City of Jackson*, 544 U.S. at 249-51 (O’Connor, J., concurring in the judgment).
upon an incorrect reading of a relevant Supreme Court precedent would not be entitled to deference, even if the statute were ambiguous: Under *Chevron* Step Two, such a reading would be unreasonable as a matter of law.

The previous study by Lauren Baer and one of us (Eskridge) demonstrated that the Court applies a "continuum" of deference regimes, ranging from very strong deference favoring the agency in foreign affairs cases to a presumption against agency interpretations in criminal cases:35

- *Curtiss-Wright* deference, or super-strong judicial reluctance to overturn executive decisions involving military policy and foreign policy.36
- *Seminole Rock* (or *Auer*) deference, or deference to agency interpretations of their own regulations, unless such interpretations are clearly invalid or unreasonable.37
- *Chevron* deference, or deference to "reasonable" agency interpretations, so long as Congress has not directly addressed the issue.38
- Pre-*Chevron* deference (e.g., *Beth Israel*), or deference to agency decisions, so long as not clearly contrary to the statute.39
- *Skidmore* deference, a judicial willingness to go along with agency interpretations based upon their cogency, the superior expertise the agency brings to an issue, or the reliance interests generated by longstanding agency constructions.40
- Consultative deference, when the Justices invoke agency factual materials or reasoning as a supporting justification for a judicial construction of the statute.41
- Antideference, where the Justices begin with a presumption against the agency's interpretation, as in cases involving penal statutes or issues where the agency's interpretation raises constitutional concerns.42

The scope of each deference regime is vague enough to leave the Justices some discretion. For instance, in *City of Jackson*, which Justice Scalia deemed an "absolutely classic case" for *Chevron* deference, he was the

35. Eskridge & Baer, supra note 24, at 1090, 1098–1120.
38. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 851 (1984). *Chevron* subsumed a number of deference regimes such as *Beth Israel* that were previously applied in specific substantive areas. For a full discussion of these regimes, see Eskridge & Baer, supra note 24, at 1106–09.
only Justice to apply *Chevron*. Justice Stevens followed the consultative deference regime, a kind of *Skidmore*-lite approach that considers agency inputs as “plus” factors supporting or confirming an interpretation. And Justice O’Connor advanced intelligent reasons for according the agency views “no weight.” At the very least, there is a lot of room for play in the Court’s application of the deference continuum. And the Eskridge and Baer study found that, in a majority of cases, the Court applied no deference regime whatsoever.

There is now a significant academic literature on the Supreme Court’s deference regimes. Most of the literature has focused on *Chevron*, but studies have also analyzed other regimes such as *Skidmore* and *Seminole Rock* (increasingly characterized as *Auer*). Many articles have debated the normative merits of different deference regimes, especially *Chevron*. Authors frequently make assumptions regarding the importance of deference doctrine that have not been tested in the existing literature. Only two existing studies statistically describe the Court’s application of deference regimes, and neither engages in a systematic empirical analysis of this issue. This study adds to and, we hope, enriches this positive literature. In so doing, it also has implications for the normative literature, as noted in the Introduction.

Most positive analyses of deference regimes have focused on the balance of power between the branches. A series of papers has debated whether the Supreme Court uses deference doctrine to achieve the longer-term policy or institutional goals of various Justices. Professors Linda Cohen and Matthew Spitzer first raised this question, predicting

43. *City of Jackson*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment).
44. Id. at 239–40 (Stevens, J., plurality opinion).
45. Id. at 263 (O’Connor, J., concurring in the judgment).
46. Eskridge & Baer, supra note 24, at 1117.
48. E.g., Manning, supra note 13.
49. E.g., Farina, supra note 16, at 499–526 (assuming *Chevron* was a revolutionary decision and offering cautions lest it be applied too aggressively); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 971–72 (1992) (analyzing whether *Chevron* is revolutionary).
50. Eskridge & Baer, supra note 24; Merrill, supra note 49.
51. Several studies have analyzed the effect of judicial deference to agencies on the balance of power between Congress, agencies, and the courts. See, e.g., William Eskridge & John Ferejohn, Making the Deal Stick, 8 J.L. Econ. & Org. 165, 187 (1992) (suggesting that courts can help to prevent agencies from straying from the original bargain reached by Congress and the President); Emerson H. Tiller, Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making, 14 J.L. Econ. & Org. 114, 117–24 (1998) (analyzing effect of Court’s deference signals on interaction between lower courts and agencies); Emerson H. Tiller & Frank Cross, Modeling Agency/Court Interaction, 121 Harv. L. Rev. F. 15, 14 (2007), at http://www.harvardlawreview.org/media/pdf/tiller_cross.pdf (on file with the Columbia Law Review) (noting dearth of work analyzing effect of deference on agency behavior).
that the Court would instruct lower courts to defer to agencies when agencies were ideologically closer to the Court than were the lower courts. In their theory, the Court sets deference policy for lower courts by deciding to uphold or overturn an agency; formal deference doctrine was not part of this signal. Drawing from observations of the Court's first decade of experience with *Chevron*, Cohen and Spitzer's empirical analysis supported their theory, but a subsequent test by Mathew Stephenson (with additional data from the Court's performance during the Clinton Administration) did not confirm this result. Instead, the Stephenson study found that the conservative Rehnquist Court deferred more frequently to Clinton Administration agencies that were more liberal than the Court itself. The Court therefore did not appear to behave strategically in the manner posited by Cohen and Spitzer. These studies neglected formal deference doctrine and focused on whether the Court upheld or overturned an agency. Our study evaluates whether this assumption is justified.

Another strand of positive work has analyzed whether *Chevron* actually increased judicial deference to agencies. In the foundational empirical study, Professors Peter Schuck and E. Donald Elliott found that agencies prevailed more frequently with the D.C. Circuit in the immediate wake of *Chevron*, but that this effect diminished somewhat over time. Other studies reported that *Chevron* had a minimal effect on the lower courts, however. Professors Frank Cross and Emerson Tiller analyzed the effect of peer monitoring on lower court judges' compliance with deference doctrine. They found that appellate court panels with both Democratic and Republican appointees were more likely to uphold agencies in *Chevron* cases. This indicates that although judges prefer to

52. Cohen & Spitzer, supra note 12, at 441–45; see also Tiller & Cross, supra note 51, at 13–15 (presenting formal model of interaction between Supreme Court, lower courts, and agencies in which Court notes preferences of lower courts and agencies and then chooses a deference doctrine to achieve its policy goals).
53. Cohen & Spitzer, supra note 12, at 467–75.
54. Stephenson, Mixed Signals, supra note 12, at 660, 687–96.
55. Id. at 701–02.
57. See, e.g., John F. Belcaster, The D.C. Circuit’s Use of the *Chevron* Test: Constructing a Positive Theory of Judicial Obedience and Disobedience, 44 Admin. L. Rev. 745, 758–59 (1992) (finding *Chevron* did not induce large increase in deference for D.C. Circuit); Sidney A. Shapiro & Richard E. Levy, Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions, 44 Duke L.J. 1051, 1070–71 (1995) (“[T]he rate of affirmance of agencies in . . . the circuit courts is about the same now as (or even lower than) before *Chevron* was decided.”).
58. Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 Yale L.J. 2155 (1998). Cross and Tiller define compliance with deference doctrine in terms of whether the Court upholds agencies in *Chevron* cases. Id. at 2162–65. This definition neglects whether lower courts act strategically when applying *Chevron*. For instance, a divided panel may simply neglect to apply *Chevron* more frequently.
59. Id. at 2172–75.
bend deference regimes when it fits their ideological preferences, they are less likely to do so when potentially exposed by a dissent.60 (This notion first appeared in Dean Richard Revesz’s landmark study of D.C. Circuit decisions in environmental cases.61) Thus, judges appear to pursue their policy goals but seek to avoid the appearance of manipulating the law when doing so.

Several studies have analyzed the Supreme Court’s application of deference doctrine. Professor Thomas Merrill analyzed 120 Supreme Court cases involving agency interpretation of a statute. He found that the Court did not apply Chevron consistently, neglecting to cite it in many cases in which it was arguably applicable.62 Merrill also found that the post-Chevron Court was not very deferential: Agencies prevailed at a lower level after Chevron than before that precedent.63 Merrill’s analysis did not consider selection effects weeding out potential appeals before they might reach the Court, nor did he attempt to predict when the Court would apply Chevron. Likewise, Professors Cass Sunstein and Thomas Miles examined a nonrandom sample of 84 Supreme Court cases that cited Chevron, but did not examine the larger universe of Supreme Court cases where Chevron was applicable but not cited.64

The Eskridge and Baer study65 presented a more comprehensive survey of the Court’s treatment of deference regimes and deference decisions. Compiling a data set consisting of 1,014 post-Chevron Supreme Court cases involving agency interpretation of a statute, that study found (somewhat surprisingly) that the Court applied no deference regime in a large majority of cases.66 Despite the focus on Chevron in the scholarly literature, the Court applied the rule in less than one-third of the cases where it was applicable under the Court’s announced approach and was not as prominent in the Court’s decisions as the Skidmore regimes that Justice Scalia had argued were overruled by Chevron.67 (In this respect, City of Jackson, where the majority applied a light version of Skidmore, was typical of the Court’s performance in this period, except that the marginalization of Chevron was usually not debated openly among the Justices.) The statistical analysis in the Eskridge and Baer study suggested

60. See id. at 2172 (“[T]he presence of a whistleblower improves the chances that the court will apply the applicable legal doctrine.”).
63. Id. at 980–84.
64. Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron, 73 U. Chi. L. Rev. 823, 825 (2006) (acknowledging that analyzing fifteen cases in which Chevron was applicable but was not cited by Court may be “too small to permit a formal analysis of the differences between Chevron and what we call ‘non-Chevron’ decisions”).
65. Eskridge & Baer, supra note 24.
66. Id. at 1121.
67. Id. at 1123–28.
the hypothesis that the Court's announced deference regimes play a marginal role in the Justices' willingness to go along with agency decisions. The Justices appeared to choose deference regimes typically to justify a particular outcome, while seemingly ignoring deference regimes in other cases. Also, the rate at which agencies were upheld did not appear closely related to the deference regime. Eskridge and Baer provided the first clear description of how the Court applies deference doctrine but did not engage in a deeper empirical analysis. The current Article seeks to build upon this contribution and empirically analyze what motivates the Justices when they apply deference regimes.

Thus, our Article starts with the data set compiled by Eskridge and Baer, which includes all 1,014 Supreme Court cases from 1984 to 2006 where an agency’s interpretation of a statute was at issue. Eskridge and Baer coded each case for 156 variables, which included both basic descriptive characteristics such as the form of agency policy at issue and more complicated issues such as the ideological direction of the decision. From this data set, we then excluded agency litigating positions (the agency's position on a case as expressed via briefs to the Court) because they are not entitled to a deference regime under any theory or doctrine. Excluding those cases, we were left with 667 cases in the Eskridge and Baer data set that were potentially eligible for a deference regime under administrative law doctrine. This subset includes cases where agency interpretations were set forth in legislative rules, adjudications, interpretative rules, guidance documents, and amicus briefs. We followed the Eskridge and Baer coding for these 667 cases but enriched the data with information on how every single Justice voted with regard to deference regime in all of the 667 cases.

II. Theory: What Drives Judicial Decisionmaking in Agency Deference Cases?

Academics have developed a variety of theories about what motivates judges, ranging from personal leisure to doctrinal preferences to career

68. E.g., id. at 1101-02 (arguing Court invokes Curtiss-Wright deference only where it is already siding with executive department).
69. Id. at 1141-42.
70. Id. at 1089-90.
71. Id. at 1094. For details of the coding mechanism followed by Eskridge and Baer, see id. at 1203-26.
73. Thus, Eskridge & Baer, supra note 24, at 1216-21, coded every Justice's vote on the merits of every case but only coded the deference regime applied by the Justices joining the majority or plurality opinion. We supplemented this data with coding for every Justice's vote with regard to what deference regime was applicable in the case. Because one of us (Eskridge) did all the coding in the Eskridge and Baer study, he also did the enriched coding in the current study.
The biggest debate is whether the Justices are primarily concerned with applying preexisting legal rules and doctrines or are advancing policy or institutional preferences they favor. Our dueling accounts of City of Jackson reflect that debate. Are the debating Justices really fighting over properly deduced legal doctrine, or is the doctrinal debate mere shadowboxing, with the real contest between contending ideologies?

In this Part, we outline the possible motivations Supreme Court Justices are alleged to have under different theories of judicial behavior, and we try to flesh out nuances of the different theories, as well as their intuitive strengths and weaknesses. More importantly, we suggest some of the ways our data can provide empirical tests of the different theories—as well as limits on what we can learn from our data.

A. The Rule of Law Model

The “rule of law model,” alternatively termed the “legal model,” assumes that judges seek to apply the law accurately. For instance, judges should strive to interpret case facts correctly, adhere to applicable precedent, and apply statutory texts faithfully. With respect to deference regimes, a strong version of the legal model would predict that Justices would apply deference doctrine as a matter of precedent. A weaker version of the legal model would predict that the Justices' votes would reflect the principles or policies underlying the doctrines, even if the precise doctrines were not persistently invoked, analyzed, or distinguished (as would be the case for a precedent-based version of the rule of law).

Unfortunately, there is no clear scholarly consensus on the accuracy of the rule of law model. Empirical studies have found support for the legal model in a number of contexts. However, other empirical studies

74. For a summary listing of such goals, see Lawrence Baum, The Puzzle of Judicial Behavior 17 (1997) [hereinafter Baum, Puzzle of Judicial Behavior].
76. This perspective is rarely applied in political science analysis of the Supreme Court, but it is generally used in the legal literature. For a discussion of this dichotomy, see Barry Friedman, Taking Law Seriously, 4 Persp. on Pol. 261, 262 (2006) (recommending positive political scientists pay greater attention both to normative import of their work and norms of legal profession, and speculating about why they generally do not).
have found that policy preferences generally trump legal considerations. Critics argue that this should be no surprise; the legal model seems particularly ill-suited to explain Supreme Court behavior, because the Court only hears difficult cases in which lower courts have reached different conclusions, which provides some evidence that the law is unclear. Put differently, the legal model may have little bite in cases where the law has "run out." Justices will take advantage of this lack of clarity to impose their policy preferences. However, theorists who believe that the "law" encompasses legal principles (and not merely legal rules) may respond that the Justices can follow the law even in such unclear cases.

Directly testing the legal model is extremely challenging. One problem is the difficulty of measuring judicial goals. Some judges may seek only to apply the law sincerely, while others exclusively value achieving their policy preferences. How can you tell the difference between these judicial behaviors when judges, as a group, are loath to admit they are doing anything but applying preexisting law in a neutral manner? Scholars are forced to infer goals from observable behaviors that are consistent with multiple goals. They then must use these inferred goals to develop a theory predicting the very behavior that was used to construct the theory. This circularity problem has plagued the academic debate


80. For a discussion of this issue, see Baum, Puzzle of Judicial Behavior, supra note 74, at 82 ("The Court's selection of close cases makes it harder to discern the impact of legal considerations in the cases that it decides, because the weight of the law seldom lies overwhelmingly on one side.").

81. For the seminal discussion of this problem, see generally H.L.A. Hart, The Concept of Law (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

82. See generally sources cited infra note 97.

83. E.g., Ronald Dworkin, Law's Empire (1986).

84. For a vivid example of very different interpretations of judicial behavior, compare Revesz, Environmental Regulation, supra note 61, at 1766-67 (arguing that D.C. Circuit judges vote ideologically in some cases), with Harry T. Edwards, Collegiality and Decision Making on the D.C. Circuit, 84 Va. L. Rev. 1335, 1339-54 (1998) (arguing Revesz's data do not support notion that judges vote ideologically).
over the dominant goal of Supreme Court Justices, and it is a problem that limits our study as well.

In addition to the circularity problem, there is the problem of doctrinal uncertainty. Determining whether the Justices faithfully follow the various deference regimes entails a case-by-case determination whether the regimes "objectively" apply. But in some cases, such an effort has an inevitably subjective element, because the scope of particular deference regimes is frequently unclear. Moreover, the Justices have a variety of choices ranging from applying no deference regime at all (Justice O'Connor in City of Jackson) to the mildly deferential Skidmore or consultative deference standards (Justice Stevens in City of Jackson) to the highly deferential Chevron test (Justice Scalia). Even if the legal requirements for deference regimes were tightly specified, Justices would frequently have discretion when mapping the rules onto complicated case facts.

This discretion is illustrated in City of Jackson. Thus, Justice O'Connor had a valid point: The EEOC's published rule purported to interpret one of the ADEA's statutory defenses and said nothing about whether plaintiffs have a disparate impact claim for relief under the statute. Justice Scalia had answers to her concern, but after reading both opinions we were left thinking that the applicability of Chevron (or any deference regime) was not entirely clear. Perhaps that is why Justice Stevens's plurality opinion ignored Chevron and treated the EEOC's views (clarified and focused on the issue before the Court by the Solicitor General's amicus brief in City of Jackson) as more of a "plus" factor.

Consider another interesting rule of law question: Does the form of legal doctrine make a difference in judicial behavior? To take the most debated issue, do legal rules induce better law-applying behavior among judges than legal standards? Justice Scalia maintains that the rule of law is a law of rules: Open-ended standards invite judges to import their own biases and predispositions into legal decisionmaking. Justice Scalia's
rules-only approach is reflected in his staunch support for a broad application of *Chevron*, as he signaled in his *City of Jackson* concurring opinion, and his view that *Chevron* requires courts to apply bright-line rules when deciding whether Congress has addressed the issue in contention. In contrast, Justice Breyer believes that contextual standards, applied by serious and fair-minded judges, usually provide the best way for legal doctrine to address the messy realities of actual cases.\(^92\) His more context-oriented approach is reflected in Justice Stevens's all-factors-considered (including agency inputs) decision in *City of Jackson*.

The rules-versus-standards debate suggests a way to shed some light on the influence of doctrine that partially avoids the circularity and indeterminacy problems, and we shall exploit that in this Article. Thus, we shall examine the Justices' votes and decisions to determine whether they faithfully follow and apply existing deference doctrines when they are formally applicable. We realize our results are subject to caveat on grounds of the fuzzy edges of those doctrines; unsupportive results might be the result of the inefficacy of law to constrain Supreme Court Justices, but they might equally well be the result of the inefficacy of rule following to constrain. Hence, we shall also use a number of proxy variables (i.e., policies underlying the deference rules) to measure when Justices should apply a greater deference regime under administrative law doctrine. For example, the Supreme Court has said that agencies are entitled to the benefit of the *Seminole Rock/Auer* deference regime when they are interpreting their own valid rules,\(^93\) *Chevron* deference when they are acting pursuant to a congressional delegation of lawmaking authority,\(^94\) and *Skidmore* deference when they have long-construed a statute in a consistent way.\(^95\) Even if the Justices do not consistently or predictably apply the *Seminole Rock, Chevron,* or *Skidmore* regimes, they might be more consistent in going along with agency decisions that represent interpretations of agency rules, are pursuant to delegated lawmaking authority, or are consistent and longstanding.

B. *The Attitudinal Model*

While many law professors and legal practitioners embrace the rule of law model for judicial decisionmaking, most political scientists do not. Instead, they accept the "attitudinal" model.\(^96\) Proponents of the attitudi-
nal model, such as Professors Jeffrey Segal and Harold Spaeth, assume that judges seek to achieve their policy preferences when deciding cases.\(^9\) Judges, like legislators and executive department officials, have ideological preferences that fall on a continuum from conservative (Justice Scalia) to moderate (Justice Kennedy) to liberal (Justice Breyer). Supreme Court Justices are especially free to pursue policy goals because they are protected by both life tenure and the lack of higher court review.\(^9\) Under this political science model, the Justices bargain over both doctrine and case holdings to pursue their policy goals.\(^9\) The simplest version of the attitudinal model predicts that Justices vote their raw preferences. In City of Jackson, for example, Justice O'Connor and her fellow conservatives refused to go along with a litigation-creating EEOC interpretation of a civil rights law burdening small businesses and municipalities; the Court's relative liberals joined Justice Stevens's plurality opinion, which created broader liability for age discrimination.\(^10\)

The attitudinal model, especially in this simple form, has been criticized on a number of grounds. First, some attitudinal studies have used crude measures of judicial and congressional ideology.\(^10\) This and other technical problems are not deep criticisms of the attitudinal model, for they can be resolved through refinement of empirical methods. For example, Professors Kevin Quinn and Andrew Martin have greatly improved upon previous techniques to develop "ideal point" measurements of each Supreme Court Justices' ideology.\(^10\)

---


98. Segal & Spaeth, Attitudinal Model, supra note 97, at 69.

99. For analysis of bargaining on the Court, see James F. Spriggs II, Forrest Maltzman & Paul J. Wahlbeck, Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts, 61 J. Pol. 485, 503 (1999) ("Our results therefore suggest that justices are indeed rational actors—systematically making judgments about the most efficacious tactic to secure favored outcomes."); Paul J. Wahlbeck, James F. Spriggs II & Forrest Maltzman, Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court, 42 Am. J. Pol. Sci. 294, 312–13 (1998) (arguing that opinion authors' choices are shaped by their own policy preferences and their colleagues' actions).

100. See supra notes 87–89 and accompanying text (discussing Smith v. City of Jackson, 544 U.S. 228 (2005)).

101. See, e.g., Jeffrey A. Segal, Separation-of-Powers Games in the Positive Theory of Congress and Courts, 91 Am. Pol. Sci. Rev. 28, 35–36 (1997) [hereinafter Segal, Separation of Powers] (classifying Court's decisions as only liberal or conservative, and assuming that ADA scores used to measure Congress members' ideology may be measured on same dimension as Segal-Cover scores for Justices).

Second, and more important, one would expect that Justices seeking to maximize their policy preferences will act in a more sophisticated manner than simply voting for their policy preferences in individual cases. Justices seeking to advance their political agendas ought to take a longer view and therefore ought to consider both the larger consequences of altering doctrine and the reaction of the other branches to their decisions. Thus, in City of Jackson, for the reasons discussed above, it might make perfect sense for Justice Scalia to go along with the Court’s liberals for this age discrimination issue, but insist that the views of the EEOC (then under the domination of the conservative Bush-Cheney Administration) should be controlling in other cases as well. Correspondingly, a strategically oriented attitudinalist might say that Justice Stevens wanted a liberal result in City of Jackson, but was not willing to announce broad deference to the Bush-Cheney EEOC in order to justify it; hence, his opinion referred to the agency views as confirmatory rather than controlling in this case, and presumably other ones.

A third important criticism is that the attitudinal model gets the Justices’ preferences wrong. A Justice who merely pushes a political agenda, whether in a sophisticated way or not, will earn a poor reputation within the profession (and perhaps a low place in the history of the Court) and will often complicate her own life if those votes produce a backlash in the political process or among lower court judges. Legal theorists as well as historians argue that the Justices prefer to follow the rule of law and to protect their institution; even if the Justices also have raw political preferences, an accurate account must include these other ones as well. This is a point of contention. The conventional wisdom among political scientists is that ideology has the most significant effect on judicial decisionmaking.

The attitudinal model has not been applied directly to deference doctrine, but its application is fairly straightforward. Justices will either manipulate existing deference regimes to justify their votes in particular cases or will push for deference regimes that advance their political pref-

---

103. E.g., Cohen & Spitzer, supra note 12, at 474–75 (concluding that Justices act strategically with respect to other government players to advance desired policy outcomes).


erences in the long term or will do both. These are testable propositions, and we shall test them with the data set we have assembled.

