Establishing an Effective Dialog between Courts and Agencies

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Better Regulation through Better Judicial Review: Judicial Deference, Legislative Purpose, and the Common Law

Abstract

The EU has is pursuing 'Better Regulation'. However, despite the importance of judicial review in the regulatory process, it has received comparatively little attention. Thus, I use the law in the United States to empirically examine an aspect of judicial review; and thus, to help guide developments of Better Regulation in the EU. I focus on 'judicial deference to administrative interpretations of legislation', whereby courts assign some weight to administrators' interpretations of statues when the court makes its own interpretation. Deference may help courts by placing legislation within a practical context, but also risks inducing interpretations that contradict the existing common law or are inconsistent with established legal values. Thus, I use a sample of 998 Supreme Court decisions to show that a low-level of deference (as in *Skidmore*) best enables courts to produce purposive judgments that also sit within the existing common law framework and are consistent with fundamental legal values.

Keywords: Agencies; Deference; Judicial Decision Making; Statutory Interpretation; Common Law; Doctrine of Legality

1 Introduction

The legislature creates legislation. Agencies interpret this legislation and implement their interpretation. People can challenge agencies' actions. Thereupon courts must interpret the legislation. To the extent that it is consistent with the words of the statute, this interpretation should (a) implement the legislative purpose, (b) integrate the existing common law framework of interpretations, and (c) uphold fundamental legal values, such as the right to due process.

The relationship between courts, administrators, and legislators has become an increasingly important issue in the EU. Administrative agencies have proliferated across the EU. With this proliferation comes the need to protect citizens from improper uses of administrative power. Subsequently, myriad schemes of protection have emerged in the EU.[1] However, fragmentation in law can lead to undesirable consequences of regulatory competition and uncertainty.[2] Perhaps recognizing the need to reform the judicial review of administrative action, the EU has moved

[1] ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES – A COMPARATIVE ANALYSIS (R J G H Seerden & F A M Stroink, 2002).

[2] Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CALIFORNIA LAW REVIEW 1775 (2002); Lucian A Bebchuk & A Cohen, *Firms' Decisions Where to Incorporate*, 46 JOURNAL OF LAW AND ECONOMICS 383 (2003); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARVARD LAW REVIEW 1435 (1992); Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUMBIA LAW REVIEW 1168 (1999); Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VIRGINIA LAW REVIEW 111 (2001); Lucian Arye Bebchuk & Allen Ferrell, *Federal Intervention to Enhance Shareholder Choice*, 87 VIRGINIA LAW REVIEW 993 (2001).

towards pursuing 'Better Regulation' (BR).[3] The goal of BR is broadly to improve regulation in the EU. However, it has largely focused on the legislative act of creating legislation, rather than on the administrative process of interpreting and applying legislation. This suggests that there is room to enhance the operation of BR. One way to enhance BR is to learn from the experiences in other countries, such as the United States.

The situation in the United States presents an environment from which the EU might learn. The United States has become 'administrative states' [4]. The legislature promulgates laws. The administrators must interpret and apply the laws. People can challenge administrators' actions (which administrators base on the administrators' interpretations). Courts then decide this challenge. I focus on the relationship between courts and administrators

When people challenge agencies' actions, courts must evaluate whether the agency's actions are valid. In particular, the court must interpret the statue. However, agencies have already interpreted the statue. Thus, the issue is whether the court must consider the agency's interpretation when the court makes its own interpretation. I focus on the relationship between administrators and courts in the context of statutes. Here, administrators interpret statues. I draw upon experiences in the United States to help guide the appropriate approach both in the US and in Europe.

[3] Ciara Brown & Colin Scott, *Regulation, Public Law, and Better Regulation*, 17 EUROPEAN PUBLIC LAW 467 (2011); Patricia Popelier, *Governance and Better Regulation: Dealing with the Legitimacy Paradox*, 17 EUROPEAN PUBLIC LAW 555 (2011); Wim Voermans & Ymre Schuurmans, *Better Regulation by Appeal*, 17 EUROPEAN PUBLIC LAW 507 (2011); Gijs van Dijck & Rob van Gestel, *Better Regulation Through Experimental Legislation*, 17 EUROPEAN PUBLIC LAW 539 (2011).

[4] Edward Rubin, *Law and Legislation in the Administrative State*, 89 COLUMBIA LAW REVIEW 369 (1981); Colin S Diver, *Statutory Interpretation in the Administrative State*, 133 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 549 (1985); Edward Rubin, *Dynamic Statutory Interpretation in the Administrative State*, 3 ISSUES IN LEGAL SCHOLARSHIP 1 (2002).

In the United States, the doctrines of deference determine how much weight the court must give the administrator's interpretation when it interprets an 'ambiguous' statute.[5] There are three main flavors. Low-level Skidmore-like deference merely gives agency-interpretations some weight in determining their own interpretation [6]. Medium-level (Chevron-like) deference mandates that courts follow the agency's interpretation if the interpretation is reasonable [7]. High-level deference, requires courts to follow the agency's interpretation unless it is `clearly wrong' and requires courts to presume that the interpretation is not 'clearly wrong' [8]. [9]

In favor of deference, administrators' interpretations may illustrate the legislative purpose. Congress delegates powers to agencies in order to implement the legislative purpose [10]. Thus, absent agency conflicts and asymmetric information, administrators' interpretations should reflect the legislature's purpose for a statute. Therefore, assigning some weight to administrators' interpretations might help courts to issue interpretations that reflect the legislative purpose.

[5] An ambiguous one is one that has multiple possible interpretations. However, as Graham *A Unified Theory of Statutory Interpretation*, 23 STATUTE LAW REVIEW 91 (2002). almost all statutes are capable of multiple interpretations, so would be relevantly vague.

[6] Dame, *Stare Decisis, Chevron, and Skidmore: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 WILLIAM & MARY LAW REVIEW 405 (2002); Kristin E Hickman & Matthew D Krueger, *In Search of the "Modem" Skidmore Standard*, 107 COLUMBIA LAW REVIEW 1235 (2007).

[7] William R Andersen, *Chevron in the States: An Assessment and a Proposal*, 56 ADMINISTRATIVE LAW REVIEW 1017 (2006); Dame, *supra* note 6; Michael A Fitts, *Retaining the Rule of Law in a Chevron World*, 66 CHICAGO-KENT LAW REVIEW 355 (1990); Orin S Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE JOURNAL ON REGULATION 1 (1998).

[8] John F Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUMBIA LAW REVIEW 612 (1996).

[9] It is important to note that the deference doctrines apply in different circumstances. For example, Chevron and Skidmore deference can apply to ordinary statutes, whereas 'high-level' deference generally only applies to specific legislative instruments (regulations). I describe this in more detail in Section 2.

[10] John B Cheadle, *The Delegation of Legislative Functions*, 27 YALE LAW JOURNAL 892 (1918); Kenneth Culp Davis, *A New Approach to Delegation*, 36 UNIVERSITY OF CHICAGO LAW REVIEW 713 (1969).

Deference may also harm courts' interpretations. Agencies sometimes act self-interestedly or myopically. [11] Thus, they may interpret the legislation incorrectly [12], or may fail to appreciate the existing body of common law interpretations that surround the legislation [13].

The literature has not empirically tested the appropriate level of deference. The literature has examined the rate of use of particular deference types. [14] The empirical literature has not examined which deference-level promotes the legislative purpose, while preserving fundamental rights and the common law structure.

This article empirically examines which deference-type promotes these three limbs. It examines a sample of 988 Supreme Court cases. It then tests which type of deference (a) promotes the legislative purpose, (b) quadrates with the existing common law structure,[15] and (c) is consistent with fundamental legal values. It concludes that a low level of deference best achieves these goals.

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[11] Myriad papers examine agencies' incentives from both a legal and an economic perspective, see for example: Robert Dur & Otto H Swank, *Producing and Manipulating Information*, 115 ECONOMIC JOURNAL 185 (2005); Jaap Hage, *Legislation and Expertise on Goals*, 3 LEGISPRUDENCE 351 (2009); Clare Leaver, *Bureaucratic Minimal Squawk Behavior: Theory and Evidence from Regulatory Agencies*, 99 AMERICAN ECONOMIC REVIEW 572 (2009); Pablo T Spiller, *Agency Discretion Under Judicial Review*, 16 MATHEMATICAL AND COMPUTER MODELLING 185 (1992); Phongthorn Wrasai & Otto H Swank, *Policy Makers, Advisers, and Reputation*, 62 JOURNAL OF ECONOMIC BEHAVIOR & ORGANIZATION 579 (2007); Nicolle Zeegers, *Distinguishing True from Other Hybrids. A Case Study of the Merits and Pitfalls of Devolved Regulation in the UK*, 3 LEGISPRUDENCE 299 (2009)..

[12] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE LAW JOURNAL 511.

[13] Richard Pierce, *Reconciling Chevron and Stare Decisis*, 85 GEORGETOWN LAW JOURNAL 2225 (1997); B G Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMPLE LAW REVIEW 635 (2008).

[14] See for example: William N Eskridge & Lauren E Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEORGETOWN LAW JOURNAL 1083 (2008); WILLIAM N ESKRIDGE & CONNOR RASO, CHEVRON AS A CANON, NOT A PRECEDENT: AN EMPIRICAL TEST OF WHAT MOTIVATES JUDGES IN AGENCY DEFERENCE CASES (Center for Empirical Legal Studies, CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, 2009); Hickman & Krueger, *supra* note 6; Kerr, *supra* note 7; Peter H Schuck & E Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE LAW JOURNAL 984; Matthew C Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMINISTRATIVE LAW REVIEW 657 (2004)..

[15] I note that the *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) suggests that *Chevron* type deference trumps stare decisis doctrines. This suggests that at least some times of deference will not uphold stare decisis.

2 How does the deference-doctrine work?

This section establishes the key types of deference. The amount of `deference' is the amount of weight that a court gives to an agency's interpretation when the court interprets a statute. Eskridge and Baer [16] indicate that there is a continuum of deference levels. However, Eskridge and Baer [17] and Eskridge and Raso [18] collapse this into three key types.

The first type is low-deference (Skidmore-deference). Low-deference arose following Skidmore v. Swift & Co., 323 U.S. 134, (1944). It holds that courts have the primary responsibility for interpreting legislation. However, the agency's interpretation is one factor that the court should consider when determining the optimal interpretation. As in Skidmore, this typically applies if the agency's interpretation is an `policy document' that lacks legislative force. Low-level deference also applies in Australia, where, if the agency's interpretation is in a mere policy document, then the court merely considers the agency's interpretation as one factor that can influence the court's interpretation (Corporation of the City of Enfield v. Development Assessment Commission, 169 A.L.R. 400, [48]-[51] (Gleeson CJ, Gummow, Kirby and Hayne JJ) (2000)).

[16] *supra* note 14.
[17] *Id.*
[18] *supra* note 14.

The second type is medium-deference (Chevron-deference). This holds that if (a) the legislation is vague, and (b) the agency's interpretation is reasonable, then the court should follow the agency's interpretation (Chevron USA Inc v Natural Resources Defence Counsel Inc, 467 U.S. 837, 864 (Stevens J) (1984)). This ordinarily applies if the legislation is in a `legislative instrument', a special document that has legislative force (United States v. Mead Corp., 533 U.S. 218, 226-7 (2001)). This type of deference also exists in Australia. Here, courts obey the administrator's interpretation if it is `reasonably proportionate' to purpose of the enabling-legislation (South Australia v. Tanner, 166 C.L.R. 161, 167 (Wilson, Dawson, Toohey and Gaudron JJ) (1989)).

The third type is high-deference (Seminole Rock/ Curtiss-Wright deference). This derives from Seminole Rock and Bowles v. Seminole Rock \& Sand Co. 25 U.S. 410 (1945) and from United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). This type of deference holds that courts should presume that the agency's interpretation is correct and should follow it unless the interpretation is `clearly wrong' [19]. This type of deference applies to agencies' interpretations of regulations (rather than to statutes).[20]

This background establishes that there are three key levels of deference. The remainder of the article establishes which of these types is optimal.