C. The Strategic Model

The strategic model builds on the second criticism of the attitudinal model and focuses on the impact of the Court's role in the system of separated powers on its decisions.106 The model's central argument is that when Justices cast votes they consider the political and institutional reactions to different decisions; this sometimes constitutes a constraint on the Court. For example, the Justices may modify their preferred outcomes because of the threat of being overridden by Congress and the President. Being overridden prevents the Justices from achieving their desired outcome in a particular case and reduces the judiciary's legitimacy. The Justices therefore have one eye on the likely reactions of the political branches when deciding cases, and they will tend to avoid issuing decisions that Congress and the President can agree to overturn. The Court enjoys greater protection in times of divided government because it is harder for Congress and the President to agree on an override. Even when Congress and the Presidency are both controlled by the same political party, the many vetogates required for legislation make it unlikely that an override would occur for an issue with strong interest group activity on either side.107

For this reason, this "avoid-overrides" version of the strategic model probably adds nothing to the other forms of analysis in City of Jackson: Whichever way the Justices had decided the legal issue, Congress would probably not have overridden the Court. Labor unions and civil rights groups would have mobilized to oppose a statute revoking disparate impact liability (the result reached by the majority), while employer groups and state and local governments would have mobilized to oppose a statute creating a new disparate impact liability (if the Court had come out the other way in City of Jackson). Although Congress and the presidency were both dominated by probusiness Republicans, it is notable that the

106. For an overview, see Lee Epstein & Jack Knight, The Choices Justices Make 139–57 (1998) (discussing how Supreme Court's relationship with other government actors constrains Justices' decisionmaking); Lee Epstein, Jack Knight & Andrew D. Martin, The Supreme Court as a Strategic National Policymaker, 50 Emory L.J. 583, 610–11 (2001) (arguing "separation of powers scheme created by the Founders established an institutional interdependence among the branches that allows for the possibility that the Court might be a protector of the rules of the game without producing a substantial countermajoritarian effect"); William N. Eskridge, Jr., Reneging on History? Playing the Court/Congress/President Civil Rights Game, 79 Calif. L. Rev. 613, 617–64 (1991) (examining how separation of powers affects Court decisions concerning civil rights statutes).

Bush-Cheney EEOC (and Department of Justice) supported the liberal result reached by the Court.\footnote{108}

Early empirical work did not support the avoid-overrides version of the strategic model,\footnote{109} perhaps for the foregoing reason: Even under the model's assumptions, there are not a lot of cases where this kind of strategic thinking would be expected to be decisive. The Court has a lot of slack in statutory interpretation cases. On the other hand, where its conditions apply, there is reason to believe the avoid-overrides version of the strategic model has some bite. Thus, some recent studies using more advanced ideological measures have challenged the previous finding and have suggested, empirically, that the Justices do sometimes decide cases with precisely these strategic features in mind.\footnote{110} Our study tests whether Justices are more prone to apply formal deference regimes to agency policies that probably enjoy the support of both Congress and the President and whether Justices are less prone to apply formal deference regimes to agency policies that probably do not enjoy the support of both Congress and the President.

Another version of the strategic model focuses on the Court's ability to control and discipline the lower courts. Because it lacks the resources to review more than a small fraction of cases, the Court must delegate to lower courts. The lower courts may exploit this dynamic to skirt precedent in favor of their own preferences. Both law professors and political scientists have cogently argued that the sheer volume of lower court decisions hinders effective Supreme Court review.\footnote{111} Thus, lower court judges who do not fear the stigma of reversal may view defiance of the

\footnotesize{108. See Smith v. City of Jackson, 544 U.S. 228, 244 n.1 (2005) (Scalia, J., concurring in part and concurring in the judgment) (citing EEOC amicus briefs in lower court cases supporting broad interpretation of ADEA).


110. Previous studies struggled to place all three branches on the same policy space so that ideology scores are comparable. Such work also struggled to bridge ideology scores across different time periods. For the first ideology scores that bridge both of these divisions, see Michael A. Bailey, Comparable Preference Estimates Across Time and Institutions for the Court, Congress, and Presidency, 51 Am. J. Pol. Sci. 433, 444 fig.7, 446 tbl.1 (2007) (graphing preferences of Supreme Court, Congress, and President and charting Senate preferences from different time periods). Bailey has since used these ideology scores to show that strategic considerations influence judicial voting even controlling for policy preferences and some legal merits. See Michael A. Bailey & Forrest Maltzman, Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court, 102 Am. Pol. Sci. Rev. 369, 374, 379 fig.5 (2008) (documenting effects of legal variables on Justices' voting).

111. McNollgast, Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law, 68 S. Cal. L. Rev. 1631, 1634 (1995) (postulating Supreme Court will expand precedential latitude to control lower courts); Strauss, One Hundred Fifty Cases, supra note 15, at 1095 (arguing Supreme Court uses deference doctrine as mechanism to control lower courts).}
Court as clearly worthwhile—and this may motivate the Supreme Court to yoke the lower courts to agency interpretations if the Justices consider agency views more congenial than the likely interpretations reached by defiant lower courts. As before, empirical work provides mixed evidence regarding the Supreme Court’s effectiveness in policing the lower courts. A number of studies show that while lower courts respond to Supreme Court decisions, exceptions clearly exist.

The “discipline lower courts” version of the strategic model posits that the threat of such defiance may motivate the Court to use deference doctrine strategically. As Cohen and Spitzer argued, the Supreme Court essentially enjoys a choice between delegating to courts and delegating to agencies when it sets deference doctrine. By embracing broad deference regimes and enforcing such regimes by reversing lower courts that veto agency interpretations, the Supreme Court can direct lower courts to cede policymaking power to agencies. The Court may therefore apply the “ally principle” and delegate to the more ideologically compatible agent. If the Court believes that the lower courts share its preferences more closely than agencies, it will embrace more narrow deference regimes and reverse lower courts that defer too much to agencies, thus empowering the lower courts; conversely, a Court out of step ideologically with the lower courts will impose a doctrine requiring lower courts to defer to decisionmakers more in tune with the Supreme Court’s ideology. This study also tests this version of the strategic model.

Justice Scalia’s behavior in City of Jackson provides a potential example of such strategic behavior. Proponents of the strategic model might concede that Justice Scalia is that oddball Justice who actually cares about the rule of law, but most would interpret his noisy support for Chevron in a civil rights case as an example of deeper strategic thinking: Empower agencies in general (not just the EEOC) and set stricter limits on judicial review.

112. Baum, Puzzle of Judicial Behavior, supra note 74, at 117-18 ("Strategic models can take into account both the control of lower-court judges over cases dispositions after appellate remands and, more fundamentally, the limited capacity of appellate courts to review decisions of their subordinates.").

113. See, e.g., Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions, 38 Am. J. Pol. Sci. 673, 674-75 (1994) (describing how lower courts respond to Supreme Court in terms of principal-agent model); see also Baum, Puzzle of Judicial Behavior, supra note 74, at 116 ("[T]hese studies consistently have found that lower federal courts shift position in tandem with the Supreme Court across a wide range of policy areas.").

114. For instance, several studies documented prolonged resistance in the Ninth Circuit to the Court during the 1980s and 1990s. See, e.g., Baum, Puzzle of Judicial Behavior, supra note 74, at 117-18 (summarizing studies).

115. See, e.g., Cohen & Spitzer, supra note 12, at 433 ("The Supreme Court may, however, extend its control over regulatory policy through strategies that exploit two closely related aspects of judicial review.").

116. Id. at 433-34.

117. Id.
review of agency interpretations. A cynical (strategic) understanding of Scalia's concurring opinion might be boiled down to this: Throw the liberals a bone in this case, so that President Bush and Vice President Cheney have freedom to direct administrative agencies to advance business interests and to fight liberal values everywhere else.

III. PRELIMINARY EMPIRICAL ANALYSIS: DO JUSTICES GIVE STARE DECISIS EFFECT TO DEFERENCE DOCTRINE PRECEDENTS?

We start our analysis with the strongest form of the legal model, namely, that at least some of the Justices follow the Court's announced deference regimes as a matter of stare decisis.

We start with this formulation in part because it is doctrinally important and in part because it is particularly susceptible to empirical testing. If the Justices treated deference regime decisions as precedents binding on the Court as a matter of stare decisis, we should expect to see the following patterns in the cases: Justices from a variety of perspectives would recognize that certain precedents (like Chevron) are authoritative and must be followed where applicable; if not followed, the precedent must be distinguished or overruled. Justices regularly follow precedents they do not agree with. When a precedent is being overruled or altered, the Court openly considers reliance and other rule of law considerations that justify such a change. Although members of the Court sometimes seem to treat deference regimes (especially Chevron) as matters of stare decisis, the data establish that neither the Court nor any one of its Justices actually does so in the general run of cases.

An initial difficulty with a stare decisis account for the Supreme Court's deployment of deference regimes is that the Justices feel free to follow their own distinctive philosophies in this matter. Stated another way, the Justices do not seem to feel professional pressure to conform their views to follow those expressed in previous "precedents." Justice Scalia is the best example, for he has been outspoken and persistent in favor of a near universal application of Chevron deference in both law

118. See Foster, supra note 77, at 1872-84 (distinguishing features of stare decisis regime).
119. Id. at 1875-76 ("[T]he Court frequently engages in stare decisis analysis when overruling decisions in the substantive law context, and . . . we would expect changes in interpretive approaches [in statutory interpretation doctrine] to be accompanied . . . by references to the doctrine of stare decisis and analysis of stare decisis factors . . . ").
120. Id. at 1876 ("[W]e would expect to find instances in which Justices vote, on stare decisis grounds, to adhere to a doctrine of statutory interpretation, despite believing that the doctrine is—or could be—wrong.").
121. See id. at 1875 (noting Supreme Court considered societal reliance when departing from precedent in Lawrence v. Texas, 539 U.S. 558 (2003)).
122. See infra Figure 2 (showing wide differences in invocation of deference based on Justice authoring opinion). If the Justices truly treated deference regimes as matters of binding stare decisis, this pattern would not be so stark because the Justices would simply defer to the preferences of the authoring Justice.
review articles and in judicial opinions, such as his concurring opinion in *City of Jackson*. His announced views about deference, moreover, fit snugly into his general jurisprudence. As Frederick Liu has argued in an unpublished paper, Scalia is a text-positivist and a judge-skeptic, and this jurisprudence explains his expansive approach to *Chevron*. To begin with, he believes that judges should apply preexisting legal rules precisely as they are written and agrees with positivist philosopher H.L.A. Hart that there is “open texture” in the application of legal rules beyond their “core.”

What does a judge do when the law “runs out”? Contrary to Hart, Justice Scalia abhors the positivist notion that when the law “runs out” the judge exercises judgment (discretion!) to fill in the gaps—and the modern regulatory state provides the Justice with a most excellent avoidance strategy: When the text does not answer the interpretive issue (when the law “runs out”), defer to the judgment of the agency charged with administering the statute. Under this approach, the judge does not exercise discretion, and any political judgment is made by a political entity that is, theoretically, accountable to both Congress (which funds and supervises the agency) and the President (who appoints the agency’s head(s), often subjects agency rules to executive department review, and usually has the authority to remove the agency head).

Accordingly, Justice Scalia interprets *Chevron* very broadly and along the positivist lines suggested above: When the statutory text answers the question posed, the “honest textualist” simply applies that text (whatever the agency’s position might be); where the text is ambiguous, the honest textualist defers to any reasonable interpretation officially and publicly adopted by the head(s) of the agency—not just rules and formal decisions, but also guidance documents, letter rulings, and even amicus briefs.

---

123. See, e.g., Scalia, Judicial Deference, supra note 15, at 516 (“*Chevron* . . . replaced this statute-by-statute evaluation . . . with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.”).


125. We owe any insights about Scalia’s positivism and its connection to his broad reading of *Chevron* to Frederick Liu, *Chevron* as a Doctrine of Hard Cases (May 28, 2008) (unpublished supervised analytical writing project, Yale Law School) (on file with the *Columbia Law Review*).

126. See Hart, supra note 81, at 124–36 (distinguishing between “core” issues covered by a rule, and “penumbral” or fuzzy edges of that rule and arguing that at some point, the law simply “runs out,” and judgment must be exercised).

127. Liu, supra note 125, at 18.
submissions endorsed by the agency head(s). Among Supreme Court Justices, Justice Scalia's is the broadest reading of *Chevron*; although his theory is unusually thoughtful, and even jurisprudential, in its scope and ambition, it appears to enjoy the complete support of no other Justice on the Court.

Justice Scalia is not alone in developing a sophisticated approach to agency deference regimes. Justice Breyer has been just as outspoken in favor of a near universal application of *Skidmore* (not *Chevron*) as the appropriate stance for the Court to take: When the agency provides good reasons, applies needed expertise, or has advanced the same interpretation for a long time such that public and private actors have relied on it, Justices should give the agency's view the benefit of the doubt. Like Justice Scalia, Justice Breyer views his approach as a means of enhancing democratic accountability. When deciding whether to defer to agency interpretations, judges should assume the perspective of a "reasonable" member of Congress seeking to enact a workable statute. Courts should therefore generally defer to agencies that are successfully making their statutes "work."

We harbor no doubt that Justices Scalia and Breyer, two of our most thoughtful scholars of administrative law, have publicly advanced theories they believe to be correct. And it is likely that others, such as Justice Stevens (who authored *Chevron*), have coherent and nuanced theories. That individual Justices continue to harbor their own distinctive theories of deference suggests that this is not an area where stare decisis is the norm, though it is possible that the Justices consider *Chevron* binding as a

128. See Scalia, Judicial Deference, supra note 15, at 517 (arguing that under *Chevron*, Congress can clearly anticipate the effect of writing a vague statute); Liu, supra note 125, at 34 (developing implications of Scalia's understanding of *Chevron*).

129. Compare *Mead*, 533 U.S. at 221, 229–30 (Souter, J., writing for all Justices except Scalia) (arguing *Chevron* is generally not applicable unless Congress has delegated lawmaking authority to the agency), with id. at 239–40 (Scalia, J., dissenting) (denouncing Court's understanding and insisting that congressional delegation of lawmaking authority does not exhaust cases where *Chevron* deference must be applied).

130. See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (Breyer, J.) (considering "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"); *Christensen v. Harris Cnty.*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting) (arguing *Chevron* made "no relevant change" to *Skidmore*’s standards of deference).

131. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, Tanner Lectures on Human Values at Harvard University 52 (Nov. 17-19, 2004), available at http://www.tannerlectures.utah.edu/lectures/documents/Breyer_2006.pdf (on file with the *Columbia Law Review*) ("At the heart of a purpose-based approach stands the "reasonable member of Congress" . . . . The judge will ask how this person (real or fictional), aware of the statute’s language, structure, and general objectives (actually or hypothetically), would have wanted a court to interpret the statute in light of present circumstances in the particular case.")
matter of stare decisis but disagree as to its precise meaning.\textsuperscript{132} Does this explain the broad run of cases? These are testable assertions, both as to the Court as a whole and as to individual Justices such as Scalia and Breyer. Our project is not to psychoanalyze the Justices, but instead to analyze what they actually do in the collegial setting of Supreme Court decisionmaking. And in that setting, we aggregated how they actually voted, and what opinions they actually joined, in the 667 cases of our data set.\textsuperscript{133}

Our hypothesis was that some Justices would systematically apply particular deference regimes as a matter of following precedent. \textit{City of Jackson} illustrates this hypothesis. Consistent with his separate opinion, Justice Scalia, we hypothesized, would be the biggest voice for \textit{Chevron} over these twenty-two years of cases, perhaps concurring separately when the majority or plurality opinion failed to hew to the rigorous two-step structure of \textit{Chevron}. Consistent with his joining the plurality in \textit{City of Jackson}, Justice Breyer, we expected, would go out of his way to show adherence to \textit{Skidmore} or \textit{Skidmore-lite} regimes. We were quite curious as to how the other Justices voted over time. Would Justice O’Connor reveal herself to be und deferential in the broad run of cases, or would she join her frequent ally, Justice Breyer, in being a voice for \textit{Skidmore}?

Surprisingly, the data do not support the hypothesis for any of the Justices. Aggregate analysis of deference doctrine voting data reveals three striking results. First, as illustrated in Table 1, the Justices did not publicly disagree over deference doctrine very often. Justices expressed disagreement over the application of a formal deference regime in only 101 of the 667 cases where an agency interpretation was clearly presented to the Court; this represents a modest rate of 15%\textsuperscript{134}. Put another way, in 566 cases, no Justice wrote a dissent or concurrence applying a different deference regime than the majority opinion. Thus, consensus on deference regime was the overwhelming norm. Any Justice could have disrupted this consensus by filing a concurring opinion on the precise issue (as Justice Scalia did in \textit{City of Jackson})—but in those 566 cases none chose to do so. More important, none of the Justices dissented or concurred enough to alter the rate of disagreement on the Court; all Justices were statistically indistinct from the Court average (Table 1).

\textsuperscript{132} For an example, see Gonzales v. Oregon, 546 U.S. 243, 255–56, 275–76 (2006), in which both the majority and the dissent treated \textit{Chevron} and \textit{Auer} as authoritative statements of deference regimes, but the majority distinguished, while the dissent followed, those precedents.

\textsuperscript{133} The Eskridge and Baer data set, see supra note 24, did not code concurring and dissenting opinions for deference regime applied, so we added such coding for our study. Hence, for all 667 cases, we coded each and every opinion for deference regime applied, so there is a complete record for how each and every Justice voted in those 667 cases.

\textsuperscript{134} Disagreement is defined as writing a concurrence or dissenting opinion that applies a different formal deference doctrine than the majority opinion. Formal deference doctrines include \textit{Skidmore}, \textit{Beth-Israel}, \textit{Chevron}, \textit{Seminole Rock}, and \textit{Curtiss-Wright}.
Table 1: Division Among the Justices on Deference and Legislative History

<table>
<thead>
<tr>
<th></th>
<th>Deference Regime</th>
<th>Legislative History</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean Rate of Division</td>
<td>95 Percent Interval</td>
</tr>
<tr>
<td>Average</td>
<td>15.33%</td>
<td>14.41%, 16.25%</td>
</tr>
<tr>
<td>Blackmun</td>
<td>16.85</td>
<td>12.93, 20.78</td>
</tr>
<tr>
<td>Brennan</td>
<td>17.20</td>
<td>12.22, 22.17</td>
</tr>
<tr>
<td>Breyer</td>
<td>13.74</td>
<td>9.92, 17.55</td>
</tr>
<tr>
<td>Burger</td>
<td>20.00</td>
<td>11.74, 28.26</td>
</tr>
<tr>
<td>Kennedy</td>
<td>13.85</td>
<td>10.88, 16.81</td>
</tr>
<tr>
<td>Marshall</td>
<td>18.11</td>
<td>13.33, 22.84</td>
</tr>
<tr>
<td>O’Connor</td>
<td>15.67</td>
<td>12.85, 18.50</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>15.28</td>
<td>12.48, 18.07</td>
</tr>
<tr>
<td>Scalia</td>
<td>14.56</td>
<td>11.68, 17.44</td>
</tr>
<tr>
<td>Souter</td>
<td>14.51</td>
<td>11.23, 17.80</td>
</tr>
<tr>
<td>Stevens</td>
<td>15.31</td>
<td>12.58, 18.05</td>
</tr>
<tr>
<td>Thomas</td>
<td>13.66</td>
<td>10.33, 16.98</td>
</tr>
<tr>
<td>White</td>
<td>17.18</td>
<td>13.08, 21.27</td>
</tr>
</tbody>
</table>

Note: This table provides the average rate at which the Court divided on deference regime and legislative history during the tenure of each Justice.
* Indicates statistically distinct from the Court mean at 5% level, two-tailed test.

To provide a baseline for comparison, we analyzed the frequency of disagreement over legislative history, which is another methodological issue in statutory interpretation, and one as to which Justices have announced different points of view. The results of that analysis are also presented in Table 1. We found that the Justices disagreed more frequently about legislative history, dividing in 20% of the cases (133 of the 667 total cases). This suggests that Supreme Court Justices reveal more intense or committed preferences as to legislative history than they reveal for deference doctrine. For example, Justice Scalia frequently files concurring opinions disassociating himself with even mention of legislative history in opinions for the Court.135 This practice not only signals Justice Scalia’s longstanding objection to the Court’s reliance on or even consultation of legislative history, but also signals his intense preference for an

135. For the most recent example, see Carr v. United States, 130 S. Ct. 2229, 2242 (2010) (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia authored or joined opinions endorsing a different application of legislative history in 11.6% of cases. This rate was statistically distinct from the Court average of 7.17% using a two-tailed test (p=0.000).
exclusionary rule. In contrast, Justice Scalia does not as often chide majorities that ignore *Chevron* and rarely files separate concurring opinions insisting that the Court follow *Chevron*; his concurrence in *City of Jackson* was exceptional. This indicates that the intensity of his views on *Chevron* is lower than the intensity of his views about legislative history. The same might be true of Justice Breyer and other colleagues with distinctive views about deference regimes. The foregoing analysis suggests that the Justices’ preferences with regard to agency deference regimes are less intensely held than their preferences with regard to legislative history regimes, which are clearly not subject to stare decisis under the Court’s traditional practice. (That the Court does not treat earlier opinions discussing the cogency of legislative history as having stare decisis effect is significant, for there is greater judicial discussion of the proper use of legislative history in separate opinions than there is of issues of deference.)

In the alternative, it might be the case that Justice Scalia (and his colleagues) have given up on taking independent views about deference regimes and have instead followed the Court’s deference landmarks, now including *Mead* as well as *Chevron*, as a matter of precedent. In *City of Jackson*, for example, Justice Scalia assumed the correctness of *Mead*, even though he had dissented from the Court’s rejection of the universal

---

136. For a discussion of whether methods of statutory interpretation should be granted stare decisis, see generally Foster, supra note 77.
This alternative explanation, however, is inconsistent with Eskridge and Baer’s findings that the Court has not consistently applied *Chevron* since *Mead* and that all the deference regime precedents are applied haphazardly rather than systematically, as one would expect if the Justices treated them as precedents entitled to full stare decisis effect. For example, Justice Stevens was the strongest voice for stare decisis on the Rehnquist and early Roberts Courts, yet his plurality opinion in *City of Jackson* ignored the *Chevron* debate between Justices Scalia and O’Connor. Justice Stevens would not, and did not, ignore any of the Court’s pertinent ADEA precedents—including some that were tangentially relevant to the disparate impact issue—but he made no effort to distinguish *Chevron* and, instead, worked deference into his opinion as a factor confirming the conclusion he had reached through traditional sources of statutory meaning. Justice Scalia is perhaps the starkest case: He has argued more vigorously than any of his colleagues that *Chevron* should be given stare decisis effect, yet his own voting record contradicts this view.