[19] Eskridge & Baer, *supra* note 14; Eskridge & Raso, *supra* note 14.

[20] Regulations are also forms of statutes D PEARCE & S ARGUMENT, DELEGATED LEGISLATION IN AUSTRALIA (2005); D C PEARCE & R S GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA (6th ed. 2006).. I note that regulations are a slightly different type of statute; and thus, 'high-deference' might not apply in situations where 'low-deference' or 'medium-deference' apply. Nonetheless, it is still useful and important to test whether high-deference promotes principled interpretations of statutes.

3 Hypotheses

This section establishes the hypotheses. The analysis rests on three key premises. First, courts should favor interpretations that promote the legislative purpose [21]. Second, statutes develop an encrustation of common law interpretations. Courts should respect these and apply rules of stare decisis [22]. Third, courts should avoid abrogating fundamental rights such as the right to due process [23]. These traits have limits: courts cannot promote any one of these traits if it contradicts the words of the statute. The following sections examine which type of deference promotes these goals.

3.1 Deference and legislative purpose

Deference can promote the legislative intent. A presumption is that legislatures make statutes in order to promote a public purpose [24]. Courts are more able to promote the legislature's purpose if they can place the statute in the current social context.

[21] William N Eskridge, *Dynamic Statutory Interpretation*, 135 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1479 (1987); Graham, *supra* note 5.
[22] Lawrence C Marshall, *"Let Congress Do It": The Case for An Absolute Rule of Statutory Stare Decisis*, 88 MICHIGAN LAW REVIEW 177 (1989); Pierce, *supra* note 13.
[23] William N Eskridge, *Public Values in Statutory Interpretation*, 137 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1007 (1989).
[24] Henry Hart & Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, 1253 (William N Eskridge & Philip P Frickey, 1994).

Agencies, and deference thereto, can promote the legislative purpose for at least three reasons. First, agencies can develop expertise in their field either through experience or by hiring experts [25]. Key examples include the expertise of the FAA and FDA [26]. Courts cannot develop a similar level of expertise due to a lack of time and resources [27].

Second, for areas outside their field of expertise, agencies can take public consultations [28]. Courts cannot ordinarily do so due to the rules of evidence [29]. These public consultations give agencies greater insight in to the social implications of the statute.

Third, agencies interpret legislation to apply to a broad range of fact-situations. Courts interpret legislation when they apply it to the facts of a particular case. This enables agencies to make clear ex ante rules that apply to many fact-situations. This should arguably enable the agency's interpretation to promote the legislative purpose in a wider number of cases. This also allows agencies to make 'dynamic' interpretations that evolve the meaning of statutes over time, and arguably promote the legislative purpose [30]. These factors suggest that agencies' interpretations are informative and that some degree of deference is desirable.

[25] Peter Strauss, *On Resegregating the Worlds of Statute and Common Law*, 429 SUPREME COURT REVIEW 429 (1994); Pierce, *supra* note 13.
[26] James T O'Reilly, *Losing Deference in the FDA's Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL LAW REVIEW 939 (2008).
[27] Pierce, *supra* note 13; Spigelman, *Just, Quick and Cheap: A New Standard for Civil Procedure*, 38 LAW SOCIETY JOURNAL 24 (2000).
[28] Richard Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 ADMINISTRATIVE LAW REVIEW 59 (1995); Pierce, *Reconciling Chevron and Stare Decisis*, *supra* note 13.
[29] Joseph Dainow, *Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems*, 37 INDIANA LAW JOURNAL 1 (1961); Joseph Dainow, *Civil Law and the Common Law: Some Points of Comparison*, 15 AMERICAN JOURNAL OF COMPARATIVE LAW 419 (1967).
[30] WILLIAM N ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); Mark L Humphery-Jenner, *Should Common Law Doctrines Dynamically Guide the Interpretation of Statutes?*, 3 LEGISPRUDENCE 171 (2009).

Complete or high-level deference may undermine the legislative purpose. This is for two reasons. First, it is arguable that the current executive could exert budgetary pressure on administrators in order to coerce them into interpreting legislation in a politically favorable way [31]. This is inconsistent with the (presumed) public-regarding purpose for the statute. Thus, presumptive (high-level) deference to such an interpretation would undermine the legislative intent. Second, agencies might interpret legislation in order to promote their own goals, and these might differ from the original legislative intent [32]. This might not be sufficient grounds in itself to hold that the agency's interpretation is `clearly wrong'. Thus, while low-level and medium-level deference would enable courts to ignore such interpretations, high-level deference might not. Therefore, high-level deference might require courts to depart from the legislative intent.

Overall, the prediction is then that low-level deference and medium-level deference should enable courts to support the legislative purpose. High-level deference might not do so. This induces the following prediction.

Prediction 1 (Legislative Purpose Prediction): Courts that adopt low-level or medium-level deference are more likely to explicitly uphold the legislative intent.

3.2 Deference and stare decisis

[31] Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARVARD LAW REVIEW 1155 (1992); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO LAW JOURNAL 273 (1993).
[32] Pierce, *Reconciling Chevron and Stare Decisis*, *supra* note 13.

I argue that promoting stare decises is a desirable trait. A key aspect of judicial integrity is the integrity of the common law. Integrity of the common law implies support for stare decisis. Thus, a deference-type should arguably doctrines of stare decisis. In the context of a statute, this holds that courts should uphold a prior interpretation unless it is clearly wrong [33].

Only low-level deference is likely to support statutory stare decisis. Medium-level (i.e. *Chevron*) deference is unlikely to support stare decisis in the light of *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). Here, the court held that if (a) a statute is ambiguous (so is capable of multiple interpretations), and (b) the court adopts one interpretation, then (c) an agency can adopt another inconsistent interpretation and the reviewing court must afford that interpretation *Chevron* deference (thereby overruling the court's prior interpretation). This means that under *Chevron* deference, stare decisis is less relevant and effective. By contrast, it would seem that if low-level deference applies, then it allows courts to ignore agencies' interpretations if they are inconsistent with stare decisis. Thus, only low-level deference quadrates with the the stare decisis threshold for over-ruling prior interpretations.

Prediction 2 (Stare Decisis Prediction): Courts that adopt low-level deference are more able to promote stare decisis; and thus, are more likely to base their decisions on it.

3.3 Deference and fundamental values

[33] P. Baker, *The Future of Equity*, 93 LAW QUARTERLY REVIEW 529 (1977); William N Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE LAW JOURNAL 331 (1991).

The optimal level of deference should uphold fundamental legal rights and values.[34] These principles ordinarily reflect civil or political such as a right to a hearing according with natural justice and the presumption against indefinite detention [35]. Here, courts may interpret legislation based on the presumption that the legislature does not intend to undermine fundamental rights. Of course, legislatures can pass legislation that undermines fundamental rights; however, the court typically requires clear words in order to give legislation such a construction.[36]

There are two presently relevant facts. (1) Because the court presumes the legislature intends to uphold fundamental rights, the court interprets legislation in a way that upholds fundamental rights unless the legislation explicitly contradicts them (see B v. DPP, [2000] 2 A.C. 423, 470 (H.L. 2000)), and (2) for each `right', the strength of this presumption varies over time as society changes and the importance of the `right' changes [37]. This implies that the threshold test to rebut the presumption varies over time.

[34] For decisions in favour of this see: Al-Kateb v. Godwin, 219 C.L.R. 562, 577 (H.C.A. 2004); Coco v. R, 179 C.L.R. 427, 437-438 (Mason CJ, Brennan, Gaudron and McHugh JJ) (H.C.A. 1994); B v. DPP, [2000] 2 A.C. 423, 470 (H.L. 2000).
[35] Stanley Fish, *Change*, 86 SOUTH ATLANTIC QUARTERLY 423 (1987).
[36] An example is Al-Kateb v. Godwin, 219 C.L.R. 562, 577 (H.C.A. 2004). Here, the court decided that the legislature intended to undermine fundamental rights (in this case, by imposing a period of indefinite detention). However, the decision was based upon the clear words of the statute, and the court looked for ways to avoid undermining rights.
[37] Michael Wait, *The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited*, 29 FEDERAL LAW REVIEW 57 (2001); Matthew Zagor, *Uncertainty and Exclusion: Detention of Aliens and the High Court*, 34 FEDERAL LAW REVIEW 127 (2006).

Low-level deference should support these fundamental rights. Low-level deference permits courts to ignore agency-interpretations that undermine fundamental rights because it merely uses agencies' interpretations as one guiding factor.

Medium-level deference allows courts to ignore agency-interpretations that are `unreasonable'. Courts may deem an interpretation to be `unreasonable' if it undermines fundamental rights. However, it is unclear that this is always the case and it is arguable that an interpretation is `textually' reasonable even if it is `socially' unreasonable.

High-level deference requires judges to accept interpretations that are not `clearly wrong'. Manning [38] suggests that high-level deference under Seminole Rock allows agencies to implement broad standards that give the agency broad discretion. This discretion can apply to fields such as incarceration lengths (see Stinson v. United States, 113 S. Ct. 1913 (1993)). This potentially allows policies that induce indefinite incarceration in the absence of an offense.[39] Therefore, high-level deference has the potential to undermine fundamental-principles.

The analysis indicates that low-deference and medium-deference are consistent with societal integrity. However, high-level deference may undermine it.

Prediction 3 (Fundamental Doctrines Prediction): Courts that adopt low-level deference are more likely to promote fundamental values. Thus, they should be more likely to base their judgments on these values.

[38] *supra* note 8.
[39] See for example Al-Kateb v. Godwin, 219 C.L.R. 562, (H.C.A. 2004). Here, the court allowed indefinite detention of an illegal immigrant. The detainee received no criminal charge.

4 Data and Methodology

This section details the empirical methodology and data sources. First, I outline the modeling technique. This motivates the choice of sample and the selection of variables. Second, I outline the data and variables. For convenience, Table 1 summarizes the variables. I note upfront that not all types of deference would be applicable to all types of case.

4.1 Modeling Technique

I first outline the general testing procedure. The idea is to test whether deference causes a particular 'outcome' (i.e. adherence to stare decisis, fundamental values, or the legislative purpose. I do this by examine the relationship between (a) whether the court bases its decision on a particular deference technique, and (b) whether the court also bases its decision on principles of stare decisis, fundamental common law values, or the legislative purpose. The idea is to test whether the need to rely on a deference technique induces a particular outcome.

I do this by creating indicator variables that equal one if the court relied on low-level, medium-level, or high-level deference. I also create indicator variables that equal one if the judgment explicitly referred to principles of stare decisis, fundamental doctrines, or the legislative purpose (I define these below). I also collect data on control variables (that might influence case outcomes). However, it is important to control for endogeneity between the case outcome and the

deference decision. Thus, I also collect instrumental variables that might predict the court's decision to defer to an agency's interpretation.

The resulting models are IVPROBIT models. These are two-stage models that control for endogeneity. The first stage predicts whether a judgment follows a particular type of deference (low, medium, high). The second stage uses the predicted values from the first stage regression to predict whether the case supports a particular outcome type (fundamental values, stare decisis, or legislative purpose). For example, to examine whether low-level deference increases the likelihood that a case upholds fundamental values: First, I predict whether a court would adopt low level deference in this case (using Equation 2). Second, I take the predicted values from this model to assess whether the court would be likely to uphold fundamental values (in Equation 1). These models are:

$$I(Fundamental\ Values\ ) = f(I(Low\ Level\ Deference), Controls) \quad (1)$$

$$I(Low\ Level\ Deference) = g(Instruments) \quad (2)$$

More generally, the models are of the form:

$$I(Outcome\ ) = f(I(Deference\ Type), Controls) \quad (1)$$

$$I(Deference\ Type) = g(Instruments) \quad (2)$$

Here, 'I(Outcome)' is an indicator that a judgment is purposive, supports stare decisis, or upholds fundamental values, 'I(Deference Type)' is an indicator that the court adopts no, low,

medium, or, high deference, ‘Controls’ is a set of other variables that might influence the outcome, and `Instruments' is a set of control variables thought to influence the deference decision and to be exogenous to the outcome of the case, ‘Instruments’ is a set of instruments that might influence the decision to defer to the agency’s interpretation, and ‘Predicted Deference’ is the predicted value from the second stage regression.