Our second finding, illustrated in Figure 1, is that all of the Justices supported each deference regime at roughly equal rates. For example, Justices Stevens and Scalia have very different interpretations of *Chevron*, which Justice Stevens authored but Justice Scalia has construed more broadly. Yet they joined opinions applying *Chevron* at almost exactly the same rate as did Justices Souter, Breyer, Kennedy, O’Connor, and Ginsburg. Indeed, no Justice exhibited a statistically significant divergence from the Court average. Likewise, all the Justices clustered around the 50% level in no-deference opinions they joined; Justices Scalia and O’Connor were a little above 50%, the rest a little below. Even though he is the Court’s strongest proponent of broad presidential power, Justice Thomas only voted to apply *Curtiss-Wright* deference in 1.5% of cases—not too different from the voting record of his colleagues, and only a fraction of the cases where *Curtiss-Wright* would have been arguably relevant. The one area where Figure 1 reveals a predictable divergence was Justice Breyer’s willingness to join a higher percentage of *Skidmore* opin-

---

138. Eskridge & Baer, supra note 24, at 1137.
139. See, e.g., Johnson v. Transp. Agency, 480 U.S. 616, 642–46 (1986) (Stevens, J., concurring) (taking seriously an affirmative action precedent that he did not join and following that precedent more expansively than its author).
140. *City of Jackson*, 544 U.S. at 239–40 (Stevens, J., plurality opinion).
141. See United States v. Mead Corp., 533 U.S. 218, 256–57 (2001) (Scalia, J., dissenting) (arguing the Court should “adhere to the original formulation of *Chevron*” and that *Chevron* is a precedent upon which Congress has relied).
142. Chief Justice Burger diverged from the Court average in his support of *Beth-Israel* deference, but a higher proportion of his cases in the data set were decided before *Chevron* was adopted in 1984 because he left the Court in 1986.
143. See infra Table 3.
ions than his colleagues did. Justice Breyer supported either *Skidmore* or *Skidmore-lite* in 33.9% of the cases, significantly higher than the Court average of 28.4%.144

These results are inconsistent with the hypothesis that some of the Justices are engaged in a long-term strategic game reflecting their very different ideological preferences.145 If Justice Scalia, for example, is pushing within the Court for universal *Chevron* deference because he thinks it will marginalize excessively liberal congressional preferences, it is not showing up in his aggregate voting behavior; he seems perfectly happy to join opinions that ignore *Chevron* even when it is clearly applicable under his theory of that case. His failure to object is particularly striking in light of the fact that he believes that *Chevron* is applicable whenever the agency head has formally announced a public interpretation of the statute.146 (The Court, in contrast, requires congressional delegation of lawmaking authority to the agency as the trigger for the *Chevron* re-

---

144. This difference is statistically significant at the 0.05 level using a two-tailed test (p=0.031).

145. See Martin & Quinn, supra note 102, at 152 (finding “strong evidence that the ideal points of many justices do change over time”).

gime.\textsuperscript{147} Thus, for Justice Scalia, the large majority of the 667 cases in our sample would qualify for analysis under the \textit{Chevron} regime—yet only a small fraction were analyzed that way, almost always without a peep from Justice Scalia.\textsuperscript{148}

Likewise, if Justice Stevens wants to narrow \textit{Chevron} because it slights Congress’s goals and advantages the executive department too much, one would not expect to see him with about the same percentage of \textit{Chevron} support as Justice Scalia. This finding reinforces the conclusion that none of the Justices, not even Justice Scalia, treats \textit{Chevron} or the other deference regimes as mandatory precedents binding as a matter of stare decisis. This finding also speaks to the intensity of the Justices’ preferences with regard to agency deference regimes: This methodological issue is not as important to Justice Scalia as is legislative history, if we are to judge from the incidence of separate opinions that are found in Table 1.

Our third empirical finding is that when one focuses only on a Justice’s record when \textit{authoring} opinions, and not her or his overall record of opinions joined, sharper distinctions emerge, and they emerge in ways consistent with most of the Justices’ self-presentations. Figure 2 maps the Justices along this dimension, and Table 3 evaluates the statistical significance of differences relative to the Court average. Chief Justice Burger and Justices Scalia and White authored majority opinions invoking \textit{Chevron} or an equivalent regime more frequently than the Court average, while Justices Ginsburg, O’Connor, Rehnquist, and Souter were well below the Court average.\textsuperscript{149} Marked differences also emerged for \textit{Skidmore}. Justices Breyer, Ginsburg, O’Connor, and Thomas authored majority opinions invoking \textit{Skidmore} or the \textit{Skidmore}-lite regime more frequently than the Court average. By contrast, Justices Brennan, Powell, and Scalia fell well below the average.\textsuperscript{150}


\textsuperscript{148} See supra Table 1. Note that our data set of 667 cases excluded all cases that Eskridge and Baer coded as representing agency “litigating positions” that Justice Scalia exempts from his understanding of \textit{Chevron}’s domain.

\textsuperscript{149} All differences noted were statistically significant at the 0.05 level, two-tailed test.

\textsuperscript{150} See supra Table 1.
The results summarized in Table 3 (and illustrated in Figure 2) were not surprising. That Chief Justice Burger and Justices White and Scalia authored opinions invoking Chevron or an equivalent regime more frequently than the rest of the Court is what we should have expected, given common perceptions of each Justice’s preference for deference regimes.151 Because of his long-time view that Chevron had rendered Skidmore obsolete, it was no surprise that Justice Scalia applied Skidmore less frequently than any of his colleagues, but we were surprised that he did apply Skidmore (or Skidmore-lite) deference rather than Chevron deference in a nontrivial number of opinions he authored. Not surprisingly, pragmatic Justices O’Connor, Breyer, and Ginsburg invoked the more informal Skidmore deference more often than their other colleagues; we were surprised to see the same was true of formalist Justice Thomas.

What the foregoing data suggest is that the Justices’ distinct preferences for deference regimes often (but far from always or even usually) show up when the Justices author opinions—but also that nonauthoring Justices tolerated and failed to object to large deference doctrine deviations by their colleagues authoring opinions. Thus, City of Jackson, where Justice Scalia wrote a separate opinion concurring only in the!151 Chief Justice Burger was the Justice who was most willing to go along with agency interpretations in Eskridge and Baer’s survey. See Eskridge & Baer, supra note 24, at 1154. Justice White was also consistently deferential to the political process, see id.; as the assigning Justice in Chevron, he urged Justice Stevens to endorse agency leeway along the lines of the published opinion. John Paul Stevens, In Memoriam: Byron R. White, 116 Harv. L. Rev. 1, 1–2 (2002). As we have noted earlier, Justice Scalia is a champion of Chevron and reads the opinion more broadly than all of his colleagues. So even though he joins opinions that ignore Chevron, his own authored opinions are more likely to cite Chevron than those of his current colleagues, consistent with his stance.
Table 3: Invocation of Deference Regime by Authoring Justice

<table>
<thead>
<tr>
<th></th>
<th>Number of cases</th>
<th>Chevron</th>
<th>Skidmore</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>95 Percent Interval</td>
<td>Mean</td>
</tr>
<tr>
<td>Average</td>
<td>5897</td>
<td>18.89%, 17.89%, 19.89%</td>
<td>31.95%, 30.76%, 33.14</td>
</tr>
<tr>
<td>Blackmun</td>
<td>328</td>
<td>21.34</td>
<td>16.91, 25.78</td>
</tr>
<tr>
<td>Brennan</td>
<td>217</td>
<td>27.65*</td>
<td>21.70, 33.60</td>
</tr>
<tr>
<td>Breyer</td>
<td>310</td>
<td>23.23</td>
<td>18.52, 27.93</td>
</tr>
<tr>
<td>Burger</td>
<td>44</td>
<td>79.54*</td>
<td>67.63, 91.46</td>
</tr>
<tr>
<td>Ginsburg</td>
<td>366</td>
<td>12.30*</td>
<td>8.93, 15.66</td>
</tr>
<tr>
<td>Kennedy</td>
<td>533</td>
<td>20.08</td>
<td>16.67, 23.48</td>
</tr>
<tr>
<td>Marshall</td>
<td>274</td>
<td>19.71</td>
<td>15.00, 24.42</td>
</tr>
<tr>
<td>O'Connor</td>
<td>678</td>
<td>11.65*</td>
<td>9.02, 14.07</td>
</tr>
<tr>
<td>Powell</td>
<td>171</td>
<td>15.79*</td>
<td>10.32, 21.25</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>374</td>
<td>13.90*</td>
<td>10.40, 17.41</td>
</tr>
<tr>
<td>Scalia</td>
<td>619</td>
<td>27.14*</td>
<td>23.63, 30.64</td>
</tr>
<tr>
<td>Souter</td>
<td>435</td>
<td>12.18*</td>
<td>9.11, 15.28</td>
</tr>
<tr>
<td>Stevens</td>
<td>693</td>
<td>17.89</td>
<td>15.04, 20.75</td>
</tr>
<tr>
<td>Thomas</td>
<td>414</td>
<td>15.22</td>
<td>11.76, 18.68</td>
</tr>
<tr>
<td>White</td>
<td>319</td>
<td>32.92*</td>
<td>27.76, 38.07</td>
</tr>
</tbody>
</table>

* Indicates statistically distinct from the Court mean at 5% level, two-tailed test.

reached by Justice Stevens and insisting on his own preferred regime, was highly exceptional in our twenty-two year sample of the Court’s work. (*City of Jackson* was even more unusual as a case where the Justices’ debate over the appropriate deference regime deprived the lead opinion of a Court majority; accordingly, Justice Stevens’s interpretation of the ADEA garnered only four votes, because Justice Scalia’s concurring opinion was premised upon the EEOC’s acceptance of that interpretation, with the possibility of changing it later in the Bush-Cheney Administration.) Generally, authorship differences did not provoke additional concurrences or dissents applying different deference regimes. Instead, Justices simply joined opinions written by their outlier colleagues. This suggests that preferences over deference regimes were not sufficiently important to justify the cost of concurring or dissenting.
There is another finding that we find more puzzling than significant. As Table 4 indicates, Justices voted to apply the established deference regimes less frequently in concurrences and dissents than in majority opinions. The one exception is that *Chevron* is invoked slightly more frequently in dissents than in majority opinions. Moreover, few patterns emerge when these data are disaggregated among individual Justices; only Justice Kennedy voted for formal deference regimes more frequently when concurring or dissenting. The Justices therefore do not appear to use their freedom when authoring dissents and concurring opinions to express distinctive or divergent preferences over deference doctrine. Admittedly, we were somewhat surprised by this finding, as we would not have expected significant deviation either way. On the one hand, Justices drafting a majority opinion have incentives to fudge the deference regime issue if there is division within the majority.\(^{152}\) There is less pressure to accommodate divergent points of view by Justices writing concurring or dissenting opinions, because there are fewer voices that have to be accommodated. Concurring or dissenting opinions need not have any other Justice joining, as was the case for Justice Scalia’s concurring opinion in *City of Jackson*. On the other hand, if our earlier surmise is correct—that the Justices’ preferences for deference regimes are weakly held—we should not expect to see as many concurring or dissenting opinions that go out of their way to stake out distinctive positions regarding deference regimes.\(^{153}\) We expected these countervailing motivations to cancel one another out—but the data mapped in Table 4 suggest that the latter considerations were more dominant in practice. Interestingly, a similar pattern emerges in the treatment of legislative history, documented in Table 5. This suggests that the Justices treat deference doctrine as roughly akin to legislative history: worthy of invocation in some cases, but not matters of stare decisis, where the rule of law depends upon

\(^{152}\) See, e.g., Eskridge & Baer, supra note 24, at 1108–09 (discussing incentives of Justices to avoid citing *Chevron*).

\(^{153}\) Concurring and sometimes dissenting opinions tend to be more focused than majority opinions, and that is another possible reason why we did not find more discussion of deference regimes—but this dearth also suggests that deference was not the kind of issue that was key to the Justices writing these separate opinions.
close judicial attention to previous decisions relevant to the issues at hand.

### Table 5: Aggregate Court Application of Legislative History by Opinion Type

<table>
<thead>
<tr>
<th>Reference Type</th>
<th>Majority</th>
<th>Concurrence 1</th>
<th>Concurrence 2</th>
<th>Dissent 1</th>
<th>Dissent 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Reference</td>
<td>43.84</td>
<td>75.37</td>
<td>73.22</td>
<td>56.27</td>
<td>69.69</td>
</tr>
<tr>
<td>Some Reference</td>
<td>14.31</td>
<td>6.52</td>
<td>5.63</td>
<td>9.84</td>
<td>3.31</td>
</tr>
<tr>
<td>Positive Reference</td>
<td>23.42</td>
<td>7.86</td>
<td>10.14</td>
<td>16.82</td>
<td>9.82</td>
</tr>
<tr>
<td>Determinative Reference</td>
<td>18.44</td>
<td>10.24</td>
<td>11.01</td>
<td>17.08</td>
<td>17.18</td>
</tr>
</tbody>
</table>

Finally, we found that a few Justices chose to apply no deference regime at all in a high percentage of their authored opinions during the period covered by our data set (1984–2006). Justice Lewis Powell is the extreme case, neglecting to apply any deference regime in 68% of his opinions. This behavior was correlated only weakly with the Justices' ideologies (.20) but is highly correlated with date of appointment to the Court: As Figure 2 illustrates, Justices appointed before *Chevron* (like Chief Justice Burger and Justices Powell and White) tended to be more casual about citing and applying deference regimes than Justices appointed after *Chevron* (like Justices Scalia, Souter, and Breyer). This suggests that authorship patterns with respect to application of deference doctrine reflect generational preferences that are not correlated with other important elements of judicial behavior. For example, Chief Justice Burger and Justices Powell and White went along with agency interpretations at a statistically significantly higher rate than Justice Scalia, but did not invoke formal deference regimes as often as the latter. Justice Breyer stands in contrast to both groups: Like Justices White and Powell, Justice Breyer goes along with agency interpretations more than his colleagues; like Justice Scalia, Justice Breyer is more likely to cite a deference regime to frame the analysis in his opinions.

* * *

The point of empirical analysis is to establish patterns of behavior that either reveal preferences not apparent publicly or falsify public representations. Even this preliminary run of the data reveals interesting patterns in the Justices' official actions: For some of the Justices, an examination of their authored opinions supports the hypothesis that they have different preferences with regard to deference regimes, with Justices Scalia (the biggest public booster of *Chevron*) and White (the assigning Justice in *Chevron*) applying *Chevron* most often, and pragmatic-balancing

---

154. The difference for both Justices is statistically distinct from the Court average at the 0.05 level using a two-tailed test.
Justices O'Connor, Breyer, and Ginsburg applying *Skidmore* most often in their authored opinions.\textsuperscript{155} The preferences with regard to deference regime were weakly held by all the Justices (including Justice Scalia), as evidenced by the fact that all the Justices usually joined opinions that did not reflect their deference regime preferences and did so without any recorded disagreement. Furthermore, the dominant pattern in the authored opinions by all the Justices was to apply no deference regime at all.\textsuperscript{156} In their public performances (joining as well as authoring opinions) none of the Justices behaved as though the deference regimes are matters of strict stare decisis, where the Court is bound by the precedents announcing the criteria for applying the different deference regimes.\textsuperscript{157}

One important consequence of these empirical findings is that the stakes of the episodic deference doctrine debates among the Justices (as in *City of Jackson*) are lower than many commentators assume, at least for work within the Supreme Court itself. This is an important point. Some Justices and law professors write as though the stakes of the *Chevron* debate are earth shattering, as though the future of the rule of law depends upon the correct understanding of judicial deference to agency interpretations.\textsuperscript{158} At the Supreme Court level, that is far from true, as the Justices do not follow *Chevron* or the other deference doctrine decisions as carefully as they follow and reason from substantive precedents. We do not test the effects of these debates on lower court judges—but articles like this one might influence such judges by demonstrating that no one on the Supreme Court rigorously follows either the Court's announced jurisprudence or his/her own announced deference regime preferences. This could be a direction for future research.

These preliminary results also cast doubt on the strongest version of the legal model for judicial decisionmaking in agency interpretation cases: that *Chevron* and other formal deference regimes are rigorously followed as a matter of stare decisis. Even the most devout apostle of the rule of law—Justice Scalia—applies *Chevron* in a small fraction of the cases where it is applicable as he interprets the case.\textsuperscript{159} If the rule of law is a law of rules, Justice Scalia does not view the *Chevron* "rule" as one that he has to observe most of the time, and he tolerates a great deal of rule

\textsuperscript{155} See supra Table 3.

\textsuperscript{156} See supra Table 3.

\textsuperscript{157} If the Supreme Court interprets a statute, that substantive interpretation is binding on future Courts, and it would be considered incompetent judging not to follow, distinguish, or (in rare cases) overrule that precedent in future cases where its holding is on point or even where it is just relevant. In contrast, the Justices routinely ignore *Chevron* and other deference regimes in cases where they are clearly relevant or on point.

\textsuperscript{158} See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (arguing that rule of law is at risk because of "avulsive change in judicial review of federal administrative action" created by majority's interpretation of *Chevron*).

\textsuperscript{159} See supra Table 2.
avoidance from his colleagues (unlike in City of Jackson). For the other Justices, there is even less evidence that they understand Chevron and the other formal deference regimes as precedents binding as a matter of stare decisis.

Accordingly, Justice Stevens’s opinion in City of Jackson is more representative of judicial practice than is Justice Scalia’s concurring opinion: Deference regimes (Chevron, Skidmore, Seminole Rock/Auer) are more like canons of statutory construction than binding precedents. Such an understanding has an intuitive appeal. The rule of lenity, for example, is universally acknowledged as a canon of statutory construction, and of course it is also a deference regime (or more precisely an antideference regime, as it sets a presumption against the agency’s interpretation of penal laws). Like the rule of lenity and many other canons, Chevron is a clear statement rule: Unless Congress has clearly spoken on the issue, the Court will accept a reasonable agency interpretation, with the agency retaining authority to alter that interpretation within the parameters set by Congress. Skidmore, in contrast, is simply a canonical balancing approach.

The critical distinction between regimes as precedents and regimes as canons is that the former treat deference regimes as independent trumping mechanisms, while the latter treat deference regimes as reflecting values whose weight will vary from case to case, depending on context. Thus, Justice Stevens in City of Jackson did not understand the agency’s interpretation to have been decisive, but it did provide important confirmation that his reading of the statutory text and legislative history was on the right track. Conversely, Justice O’Connor believed that the statutory materials cut the other way, and the agency’s views were too discordant with the legal materials and too late to affect her judgment.

160. Consider some dramatic cases where Justice Scalia went along with or authored opinions that ignored the Court’s Auer precedent (authored by Justice Scalia) requiring super deference when an agency is interpreting its own regulations. E.g., Rapanos v. United States, 547 U.S. 715, 724–29 (2006) (Scalia, J.) (ignoring Auer even though Army Corps was interpreting regulation that had been upheld by the Court); id. at 739 (citing Chevron in passing at end of opinion rather than as framing precedent). Similarly, in Solid Waste Agency v. U.S. Army Corps of Eng’rs, 531 U.S. 159 (2001), Chief Justice Rehnquist’s majority opinion ignored Auer, and Justice Scalia joined without writing separately. Id. at 161. In other cases, Justice Scalia has been adamant that the Court accord Auer deference to agency regulations. E.g., Gonzales v. Oregon, 546 U.S. 243, 275–81 (2006) (Scalia, J., dissenting).


162. See Skilling v. United States, 130 S. Ct. 2896, 2932–33, 2935 (2010) (drawing from rule of lenity to hold that 1988 “honest services” law should not be applied beyond core cases targeted by Congress).


164. Id. at 262–67 (O’Connor, J., concurring in the judgment).
Like the canons, and unlike binding precedents, *Chevron* and the other formal deference regimes have the following characteristics in practice: They are flexible rules of thumb or presumptions deployed by the Justices episodically and not entirely predictably, rather than binding rules that the Justices apply more systematically. They are often deployed in distinctive ways by individual Justices, reflecting each Justice's particular normative vision, with Justice Scalia articulating the regimes as rules restricting expansive agency interpretations and Justice Breyer articulating the regimes as standards helping judges understand which agency innovations they should go along with and which they should resist. Idiosyncrasy in deployment (or not) of deference regimes is tolerated within the Court, and there is little collective pressure for Justices authoring majority opinions to justify departures from other decisions or for the Court to be consistent across the general run of cases. If deference regimes are more like canons than precedents, one wonders whether these regimes impose any constraints whatsoever on Supreme Court Justices. There is little empirical evidence on the question of whether canons can constrain judicial decisionmaking, and the scant evidence we have in hand cuts both ways—sometimes canons seem to constrain, but usually not.\textsuperscript{165} If the canons do not constrain the Justices in any way, do they vote ideologically, the way the attitudinal model suggests, or strategically? In the next Part, we tackle these very questions.

IV. SIMULTANEOUS EQUATION MODEL: WHAT INFLUENCES A JUSTICE’S WILLINGNESS TO FOLLOW AN AGENCY INTERPRETATION?

The foregoing analysis undermines the hypothesis that Supreme Court Justices follow deference regimes the way they follow substantive precedents, but it does not tell us what does influence the Justices’ willingness to follow agency interpretations. That is the project of this Part. We start with the looming obstacle that usually defeats any kind of causal analysis, namely, the “simultaneity problem.” The simultaneity problem is easily explained: We do not know whether deference regimes influence outcome votes, or outcome votes influence deference regimes (that is, the Justices select a deference regime that justifies their outcome vote). This problem is difficult to resolve empirically, however. Nonetheless, we suggest a way to reach some preliminary conclusions.

The conclusions we reach are surprising to the conventional wisdom of both political scientists and law professors. Contrary to the predictions of political scientists, rule of law considerations do play a role in Supreme Court deference to agency interpretations; contrary to the predictions of

\textsuperscript{165} See generally James J. Brudney & Corey Ditslear, The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras, 89 Judicature 220 (2006) (presenting empirical analysis of Court’s labor cases and finding that legislative history canons constrain “liberal” context-oriented Justices like Breyer more than textual canons constrain “conservative” text-oriented Justices like Scalia).
law professors, ideological views play a role as well.\textsuperscript{166} We shall explore both of these observations in connection with another case study, introduced in this Part.

A. Problems Making Causal Inferences in Previous Studies

The "endogeneity" or "simultaneity" problem with drawing causal inferences from statistical data is prominent, pervasive, and perhaps inevitable when attempting to discover "what motivates judges." In the context of this study, drawing causal inferences regarding the relationship between deference doctrine and case outcomes is inevitably complicated by the fact that the Justices decide simultaneously whether to apply a particular deference regime \textit{and} whether to uphold or overturn the agency policy at issue. Naïve regression analysis (that is, regression analysis that does not attempt to correct for the simultaneity problem) finds that each decision is strongly correlated with the other—hence it is hard to conclude that either "causes" the other.

\textbf{Table 6: Deference Regime and the Decision to Uphold}

<table>
<thead>
<tr>
<th></th>
<th>No regime, Antideference</th>
<th>Consultative deference, Skidmore</th>
<th>\textit{Chevron}, \textit{Beth Israel}</th>
<th>\textit{Seminole Rock}, Curtiss-Wright</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uphold Agency</td>
<td>60.76</td>
<td>78.21</td>
<td>72.13</td>
<td>88.41</td>
</tr>
<tr>
<td>Overturn Agency</td>
<td>39.24</td>
<td>21.79</td>
<td>27.87</td>
<td>11.59</td>
</tr>
</tbody>
</table>

Pearson $\chi^2(3) = 249.0136$ Pr = 0.000

Let us be more specific. Simple cross-tabulations, set forth in Table 6, show that a strong correlation exists between deference regime and outcome votes. Unsurprisingly, Table 7 shows that a Justice's vote to uphold or overturn an agency is a statistically significant predictor of his or her vote for a deference regime. Table 8 shows that a Justice's deference regime vote is also a statistically significant predictor of whether she or he votes to overturn an agency action. This simultaneous relationship suggests an endogeneity problem that precludes valid causal interpretation of the estimates from either equation. As a result, the relationship between deference regimes and the decision to uphold an agency interpretation is unclear. Justices may first decide whether to uphold or overturn an agency and then choose a deference regime supporting this outcome; that is, the decision to uphold has a causal effect on the deference regime decision. Alternatively, Justices may first decide whether to apply a deference regime and then determine whether to uphold the agency interpretation; that is, the deference regime decision has a causal effect on the decision to uphold. Or there might be a third variable that drives the other two.