The model functions in two steps: First, Equation (2) predicts whether the court will adopt a deference type as a function of the instrumental variables. Second, Equation (1) assesses the outcome of the case as a function of the predicted deference level, and the control variables.

The models control for econometric specification issues. Specifically, they control for heteroscedasticity and clustering by year and by subject-matter of the decision due to findings that the subject-matter and composition of the court can influence the nature of the court's decision [40]. The use of instrumental variables controls for endogeneity [41].

4.2 Sample

I use a sample of Supreme Court decisions in order to analyze deference, stare decisis, and fundamental doctrines. The sample is a set of 1014 Supreme Court decisions between 1983 and 2005. Some of the control variables are lagged (by one period), and the use of lagged data

[40] Stephenson, *supra* note 14; Eskridge & Baer, *supra* note 14.
[41] J. Bound et al., *Problems with Instrumental Variables Estimation When the Correlation Between the Instruments and the Endogenous Explanatory Variables Is Weak*, 90 JOURNAL OF THE AMERICAN STATISTICAL ASSOCIATION 443 (1995); D. Staiger & J H Stock, *Instrumental Variables Regression with Weak Instruments*, 65 ECONOMETRICA 557 (1997); JEFFREY M WOOLDRIDGE, ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA (2002).

reduces the regression sample size to 998 observations. The sample features in [42].[43] I note that the court must decide its case-load; and thus, there is some selection bias in the data. Nonetheless, it is unclear that this selection bias would work either for or against the level (and impact) of deference. The data yields four presently relevant categories of variable.

4.3 Deference Variables

The sample yields three deference variables. I(Low Level Deference) equals one if the court relies on a case, such as Skidmore, that supports low-level deference. I(Medium Level Deference) equals one if the court relies on a case that supports medium level deference. These cases include Chevron and Mead. I(High Level deference) equals one if the court relies on a case that supports a high-level of deference. These include Curtiss-Wright and Seminole Rock. In all cases, the indicator equals one if the court reaches its decision by relying on a particular deference doctrine.

4.4 Independent `Case Outcome' Variables

[42] Eskridge & Baer, *supra* note 14.
[43] This data is available from http://www.georgetownlawjournal.com/extras/96.4/. For papers using the data see *Id.*; Eskridge & Raso, *supra* note 14..

There are three case outcome variables. All variables are indicator variables. First, `Purposive' is an indicator that equals one if the court explicitly relies on legislative purpose in its judgment. This proxies for the court issuing a judgment that explicitly supports the legislative purpose.[44]

Second, `StareDecisis' equals one if the court's judgment explicitly relies on doctrines of statutory stare decisis. This tests Prediction 2 (the stare decisis prediction), which holds that low level deference should increase the likelihood that the court can rely on stare decisis. If there is a positive coefficient on a deference-type, then it suggests that that deference-type allows the court to use stare decsis doctrines. This implies that that deference-type supports the common law structure surrounding the statute.

Third, `Doctrine' equals one if the court's judgment explicitly uses presumptions based upon due process and avoiding constitutional conflicts. These are two fundamental societal doctrines or values. Thus, a positive relation between low level deference and the `Doctrines' variables implies that the deference-type is consistent with the use of fundamental legal doctrines.

Importantly, all variables refer to a situation where the court cites stare decisis, common law doctrines, or legislative purpose in its decisions. A positive value indicates that the court considered upholding the value (and thus, that it influenced the court's reasoning). A positive value does not per se mean that the decision upheld stare decisis (by upholding a prior

[44] This variable is over-inclusive because courts often refer to legislative purpose. However, this actually makes it more difficult to test Prediction 1 (the legislative purpose prediction) because it makes it more difficult to distinguish between purposive and non-purposive judgments; and thus, makes it more difficult to find a significant coefficient on the deference variable.

interpretation), merely that the court gave some consideration to stare decisis values when making a decision.

4.5 Control Variables

The control variables are factors that might affect the nature of the court's decision. The come in five key categories. The first set has intention-based variables. The court's tendency to adopt purposive interpretation and to utilize legislative histories to discern legislative intent may especially influence the likelihood of a purposive interpretation in the present case. This flows from prior empirical studies, which show that judges who historically are more (less) intention-based tend to make judgments that are more (less) intention based [45]. Thus, the models include p(Purposive) $_{t-1}$ and p(Histories) $_{t-1}$, the proportion of judgments in the prior judicial term in which the majority cited legislative purpose of legislative histories.

The second category is text based. The tendency to rely on textual doctrines could influence the likelihood that a court expressly cites the legislative purpose or expressly rely on fundamental doctrines [46]. Further, textualism may influence the likelihood that a court will defer to agency-interpretations [47]. Arguably, it should reduce the likelihood due to the risk that agencies will depart from the words of the statute. However, it may increase the likelihood of deference if the statute uses clear words to delegate interpretative power to agencies; and thus, limit courts'

[45] Stephenson, *supra* note 14; Eskridge & Raso, *supra* note 14.
[46] John F Manning, *Textualism and the Equity of the Statute*, 101 COLUMBIA LAW REVIEW 1 (2001).
[47] John F Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUMBIA LAW REVIEW 673 (1997).

interpretative powers [48]. Thus, the paper includes three key measures of textualism: the tendency to explicitly cite textual factors in the judgment, $p(\text{Text})_{t-1}$, the tendency to refer to the act as a whole, $p(\text{Whole Act})_{t-1}$, and the tendency to refer to the whole legislative code, $p(\text{Whole Code})_{t-1}$.

The third category is cannon and presumption based. Canons ordinarily motivate against purposive-based interpretations, or interpretations that rely on prior common law reasoning [49]. The key canons are federalism canons, which presume the legislature did not intend to undermine the federal structure by abrogating state authority; and other miscellaneous canons that relate to the grammatical structure and syntax of the text [50]. Thus, the models include $p(\text{Federalism})_{t-1}$ and $p(\text{Other Canons})_{t-1}$, which reflect the proportion of judgments in the prior term that utilized federalism of 'other' canons. The models also include the proportion of judgments that acquiesce to legislative inaction vis-à-vis an interpretation, denoted $p(\text{Legislative Acquiescence})_{t-1}$. If the court relies on legislative acquiescence then it is less likely to actively pursue key doctrines, or to promote the legislative purpose.

The fourth category contains the court's use of common law doctrines and stare decisis in the prior judicial term. These are denoted $p(\text{Common Law})_{t-1}$ and $p(\text{Stare Decisis})_{t-1}$. The goal is to control for the possibility that the relation between deference and stare decisis in this decision merely reflects auto-correlation with the court's historical tendency to rely on the common law or

[48] Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO LAW JOURNAL 1663 (1991); Thomas W Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASHINGTON UNIVERSITY LAW QUARTERLY 351 (1994).
[49] Cass R Sunstein, *Nondelegation Canons*, 67 UNIVERSITY OF CHICAGO LAW REVIEW 315 (2000).
[50] Larry Obhof, *Federalism, I Presume - A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statement Rules*, 2004 MICHIGAN STATE LAW REVIEW 123; Kenneth A Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE LAW JOURNAL 64 (2008).

stare decisis. Similarly, the fifth category contains the court's historical use of fundamental principles. Specifically, these are the court's use of due process and conflict-avoidance principles, denoted p(Due Process) $_{t-1}$, and p(Avoidance) $_{t-1}$, respectively.

4.6 Instrumental Variables

The instrumental variables contain factors that might affect the decision to defer to agencies' interpretations. First, if the agency is more `expert', then the court is more likely to defer to its decisions [51]. Thus, the models include the indicator variable I(Expert) that equals 1 if the court mentions the agency's expertise.

Second, if the agency is more accountable to the executive, then their interpretations have more constitutional legitimacy, and the court should be more likely to defer to their interpretations [52]. Thus, the models include I(Accountable), a dummy that indicates if the agency is accountable to the executive. Similarly, direct delegation from the congress should increase the likelihood of deference. Thus, the models use I(Congressional Delegation), an indicator of congressional delegation.

Third, if the interpretation is in a more formal document, such as a legislative instrument, then the court is more likely to adopt it [53]. This is particularly relevant after in *Christensen v. Harris*

[51] Wendy B Davis & Rebecca Clarke, *Hot Air: Undue Judicial Deference to Federal Aviation Administration Expertise in Assessing the Environmental Impacts of Aviation*, 69 JOURNAL OF AIR LAW & COMMERCE 709 (2004); O'Reilly, *supra* note 26.
[52] Douglas W Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMINISTRATIVE LAW JOURNAL 269 (1988).
[53] Dame, *supra* note 6.

County, 529 U.S. 576 (2000), where the court indicated that the type of legislative instrument might influence the level of deference. Therefore, the models use I(Rule) and I(Adjudication), dummies that indicate if the interpretation is a `Rule' document or an `Adjudication'. The models omit the third format, `Policy', in order to avoid perfect multicollinearity.

Fourth, the political environment may influence the interpretation [54]. Therefore, the models include indicators for whether the President, the House of Representatives, or the Senate are liberal or conservative (denoted I(Liberal President), I(Liberal House), and I(Liberal Senate), respectively).

Fifth, the stability of the agency's interpretation should promote deference since supporting a long-standing interpretation could promote the goal of allowing people to organize their affairs around the law. Therefore, the models include I(Old) and I(Evolving), indicators of old or evolving interpretations. The models omit the third variable I(New), which represents a new interpretation, in order to avoid perfect multicolinearity.

5 Empirical Results

The results indicate that only low-level deference upholds the legislative purpose, promotes stare decisis, and upholds fundamental values. First, I present the univariate analysis and summary statistics. Second, I present the multivariate IVPROBIT results.

[54] Devins, *supra* note 31.

5.1 Univariate Analysis

Table 2 contains the sample composition by year, and Table 3 contains sample statistics by deference-type. It indicates that high-level deference is uncommon, featuring in only 19 judgments over the sample period, and clustering toward the end of the sample period. This is unsurprising as 'Curstiss-Wright' type deference does not apply to all statutes. Low-level deference is the most common form. Neither low-level deference nor medium-level deference show year-clustering.

The correlation and univariate statistics do not clearly support any form of deference. Table 4 contains the correlation statistics. It reports both tetrachoric correlations and pairwise correlations. Table 5 contains the univariate statistics. The correlations indicate a significant positive correlation between low-deference and medium-deference, and the use of legislative purpose. However, low-deference has a significant negative correlation with the use of fundamental doctrines. Medium-deference has a significant negative correlation with the use of stare decisis and with the use of fundamental principles. These results do not strongly confirm or deny that deference promotes principled interpretations. The univariate results indicate that low-deference and medium-deference decisions are significantly more likely to promote the legislative purpose (at 1% significance). However, medium-deference and high-deference decisions are significantly less likely to uphold stare decisis. While the results do not clearly support any deference-type, it is problematic to rely on them since (a) they do not control for other contaminating factors that might explain the case-outcome; and (b) they do not address

endogeneity and sample-selection issues. Subsequently, it is necessary to examine the IVPROBIT results.

5.2 Multivariate Analysis

The IVPROBIT results indicate that only low-level deference promotes all three goals. Preliminarily, it is notable that no model rejects the null that the instrumental variables are exogenous, and all models reject the null that the instruments are weak. This implies that the instruments are valid and are adequate to identify deferential judgments.