\textsuperscript{166} Compare supra Part II.A (describing legal model), with supra Part II.B (describing attitudinal model).
### Table 7: Predicting Support of Deference Regimes

<table>
<thead>
<tr>
<th>Dependent Variable: Support for deference</th>
<th>(1)</th>
<th>(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice votes to uphold agency</td>
<td>-0.79***</td>
<td>-0.79***</td>
</tr>
<tr>
<td></td>
<td>(0.129)</td>
<td>(0.128)</td>
</tr>
<tr>
<td>Agency position diverges from Justice ideology</td>
<td>-0.0065</td>
<td>-0.013</td>
</tr>
<tr>
<td></td>
<td>(0.0151)</td>
<td>(0.0228)</td>
</tr>
<tr>
<td>Ideological preference of Justice</td>
<td>-0.043***</td>
<td>-0.032</td>
</tr>
<tr>
<td></td>
<td>(0.00988)</td>
<td>(0.0521)</td>
</tr>
<tr>
<td>Continuous agency position</td>
<td>-0.36***</td>
<td>-0.36***</td>
</tr>
<tr>
<td></td>
<td>(0.070)</td>
<td>(0.070)</td>
</tr>
<tr>
<td>Unified government</td>
<td>-0.19</td>
<td>-0.20</td>
</tr>
<tr>
<td></td>
<td>(0.136)</td>
<td>(0.147)</td>
</tr>
<tr>
<td>Legislative rule</td>
<td>2.18***</td>
<td>2.19***</td>
</tr>
<tr>
<td></td>
<td>(0.159)</td>
<td>(0.159)</td>
</tr>
<tr>
<td>Adjudication</td>
<td>1.97***</td>
<td>1.97***</td>
</tr>
<tr>
<td></td>
<td>(0.264)</td>
<td>(0.264)</td>
</tr>
<tr>
<td>Blackmun</td>
<td>-0.0036</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.127)</td>
<td></td>
</tr>
<tr>
<td>Brennan</td>
<td>-0.0067</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.275)</td>
<td></td>
</tr>
<tr>
<td>Breyer</td>
<td>0.019</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.0683)</td>
<td></td>
</tr>
<tr>
<td>Burger</td>
<td>-0.28</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.156)</td>
<td></td>
</tr>
<tr>
<td>Ginsburg</td>
<td>-0.039</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.0650)</td>
<td></td>
</tr>
<tr>
<td>Kennedy</td>
<td>-0.023</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.0910)</td>
<td></td>
</tr>
<tr>
<td>Marshall</td>
<td>0.041</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.308)</td>
<td></td>
</tr>
<tr>
<td>O’Connor</td>
<td>-0.088</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.0729)</td>
<td></td>
</tr>
<tr>
<td>Powell</td>
<td>-0.32*</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.155)</td>
<td></td>
</tr>
<tr>
<td>Rehnquist</td>
<td>-0.063</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.120)</td>
<td></td>
</tr>
<tr>
<td>Scalia</td>
<td>0.0070</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.160)</td>
<td></td>
</tr>
<tr>
<td>Stevens</td>
<td>-0.024</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.120)</td>
<td></td>
</tr>
<tr>
<td>Thomas</td>
<td>-0.078</td>
<td></td>
</tr>
<tr>
<td></td>
<td>0.232</td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>-0.083</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.0845)</td>
<td></td>
</tr>
<tr>
<td>Cut1</td>
<td>0.37</td>
<td>0.32</td>
</tr>
<tr>
<td></td>
<td>(0.13)</td>
<td>(0.14)</td>
</tr>
<tr>
<td>Cut2</td>
<td>1.93</td>
<td>1.89</td>
</tr>
<tr>
<td></td>
<td>(0.14)</td>
<td>(0.14)</td>
</tr>
<tr>
<td>Cut3</td>
<td>4.50</td>
<td>4.45</td>
</tr>
<tr>
<td></td>
<td>(0.25)</td>
<td>(0.25)</td>
</tr>
<tr>
<td>Cut4</td>
<td>5.47</td>
<td>5.42</td>
</tr>
<tr>
<td></td>
<td>(0.36)</td>
<td>(0.36)</td>
</tr>
<tr>
<td>Log-pseudolikelihood</td>
<td>-7243.19</td>
<td>-7240.32</td>
</tr>
<tr>
<td>Pseudo-R²</td>
<td>0.150</td>
<td>0.150</td>
</tr>
<tr>
<td>N</td>
<td>8639</td>
<td>8639</td>
</tr>
</tbody>
</table>

Notes: Table provides ordered logit coefficient estimates (robust standard errors clustered on the cases shown in parentheses).
* Means significant at 5% level. ** Means significant at 1% level. *** Means significant at .01% level, two-tailed tests.
Table 8: Predicting the Decision to Uphold or Overturn an Agency

<table>
<thead>
<tr>
<th>Dependent Variable: Justice votes to uphold agency</th>
<th>(1)</th>
<th>(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deference regime vote</td>
<td>-0.47***</td>
<td>-0.48***</td>
</tr>
<tr>
<td></td>
<td>(0.0832)</td>
<td>(0.084)</td>
</tr>
<tr>
<td>Agency position diverges from Justice ideology</td>
<td>0.29***</td>
<td>0.38***</td>
</tr>
<tr>
<td></td>
<td>(0.0188)</td>
<td>(0.0291)</td>
</tr>
<tr>
<td>Ideological preference of Justice</td>
<td>-0.029*</td>
<td>0.050</td>
</tr>
<tr>
<td></td>
<td>(0.0130)</td>
<td>(0.0481)</td>
</tr>
<tr>
<td>Continuous agency position</td>
<td>0.0432</td>
<td>0.048</td>
</tr>
<tr>
<td></td>
<td>(0.0576)</td>
<td>(0.059)</td>
</tr>
<tr>
<td>Unified government</td>
<td>-0.14</td>
<td>-0.18</td>
</tr>
<tr>
<td></td>
<td>(0.108)</td>
<td>(0.120)</td>
</tr>
<tr>
<td>Legislative rule</td>
<td>0.16</td>
<td>0.16</td>
</tr>
<tr>
<td></td>
<td>(0.146)</td>
<td>(0.146)</td>
</tr>
<tr>
<td>Adjudication</td>
<td>0.60***</td>
<td>0.60***</td>
</tr>
<tr>
<td></td>
<td>(0.188)</td>
<td>(0.189)</td>
</tr>
<tr>
<td>Blackmun</td>
<td></td>
<td>0.066</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.153)</td>
</tr>
<tr>
<td>Brennan</td>
<td></td>
<td>-0.13</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.249)</td>
</tr>
<tr>
<td>Breyer</td>
<td></td>
<td>-0.14</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.0929)</td>
</tr>
<tr>
<td>Burger</td>
<td></td>
<td>-1.14***</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.209)</td>
</tr>
<tr>
<td>Ginsburg</td>
<td></td>
<td>-0.089</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.0843)</td>
</tr>
<tr>
<td>Kennedy</td>
<td></td>
<td>-0.0029</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.104)</td>
</tr>
<tr>
<td>Marshall</td>
<td></td>
<td>-0.51</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.282)</td>
</tr>
<tr>
<td>O'Connor</td>
<td></td>
<td>-0.030</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.9933)</td>
</tr>
<tr>
<td>Powell</td>
<td></td>
<td>-0.23</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.177)</td>
</tr>
<tr>
<td>Rehnquist</td>
<td></td>
<td>-0.59***</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.154)</td>
</tr>
<tr>
<td>Scalia</td>
<td></td>
<td>-0.43***</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.158)</td>
</tr>
<tr>
<td>Stevens</td>
<td></td>
<td>-0.092</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.127)</td>
</tr>
<tr>
<td>Thomas</td>
<td></td>
<td>-0.80***</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.218)</td>
</tr>
<tr>
<td>White</td>
<td></td>
<td>-0.27</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.113)</td>
</tr>
<tr>
<td>Log-pseudolikelihood</td>
<td>-5227.71</td>
<td>-5190.20</td>
</tr>
<tr>
<td>Pseudo-R²</td>
<td>0.0493</td>
<td>0.0562</td>
</tr>
<tr>
<td>N</td>
<td>8639</td>
<td>8639</td>
</tr>
</tbody>
</table>

Notes: Table provides ordered logit coefficient estimates (robust standard errors clustered on the cases shown in parentheses).
* Means significant at 5% level. ** Means significant at 1% level. *** Means significant at .01% level, two-tailed tests.
This endogeneity (or "simultaneity") problem is one that has challenged economists and political scientists and has eluded law professors studying judicial deference to agency interpretations. Very few legal studies have even flagged this problem, much less suggested a methodology for isolating different variables and suggesting evidence for causal relationships between those variables and the behavior of judges as modeled by the theories laid out in Part II.

The more sophisticated empirical studies use a number of approaches to address the simultaneity problem. Some studies design a field experiment in which the variable of interest is randomly assigned to the relevant decisionmaker.\(^{167}\) This approach cannot be applied to the Supreme Court; the Justices do not subject themselves to academically designed experiments.

Other studies use an "instrument," or a variable that alters the independent variable of interest in a way that is clearly uncorrelated with the dependent variable.\(^{168}\) We considered this approach but were unable to utilize it because we cannot identify a variable that (in our view) clearly affects only the choice of a deference regime or only the decision to uphold or overturn the agency without affecting the other. We considered several possible instruments. For example, one might claim that "congressional delegation of lawmaking authority to the agency" is a variable that affects only the choice of a deference regime, for it is the announced test for applying *Chevron*—but many legal scholars (the authors included) believe that variable also affects the Justices' decision to uphold the agency's interpretation.\(^{169}\) Thus, it is not a suitable instrument. A more promising instrument would be an external and unanticipated "shock" that altered the scope or substance of one deference regime. Such a shock would allow us to isolate how doctrine influences the Justices because we could measure how the Justices respond to the doctrinal change relative to how they treat similar cases where the altered doctrine is inapplicable. Unfortunately, we lack such a "shock" because the Court itself imposes doctrinal changes.

Finally, some studies have relied on regression discontinuity to solve the simultaneity problem.\(^{170}\) This approach exploits an externally defined, clear classification rule by analyzing the average difference in out-


169. Eskridge & Baer, supra note 24, at 1129.

comes between observations that fall on each side of the threshold. That
does not solve the problem here, because no quantifiable threshold exists
to determine when the Justices should apply a particular deference re-
gime. In short, none of the widely used methods of drawing causal infer-
ence is applicable to solve the problem at hand. In that event, we have
opted for a second-best strategy that may not "solve" the problem, but
that might help us evaluate the depth of the simultaneity problem and
generate some useful predictive results. We now turn to this
methodology.

B. The Simultaneous Equation Model

Political scientists and economists have applied two-equation models
to analyze similar problems.\textsuperscript{171} For instance, Jeffrey Staton estimated that
the Mexican Supreme Court's simultaneous decision to invalidate or up-
hold a law and to issue a statement promoting the decision supported an
account of constitutional review in which judges wield their authority
through case promotion.\textsuperscript{172} The two-equation approach accounted for
the possibility that the decision to uphold the law influences the decision
to promote the decision. The particular approach we use is a "bivariate
mixed-response probit model."\textsuperscript{173} Similarly, Lisa Baldez and her coau-
thors used simultaneous equations to analyze whether judicial review
standards mediate the effect of constitutional provisions on judicial deci-
sionmaking.\textsuperscript{174} We follow this approach to analyze the relationship be-
tween deference and outcome decisions.

The simultaneous equation model is designed to analyze data gener-
ated by an actor making concurrent and interrelated decisions. Our
model simultaneously estimates an equation via maximum likelihood pre-
dicting Justices' deference regime votes and an equation predicting
whether Justices vote to uphold or overturn the agency. The model ad-

\textsuperscript{171} See generally Adam J. Berinsky, The Two Faces of Public Opinion, 43 Am. J. Pol.
Sci. 1209 (1999) (examining effect of perceptions of social desirability on public opinion
survey responses); Derek Leslie & Stephen Drinkwater, Staying On in Full-Time Education:
Reasons for Higher Participation Rates Among Ethnic Minority Males and Females, 66
Economica 63 (1999) (examining different economic and ethnic factors contributing to
higher percentage of ethnic minorities pursuing education beyond compulsory age in
Britain); William Reed, A Unified Statistical Model of Conflict Onset and Escalation, 44
Am. J. Pol. Sci. 84 (2000) (using simultaneous models of escalation and conflict onset to
control for interdependent relationship between the two factors in international
relations); Mark B. Stewart & Joanna K. Swaffield, Low Pay Dynamics and Transition
Probabilities, 66 Economica 23 (1999) (examining effect of low pay one year on likelihood
of low pay in following year).

\textsuperscript{172} Jeffrey K. Staton, Constitutional Review and the Selective Promotion of Case

\textsuperscript{173} This technique was first presented in Lisa Baldez, Lee Epstein & Andrew D.
Martin, Does the U.S. Constitution Need an Equal Rights Amendment?, 35 J. Legal Stud.
243, 261 (2006). Professor Martin and his colleagues were kind enough to share their
code.

\textsuperscript{174} See id. at 260–62.
dresses the fact that the decisions are related by allowing a portion of the error term (the portion of the variation in the outcome that the model does not capture) in each equation to be correlated with a corresponding portion of the error term in the other equation. This correlation captures the dependence between the two outcomes. To take *City of Jackson* as an example, the correlation parameter captures the relationship between support for deference and support for affirming the EEOC. If the correlation parameter equaled zero, the two decisions would be unrelated, or independent.

Such a model offers several advantages over naive regression analysis. First, and most important, the simultaneous equation model allows a more precise and more reliable assessment of the dependence between the two equations. In particular, a statistically significant correlation parameter indicates that dependence exists between deference regime and case outcome. This does not isolate whether the deference regime causes case outcomes or vice versa, but it shows that the two variables are correlated after controlling for other variables in the model. By controlling for other variables, we can be more certain that the correlation between deference regime and upholding the agency is not being driven by a third variable.

Second, the model makes some progress in dealing with the simultaneity (or endogeneity) problem presented by naive regression analysis. By treating both outcomes as dependent variables, the model handles their dependence through the correlation parameter. By contrast, naive analysis fails to model this dependence. This can create a correlation between the error term and the independent variables, resulting in biased parameter estimates. Addressing this problem eliminates this source of bias. Third, the simultaneous equation model incorporates more data than is possible when estimating separate models. These advantages allow a more efficient and unbiased estimate of the parameters in both models.

Although we cannot draw causal inferences regarding the relationship between deference doctrine and outcome decisions, we make several important improvements to previous studies. To begin with, we analyze voting at the level of individual Justices in particular cases. By contrast, previous studies, such as the Eskridge and Baer study, focused on analyzing how the Court as a collective entity applied deference doctrine. In particular, Eskridge and Baer only analyzed the application of deference doctrine in majority or plurality opinions. Our study incorporates application of deference doctrine in all concurring and dissenting opinions, creating a full data set of deference votes for every participating Justice in every case. This individual level analysis allows us to test theories more

175. See id. at 261–62.
176. Id.
177. See Eskridge & Baer, supra note 24, at 1094; Merrill, supra note 49, at 980.
178. Eskridge & Baer, supra note 24, at 1094.
precisely, because a number of important variables differ at the level of individual justices. Ideological preferences are one such example. Using Justice-level data allows us to test such individual level variation more precisely than prior studies have done. Moreover, our model controls for a multitude of variables that may influence both deference doctrine and outcomes. This strategy reduces the probability that an omitted variable drives the results. The cross-tabulations presented in Eskridge and Baer only present the correlation between pairs of variables in isolation, creating the possibility that a third variable intermediates the reported relationship. As noted, the model’s primary limitation is that the results cannot be interpreted causally. Instead, the results are predictive.

The first equation predicts deference regime votes \( V_{jc} \) by a particular Justice \( j \) in a particular case \( c \). The dependent variable, \( V_{jc} \), is coded ordinally as follows: (1) no deference regime and antideference, (2) Skidmore and consultative deference, (3) Chevron and equivalent pre-Chevron regimes, (4) Seminole Rock or Curtiss-Wright. Coding of the dependent variable was taken from Eskridge and Baer, but regimes were condensed by combining all of the regimes with the same level of deference. For instance, consultative deference and Skidmore deference receive the same coding because they accord roughly equivalent levels of deference. The variables are explained below, but for present purposes the regression equation is:

\[
V_{jc} = \beta_0 + \beta_1(\text{justice-agency agreement}_{jc}) + \beta_2(\text{justice fixed effects}) + \beta_3(\text{continuous agency policy}_{c}) + \beta_4(\text{legislative rule}_{c}) + \beta_5(\text{adjudication}_{c}) + \beta_6(\text{agency-unified government alignment}_{c}) + \beta_7(\text{policy complexity}_{c}) + \beta_8(\text{congressional delegation to the agency}_{c}) + \beta_9(\text{relative ideological proximity of lower courts and agencies}) + u_{jc} + r_{jc}
\]

The second equation predicts whether an individual Justice \( j \) votes to uphold (0) or overturn (1) an agency in an individual case \( c \). The model uses a similar set of independent variables as the first model:

\[
U_{jc} = \beta_0 + \beta_1(\text{justice-agency agreement}_{jc}) + \beta_2(\text{continuous agency policy}_{c}) + \beta_3(\text{legislative rule}_{c}) + \beta_4(\text{adjudication}_{c}) + \beta_5(\text{agency-unified government alignment}_{c}) + \beta_6(\text{policy complexity}_{c}) + \beta_7(\text{congressional delegation to the agency}_{c}) + \beta_8(\text{relative ideological proximity of lower courts and agencies}) + u_{jc} + r_{jc}
\]

---

179. See infra Table 11 and Figure 3.
180. Condensing Seminole Rock/Auer and Curtiss-Wright into the Chevron category had no effect on the results. This is unsurprising given that Seminole Rock/Auer and Curtiss-Wright comprise only 1.5% of total cases. Results are available from authors upon request.
181. For a description of the methodology, see Eskridge & Baer, supra note 24, at 1216–21 (dividing deference into seven regimes described in Part I, supra).
182. The dependent variable in the first equation is on an ordinal scale ranging from 1 to 4. This is necessarily an approximation of the latent level of deference afforded by each regime, as no objective quantitative measure of deference exists. The dependent variable in the second equation is necessarily dichotomous, as judges may either uphold or overturn agencies.
C. Applying the Simultaneous Equations Model to Suggest What Motivates the Justices in Agency Deference Cases

Now consider how this model can provide a useful starting point for determining whether the Justices follow the legal, attitudinal, or strategic models of decisionmaking. The conventional wisdom among political scientists is that ideology dominates legal criteria, while some law professors (and virtually all judges) insist that the law is all that matters.\textsuperscript{183}

We shall start with the legal model.\textsuperscript{184} Recall, from Part III, that the legal model does not hold up well if deference regimes are understood, most formally, as matters of stare decisis. Such a hypothesis is inconsistent with the data. But a “canons” model is also a “legal” model for deference, as illustrated by Justice Stevens’s opinion for the Court in \textit{City of Jackson}. Because a canons model, as traditionally understood, is so flexible and does not enjoy the formalist bite of stare decisis, we do not test for it directly. Instead, we run a series of more indirect tests. Each test draws from the Court’s public justification for deference, namely, the rule of law value that going along with agency decisions assertedly has for the Supreme Court (and the country).

We start with the easiest regime to test, namely, super deference to agency interpretations of their own rules. Although the Court rarely announces that it is applying the \textit{Seminole Rock}/\textit{Auer} regime when it is evaluating such interpretations, it might be the case that agency interpretation of its own rules correlates to super high deference in practice. To test for that, we include a dummy variable to measure whether an agency is interpreting its own rule, the supposed triggering mechanism for \textit{Seminole Rock}/\textit{Auer} deference. If the Justices go along with the agency at super high rates in such cases, there is indirect legal bite for \textit{Seminole Rock}/\textit{Auer} even if the Court does not formally apply that deference regime.

We next examine the data in light of the doctrinal trigger for \textit{Chevron} deference. Thus, we factor in a dummy variable to measure whether Congress delegated authority for the agency to promulgate the policy at issue. (Recall that \textit{Chevron}, as interpreted in \textit{Mead}, is the appropriate deference regime when an agency is acting under a congressional delegation of lawmaking authority to that agency.\textsuperscript{185}) Coding rules for this variable are available in Eskridge and Baer.\textsuperscript{186} The Court should be expected to

\textsuperscript{183} See supra notes 75–117 and accompanying text (discussing divergent interpretive theories espoused by legal scholars and political scientists).

\textsuperscript{184} See infra Part IV.C.1.


\textsuperscript{186} Thus, Eskridge & Baer, supra note 24, at 1209–11, examine agency authority under the strict historical approach to lawmaking delegation laid out in Thomas A. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467 (2002), and under the more lenient approach followed by the federal circuit courts in the 1970s and afterwards. Generally, we shall follow Eskridge and
uphold agency interpretations when Congress has authorized the agency to engage in lawmaking. Similarly, dummy variables for whether the policy at issue was either a legislative rule or an adjudication are used to test whether Justices follow administrative law doctrine and apply a more deferential regime to formal agency decisions. This variable is correlated with the proper application of Chevron deference, because the large majority of agency rules and adjudications are made pursuant to congressional delegations that fall within Chevron's domain. Both variables are interpreted relative to the baseline of informal agency policymaking; a positive coefficient therefore signifies that the Justices defer more to rules and adjudication than to informal policies.

Unlike Seminole Rock/Auer and Chevron, the Skidmore regime does not have a distinctive legal trigger; Skidmore ought to be the default regime whenever one of the formal regimes does not apply. Under Skidmore, the Court will consider how cogent the agency interpretation is, how longstanding it has been, and whether the agency has applied a distinctive expertise. While testing for "cogency" is too subjective, we indirectly test for the other two factors. Eskridge and Baer's measure of whether the agency policy at issue was consistent and longstanding is used to test the second factor. Higher values of this variable indicate that the policy is more recent, so the coefficient is expected to be negative if the Justices grant greater deference to continuous policies.

To test the third Skidmore factor, we use a series of dummy variables that measure the complexity of the agency policy. The Supreme Court has been particularly agreeable to agency interpretations of statutes that are relatively technical and involve a specialized expertise that most lawyers and judges do not possess. To test whether the Justices actually

---

187. "Legislative rules" are the administrative equivalent of public laws passed by Congress. Like public laws, rules are legally binding, generally applicable, and nonretroactive. In this paper, the term "legislative rule" is defined to include all rules adopted under the Administrative Procedure Act's notice-and-comment process. See 5 U.S.C. § 553 (2006) (codifying procedure for proposing and adopting "legislative rules").

188. See, e.g., Mead, 533 U.S. at 226-27 (holding that agency's power to adjudicate shows delegation of congressional authority suitable for Chevron deference).

189. Id. at 229-30 (recognizing "a very good indicator of delegation meriting Chevron treatment is express congressional authorizations to engage in the process of rulemaking or adjudication").

190. See id. at 227-28 (describing Skidmore as default regime for how deferential judges should be to agency interpretations, with Chevron being a "special" case for extra deference where there has been congressional delegation of lawmaking authority to agency).


192. For details on Eskridge and Baer's coding scheme for the continuity of agency positions, see Eskridge & Baer, supra note 24, at 1206.

cite deference regimes more frequently when faced with technical policies, cases are classified as highly technical,194 intermediate,195 highly normative,196 or court-centered.197 Classification of cases into particular policy areas is taken from Eskridge and Baer.198 The Court should be expected to cite a more deferential regime when evaluating technical agency policies because a number of important administrative law decisions cite agency expertise as an important rationale for judicial deference.199

After considering the rule of law model, we then turn to the attitudinal model.200 Justice-agency agreement tests the attitudinal model's prediction that Justices will vote for a more deferential regime if the agency policy at issue is compatible with their ideological preferences. This variable is calculated by taking the absolute value of the difference between the ideological position of the agency's decision201 and the Justice's Martin-Quinn ideology score202 for the Supreme Court Term in which the case was heard. If ideological approval of agency policy decisions influences how Justices apply deference regimes, an increase in this variable should reduce the level of deference.