Table 6 analyzes the relation between deference and the use of legislative purpose in judgments. The dependent variable is `Purposive', an indicator that equals one if the majority bases its reasoning on the promotion of the legislative purpose. The results indicate that low-level deference causes courts to refer more to the legislative purpose at 1% significance, and medium-level deference does so at 5% significance. High level deference does not significantly increase the likelihood that the court will refer to legislative purpose. Consistent with expectations, the historical tendency to refer to legislative purpose significantly increases the likelihood of a purposive judgment (at 5% significance). Similarly the use of common law doctrines increases the likelihood of a purposive interpretation.

Table 7 examines the likelihood that a court will issue a judgment that explicitly supports stare decisis. The dependent equals one if the majority explicitly supports stare decisis and equals zero

otherwise. A positive coefficient on a deference-type indicates that it makes the court more free to rely on stare decisis doctrines in its reasoning. Here, low-level deference significantly increases the likelihood of stare decisis references (at 1% significance). However, medium-level and high-level deference significantly decrease the likelihood (both at 1% significance). Thus, only low-level deference supports stare decisis doctrines.

Table 8 assesses the relationship between deference and the use of fundamental doctrines such as due-process, or avoidance of constitutional conflict. The results indicate that low-level deference significantly increases the likelihood of such references (at 1% significance). However, medium-level and high-level deference reduce the likelihood (both at 1% significance). This suggests that low-level deference allows courts to consider fundamental principles, whereas medium and high level deference discourage courts from doing so.

Overall, the results indicate that low-level deference significantly increases the likelihood of a judgment that supports the legislative purpose, upholds stare decisis, and promotes fundamental doctrines. By contrast, medium-level deference and high-level deference both significantly reduce the probability that a court will consider stare decisis or fundamental-doctrines. This indicates that low-level deference best promotes a principled approach to statutory interpretation.

6 Conclusion

Administrators interpret legislation. Deference doctrines indicate how much weight, if any, courts should give to administrators' interpretations. The optimal weight is the one that enables

courts to implement the legislative purpose while supporting exiting common law rules and upholding established fundamental legal values.

The results show that only low-level deference is optimal. This implies that courts should assign agencies' interpretations some weight in reaching their own interpretations of statutes and should not simply follow any interpretation that is `reasonable' or not `clearly wrong'.

These results make a significant contribution to the literature. This is the first study to empirically test the optimal level of deference. Thus, the results indicate how the court should approach administrators' interpretations of statutes in order to produce principled interpretations of statutes. These results have implications for the United States and for Europe. For the United States, they illustrate that reforms to the nature of deference might be desirable in order to promote better statutory interpretations. For Europe, the results illustrate how to develop European administrative law in order to promote better regulation.

7 Tables

Table 1: Variable Definitions

Variable	Definition
Panel A: Dependent Variables	
I(Purposive)	An indicator variable that equals 1 if the majority or concurring judgments explicitly cite legislative purpose in their judgments
I(Stare Decisis)	An indicator variable that equals 1 if the majority or concurring judgments explicitly cite common law doctrines and/or stare decisis in their judgments
I(Doctrines)	An indicator variable that equals 1 if the majority or concurring judgments explicitly cite in their judgments either (a) due process doctrines, or (b) doctrines that promote interpretations that avoid constitutional conflicts
Panel B: Deference Variables	
I(Low Level Deference)	An indicator that equals 1 if the court relies on low-level deference. The court does this if it follows the judgments in Skidmore or Beth-Israel
I(Medium Level Deference)	An indicator that equals 1 if the court relies on medium-level deference. The court does this if it follows the judgments in Chevron
I(High Level Deference)	An indicator that equals 1 if the court relies on high-level deference. The court does this if it follows the judgments in Curtiss-Wright or Seminole Rock
Panel C: Control Variables	
$p(\text{Purposive})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority relied on legislative purpose.
$p(\text{Text})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority utilized textualist doctrines
$p(\text{Whole Act})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority examined the act as a whole
$p(\text{Whole Code})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority relied on notions of the whole code
$p(\text{Histories})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority relied on legislative histories
$p(\text{Stare Decisis})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority cited stare decisis.
$p(\text{Other Canons})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority utilized miscellaneous canons of interpretation.
$p(\text{Legislative Acquiescence})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority relied on the doctrine of legislative acquiesce.
$p(\text{Common Law})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority cited common law doctrines.
$p(\text{Federalism})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority based its judgment on notions of federalism.
$p(\text{Avoidance})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority used the principle that it should avoid interpretations that could induce constitutional conflicts

$p(\text{Due Process})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority cited due process doctrines.
$p(\text{Separation of Powers})_{t-1}$	The average proportion of judgments in the prior judicial term in which the majority relied on separation of powers notions.
Panel D: Instrumental Variables	
I(Expert)	An indicator that equals 1 if the court refers to agency expertise.
I(Accountability)	n indicator that equals 1 if the court refers to the accountability of the agency to congress.
I(Delegation)	An indicator that equals 1 if the court refers to a delegation of authority from the congress to the agency to interpret statutes.
I(Rule)	An indicator that equals 1 if the agency places its interpretation in a rule or instrument that has legislative force.
I(Adjudication)	An indicator that equals 1 if the agency places its interpretation in an adjudication.
I(Liberal President)	An indicator that equals 1 if the president is a `liberal' president.
I(Liberal House)	An indicator that equals 1 if the House of Representatives is predominantly `liberal’
I(Liberal Senate)	An indicator that equals 1 if the Senate is predominantly `liberal'
I(Old)	An indicator that equals 1 if the agency's interpretation is long-standing.
I(Evolving)	An indicator that equals 1 if the court refers to agency's interpretation as evolving