We test the attitudinal model's prediction that Justices hold unique preferences over deference regimes; our model includes a fixed effect for each Justice who served from 1983 to 2005. A fixed effect is essentially a dummy variable that is coded "1" if the Justice in question is voting. If the fixed effect for a Justice is statistically significant, his or her preference over deference doctrine is distinct from those of Justice Souter. Justice Souter is the baseline because he was the ideological median among all Justices serving from 1983 to 2005.203 If Justices have distinct preferences over deference doctrine, their fixed effects should be statistically significant.

194. The following policies fell into this category: taxation, intellectual property, pensions, telecommunications, energy, transportation, and bankruptcy.

195. The following policies fell into this category: environment, business regulation, federal lands, health and safety, education, and housing.

196. The following policies fell into this category: criminal law, civil rights, Indian law, labor relations, entitlement programs, federal government, immigration, and foreign affairs/national security.

197. The following policies fell into this category: federal procedure and maritime law.

198. See Eskridge & Baer, supra note 24, at 1205.


200. See infra Part IV.C.2.

201. Agency ideologies were placed on the Martin-Quinn scale via the following rule: Agency policies coded in the Eskridge-Baer data set as liberal were assigned a Martin-Quinn of -1, mixed policies were coded as 0, and conservative policies as 1. For details on the coding methodology for agency decisions, see Eskridge & Baer, supra note 24, at 1205–06.

202. See Martin & Quinn, supra note 102.

203. See infra Figure 3.
Last of all, we evaluate the strategic model using our data set. A dummy variable is coded as “1” if the agency policy at issue conflicted with the policy preferences of the sitting unified government and “0” otherwise. For instance, a liberal agency policy that was challenged before the Court at a time in which the Congress and Presidency were both controlled by Republicans (the “conservative” party) received a 1. All cases heard during a time of divided partisan control of the Presidency and Congress received a 0. Coding rules for the ideological direction of agency policy decisions are included in Eskridge and Baer. If the likely response of the political branches influences how the Justices vote to apply deference doctrine, they should vote for less deferential regimes on policies opposed by both the Congress and President.

We also include a variable to measure whether the Court was ideologically closer to lower courts or to agencies. The ideological position of each branch was measured with Judicial Common Space Scores, which are comparable across institutions. The Common Space score of the Justice measures Supreme Court ideology; the President’s Common Space score measures agency ideology; and the average Common Space ideological score of all appellate circuits measures lower court ideology. The absolute value of the distance between the Justice ideology score and the lower courts is compared to the absolute value of the distance between the Court median and the agencies. If the Cohen and Spitzer version of the strategic model is correct, the Court will apply more deferential regimes when agencies are closer to the Court’s ideology than lower courts are. Conversely, the Court will apply less deferential regimes when its ideology is closer to that of the lower courts than to that of agencies.

* * *

Before discussing what variables influence the Court’s application of deference doctrine in detail, we would like to flag at the outset our finding that is the biggest departure from the previous empirical literature, most of which has been generated by political scientists. Specifically, we

---

204. See infra Part IV.C.3.
205. See Eskridge & Baer, supra note 24, at 1205.
206. For a description of these scores, see Lee Epstein et al., The Judicial Common Space, 23 J.L. Econ. & Org. 303 (2007).
207. Although other forces such as Congress and the courts clearly influence agency behavior, presidential preferences are used as a proxy of agency ideology because a large literature shows that presidents exert significant authority over agencies. See, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2244, 2248 (2001) (arguing “the regulatory activity of the executive branch [became] more and more an extension of the President’s own policy and political agenda”); Terry M. Moe, An Assessment of the Positive Theory of “Congressional Dominance,” 12 Legal Stud. Q. 475, 489 (1987) (arguing that President appoints agency heads who are “conducive to presidential control”).
208. See Cohen & Spitzer, supra note 12, at 474–75 (finding Court adjusts deference levels to achieve policy goals).
find that deference doctrine matters. Deference doctrine is correlated with how Justices vote on case outcomes. If they apply deference regimes sincerely, Justices should be less likely to vote to overturn an agency when they vote for a more deferential regime. We found that the correlation parameter (r) between deference regime and outcome is statistically significant, showing that deference doctrine is strongly correlated with case outcomes after controlling for a number of other variables. Although our result does not establish a causal pathway, it does establish that deference regimes play an important role in Supreme Court decisionmaking. The Justices either manipulate deference doctrine to justify outcomes or they apply deference doctrine sincerely. This analysis suggests that the "canons" (rather than a "precedent" or stare decisis) approach to deference regimes that all the Justices follow has an effect on their decisionmaking. The predictability we find lends some credibility to the weak legal account of the Supreme Court's evaluation of agency interpretations—while at the same time we further demonstrate that ideology and political context also affect the Court's decisionmaking.

1. Testing the Legal Model. — This Article does not directly test whether Justices apply administrative law doctrine faithfully when voting on deference regimes. To do so would be almost impossible. For example, if the Court applies the Chevron regime, it will first determine whether Congress has directly addressed the issue in suit; to make this determination, the Court will examine the statutory text and structure, the law's legislative history, and relevant statutory precedents. If the Court arrives at a clear answer after consulting these sources, it will follow Congress's directive, whatever that may be. If there is no clear answer, the Court will defer to any reasonable interpretation taken by the agency. To determine whether the Court has faithfully followed the rule of law in each case, one would have to determine that the Court (1) followed the correct deference regime, (2) was right about any clear statutory meaning, and, if applicable, (3) was right about the reasonableness of the agency's interpretation. This exercise would have to be accomplished with high intercoder reliability for all 667 cases in our data set. This is a task we have not even attempted. The Supreme Court takes the hardest cases, usually where intelligent lower court judges have disagreed about the correct legal analysis—and we have no reliable mechanism to second-guess those judges and the Supreme Court Justices on these mat-

209. See infra Table 9.
210. See supra Table 6.
211. The correlation is negative because the dependent variables for each of the two equations are coded in the opposite direction.
213. Chevron, 467 U.S. at 843 & n.11, 845 (holding that "question for the Court is whether the agency's answer is based on a permissible construction of the statute").
ters of legal interpretation. In short, we do not directly test the robustness of the legal model in the context of our 667 agency deference cases.

Instead, we use several proxies to test, indirectly, whether the Court is attentive to legal concerns when the Justices decide cases where there is an agency interpretation on point. The proxies we use are the policies underlying and justifying various deference regimes: Is the agency interpreting its own rule or regulation (Seminole Rock/Auer)? Is the agency acting pursuant to congressional delegation of lawmaking authority (Chevron/Mead)? Is the agency interpretation longstanding, and is it informed by the agency's comparative expertise (Skidmore)? The advantage of these proxies is that they are easier to determine objectively. Either the Court's opinion or the Solicitor General's brief (usually both) reliably tells us whether the agency is interpreting its own rule or regulation. Whether there is congressional delegation is trickier, but under the broad view of delegation the Court has taken since Chevron, it is usually possible to make that determination by reading the underlying statute. Whether an agency's interpretation is "longstanding" or involves "expertise" is the most subjective enterprise, but we have followed bright-line criteria for applying these spongier considerations.

We do not test to determine whether the Justices faithfully follow the precise deference regimes (Seminole Rock, Chevron, Skidmore); the Eskridge and Baer study established that the Justices are very uneven in this regard, especially in their tendency not to mention (much less follow) deference regimes in a majority of the cases where they are probably relevant. Nonetheless, in the current study we do find a strong relationship between most but not all of these rule of law policies and the Court's willingness to follow agency interpretations. By using the simultaneous equation model, we can say that the correlations are particularly robust, because the model controls for other relevant variables. Although our results also suggest that ideology is playing some role in the Justices' decisions whether to defer to or agree with agency interpretations, our findings support the claim that legal criteria do make a difference in these cases—contrary to strong versions of the attitudinal model.

a. Agency Interpretations of Its Own Rules. — The Eskridge and Baer study found that the Court rarely cited the Seminole Rock/Auer deference regime, but also found a super-high agreement rate in Supreme Court cases when the agency was interpreting one of its own rules. From that
super-high rate, one might, naively, conclude that the rule of law underpinning for *Seminole Rock/Auer* exercises an independent effect on the Justices’ inclination to either cite a deference regime or to go along with an agency interpretation. Under the simultaneous equation model, however, the effect of this variable (whether the agency was interpreting its own rule) was not statistically significant for either outcome.

This surprising result does not establish that agency interpretation of rules has no effect on the Justices’ decisions to cite a deference regime or to go along with agency interpretations. Instead, this result suggests that agency interpretation of its own rules is highly correlated with other variables. The result with respect to the decision to overturn or uphold the agency may have been a product of the high correlation between agency interpretations of rules and other legal variables. Most importantly, the correlation between *Seminole Rock/Auer* eligibility and agency issuance of a rule was quite high (83%). This correlation may have mitigated the marginal effect of agency interpretation of rules. Put differently, *Seminole Rock/Auer* eligibility had little effect beyond the fact that an agency rule was frequently at issue.

The result with respect to deference doctrine is simpler to explain. This result was likely influenced by the fact that the Justices rarely applied *Seminole Rock/Auer*. The Justices voted to apply *Seminole Rock/Auer* in only 8% of cases where the agency interpreted its own rules. The Justices only voted to apply *Seminole Rock/Auer* in 1% of their total votes. In short, the regime itself had little effect because it was rarely applied. (One reason for this is that other deference regimes were available to the Justices, and so *Seminole Rock/Auer* was probably overlooked or deemed to add little or nothing to the guidance of that other regime.) We shall in Part V argue that the infrequency with which less prominent regimes like *Seminole Rock/Auer* were applied supports condensing the number of deference regimes.

b. *Congressional Delegation of Lawmaking Authority to Agencies.* — Contrast our results for the *Seminole Rock/Auer* criterion with those for the *Chevron/Mead* criterion. Running the data through our model, with dummy variables for the *Chevron/Mead* trigger (congressional delegation) and for agency use of that trigger (agency rulemaking and adjudication), we find a statistically significant relationship between these rule of law considerations and the Justices’ willingness to announce a deference regime and their willingness to go along with agency interpretations. That is, the Justices apply more deferential regimes when evaluating adjudications and legislative rules, as opposed to informal agency interpretations. And the Justices cite deference regimes (not just *Chevron*, of course) more frequently when hearing agency policies authorized by
clear congressional delegation. Both results are consistent with the Court's decision in *Mead*.219

These results provide support for the weaker version of the legal model. Even though the Justices do not rigorously apply *Chevron*/*Mead* as a matter of stare decisis (the stronger version of the legal model), there is a statistically significant correlation between a congressional delegation of lawmaking authority to an agency and the Court's invocation of a deference regime.220 Using the simultaneous equations model, we can say that the correlation is particularly robust, because all other variables (including ideology) are excluded.221 Thus, our analysis is the first to demonstrate that the standards outlined for the *Chevron*/*Mead* deference regime are reliably correlated with deference voting, even after controlling for other political and strategic influences. This empirical finding may have some normative significance, for it lends support to *Mead*'s controversial holding that the *Chevron* deference regime is applicable only when the agency is acting pursuant to an explicit or implicit congressional delegation of lawmaking authority.222

This finding therefore represents an important contribution to the deference literature and ought to be of particular interest to political scientists, because it is the first statistical evidence that rule of law considerations cannot be excluded from the conversation about what motivates Supreme Court Justices in agency deference cases. Our findings do not establish that the Justices are motivated by nothing but rule of law considerations, and so our examination remains open to the further testing of the attitudinal and strategic models below.

c. Agency Interpretations That Are Longstanding or Involve Expertise. — Other rule of law considerations are those underlying the more informal deference regime entailed in *Skidmore*. Running the data through our model, with dummy variables for the most easily testable *Skidmore* considerations, we find a significant effect for one of these rule of law considerations on the Justices' willingness to go along with agency interpretations, but no effect for the other that we tested. (Recall that we do not even test the *Skidmore* "agency offers persuasive reasoning" factor because we find it too subjective.)

To begin with, we find a statistically significant correlation between a longstanding agency policy and the Justices' willingness to apply defer-

---


220. See infra Table 9 (showing correlation of .60).

221. See infra Table 9.

222. For continued controversy ten years after *Mead* was handed down, see *Coeur Alaska, Inc. v. Se. Alaska Conserv. Council*, 129 S. Ct. 2458, 2479–80 (2009) (Scalia, J., concurring in part and concurring in the judgment) (arguing, alone on the Court, for *Mead* to be overruled).
ence regimes and to go along with the agency’s interpretation.\textsuperscript{223} This prominent Skidmore factor suggests that there are rule of law reliance interests at stake in the agency’s interpretation, and our data indicate that such a reliance effect is motivating the Justices to give more lenient treatment to the agency’s interpretation in such cases. This finding is consistent with Supreme Court precedent holding that recently altered agency policies should sometimes receive less deferential treatment\textsuperscript{224} and with opinions such as \textit{Barnhart v. Walton} arguing that longstanding policies should receive more deferential treatment even when \textit{Chevron}’s trigger (congressional delegation) is apparent.\textsuperscript{225}

This finding provides important support for our thesis that the deference regimes are more like canons than like precedents entitled to stare decisis effect. Justice Breyer’s opinion in \textit{Barnhart} went well beyond \textit{Chevron/Mead} when it invoked reliance interests as confirming the need for deference, even though it was uncontested that the \textit{Mead} trigger—congressional delegation—supported \textit{Chevron} deference. That level of candor about reliance interests is unusual in the Court’s agency interpretation cases—but our data suggest that this is a process that influences the Justices in a lot of cases, in addition to \textit{Barnhart}.

On the other hand, we came up with mixed results for another prominent Skidmore factor, namely, agency expertise.\textsuperscript{226} Specifically, the complexity of the agency policy decision at issue was not correlated with application of deference doctrine. This was a surprising finding, because agency expertise has since the New Deal been the most commonly expressed rationale for judicial deference. Under the simultaneous equation model, however, the Justices did not grant agencies greater defer-

\textsuperscript{223} For details on Eskridge and Baer’s coding scheme for the continuity of agency positions, see Eskridge & Baer, supra note 24, at 1206. One reader queried: In this and perhaps other runs of the data, have we included a variable to codify which presidential administration originated the agency interpretation? We have not. The reason is that in many, perhaps most, instances it was not clear to us which presidential administration was “responsible” for a precise agency interpretation. Rulemaking commenced under President A but completed under President B cannot unequivocally be attributed just to the latter. An agency interpretation first publicly announced in an amicus brief filed by President B’s Solicitor General might have originated in the agency under President A. In some instances, it is simply not clear when an agency position actually originated.

\textsuperscript{224} See, e.g., Gonzales v. Oregon, 546 U.S. 243, 268–69 (2006) (holding recent interpretation by Attorney General receives only Skidmore deference because it was “not promulgated pursuant to the Attorney General’s authority” and that weight given to interpretation depends in part on consistency with earlier and later pronouncements); see also Haig v. Agee, 453 U.S. 280, 306 (1981) (“We hold that the policy announced in the challenged regulations is ‘sufficiently substantial and consistent’ to compel the conclusion that Congress has approved it.”); Theodore W. Ruger, \textit{FDA v. Brown & Williamson: The Norm of Agency Continuity, in Statutory Interpretation Stories (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2010)}.


\textsuperscript{226} See infra Table 9.
ence when evaluating "technical" agency policies. This finding may simply indicate that the expertise rationale does not influence how the Justices apply deference doctrine. Alternatively, this finding may be a product of measurement imprecision. We inferred "complexity" of individual cases from a general judgment about the complexity of the agency's general policy jurisdiction.\textsuperscript{227} These agency-wide classifications are inevitably imprecise when applied to the full set of individual cases. Hence, further testing, using more refined criteria, might discover an effect that our simultaneous equation model did not.

Consistent with the findings of the Eskridge and Baer study,\textsuperscript{228} however, we also found that the Justices were less apt to overturn policies issued by agencies in highly and modestly technical areas.\textsuperscript{229} This is an important finding. Although our model does not allow us to say that super-high agreement rates are the same as super-high deference rates, these findings provide further evidence that an agency's comparative expertise (vis-à-vis the Court) probably motivates the Justices to go along with a wider range of agency interpretations. The irony, of course, is that the super-high agreement rates did not generate super-high invocations of specific deference regimes (as shown in Table 9, the technical variable is insignificant for deference regime, but not for the decision to overturn or uphold the agency). Did the Justices simply overlook deference doctrine in technical cases? Overall, the technical cases did not generate as much internal debate among the Justices (there were fewer concurring and dissenting opinions, as well as five-four splits among the Justices), and this may explain the disparity. In any event, this important finding further supports our conclusion in Part III that the strongest form of the legal model (where deference precedents like \textit{Chevron} have formal stare decisis effect) does \textit{not} motivate the Justices in these cases.

***

Collectively, the foregoing findings suggest that legal concerns influence the Court's application of deference doctrine. The findings do not preclude the possibility that functional concerns also play a significant role in these results, however. Functional concerns such as a desire to maintain a national rule of law, to respect comparative institutional competence, or to maintain the Court's legitimacy are often correlated with legal concerns.\textsuperscript{230} The empirical model does not measure these functional concerns. As a result, omitted variable bias could influence the results, attributing functional concerns to legal concerns. Even complete data on all functional concerns and legal concerns would not resolve this problem, however. Legal doctrine is often crafted to accommodate func-

\textsuperscript{227} See supra notes 194–196 and accompanying text.
\textsuperscript{228} Eskridge & Baer, supra note 24, at 1144–47 & tbl.16.
\textsuperscript{229} See infra Table 9.
\textsuperscript{230} See Eskridge & Baer, supra note 24, at 1168–79 (explaining and analyzing these functional concerns).
tional concerns, making efforts to separate the two impossible. These results therefore may be a product of other unmeasured variables such as functional concerns that are correlated with legal doctrine.

2. Testing the Attitudinal Model. — Applying the simultaneous equation model, we find that ideology also correlates significantly with how Justices vote on deference doctrines. As Table 9 reports, Justices systematically support less deferential regimes for policies with which they disagree. Likewise, Justices are more likely to vote to overturn policies with which they disagree. The coefficient on a Justice’s ideological disagreement with the agency position is positive and highly significant, suggesting that ideological disagreement increases the propensity to overturn the agency. Together, these findings suggest that ideological preferences influence both deference regime votes and outcome votes. These findings strongly suggest that Justices do not select deference regimes solely on the basis of legal considerations. As political scientists maintain, ideology matters.
### Table 9. Maximum Likelihood Estimates for the Bivariate Mixed-Response Probit Model Fit to the Supreme Court Deferece Regime Data

<table>
<thead>
<tr>
<th>Parameter</th>
<th>Maximum Likelihood Estimate</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Deferece Equation:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agency—Justice Ideological Difference</td>
<td>-0.06</td>
<td>0.02*</td>
</tr>
<tr>
<td>Continuity</td>
<td>-0.23</td>
<td>0.02*</td>
</tr>
<tr>
<td>Technical Policy</td>
<td>-0.06</td>
<td>0.04</td>
</tr>
<tr>
<td>Intermediate Policy</td>
<td>-0.04</td>
<td>0.04</td>
</tr>
<tr>
<td>Court-centered Policy</td>
<td>-0.13</td>
<td>0.06*</td>
</tr>
<tr>
<td>Legislative Rule</td>
<td>0.49</td>
<td>0.06*</td>
</tr>
<tr>
<td>Adjudication</td>
<td>0.52</td>
<td>0.06*</td>
</tr>
<tr>
<td>Congressional Delegation</td>
<td>0.60</td>
<td>0.05*</td>
</tr>
<tr>
<td>Agency Interpretation of Its Own Rule</td>
<td>0.04</td>
<td>0.05</td>
</tr>
<tr>
<td>Agency Policy Contrary to Unified Government Preferences</td>
<td>-0.16</td>
<td>0.05*</td>
</tr>
<tr>
<td><strong>Justice-level Fixed Effects</strong>:</td>
<td>Included</td>
<td></td>
</tr>
<tr>
<td>Relative Ideological Proximity of Lower Courts and Agencies</td>
<td>-0.13</td>
<td>0.4*</td>
</tr>
<tr>
<td>Constant</td>
<td>0.06</td>
<td>0.07</td>
</tr>
<tr>
<td>Cut Point 1</td>
<td>0.96</td>
<td>0.02*</td>
</tr>
<tr>
<td>Cut Point 2</td>
<td>1.38</td>
<td>0.04*</td>
</tr>
<tr>
<td><strong>Case Outcome Equation:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>-0.91</td>
<td>0.05*</td>
</tr>
<tr>
<td>Agency—Justice Ideological Difference</td>
<td>0.18</td>
<td>0.01*</td>
</tr>
<tr>
<td>Continuity</td>
<td>0.11</td>
<td>0.02*</td>
</tr>
<tr>
<td>Technical Policy</td>
<td>-0.41</td>
<td>0.04*</td>
</tr>
<tr>
<td>Intermediate Policy</td>
<td>-0.22</td>
<td>0.05*</td>
</tr>
<tr>
<td>Court-centered Policy</td>
<td>-0.24</td>
<td>0.07*</td>
</tr>
<tr>
<td>Legislative Rule</td>
<td>-0.09</td>
<td>0.07</td>
</tr>
<tr>
<td>Adjudication</td>
<td>0.11</td>
<td>0.08</td>
</tr>
<tr>
<td>Congressional Delegation</td>
<td>0.08</td>
<td>0.07</td>
</tr>
<tr>
<td>Agency Interpretation of Its Own Rule</td>
<td>0.01</td>
<td>0.06</td>
</tr>
<tr>
<td>Agency Policy Contrary to Unified Government Preferences</td>
<td>0.06</td>
<td>0.05</td>
</tr>
<tr>
<td>Relative Ideological Proximity of Lower Courts and Agencies</td>
<td>0.34</td>
<td>0.05*</td>
</tr>
</tbody>
</table>

* Statistically significant at the 0.05 level, two-tailed test.

Notes: N = 5897; log-likelihood = -9210.92. The dependent variable in equation 1 is deference regime; the dependent variable in equation 2 is whether the agency is overturned; r represents the correlation between the two equations.

231. All Justice fixed effects were statistically insignificant with the exception of Justices Blackmun and Marshall.

232. The relative proximity was coded so that positive values indicate that the lower courts are closer than agencies. A strategic court would grant less deference under such conditions, so the expected coefficient value is negative.
The results from the simultaneous equation model also demonstrate that Justices do not display distinct preferences over deference regimes. The fixed effects are statistically insignificant for all Justices except Blackmun and Marshall. This finding is in accordance with Part III's aggregate-level analysis suggesting that Justices do not exhibit unique deference regime preferences in their voting patterns. In short, ideological concerns influence deference regime votes. The Justices do not exhibit differences in their aggregate deference regime voting patterns, however. Conservative Justices and liberal Justices support deference regimes at roughly the same overall rates, because each group supports applying more deferential regimes when faced with ideologically compatible agency policies.

The Justices' ideal points illustrate the foregoing dynamic. Ideal point estimates represent the propensity of each Justice to vote for a particular deference regime relative to his or her colleagues. Ideal points are calculated by conducting a factor analysis on deference regime voting data. The factor analysis uncovers a pattern of association in the data, which represents the propensity of particular Justices to support deference doctrine. The analysis is done by performing Bayesian inference via simulation. The algorithm takes the data and the prior distribution and uses Markov chain Monte Carlo (MCMC) to estimate a posterior distribution, which represents the ideal point. The model returns an ideal point estimate for each Justice that maximizes the ability of each factor in the model to explain the deference regime votes. To place the deference regime ideal points in context, the scores are compared to Justice ideology scores used in much current research on the Court. These scores are calculated using a method of statistical inference that is very similar to the technique used to generate the Martin-Quinn ideology

---

233. See, e.g., supra Table 2.
234. For an overview of this technique, see generally Jeff Strnad, Should Legal Empiricists Go Bayesian?, 9 Am. L. & Econ. Rev. 195, 195–203 (2007).
235. Software to conduct this analysis was developed by Andrew D. Martin, Kevin M. Quinn & John Hee Park, MCMCpack 1.0, at http://mcmcpack.wustl.edu (2004).
236. See, e.g., Martin & Quinn, supra note 102, at 146 tbl.1.
scores. The values of the ideal points are not on the same scale, however. Only the order should be compared between deference regime preferences and ideological preferences.

Table 11: Ideal Point Estimates for Justices Over Deference Regimes, 1983–2005

<table>
<thead>
<tr>
<th>Justice</th>
<th>All Cases</th>
<th>Liberal Agency Interpretation</th>
<th>Conservative Agency Interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Mean</td>
<td>95 Percent Interval</td>
<td>Mean</td>
</tr>
<tr>
<td>Blackmun</td>
<td>0.60</td>
<td>0.34, 0.91</td>
<td>-0.71</td>
</tr>
<tr>
<td>Brennan</td>
<td>0.98</td>
<td>0.56, 1.64</td>
<td>-1.45</td>
</tr>
<tr>
<td>Breyer</td>
<td>0.48</td>
<td>0.23, 0.79</td>
<td>-0.83</td>
</tr>
<tr>
<td>Burger</td>
<td>-0.43</td>
<td>-1.24, 0.15</td>
<td>0.91</td>
</tr>
<tr>
<td>Ginsburg</td>
<td>0.36</td>
<td>0.13, 0.61</td>
<td>-0.66</td>
</tr>
<tr>
<td>Kennedy</td>
<td>-0.38</td>
<td>-0.60, -0.15</td>
<td>0.45</td>
</tr>
<tr>
<td>Marshall</td>
<td>1.06</td>
<td>0.62, 1.69</td>
<td>-1.21</td>
</tr>
<tr>
<td>O’Connor</td>
<td>-0.21</td>
<td>-0.41, 0.01</td>
<td>0.23</td>
</tr>
<tr>
<td>Powell</td>
<td>0.07</td>
<td>-0.31, 0.43</td>
<td>0.08</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>-0.45</td>
<td>-0.67, -0.22</td>
<td>0.52</td>
</tr>
<tr>
<td>Scalia</td>
<td>-1.16</td>
<td>-1.68, -0.77</td>
<td>1.21</td>
</tr>
<tr>
<td>Souter</td>
<td>0.21</td>
<td>0.01, 0.45</td>
<td>-0.56</td>
</tr>
<tr>
<td>Stevens</td>
<td>0.70</td>
<td>0.44, 1.00</td>
<td>-0.92</td>
</tr>
<tr>
<td>Thomas</td>
<td>-0.95</td>
<td>-1.34, -0.62</td>
<td>0.97</td>
</tr>
<tr>
<td>White</td>
<td>-0.11</td>
<td>-0.40, 0.16</td>
<td>-0.15</td>
</tr>
</tbody>
</table>

Deference regime ideal points and ideological preferences are strongly related, as reflected in Table 11 and Figure 3. The correlation between ideological preferences and deference regime preferences is 0.92, with liberal Justices favoring less deferential regimes than the conservatives when conservative agency interpretations are at issue. When only liberal agency policies are analyzed, the results are reversed: Liberals support more deferential regimes and conservatives support less deferential regimes. Together, these results show that an independent deference doctrine dimension does not emerge from the Justices’ voting patterns. Instead, deference regime votes closely track votes on final dispositions. This finding reconciles the conflict in the bivariate mixed-response probit model results presented in Table 9 above. Justices have statistically indistinct deference regime ideal points because ideological voting balances out in aggregate. That is, total deference regime voting appears relatively equal because liberal Justices support deferential regimes for liberal agency policies, and conservative Justices support deferential regimes for conservative agency policies.

237. Id. at 137–45.
238. Ideological classification of agency policy decisions is taken from Eskridge & Baer, supra note 24.
Do Justices actively manipulate deference regimes to pursue ideological preferences? Analyzing this question directly would require a window into the cognitive process by which Justices decide cases, which we do not have. There is some indication, though, that the Justices are not systematically manipulating deference regimes. Consider a situation in which Justices face different incentives—close cases as opposed to lopsided cases.

In close cases, Justices seek to win and maintain five votes. As a consequence, they are highly attuned to the preferences of their colleagues, and will tend to balance their preferences about deference doctrine against preferences over other legal issues and over the case holding. Justices may avoid invoking a deference regime that would create dissonance within their tentative majority coalitions or may support a regime favored by a wavering or undecided colleague. The incentives differ in lopsided cases. Because the outcome is apparent and does not depend upon one or two critical colleagues, the authoring Justice in a lopsided case has greater freedom to structure the opinion the way she or he wants, without worrying about securing an uncertain fifth vote. The Justice may therefore invoke her or his preferred deference regime. This preference may be motivated by the attitudinal or strategic concerns mentioned in the theoretical discussion above. Justices may not be entirely unconstrained in these cases, however. In some cases, they may desire to win unanimous support of their colleagues to increase the legitimacy of a decision. Theoretically, however, Justices ought to be, on balance, less constrained in lopsided cases. If their preferences are suffi-
ciently intense and heterogeneous, Justices ought therefore to differ more on deference regime votes in lopsided cases than in close cases.

**Table 12: Deference Regimes Votes in Lopsided Cases**

<table>
<thead>
<tr>
<th></th>
<th>Majority</th>
<th>Concur</th>
<th>Dissent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Regime, Antideference</td>
<td>46.25</td>
<td>65.68</td>
<td>67.05</td>
<td>48.92</td>
</tr>
<tr>
<td>Consultative Deference, Skidmore</td>
<td>33.51</td>
<td>22.51</td>
<td>15.71</td>
<td>31.61</td>
</tr>
<tr>
<td><em>Chevron, Beth Israel</em></td>
<td>17.40</td>
<td>10.70</td>
<td>14.94</td>
<td>16.79</td>
</tr>
<tr>
<td><em>Seminole Rock, Curtiss-Wright</em></td>
<td>2.84</td>
<td>1.11</td>
<td>2.30</td>
<td>2.69</td>
</tr>
</tbody>
</table>

Note: Table provides distribution of deference regimes applied in all majority, concurring, and dissenting opinions. Pearson chi²(6) = 80.3674 Pr = 0.000

**Table 13: Deference Regimes Votes in Close Cases**

<table>
<thead>
<tr>
<th></th>
<th>Majority</th>
<th>Concur</th>
<th>Dissent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Regime, Antideference</td>
<td>47.74</td>
<td>47.78</td>
<td>58.13</td>
<td>51.76</td>
</tr>
<tr>
<td>Consultative Deference, Skidmore</td>
<td>26.50</td>
<td>17.78</td>
<td>14.60</td>
<td>21.49</td>
</tr>
<tr>
<td><em>Chevron, Beth Israel</em></td>
<td>22.65</td>
<td>33.33</td>
<td>25.21</td>
<td>24.15</td>
</tr>
<tr>
<td><em>Seminole Rock, Curtiss-Wright</em></td>
<td>3.10</td>
<td>1.11</td>
<td>2.07</td>
<td>2.61</td>
</tr>
</tbody>
</table>

Note: Table provides distribution of deference regimes applied in all majority, concurring, and dissenting opinions. Pearson chi²(6) = 45.3913 Pr = 0.000

The hypothesis suggested by strategic behavior theory is that Justices will actively manipulate deference doctrine in close cases and will vote more sincerely in lopsided cases. Contrary to the hypothesis, Tables 12 and 13 report our finding that the Justices behave similarly in close and lopsided cases. Thus, they do not vote for deference regimes more frequently in lopsided cases. Instead, they actually opt not to apply any deference regime more frequently in lopsided cases. This suggests that Justices generally devote more effort to close cases and therefore take the time to apply a deference regime. Conversely, they do not spend the effort in lopsided cases to consider whether to apply a deference regime.
Ideal point analysis confirms this result. As Table 14 reveals, Justices behave consistently regardless of case-vote margin. The absolute value of the ideal point scores should not be compared between close and lopsided votes, because the estimates are designed to be compared only to other scores generated using the same data. More importantly, the ordering of the Justices is comparable across analyses. A comparison of the ordering shows that only Chief Justice Burger, Justice Marshall, and Justice Powell displayed significant movement in the rank order. Ideal point estimates for all of these Justices were generated with relatively little data, so the standard errors and associated 95% credible interval are quite large. All other Justices remained within three places of their overall position. This result shows that a very different incentive structure does not induce the Justices to behave differently when applying deference doctrine.

We have several potential explanations for this surprising lack of manipulation. First, and perhaps most important, the Justices do not display unique preferences about deference doctrine in their voting. Although some Justices say (we think sincerely) that they have distinct preferences over deference doctrine, Part III of this Article demonstrates that those preferences are relatively weak; preferences over legislative history doctrine, another area of methodological disagreement not subject to stare...
decis, are stronger for the Justices than their preferences over defer-ence. If the Justices place relatively little emphasis on deference doc-trine, then it would have relatively little effect on intra-Court bargaining. As a result, Justices would have little incentive to engage in such manipulation.

Second, peer monitoring effects may constrain Justices from manipu-lating deference doctrine. Justices may fear that their colleagues with differ-ent ideological preferences will expose implausible applications of deference doctrine. Empirical work such as the pioneering study by Dean Richard Revesz suggests that this dynamic moderates the behavior of appeals court judges. This effect may exist because Justices in the majority adjust their decisions to avoid provoking a dissent. Deliberation among circuit court judges with different ideological perspectives may also have a moderating effect. To be sure, such peer monitoring may be less effective on the Supreme Court. Peer effects may be stronger on appeals courts because judges sit in smaller panels. Moreover, the norms of disagreement differ. In particular, dissents are viewed as more con-frontational on the appeals courts, and so there is more collegial pressure not to issue them. Nonetheless, the fact that the Court is a collegial body likely checks the inclination of Justices to manipulate deference doctrine at the margin.

Third, the law matters, too. The previous subpart demonstrates that legal doctrine influences how Justices vote to apply deference doctrine. Legal concerns may therefore prevent Justices from engaging in blatant manipulation of deference regimes. For instance, Justices may be reluc-tant to deny Chevron deference to a formal agency policy such as a legisla-tive rule or an adjudication with which they disagree because they are concerned about the appearance of misapplying doctrine. The same concern may also reduce strategic behavior in cases where Congress clearly delegated to the agency. In short, the Justices may be loath to bend deference doctrine in the relatively clear cases.

3. Testing the Strategic Model. — The strategic model predicts that the Court considers and anticipates the preferences of Congress and the
President when issuing decisions. The strategic model enjoys much less academic support than the legal and attitudinal models. Law professors generally hew to the legal model, and judges distance themselves from any model suggesting that they are not applying neutral legal criteria when they decide cases; like the attitudinal model, the strategic model undermines the sharp distinction between “law” and “politics” that judges and their law professor allies believe is important to the legitimacy of the rule of law.\(^2\)\(^4\) Yet political scientists have not embraced the strategic model either. Attitudinalists such as Segal and Spaeth have criticized it and have produced empirical studies suggesting that it is wrong.\(^2\)\(^4\)\(^3\) What our data reveal, however, is that the strategic model is supported by empirical evidence.

Accordingly, our simultaneous equation model supports one prediction of the strategic model, as we find that the Justices apply less deferential regimes for agency policies that are likely to be opposed by both the sitting President and Congress. The Justices are also more likely to vote to overturn such policies, but this coefficient is not statistically distinct from zero, as revealed in Table 9. This latter result is consistent with a large body of political science literature, although academics continue to debate the issue.\(^2\)\(^4\)

These findings provide qualified support for the strategic model, but several caveats are in order. First, the measures of the preferences of the Justices, of the median member of Congress, of the President, and the agency policy decision at issue are admittedly rough, and measurement error could theoretically be correlated with an omitted variable that drives the results. On the other hand, measurement error may actually bias the coefficients toward zero, making the findings all the more robust. Second, the fact that the Justices apply less deferential regimes to agency decisions opposed by both Congress and the President does not necessarily indicate that they are concerned about provoking retaliation by making a decision, such as citing \textit{Chevron} instead of \textit{Skidmore}. Instead, the Justices may simply use deference doctrine to justify outcomes that will satisfy the political branches. Third, our finding of a strategic effect is particularly striking because the analysis includes votes by all Justices. Most versions of the strategic model predict that only Justices in the majority are constrained, because the political branches will not respond to votes that fail to change the law. A more precise test of the theory may actually yield stronger results.

Although our results are tentative, they are the first to show that strategic considerations may influence how the Justices apply deference doctrine. If so, then Congress and the President have a greater impact on

\(^{242}\) See, e.g. Edwards, supra note 84, at 1339–54 (criticizing empirical study demonstrating that judges on his court often vote ideologically and strategically).

\(^{243}\) See Segal & Spaeth, Attitudinal Model Revisited, supra note 97, at 44–76.

\(^{244}\) For a review of this literature, see generally Lawrence Baum, The Supreme Court in American Politics, 6 Ann. Rev. Pol. Sci. 161 (2003).
the Court than accounts focusing only on case outcomes suggest. For instance, if the political branches influence the Court’s doctrinal choices, then the effects could easily reverberate among the lower courts, including the D.C. Circuit, which hears many important administrative law cases. The results in this Article do not establish that such dynamics actually occur, but they suggest this as a plausible hypothesis that ought to be tested in the future.

Our results are also consistent with the alternative version of the strategic model advanced by Linda Cohen and Matthew Spitzer. The Justices apply less deferential regimes to agency policies when the Justices are ideologically closer to the lower courts than to agencies. Conversely, the Justices are also more likely to overturn agency policies when the Justices are ideologically closer to the lower courts than to agencies. These findings suggest that the Justices are sensitive to relative ideological preferences of lower courts and agencies, and they use deference doctrine and outcome decisions to delegate strategically.

Although the same caveats mentioned above regarding measurement error are in order, this finding represents an important advance to the academic literature. Existing research has not analyzed what impact the ideology of lower courts and of agencies has on deference doctrine, instead focusing on case outcomes. Our results are the first to do so, and our findings indicate that the Justices’ application of deference doctrine responds to the views of external actors such as lower courts and agencies. If so, this suggests that the ideology of the lower courts actually influences the doctrine that the Court directs to the lower courts. This supports arguments by law professors such as Peter Strauss and positive

---

245. Professor (and University Provost) Elizabeth Garrett suggests to us that Chevron has had the greatest impact on the D.C. Circuit. Indeed, D.C. Circuit judges were early and key proponents of an expansive application of Chevron. E.g., Scalia, Judicial Deference, supra note 15, at 516 (discussing pre-Chevron decisions in the D.C. Circuit that deferred to agency action based on theoretical justification similar to Chevron’s); Starr, supra note 13, at 295–96 (discussing D.C. Circuit’s expansive application of Chevron in recent cases). We found no empirical support for the further claim that D.C. Circuit judges on average have internalized Chevron more than other kinds of judges. Thus, none of the Justices who sat on the D.C. Circuit—Scalia, Ginsburg, and Thomas—had a statistically distinct preference over deference doctrine. (We do not count Chief Justice Roberts, for whom we have too few Supreme Court observations.) Also, we included a variable in our model testing whether Justices who hired more clerks from the D.C. Circuit were more likely to vote for opinions citing deference regimes. The coefficient for this variable did not approach statistical significance, however. Finally, the proportion of D.C. Circuit clerks was not correlated with whether Justices cited deference regimes when authoring opinions. Hence, we are skeptical that the D.C. Circuit has inculcated a culture of deference that has any influence at the Supreme Court level.

246. See Cohen & Spitzer, supra note 12, at 441–56 (laying out model).

247. See supra notes 47–69 and accompanying text (reviewing academic literature on deference doctrine).
political theorists such as McNollgast, who argue that the Court uses doctrine to manage the lower courts.248

This finding also contributes to the debate between Cohen and Spitzer, on the one hand, and Stephenson, on the other, regarding the influence of lower courts and agencies on whether the Justices uphold agencies.249 Our results support Cohen and Spitzer’s argument that the Justices tend to delegate authority to the ideologically closer institution (either lower courts or agencies) and that they use deference doctrine to do so.250 Although our study is far from the final word on the debate over Cohen and Spitzer’s thesis, we do provide an empirically robust basis for supporting their and Peter Strauss’s notion that Chevron involves the Court’s supervision of lower courts as well as agencies.251

V. IMPLICATIONS FOR THE SUPREME COURT’S CONTINUUM OF DEFERENCE

In exploring the implications of our empirical findings, we now abandon City of Jackson as our “representative” case, for City of Jackson reflected several of the hypotheses we tested and rejected in this study. Consider another Supreme Court case that better captures some of the conclusions supported by our empirical analysis: Solid Waste Agency v. United States Army Corps of Engineers.252 According to the government, the Clean Water Act authorized the U.S. Army Corps of Engineers to exercise discretion to deny a waste disposal permit for a group of Illinois cities seeking to dispose of trash in abandoned gravel pits.253 The Corps determined that the gravel pits constituted “navigable waters” subject to protection under the Act. The Corps rejected the permit because waste disposal in the gravel pits would disrupt a habitat for protected birds.254 The cities sued the Corps, alleging that it exceeded its authority under the Clean Water Act: The section of the Act authorizing the Corps to grant permits for discharge of water into “navigable waters” did not extend to gravel pits. As a result, the Corps lacked authority to deny the permit. The Corps responded that its decision was consistent with the text of the Clean Water Act, which defines “navigable waters” as all “waters of the United States,” a category that logically includes gravel pits

248. McNollgast, supra note 111, at 1634; Strauss, One Hundred Fifty Cases, supra note 15, at 1095.
249. See Stephenson, Mixed Signals, supra note 12, at 709 (discussing differences between Stephenson’s findings and Cohen and Spitzer’s findings).
250. See Cohen & Spitzer, supra note 12, at 474–76.
251. See Strauss, One Hundred Fifty Cases, supra note 15, at 1095 (arguing, in leading work of scholarship, that Chevron is effort by Court to manage efforts of diverse array of lower court judges).
254. See id.
that are connected to the national hydrological system.\textsuperscript{255} According to the government, Congress had also provided implicit approval by declining subsequent opportunities to overturn the policy.\textsuperscript{256}

The Supreme Court ruled in favor of the Illinois cities. Writing for the five-Justice majority, Chief Justice Rehnquist concluded that gravel pits did not fall under the Clean Water Act's definition of "navigable waters," so the Corps lacked authority to deny a permit to the cities. The majority first discussed precedent, distinguishing the case from United States v. Riverside Bayview Homes, Inc.\textsuperscript{257} In the earlier case, the Court had upheld a Corps policy applying the same section of the Clean Water Act to wetlands adjacent to navigable waterways.\textsuperscript{258} In Solid Waste, Chief Justice Rehnquist concluded that the Court's earlier decision had hinged on the fact that wetlands were "inseparably bound up with the 'waters' of the United States."\textsuperscript{259} Gravel pits were not so similarly intertwined with navigable waters, however. In response to the Corps's argument that the legislative history supported its interpretation, the majority argued that the legislative background might support the Corps's jurisdiction over wetlands, but was silent on unconnected bodies of water such as gravel pits.\textsuperscript{260}

Only after finding a statutory plain meaning and essentially ruling against the government did the Chief Justice turn to the deference argument. The Chevron regime was apparently applicable, because no one disputed that the Corps was acting pursuant to a congressional delegation of lawmaking authority. Neither the majority nor the dissenting opinion started with Chevron, however, but both closed with a discussion of how that regime should have been applied—a practice that is consistent with our observation that the Justices on the whole treat Chevron more as a canon of statutory construction than as a binding precedent. Although the majority may have considered the possibility that the statutory text was clear, Chief Justice Rehnquist reasoned that, even if the statute were ambiguous, "we would not extend Chevron deference here," because the Corps's decision raised a constitutional issue.\textsuperscript{261} In particular, the policy may have improperly extended Congress's powers under the Commerce Clause, thereby encroaching upon state sovereignty. Absent a clear statement of congressional intent, the majority declined to grant Chevron def-

\textsuperscript{255} Brief for the Federal Respondents at 18–21, Solid Waste, 531 U.S. 159 (No. 99-1178) (invoking Federal Water Pollution Control Act, 33 U.S.C. § 1362(7), for statutory definition of "navigable waters").

\textsuperscript{256} Id. at 21–28.

\textsuperscript{257} 474 U.S. 121 (1985) (unanimous opinion).

\textsuperscript{258} Id. at 139.

\textsuperscript{259} Solid Waste, 531 U.S. at 167 (quoting Riverside Bayview Homes, 474 U.S. at 134).

\textsuperscript{260} Id. at 170–71.

\textsuperscript{261} Id. at 172–73.
ference to a policy raising such constitutional issues. The majority instead followed the canon to avoid constitutional questions.262

Like the Chief Justice’s opinion for the Court, Justice Stevens’s dissenting opinion devoted its greatest attention to legislative history263 and precedent.264 At the end of his opinion, Justice Stevens made a strong appeal to deference. The statutory definition (“waters of the United States”265) was pretty open-ended, and the Court had earlier deferred to the Corps’s broad construction to include property that was part of a larger, interconnected aquatic system.266 Justice Stevens objected that the Court’s invocation of the avoidance canon was untenable, as the Court’s Commerce Clause precedents afforded no reason to doubt the constitutionality of the Corps’s assumption of jurisdiction. Indeed, “[t]he Corps’s interpretation of the statute as extending beyond navigable waters, tributaries of navigable waters, and wetlands adjacent to each is manifestly reasonable and therefore entitled to deference.”267 Although not mentioned by the dissenters, it is also significant that the Corps in Solid Waste was interpreting its own prior regulation (the one upheld in Riverside Bayview) and therefore was entitled to Seminole Rock/Auer deference as well as Chevron deference.268

Solid Waste illustrates several of the empirical themes we have been developing in this Article: The Justices do not follow Chevron and other deference regime decisions as precedents entitled to strict stare decisis effect; they treat deference regimes more as canons of statutory construction; and they are influenced by legal as well as ideological considerations when they decide whether to apply a deference regime and to uphold or overturn an agency interpretation. These empirical themes can be tied to the ongoing debates about Chevron and to the doctrinal framework the Court ought to be developing to guide its own decisionmaking when there is an agency interpretation of the statute on point. Consider three normative doctrinal ramifications of our study.

A. Lowering the Stakes of the Deference Debate

So much of the Chevron scholarship, and the occasional Supreme Court dissent, is overheated with claims that the future of the rule of law and judicial review rise or fall with the precise articulation of Chevron’s domain. Boosters assume that universal Chevron will liberate agencies

262. Id. at 174 (“We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation, and therefore reject the request for administrative deference.”).
263. Id. at 177–82 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).
264. Id. at 185–87.
266. Solid Waste, 531 U.S. at 191–92 (Stevens, J., dissenting) (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131–32 (1985) (White, J., writing for a unanimous Court)).
267. Id. at 192.
268. Id. at 163–65 (majority opinion).
from meddlesome judges and save a lot of money or resources. Critics assume that a broad reading of *Chevron* would imperil the Supreme Court’s *Marbury* role as the guarantor of the rule of law or would turn loose agencies to engage in unreviewed mischief. At the Supreme Court level, these fears and their intensity are not only exaggerated, but they are close to nonsense.

Our empirical analysis ought to have the effect of debunking strong claims evaluating different conceptualizations of deference doctrine. The big picture created by our data is that, notwithstanding their stated (and we think sincere) differences of opinion regarding *Chevron*’s domain, the Justices do not frequently disagree among themselves as to the applicability of *Chevron* or other deference regimes; they vote to apply *Chevron* at roughly equal rates and unanimously ignore *Chevron* in many cases where it is applicable; and even when authoring opinions, they tend to cluster together. This big picture is not only one where Justices rarely treat *Chevron* as a precedent entitled to strict stare decisis effect, but also one where Justices rarely even consistently treat *Chevron* as a high stakes canon.

The same points can be made through analysis of the advocates of diametrically opposed understandings of *Chevron* itself. That is, Justices Scalia and Breyer have advanced opposing visions of deference regimes, but their claims about the importance of the debate are refuted by their own performance as Justices. Part III demonstrates that neither Justice Breyer nor Justice Scalia insists on his preferred regime as a matter of stare decisis and that Justices Scalia, Breyer, and their colleagues join opinions that ignore the deference regimes when clearly applicable. To be sure, when Justice Scalia authors opinions, he is somewhat more likely to invoke *Chevron* than other Justices, but he does not invoke it nearly as often as his universal *Chevron* theory would suggest, nor does he

---

269. See, e.g., United States v. Mead Corp., 533 U.S. 218, 239–40 (2001) (Scalia, J., dissenting) (arguing that Court’s moderate understanding of *Chevron*’s domain is an “avulsive” shift in law and will be a disaster); Vermeule, supra note 91, at 215 (arguing that country would save a lot of money if agencies were substantially left alone by meddling judges); see also David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 Geo. L.J. 97, 141–42 (2000) (arguing that judges should be deferential to agency interpretations, which tend to be more public-spirited than those judges are likely to render).


271. See supra Table 1.

272. See supra Table 2.

273. See supra Table 3 and Figure 2.

274. See supra Table 2 and Figure 1.

275. See supra Table 3 and Figure 2.
often file concurring or dissenting opinions insisting on the application of *Chevron*.276 Also, Justice Scalia frequently authors opinions that follow more informal deference regimes such as *Skidmore*.277 Likewise, when he authors opinions, Justice Breyer is more prone to follow the informal *Skidmore* regime than most other Justices but invokes the more formal regimes about as much as the average Justice278 and rarely writes special concurring or dissenting opinions insisting on *Skidmore*.279

*Solid Waste* is an illustration of the foregoing empirically based conclusion. Recall that the Chief Justice’s opinion for the Court said that *Chevron* would not be applicable even if the statute were ambiguous (because of possible constitutional difficulties)—without a peep out of Justice Scalia, even though the Chief Justice’s observation was at some odds with Justice Scalia’s strongly positivist theory of statutory interpretation.280 Nor did Justice Scalia (or Justice Stevens) even notice that *Seminole Rock/Auer* deference was formally applicable in *Solid Waste*; in other cases, where *Seminole Rock/Auer* cut in conservative directions, Justice Scalia has sometimes been insistent that the Court at least acknowledge the relevance of this deference regime and has demanded that the Court defer unless the statute is clear.281

Correspondingly, Justice Breyer, a strong exponent of a more flexible deference regime, joined every sentence of Justice Stevens’s dissenting opinion, which insisted on strict adherence to the *Chevron* regime.282 Although Justice Breyer is inclined to accord less deference when agencies have adopted dramatically new constructions, he allowed that feature of *Solid Waste* to pass by.

*Solid Waste* also illustrates an important feature of the deference debate that is suggested by our analysis in Part IV. Recall that we found some influence of legal considerations upon the Justices’ behavior in the 667 cases in our data set—but we also found that ideology played a significant role. *Solid Waste* illustrates this latter point. Even though the statutory text (“waters of the United States”) was vast and expansive, five property-protecting ideological conservatives insisted that there was a plain meaning cutting against the Corps under *Chevron*.283 The same conservatives then “discovered” constitutional problems with the Corps’s assertion

---

276. See supra Table 1.
277. See supra Table 3.
278. See supra Table 3 and Figure 2.
279. See supra Table 1.
280. See Liu, supra note 125, at 41 (examining systemically Justice Scalia’s positivist philosophy).
283. Id. at 170 (Rehnquist, C.J., joined by O’Connor, Scalia, Kennedy & Thomas, JJ.).
of jurisdiction over local gravel pits, even though the agency's jurisdiction was supported by scientific evidence that local gravel pits of this sort implicate the national hydrological system (and therefore fall securely within the Court's longstanding Commerce Clause jurisprudence).

Whatever "formal" deference regime the Court says it is applying, the actual fate of an agency's interpretation depends on a cluster of variables—or canons—only one of which is the deference regime. In *Solid Waste*, the Justices devoted little of their attention to the *Chevron* issue; both the majority and dissenting opinions dedicated more pages of the U.S. Reports to discussing the dictionary and other sources for fixing a meaning on "waters"; the expectations of Congress when it enacted the Clean Water Act in 1972 and amended it in 1977; the Court's precedents interpreting that statute, as amended; and the constitutional questions generated by the agency's expansive interpretation. This debate among the Justices—in a high-profile case where no party or Justice disputed that the triggering condition for *Chevron* existed (namely, delegation of lawmaking authority to the Corps)—illustrates our conclusion that deference doctrine functions as one of many competing canons of statutory interpretation. Specifically, it functions much like the plain meaning rule (and the dictionary canon for determining "plain meaning"); the committee report and purpose canons for discerning legislative intent; and the avoidance canon—all presumptions of legislative meaning that the Justices invoke frequently and sincerely, even if unsystematically.

In many cases, moreover, the ultimate disposition will rest on the Justices' ideological agreement with, or at least comfort with, what the agency is doing. "Waters of the United States" can ebb and flow, depending on the normative reaction of the judges more than on their fealty to particular deference regimes. Thus, the ascendancy of *Chevron* within the Supreme Court does not assure that agency interpretations will prevail any more than would be the case under the formally less deferential *Skidmore* regime. Conversely, if the Court abandoned *Chevron* entirely and followed standard statutory interpretation methodology, it is far from clear that agencies would fare any worse.

Our argument here is only that our data lower the stakes of the Court's deference debates; our argument is not that the debates have no stakes whatsoever. To begin with, our study focuses only on Supreme Court practice; formal deference regimes taken seriously by lower courts might generate much of the benefit (or cost) asserted by Justices Scalia and Breyer. Indeed, the empirical evidence for applying *Chevron* by the

---

284. Id. at 163–64, 167–71; id. at 175, 177, 180–82, 188–90 (Stevens, J., dissenting).
285. Id. at 167–72, 174 (majority opinion); id. at 179–82, 185–86, 188–90 (Stevens, J., dissenting).
286. Id. at 167, 171–72 (majority opinion); id. at 176, 181, 184–86, 190–91 (Stevens, J., dissenting).
287. Id. at 172–74 (majority opinion); id at 181, 192–97 (Stevens, J., dissenting).
Columbia Law Review

Court of Appeals for the D.C. Circuit tentatively suggests that this deference regime has made a difference and has reduced that court's tendency toward political polarization with respect to statutory interpretation issues. Moreover, even at the Supreme Court level, the evidence assembled in Part IV supports the conclusion that rule of law norms do matter in some cases. Recall City of Jackson, where deference doctrine (Chevron) made a difference in the Court's disposition, as conservative Justice Scalia went along with a liberal interpretation of a civil rights law because of Chevron. The analysis in Part IV indicates that the Court's practice includes many examples of both City of Jackson (where deference doctrine makes a difference) and Solid Waste (where it does not).

B. Simplifying and Canonizing the Court's Continuum of Deference

Our study provides some ammunition for scholars suggesting improvements in the Supreme Court's "continuum of deference." Not surprisingly, we endorse Eskridge and Baer's proposal for simplifying the continuum, boiling down the proliferation of categories to three: (1) antideference, (2) Skidmore, and (3) Chevron. Our most novel point is the evidence presented in Part IV indicating that Seminole Rock/Auer does not operate as a distinct deference regime at the Supreme Court level: The Court rarely applies that regime when the agency is interpreting its own rules (as in Solid Waste), and agency application of its own rules does not always motivate the Justices to apply any kind of deference regime. This deference regime should be assimilated into Chevron (where the rule was issued pursuant to a congressional delegation of lawmaking authority) and Skidmore (where it was not). The agency should not necessarily receive a deference bounce because it is applying its own prior rule. Our results show that both ideological preferences and legal con-

---

288. See Revesz, Environmental Regulation, supra note 61, at 1729–32, 1767 (arguing polarized voting in D.C. Circuit is strong when judges are reviewing agency decisions for arbitrariness, and less strong when deferring to agency interpretations under Chevron). One of us presented our data to the assembled judges and practitioners at the D.C. Circuit's 2010 Conference; judges of varying ideologies told us that Chevron had some dampening effect on ideological disagreement within the D.C. Circuit. As Dean Revesz cautioned in his article, we need to take judicial self-reporting with a grain of salt. Still, we find such accounts credible.

289. For a discussion of Supreme Court deference doctrine, see supra Part I.

290. See Eskridge & Baer, supra note 24, at 1092 (arguing the Court should apply three deference regimes: antideference, Skidmore, and Chevron).

291. See supra Table 10.

292. In the Court's big Auer decision after 2006 (the terminal date for the Eskridge and Baer data set), Justice Scalia tartly observed that the Court was really just applying Chevron. Coeur Alaska, Inc. v. Se. Alaska Conserv. Council, 129 S. Ct. 2458, 2479–80 (2009) (Scalia, J., concurring in part and concurring in the judgment).

293. See Manning, supra note 13, at 617 (cautioning that Seminole Rock/Auer deference carried risk that agencies would bootstrap their views into law by adopting vague regulations and then interpreting them ambitiously).
cerns influence how the Justices vote to apply deference regimes. Simplifying the deference continuum might mitigate the former impulse and strengthen the latter. Ideological manipulation of deference would be more transparent with a simplified deference continuum. Moreover, accurate application of legal precedent would be easier under a simplified continuum.

Should one go further and eliminate all the “deference regimes,” perhaps because they are so haphazardly applied? One might argue from our data and examples that there is no reason to believe that following an openly functional approach will undermine the deference appropriately due agencies from the Supreme Court. It is quite possible that it would have an effect in the D.C. Circuit, but the same effect might accrue now that its judges are aware (from studies such as this one) that *Chevron* is more like a Potemkin Village than like the Russian Revolution. We remain reluctant to take such a radical approach without more data or more experience, in large part because *Chevron* does make a distinctive contribution by recognizing that, when Congress delegates “lawmaking” authority to agencies, the role of judges ought to be different.294 Relatedly, when Congress has delegated lawmaking authority to agencies, the Supreme Court needs to be clear when it is finding a statutory plain meaning (which interpretation the agency cannot change) and when it is deferring to the agency acting within its zone of reasonableness (which interpretation the agency can change). This suggests the utility of deference debates such as the ones found in the three *City of Jackson* opinions.

On the other hand, the question of how much lawmaking authority Congress has granted the agency is often bound up with the merits of the case, at least at the Supreme Court level. Thus, in *City of Jackson*, seven Justices (all the participating Justices except for Justice Scalia) were not willing to say that Congress delegated lawmaking authority to the EEOC to create a disparate impact claim for relief.295 Nor in *Solid Waste* were the five majority Justices willing to say that Congress delegated lawmaking authority to take wetlands regulation to the furthest reaches of Congress’s own Commerce Clause authority. This suggests the intuition, which we have not tested, that congressional delegation issues and merits issues are often interconnected; they are not entirely separable issues. In those cases, *Chevron* is not doing any distinctive work—but there are probably enough Supreme Court cases where it is doing substantial work to counsel against ending the *Chevron* analysis.296 Another ramification of our

294. This is not a novel point. For an excellent conceptual statement, see Louis L. Jaffe, Judicial Review: Question of Law, 69 Harv. L. Rev. 239, 249–57 (1955).

295. Smith v. City of Jackson, 544 U.S. 228, 239–40 (2005) (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ.) (plurality opinion) (concluding statute itself authorized recovery in disparate impact cases); id. at 262–67 (O’Connor, J., joined by Kennedy & Thomas, J.J., dissenting) (arguing this was not case where agency exercised its delegated authority). The Chief Justice did not participate in *City of Jackson*.

296. For an example where a “liberal” Democrat Justice went along with “conservative” agency cost-benefit innovation out of deference to the EPA, see Entergy
analysis is to reinforce the possible utility of an antideference regime where constitutional or other normative concerns trump both *Chevron* and *Skidmore* and reverse the burden: The agency loses unless it can show clear statutory support for its interpretation.

If one wants a doctrinal formulation for our normative analysis, we suggest pitching the boiled-down deference regimes as canons of statutory construction, along the following lines:

- **Antideference**: a clear statement requirement for the agency to demonstrate that statutory text authorizes its expansive statutory interpretation when the statute is penal, or the interpretation poses genuine constitutional difficulties.
- **Skidmore**: a presumption favoring agency interpretations that are longstanding (especially if there has been public as well as private reliance) and/or that involve the application of special expertise to technical problems.
- **Chevron**: a presumption favoring agency interpretations issued pursuant to congressional delegations of lawmaking authority to agencies, with the corollary that agencies can alter their interpretations within the zone of reasonableness suggested by the statutory scheme.

Chief Justice Rehnquist's majority opinion in *Solid Waste* is an example of the first canon in operation: Because the Court believed that the Corps's interpretation was on the constitutional periphery, it wanted a clearer statement from Congress before it would allow the agency to venture that close. Justice Stevens's plurality opinion in *City of Jackson* illustrates the second (*Skidmore*) canon: Because the Court believed that the EEOC had consistently maintained that the ADEA provided a cause of action for disparate impact liability, it presumed in favor of such a construction. Justice Scalia's concurring opinion in *City of Jackson* and Justice Stevens's dissenting opinion in *Solid Waste* are classic examples of the third (*Chevron*) canon: Because those concurring or dissenting Justices believed that there were agency interpretations rendered pursuant to congressional delegation of lawmaking authority, they were going to follow those interpretations unless inconsistent with the relevant statutory texts.

The Court should also clarify the scope or contours of these canons (or of the existing deference regimes). Surely, the Court should clarify *Chevron*'s domain, perhaps announcing that agencies would enjoy *Chevron* deference for any regulation promulgated as a result of congres-

---

298. *City of Jackson*, 544 U.S. at 239–40 (plurality opinion).
299. Id. at 243–47 (Scalia, J., concurring in part and concurring in the judgment); *Solid Waste*, 531 U.S. at 177–82 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).
sional delegation of substantive rulemaking authority and for any order accompanying an adjudication pursuant to congressional authorization. The Court might at some point include a nonexclusive list of statutory authorizations that meet these requirements. A simplified set of clearly defined deference canons or regimes would have a higher probability of consistent application than the current system. This consistency would make deference doctrine more transparent and predictable, sending a clearer message to the lower courts and reducing reliance concerns among litigants. Again, this might reduce the Justices' tendency to allow ideology to influence application of deference and might increase the importance of legal concerns.

Simplification and clarification proposals are probably the most that can be accomplished by focusing on deference doctrine generally. More ambitious proposals promising great benefits from a rethinking of the deference canons suffer from the implausibility of providing those benefits and from the likelihood of offsetting costs. For example, our empirical findings throw cold water on Justice Scalia's view (reflected in his City of Jackson concurring opinion) that all interpretations endorsed by an agency's head after some administrative deliberation should receive Chevron deference. Heroically and unrealistically assuming that universal deference would be a good thing—namely, the advantages outweigh the drawbacks—it is unlikely that the judicial branch would willingly hand over so much power and interpretive authority to the executive branch. Indeed, our study suggests that, even in Chevron's more limited domain (where there has been congressional delegation of lawmaking authority), the Supreme Court has not handed over ultimate interpretive authority to agencies. On issues they care about, like property (Solid Waste) and civil rights (City of Jackson), the Justices retain the final say. The correlation between ideological preferences and application of deference further supports this point.

If one really agreed with Justice Scalia and his academic supporters that lower court judges are not to be trusted and agencies should receive near absolute deference when the statute is unclear, a theoretically better doctrinal proposal is the suggestion by Professors Jacob Gersen and


302. See supra Table 11.
Adrian Vermeule that *Chevron* be transformed into a voting rule: If the *Chevron* trigger is met, the agency interpretation prevails unless the Supreme Court rejects it by 6–3 or a more lopsided majority. In a thoughtful and learned response, Professor Richard Pierce says that such a proposal would transfer too much interpretive authority to the executive branch and, fortunately, has no chance of being adopted. If one agrees with Professor Pierce (as we do) that judges perform useful monitoring of executive department interpretations, the Gersen-Vermeule proposal ought to be rejected. But if one believes that judicial second-guessing of agency interpretations is fraught with errors and other costs that outweigh its benefits, then our study supports their view that a bright-line voting rule could be superior to the current approach, whether understood as a canon or as a binding precedent.

Our caution is that *Chevron* as a supermajority voting rule would not capture all of the benefits promised by Gersen and Vermeule and would have an unacknowledged cost. The voting rule would not capture all the promised benefits, so long as the trigger required five Justices to make a particular finding (such as congressional delegation of lawmaking authority). As *City of Jackson* illustrates, there is often legitimate debate over *Chevron’s* domain, and a supermajority voting rule would certainly raise the stakes over the domain issue and produce more decisions where a majority of the Court would refuse to pull the trigger. The unacknowledged cost is illustrated by *Solid Waste*, where none of the Justices denied that *Chevron’s* trigger had been pressed. Under the Gersen-Vermeule voting rule, the Corps of Engineers’ interpretation would, in theory, have prevailed, even though five Justices were strongly opposed to it. On the one hand, as we just suggested, the majority Justices would have been tempted to say that *Chevron’s* trigger had not been activated; indeed, this is one reading of the majority opinion. On the other hand, the majority Justices would have been tempted to strike down the agency action as unconstitutional in some cases. Overall, the hydraulic effect of the proposal would be to motivate the Justices toward more constitutional activism (how much more is impossible to foresee). This is potentially a significant cost to society, because it takes more issues out of the political process—precisely contrary to *Chevron’s* primary virtue (leaving policy issues with the political process).


C. What Is the Best Way to Assure Judicial Deference to Agency Interpretations?

As a normative matter, we are unpersuaded by commentators who claim that the Supreme Court is not deferential enough to agency statutory interpretations. But it is hardly unreasonable to reach such a conclusion. (Let us be clear: Defenders of the current level of judicial review have no more evidence supporting the status quo than critics have for their position.) Is a liberalization of deference regimes, such as universal *Chevron*, a plausible way to achieve greater judicial deference? Our empirical survey suggests that it is not: The Justices follow existing deference regimes inconsistently, and they are unlikely to be more conscientious about adhering to a liberalized *Chevron* regime.

Our analysis also suggests better ways to achieve the goal of judicial acquiescence in agency innovations. Our suggestions are addressed to Congress and to the agencies—this is perhaps appropriate in light of *Chevron*’s emphasis on the greater legitimacy for policymaking accomplished by Congress (primarily) and agencies (secondarily).

On the one hand, we would suggest that Congress deliberate about how much it trusts agencies versus courts to implement statutes—and then draft appropriate delegations. If Congress trusts courts to implement the statute better, there should be no or just limited delegation of authority to the agency. Also, Congress ought to consider antideference provisions in statutes that delegate rulemaking (or other authority) if Congress wants hard look judicial scrutiny. Conversely, if Congress trusts the agency to implement the statute better than courts, Congress should draft broad delegations to the agency. Because our study establishes that the Supreme Court applies deferential review (even if not usually *Chevron*) and goes along with agency views most often when there has been a broad congressional delegation, such a move would probably be

---

305. For scholars hailing the administrative state and urging strong judicial deference (and hence a broad understanding of *Chevron*), see, e.g., Vermeule, supra note 91; Frank B. Cross, Pragmatic Pathologies of Judicial Review of Administrative Rulemaking, 78 N.C. L. Rev. 1013, 1014–57 (2000) ("Judicial review functionally undermines the substance of the law by pledging fealty to its letter. The resulting effects on administrative programs alone should be sufficient to dejustify judicial review."); Spence & Cross, supra note 269, at 128–42 (defending public choice theory and noting that “the delegation of decisionmaking power to unelected bureaucrats is true to the spirit of Madisonian democracy, and . . . the scholarly obsession with countermajoritarian difficulties is best understood as a modern variant of the populist challenge to Madisonian liberalism, rather than a defense of founding principles”); Cass R. Sunstein, Beyond *Marbury*: The Executive’s Power To Say What the Law Is, 115 Yale L.J. 2580, 2580–2602 (2006) (arguing *Chevron* is a “kind of counter-*Marbury*” and that “it suggests that in the face of ambiguity, it is emphatically the province of the executive department to say what the law is”).


efficacious. Our results suggesting that the Justices pay heed to congressional preferences when applying deference doctrine further support this point. Finally, such a move would be democratically legitimate, as our elected representatives in Congress would be providing the needed trigger, and they could calibrate where deference ought to be due and where not.

On the other hand, the agency can increase the likelihood that its interpretations receive greater deference by following formal policymaking processes: either notice-and-comment rulemaking or formal adjudication. The data establish that the Supreme Court is most likely to apply a deference regime when Congress has delegated lawmaking authority to the agency and the agency has followed a deliberative process such as notice-and-comment rulemaking.308

Likewise, agencies are most likely to prevail under these circumstances, as the EEOC did in City of Jackson.309 (Contrast Solid Waste, where the Corps of Engineers did not prevail, in part because it had not engaged in a public deliberative process to justify an expansive assertion of wetlands jurisdiction.310) Like our suggestion for Congress, this recommendation enhances democratic legitimacy. Formal agency processes grant greater direct participatory rights to affected parties. These processes also empower affected parties to monitor the agency on behalf of Congress and the President.311

VI. JURISPRUDENTIAL IMPLICATIONS

Read through the lens of our empirical findings, Solid Waste also suggests some broader implications of our present study. We label these implications "jurisprudential" because they are not prescriptions about the Supreme Court's doctrinal formulations so much as they are conclusions about how the law works at the Supreme Court level. As before, we caution that our study does not treat the larger system of lower courts, with Supreme Court review, created under the auspices of Article III. Conclusions about that larger system would require a much more ambitious empirical study, but the one we have conducted does suggest some important thoughts about jurisprudential debates concerning the rule of law, stare decisis, and rules versus standards. We conclude with some thoughts about the role of norms in Supreme Court statutory interpretation.

308. See supra Table 7.
309. See supra Table 8.
A. Difficulty of Giving Stare Decisis Effect to Methodological Reasoning

Some judges and law professors maintain that some of the Supreme Court's methodological decisions ought to be precedents entitled to stare decisis effect at the Supreme Court level as well as among lower courts. Our results and previous discussion demonstrate that such a stare decisis model captures neither the formal presentation nor the reality of the Supreme Court's treatment of deference doctrine.

We now extend our analysis to other methodological issues such as word meaning, legislative history, statutory purpose, constitutional issues, and even statutory plain meaning. *Solid Waste* illustrates how lurking constitutional issues might throw a monkey wrench into how “plain” the Justices find statutory text to be: The majority found clarity in the soupy term “waters” where the dissenters did not, and surely the difference was not one of methodology. A more recent example is even more dramatic. In *Northwest Austin Municipal Utility District v. Holder*, the Court ruled that a utility district was a “political subdivision” eligible to opt out of the Voting Rights Act, even though the statutory definition of “political subdivision” did not reasonably include the district. Chief Justice Roberts's opinion for the Court—including arch-textualist Justice Scalia—declined to apply the plain meaning rule but certainly cannot be read as “overruling” the plain meaning rule. Like a canon, and unlike a precedent, the plain meaning rule represents a judicial practice that can be invoked, or not, depending on how weighty its underlying value might be. In *Northwest Austin*, the plain meaning rule was outweighed by the Court’s reluctance to tackle the serious constitutional issue presented by section 5 of the Voting Rights Act.

We use the plain meaning rule as our opening example because it is the one methodological canon we would expect the Supreme Court to honor most consistently, yet the Justices do not treat it as a matter of stare decisis. This is much more true of canons relating to legislative history. In *Riverside Bayview*, the Supreme Court (Justice Stevens writing) paid lavish attention to and relied on the 1977 Amendments to the Clean Water Act—while in *Solid Waste* the Court (Chief Justice Rehnquist writing) said that legislative amendments constituted subsequent legislative his-

---

312. E.g., Foster, supra note 77, at 1884–99; Gluck, supra note 19, at 1771–811 (discussing favorably several state court systems that treat statutory interpretation methodology as matter of stare decisis); cf. Antonin Scalia, Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws, in *A Matter of Interpretation* 3 (Amy Gutmann ed., 1997) (treating statutory interpretation as matter that should be settled by precedent but without discussing it in stare decisis terms).


tory that were too unreliable to be decisive. Justice Scalia, the Court's biggest critic of legislative history generally and of committee reports in particular, would never treat Riverside Bayview as a precedent settling the issue of committee reports. Yet in Rapanos v. United States (the Court's most recent interpretation of the jurisdictional reach of the Clean Water Act), his plurality opinion carefully treated Riverside Bayview as a binding precedent allowing the Corps of Engineers to regulate property adjacent to traditionally navigable waters (a jurisdictional expansion Scalia would not likely have endorsed as a matter of first impression).

Although Justices sometimes seem to treat Chevron as binding as a matter of stare decisis (illustrated by Justice Scalia's concurring opinion in City of Jackson), Chevron is more typically treated like a canon of construction (illustrated by Justice Stevens's opinion for the Court in City of Jackson, by Chief Justice Rehnquist's opinion for the Court in Solid Waste, and probably by Justice Scalia's plurality opinion in Rapanos). This idea can be generalized: In matters of statutory interpretation methodology, it is harder for the Supreme Court to follow a stare decisis approach than it is in matters of statutory substance.

This conclusion initially struck us as counterintuitive. Two of the core values of stare decisis are legal predictability and judicial economy. If the Supreme Court always excluded legislative history (including committee reports) from consideration in statutory cases, as the British House of Lords did until 1993, judges would follow a more parsimonious methodology; such a trimmed back method might generate more predictable results and probably would save judicial time and energy. Yet these virtues of stare decisis have not prevailed on matters of methodology even in England, where the House of Lords jettisoned its exclusionary rule in 1993—and efforts by the Lordships to create a new stare decisis regime to govern the use of legislative materials have on the whole been unsuccessful. Part III of this Article finds that even Justice Scalia, who seems to believe (intensely) that Chevron ought to govern as a

319. See Pepper v. Hart, [1993] A.C. 593 (H.L.) 598-603 (appeal taken from Eng.) (discussing previous precedents precluding English judges from relying on parliamentary debates when construing ambiguous statutes, and then overruling those precedents).
320. See Foster, supra note 77, at 1884-97 (making argument for giving stare decisis effect to methodological decisions).
matter of stare decisis, does not behave any differently than his colleagues in the general run of cases and, indeed, authors opinions that routinely ignore Chevron even though his universal-application interpretation would demand that the “precedent” be followed, distinguished, or at least discussed.

Solid Waste and the other wetlands cases suggest some reasons why stare decisis does not stick as well in the realm of statutory methodology as it does in the realm of statutory substance. One reason invokes a third value commonly associated with stare decisis, namely, reliance. If the Supreme Court rules that the Corps of Engineers can regulate land adjacent to traditional navigable waters as “waters of the United States,” as the Court did in Riverside Bayview,322 agency officials, state officials, legislators, lawyers, and land planners will rely on that interpretation as they interact all over the country. Especially with regard to property interests, Americans rely on settled law, including judicial doctrine, as they plan their activities.323 This is a powerful reason for even regulation-hating Justices such as Justices Rehnquist and Scalia not to revisit the Court’s holding in Riverside Bayview (though not a good reason to expand that holding to increase the Corps’s jurisdiction beyond the property explicitly covered by the earlier precedent). Indeed, reliance is probably a more powerful support for stare decisis for property precedents than the rule of law and judicial economy reasons—but it is not so powerful for matters of methodology. One might say that Congress relies on judicial methodology when it passes statutes, because legal staff and lobbyists tell Congress how the statute will probably be applied, but the leading empirical study found that congressional staff often ignored the relevant statutory interpretation techniques actually employed by the Supreme Court.324 This reliance interest is, typically, not very powerful.

Consider a homely example. The legislature adopts a law fining persons who bring a “vehicle” into a public park,325 and the state’s highest court relies on legislative history to interpret the law not to cover tricycles (a “vehicle,” broadly understood, but not the “intended” meaning of the term according to the state justices). Parents and kids will rely on that interpretation, not only to bring tricycles into the park, but also to make decisions about how to spend money (more money will be spent on tricycles). Legislators will rely on that interpretation as well; if they revise the

324. See Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 615 (2002) (“It was not that the staffers did not know the rules or recognize the interpretive virtues; it was that those virtues frequently were trumped by competing virtues demanded by the institutional context of the legislature.”).
vehicles-in-the-park law, they might decide not to create a statutory definition of "vehicle," if they are happy with the evolving law on the matter. Park administrators will rely on the interpretation as they maintain the park; for example, they might create specific tricycle paths for kids to use. If the court adopted a new interpretive regime, say one that excluded legislative history, some legislators and law professors might object, but few if any citizens, lawyers, or administrators would say that their reliance interests were sacrificed by the regime shift. If, however, the court also said it was overruling the earlier precedent exempting tricycles from the prohibition and fine, there would certainly be howls of protest, in large part because of reliance interests.

Relatedly, people care more about statutory substance than they care about interpretive process. It is more important to have clear winners and losers when the Court is deciding substantive matters under a statute than when the Court is deciding whether to exclude or sometimes consider legislative history. Perhaps people ought to care more about interpretive process, but the fact is that they do not. The statutory issues that deeply engage the average citizen include matters such as the permissibility of race-based affirmative action in the workplace, efforts to expand marriage (or create a new institution) to include lesbian and gay couples, "green" restrictions on traditional uses of private property, and the allowance of official torture against detained persons, especially when there is reasonable doubt that they are really enemies or terrorists. Our analysis of deference doctrine suggests that the Justices often behave similarly, prioritizing outcomes over process. This phenomenon is even more acute when deference doctrine directly conflicts with substantive stare decisis.

Finally, statutory interpretation methodology itself is a cluster of values and concerns that do not lend themselves to a rule-based stare decisis. Statutory interpreters rely on plain meanings for rule of law and legislative supremacy reasons. Evidence of legislative intent (such as the statute's drafting and deliberation history) can be useful evidence relevant to both values, but more directly serves the additional value of deference doctrine suggests that the Justices often behave similarly, prioritizing outcomes over process. This phenomenon is even more acute when deference doctrine directly conflicts with substantive stare decisis.

326. Cf. Nathaniel Persily, Introduction, in Public Opinion and Constitutional Controversy (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (focusing on American public's opinion of these issues to allow "evaluation of the costs and benefits of a more pluralized and less court-focused approach to constitutional development").

327. See Pierce, Role of Theory, supra note 15, at 485 n.92, 504 (noting "judge's basic political philosophy shapes the amount of deference he will give to agency actions").

328. Sydney Foster makes the important point that stare decisis can operate in the domain of standards as well as that of rules, but does not deny that stare decisis will tend to operate differently in each realm, unless there is a "rulification" of the standard, as the Supreme Court often will do. Foster, supra note 77, at 1901–05 (quoting Frederick Schauer, The Tyranny of Choice and the Rulification of Standards, 14 J. Contemp. Legal Issues 803, 803 (2005)). Our concern is that statutory methodology resists hard and fast rulification; even the uncontroversial plain meaning rule gives way in a lot of cases that are not specified beforehand.
mocracy; larger normative concerns, such as Congress's constitutional authority, might bend a statute in another direction altogether, yet judges take these into consideration as well (vide *Solid Waste*, where the constitutional concern seems to have been paramount). In short, statutory interpretation methodology does not seem susceptible to the rule-like approach of stare decisis—instead, it is what John Ferejohn and one of us has called an “interpretive regime,” a web of considerations with different and varying weights rather than a set of hierarchical rules. Note that when legislatures codify statutory interpretation methodology, they usually provide laundry lists of considerations and not sharply delineated rules. At least some of these rules are going to be in tension with other rules, undermining efforts at strict stare decisis application. The inevitable vagueness of these rules complicates the task even further.

We have sympathy for the recommendations of younger scholars such as Sydney Foster and Abbe Gluck who argue for bringing more order to statutory interpretation methodology. As a normative matter, in fact, we find that the case for stare decisis is especially strong for the core *Chevron* proposition that when Congress delegates lawmaking authority to an agency, judges are required to defer to any reasonable agency interpretation, unless Congress has resolved the issue in the statute. This is a foundational principle of the modern regulatory state—yet the Justices (including Justice Scalia) do not even afford the principle lip service in most cases where it is applicable, much less stare decisis effect. And when the principle is applicable, it is sometimes trumped by other considerations (canons), as in *Solid Waste*, where the avoidance canon trumped the *Chevron* canon.

Procedurally, we think that “more order” (if it is to be had) will come through more candid and filled out interpretive regimes (the canons idea) rather than through the mechanism of stare decisis. Realistically, we are pessimistic that the Supreme Court will actually adhere to a more rigid regime than the one it has followed for the last several generations. But this debate also has interesting implications for the older rules versus standards debate, to which we now turn.


331. Foster, supra note 77, at 1867 (advocating "giving stare decisis effect to doctrines of statutory interpretation"); Gluck, supra note 19, at 1846–55 (arguing for interpretive consensus).

332. See supra text accompanying notes 261–262.
B. Rules Versus Standards: Practical Constraints on the Justices' Discretion

Scholars and judges typically assume that bright-line rules are more constraining on judicial and administrative decisionmakers than context-saturated standards. 333 This assumption is one of the few points of wide agreement in the longstanding debate about the relative utility of rules and standards. 334 Notably, however, we are not aware of any rigorous empirical evidence to this effect, and there is good reason to doubt or qualify the conventional wisdom. To be sure, it is plausible to think that bright-line rules are more constraining under many circumstances. A law that says drivers may not exceed sixty-five miles per hour usually constrains judges more than a law that says drivers should not "drive faster than conditions safely warrant." But it is also plausible to think that standards will sometimes constrain judges more. In our opinion, a law that tells judges the Corps of Engineers can regulate the "waters of the United States" constrains them less than a law that tells judges that the Corps can regulate property only when they can demonstrate through scientifically reliable evidence that the property is an integral part of a regional hydrological system. The reason is that the bright-line term ("waters of the United States") is susceptible to many different meanings, depending on context and the viewpoint of the interpreter. In contrast, the hydrological system approach requires verification by scientists, whose arguments are buttressed by objectively determinable tests and measurements. In short, context-sensitive legal directives (like standards) can sometimes be more constraining than context-independent directives (like rules).

Likewise, an interpretive method that tells judges to consider only the "plain meaning" of the statutory text might sometimes constrain judges more than a method that tells judges to consider textual plain meaning and the statute's legislative history—but not always, and perhaps not typically. Recall the vehicles-in-the-park statute. If a judge just consulted the statutory text, we have no idea whether she would apply the statute to tricycles; it would depend, completely, on how broadly the judge wanted to read the term "vehicle" and perhaps whether she follows the rule of lenity, which directs that judges should interpret penal statutes against the state. A judge who consulted the legislative history as well as the text would be more constrained if the history gave some examples of what the legislators were aiming at (for example, motorized machines,

---


a common understanding of "vehicles") or even the legislative purpose (such as noise and other pollution from motorized machines). In short, a more context-oriented approach to statutory interpretation might, overall, constrain judges more than a parsimonious textualism. Indeed, this is precisely what Professors James Brudney and Corey Ditslear have demonstrated empirically in their impressive survey of the Supreme Court's labor cases decided between 1969 and 2004.

As an abstract matter, therefore, there is no compelling reason to think that a rule-like approach such as *Chevron* will necessarily constrain judges more than a standards approach such as *Skidmore*. Is there a solid reason to think that a regime treating *Chevron* as a matter of stare decisis will "constrain" Supreme Court Justices more than a regime treating *Chevron* as a canon of statutory construction? Consider this contrast within the Court. Justice Scalia has the broadest understanding of *Chevron* among the Justices and sometimes says *Chevron* is a precedent (a rule) that must be followed, yet he is one of the less deferential Justices on the current Court. Justice Breyer, in contrast, considers *Chevron* more as a canon or balancing factor (standards), yet he is the most deferential Justice who served through most of the period our survey covers and is the most deferential Justice on the current Court. This contrast does not prove that standards are better than rules on the dimension of constraint—but it does undermine the facile assumption that rules are always more constraining than standards. It also suggests the hypothesis that other factors, such as a judicial temperament or a nondogmatic approach to one's own views, are more important to agency deference than the form of legal directives.

*Solid Waste* suggests that this point can be generalized beyond Justice Scalia. The Court's most conservative Justices (Figure 3) joined the Chief Justice's *Solid Waste* opinion that conceded the applicability of the *Chevron* regime but refused to defer to the agency's interpretation, either because they implausibly thought "waters of the United States" sets unambiguous limits on the agency or because they worried that the agency was pushing the statute toward the constitutional periphery. (No Justice argued, however, that the agency's application was actually unconstitutional.) Even if

---

335. For a prominent recent example of the discretion afforded by strict textualism, see Justice Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715, 716 (2006) (citing only one of many examples from Webster's Dictionary for meaning of word "waters").

336. See *Brudney & Ditslear*, supra note 165, at 227–28. The authors argue that legislative history probably constrains judges more reliably than text-based canons do. See id. at 228 ("The findings here indicate . . . that the relatively neutral aspects of legislative history reliance . . . may be explained at least in part based on certain recurrent and principled judicial approaches to the record."). The authors argue that legislative history probably "constrains" judges more reliably than text-based canons do. Id.

337. For the contrast between highly deferential Justice Breyer and somewhat less deferential Justice Scalia, see *Eskridge & Baer*, supra note 24, at 1154 tbl.20; *Miles & Sunstein*, supra note 64, at 832–33 (finding even sharper difference between deferential Justice Breyer and less deferential Justice Scalia, but from more limited data set).
it were considered binding precedent, *Chevron* is filled with loopholes (like the constitutional avoidance canon) and depends in application upon how dogmatic one chooses to be about construing open-textured language ("waters")—and so it is hard to see how constraining it would be in the "hard cases." *Solid Waste* also illustrates the old saw that rules and standards tend to merge as they are applied over time: Bright-line rules accumulate exceptions, qualifications, and loopholes that make them more like standards, while standards are applied in ways that create regularities along the lines of rules.\(^{338}\)

The five majority Justices (Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) in *Solid Waste* were together on the Court for most of the twenty-two years of Supreme Court cases in our data set.\(^{339}\) They were all jurists who emphasized statutory plain meanings and the authority of *Chevron*, at least as a strong canon or as binding precedent.\(^{340}\) All appointed by Presidents Reagan and Bush, they were a block of political conservatives.\(^{341}\) Our data demonstrate that these conservative Justices went along with conservative agency interpretations at significantly higher rates than they did with liberal agency interpretations and that this statistically significant ideological voting occurred in cases where *Chevron* was applicable as well as in the larger data set. This evidence cuts against the conclusion that *Chevron* always constrains these conservative Justices.\(^{342}\)

338. This point originates in Hart & Sacks, supra note 90, at 139–41.
339. Between 1991, when Justice Thomas joined the Court, and 2005, when Justice O'Connor left it, these five conservative Republican Justices served continuously together on the Court. They were, for example, the majority block that decided Bush v. Gore, 531 U.S. 98 (2000).
340. See Gonzales v. Oregon, 546 U.S. 243, 275–83 (2006) (Scalia, J., joined by Roberts, C.J. & Thomas, J., dissenting) (treating *Chevron* and *Auer* as precedents entitled to serious stare decisis effect and emphasizing statutory plain meaning with regard to agency delegation issue); Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171–72 (2001) (Rehnquist, C.J., joined by Kennedy, O'Connor, Scalia & Thomas, JJ.) (trumping agency's view with statutory plain meaning and presenting decision as consistent with *Chevron*); K Mart v. Cartier, 486 U.S. 281, 291–93 (1988) (Kennedy, J.) (following statutory plain meaning and deferring to Agency on issue where there was ambiguity). A final example is Sutton v. United Air Lines, 527 U.S. 471 (1999), in which Justice O'Connor, writing for seven Justices, including all five conservatives, argued that *Chevron* should be applied only to instances where Congress has clearly given an agency lawmaking authority over the particular issue in suit. Id. at 478–79, 482–84.
341. See supra Figure 3.
342. Is the fact that conservative Justices such as Scalia and Rehnquist went along with a majority of liberal agency interpretations in cases where they applied the *Chevron* framework evidence that *Chevron* exercises some constraining power? Unfortunately, no. This is the simultaneity problem again: Willingness to go along with the agency interpretation is correlated with willingness to cite *Chevron*. Better evidence is the fact that
To be sure, our evidence does not establish that *Chevron* imposed no constraint whatsoever on these conservative Justices, who after all frequently went along with liberal agency interpretations.\textsuperscript{345} *City of Jackson* might be an example of a case where a conservative (Justice Scalia) voted for a liberal agency interpretation because he felt constrained by *Chevron*. It is not clear how many votes by conservative Justices had that feature, for *Solid Waste* is much more representative of our data than *City of Jackson* (where only Justice Scalia surprised us with his vote). Most of the cases presenting salient ideological divisions went the way of *Solid Waste*, where neither ambiguous statutory texts nor *Chevron* could save a liberal agency interpretation from invalidation.\textsuperscript{344} And there are important cases where an apparent plain meaning and *Chevron* deference cut in favor of liberal agency interpretations, yet the conservative Justices still invalidated the agency rules through manipulation of plain meaning analysis and construction of new loopholes around *Chevron*.\textsuperscript{345}

**CONCLUSION: NORMS MATTER**

At the Supreme Court, norms matter. This is easy to see in *City of Jackson*, where the non-discrimination norm was in play. The longstanding EEOC view, that facially neutral policies can still be “discriminatory” when their impact is felt by a protected group and their business justification is weak, is a view that American culture has accepted as a good norm.\textsuperscript{346} It surely inspired the Court’s four moderate-to-liberal Justices to join Justice Stevens’s plurality opinion which tried to hard wire the EEOC’s interpretation into the statute—but it also likely motivated Justice Scalia, a strong conservative, to “go along” with the agency, with

---

\textsuperscript{343} See supra Table 11.

\textsuperscript{344} See supra Table 11 (showing Justices flip deference preferences based on changes in ideological content of agency decisions being reviewed).

\textsuperscript{345} In one case, the five conservative Justices read “best technology available” to mean agency “cost-benefit analysis.” See Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1510 (2009). In another case, the five conservative Justices made holistic arguments that Congress did not delegate authority to revise tobacco rules to the FDA and found that these arguments trumped the statutory plain meaning and *Chevron*. FDA v. Brown & Williamson Co., 529 U.S. 120 (2000). Finally, four conservatives (one conservative did not participate in the case) plus Justice Ginsburg imposed a narrow meaning on “modify” and trumped *Chevron* when the agency was making a “major” policy shift. MCI Telecommc’ns. Corp. v. AT&T Co., 512 U.S. 218 (1994).

\textsuperscript{346} Donald Schwartz, Quinnipiac Univ. Polling Inst., Quinnipiac University Poll: U.S. Voters Disagree 3–1 with Sotomayor on Key Case, Quinnipiac University National Poll Finds; Most Say Abolish Affirmative Action (reporting that in wake of Supreme Court’s 2009 decision in Ricci v. DeStefano, 129 S. Ct. 2658 (2009), 70% of Americans believed that City of New Haven should be required to use results of promotion test even if result was that no blacks were promoted).
the option of a later shift in policy.\textsuperscript{347} He was probably not wild about the EEOC’s policy, but he recognized that it was the mainstream viewpoint (accepted by Republican and Democratic administrations alike) and felt that he had no text-based reason to trump that policy on rule of law grounds. Note that more controversial policies on which accepted public norms have not settled into a national consensus, such as affirmative action, likely would \textit{not} have motivated Justice Scalia to go along with an agency interpretation. The reason is that he personally feels that non-discrimination law is inverted by such policies, and he is willing to say so because the polity remains normatively divided with regard to the justice or wisdom of affirmative action.\textsuperscript{348}

In short, norms matter. The norms that matter are not just the personal beliefs of the Justices, but also the political consensuses among experts and other institutions, as well as the norms accepted by the media and by most Americans. Norms matter for each Justice as she or he decides whether terms like “discriminate” or “waters” have a plain meaning. They matter for the Court as an institution whose fragile legitimacy can be undermined if its opinions strike commentators and citizens as inconsistent with settled public values. They matter for the ability of the federal government as a whole to carry out national projects.

The wetlands cases are dramatic examples of the importance of norms. From \textit{Bayview} to \textit{Solid Waste}, property-protecting conservatives such as Chief Justice Rehnquist and Justice Scalia did not dispute that the statutory term “navigable waters” (defined in the statute as “waters of the United States”) extended well beyond waterways that were “navigable” in the traditional sense and, indeed, extended to property that was not water-saturated all the time. This is an astounding concession for such conservatives to make—but it is a concession they thought they had to make to an aggressive agency that seemed to have the blessing of both Congress and expert opinion. But the conservatives were \textit{not} willing to extend this concession to a gravel pit that was connected to the national hydrological system more indirectly. If the Court had gone along with the Corps in \textit{Solid Waste}, conservative Justices feared there would be \textit{no effective limit} on that agency’s wetlands rules—virtually any piece of property would be included, and would be heavily regulated. The conservatives saw nothing in the statute (or, if they were pecking, the legislative history) to support such vast jurisdiction, and they sought to rein in the agency. This was, we repeat, a substantive judgment. But it was more than the “personal” beliefs of the conservative Justices; it was a reasoned

\textsuperscript{347} See Smith v. City of Jackson, 544 U.S. 228, 243–45 (2005) (Scalia, J., concurring in part and concurring in the judgment) (emphasizing EEOC’s liberal interpretation was affirmation of “longstanding position of the Department of Labor”); id. at 247 (accepting plurality’s substantive points as establishing that EEOC’s view is “eminently reasonable”).

judgment on their part, with one eye to the norms that existed among Congress, the experts, and the public.349

As the observant reader will have noticed, our view that norms matter is not grounded in empirical analysis, though it is consistent with that analysis. For example, we document ideological voting much of the time by all the Justices, but not all of the time. (According to Table 11, Justice Thomas, the most conservative, and Justice Stevens, the most liberal, vote for results contrary to their political views in more than one-third of the cases.) But at a certain point, the objective data run out and are of limited utility in understanding what choices the Justices are making and why they make them. We close with this hypothesis: When deciding whether to go along with an agency interpretation the Justice does not find ideologically congenial, the Justice will consider not only the intensity of her or his personal views, but also the national political landscape and the likely public and political response to overriding the agency on this particular issue.

* * *

Academics and practitioners alike frequently assume that federal judges faithfully defer to agency interpretations of statutes. This untested assumption has underpinned much of the debate over the scope and extent of deference doctrine. Our analysis finds that this assumption is unfounded. Contrary to the prevailing wisdom, the Justices do not treat deference regime precedents such as Chevron as matters of stare decisis. Instead, the Justices apply deference doctrine inconsistently, responding to their ideological preferences, the policies underlying the major deference regimes, and the preferences of Congress and the President.

These results support reforms to reduce the number of deference regimes. The results also bolster characterizing deference doctrines as canons of statutory construction, and not binding precedents. These results also raise larger doubts about the ability to grant stare decisis effect to methods of statutory interpretation. The application of such methods is inherently subjective, and may be influenced by ideological preferences and societal norms. Reforms to establish binding, bright-line interpretive rules are therefore unlikely to succeed.