Table 2: Sample description and deference type by year

Year	All	Percentage	Low Level Deference	Medium Level Deference	High Level Deference
1983	16	1.58%	4	3	0
1984	66	6.51%	11	13	0
1985	56	5.52%	6	7	0
1986	57	5.62%	10	5	0
1987	57	5.62%	8	5	4
1988	49	4.83%	12	3	1
1989	47	4.64%	6	5	1
1990	51	5.03%	10	6	1
1991	46	4.54%	12	5	0
1992	61	6.02%	8	3	3
1993	41	4.04%	4	2	1
1994	35	3.45%	6	4	1
1995	36	3.55%	2	6	1
1996	41	4.04%	12	2	0
1997	49	4.83%	10	5	0
1998	43	4.24%	9	6	1
1999	31	3.06%	6	2	2
2000	36	3.55%	7	1	1
2001	42	4.14%	9	8	0
2002	38	3.75%	9	4	0
2003	42	4.14%	17	4	1
2004	35	3.45%	6	1	1
2005	39	3.85%	11	0	0
Total	1014	100.00%	195	100	19

Table 3: Sample Description

Sample	All	Low Level Deference	Medium Level Deference	High Level Deference
Variable	(1)	(2)	(3)	(4)
p(Purposive)	0.393***	0.395***	0.403***	0.349***
p(Text)	0.577***	0.589***	0.550***	0.611***
p(Whole Act)	0.260***	0.264***	0.246***	0.263***
p(Whole Code)	0.154***	0.158***	0.156***	0.140***
p(Histories)	0.425***	0.418***	0.447***	0.409***
p(Stare Decisis)	0.463***	0.484***	0.465***	0.423***
p(Other Canons)	0.279***	0.291***	0.265***	0.309***
p(Legislative Acquiescence)	0.076***	0.074***	0.068***	0.077***
p(Common Law)	0.089***	0.090***	0.083***	0.088***
p(Federalism)	0.033***	0.030***	0.034***	0.021***
p(Avoidance)	0.052***	0.053***	0.055***	0.034***
p(Due Process)	0.028***	0.025***	0.027***	0.034***
p(Separation of Powers)	0.005***	0.006***	0.003***	0.007**

Table 4: Tetrachoric correlations

	Low Level Deference	Medium Level Deference	High Level Deference
Panel A: Tetrachoric correlations			
I(Purposive)	0.128**	0.143**	-0.113
	[0.024]	[0.042]	[0.483]
I(Stare Decisis)	0.027	-0.433***	-0.346***
	[0.690]	[0.000]	[0.005]
I(Doctrines)	-0.231***	-0.354***	0.027
	[0.009]	[0.006]	[0.696]
Panel B: Pairwise correlations			
I(Purposive)	0.071**	0.067**	-0.029
	[0.023]	[0.033]	[0.353]
I(Stare Decisis)	0.015	-0.201***	-0.090***
	[0.637]	[0.000]	[0.004]
I(Doctrines)	-0.080**	-0.084***	0.006
	[0.011]	[0.008]	[0.861]

Table 5: Univarite statistics

This table contains the univariate statistics for the proportion of purposive-based, decisis-based, or doctrine-based decisions. It contains the average number of judgments that cite legislative purpose, stare decisis, or fundamental doctrines. It analyses the full sample, and sub-samples of low level deference, medium level deference, and high level deference cases. Superscripts ***, **, and * denote significance at 1%, 5%, and 10%, respectively.

Sample	I(Purposive) (1)	I(Stare Decisis) (2)	I(Doctrines) (3)
All	0.420***	0.534***	0.094***
No Deference	0.357***	0.576***	0.057***
Low Level Deference	0.492***	0.549***	0.046***
Medium Level Deference	0.520***	0.230***	0.02
High Level Deference	0.316***	0.211*	0.105
Low Level Deference – No Deference	0.136***	-0.027	-0.011
Medium Level Deference – No deference	0.163***	-0.346***	-0.037
High Level Deference – No deference	-0.041	-0.365***	0.048

Table 6: Legislative purpose regressions

This table contains IVPROBIT regressions where the dependent variable is an indicator variable that equals 1 if the majority or concurring judgments explicitly relied legislative purpose their decisions. The key control variable is the deference variable that equals 1 if the court adopts low-level deference, medium-level deference or high-level deference. The models control for endogeneity in the deference variables. Brackets contain p-values calculated using robust standard errors clustered by year and subject-matter of the interpretation. Supers cript***, **, and *represent significance at 1%, 5%, and 10% respectively.

Dependent Variable		I(Purposive)	
Deference Variable	Low Level Deference (1)	Medium Level Deference (2)	High Level Deference (3)
I(Low Level Deference)	2.037***		
	[0.001]		
I(Medium Level Deference)		0.449*	
		[0.088]	
I(High Level Deference)			0.573
			[0.651]
$p(Purposive)_{t-1}$	1.298*	1.551**	1.694***
	[0.080]	[0.015]	[0.008]
$p(Text)_{t-1}$	-0.891*	-0.424	-0.578
	[0.092]	[0.462]	[0.317]
$p(Whole\ Act)_{t-1}$	-0.556	0.018	0.059
	[0.365]	[0.979]	[0.931]
$p(Whole\ Code)_{t-1}$	0.452	0.604	0.604
	[0.735]	[0.677]	[0.676]
$p(Histories)_{t-1}$	0.752	1.193***	1.285***
	[0.201]	[0.009]	[0.004]
$p(Stare\ Decisis)_{t-1}$	-1.805**	-0.336	-0.253
	[0.036]	[0.665]	[0.752]
$p(Other\ Canons)_{t-1}$	0.656	1.336**	1.458**
	[0.423]	[0.038]	[0.025]
$p(Legislative\ Acquiescence)_{t-1}$	-2.370*	-2.297	-2.678*
	[0.083]	[0.115]	[0.064]
$p(Common\ Law)_{t-1}$	2.977*	3.338*	3.428*
	[0.083]	[0.073]	[0.062]
$p(Federalism)_{t-1}$	3.933**	2.947	3.560*
	[0.034]	[0.129]	[0.073]

$p(\text{Avoidance})_{t-1}$	-2.333*	-1.901	-2.061
	[0.067]	[0.198]	[0.162]
$p(\text{Due Process})_{t-1}$	2.447	1.841	1.97
	[0.265]	[0.454]	[0.416]
$p(\text{Separation of Powers})_{t-1}$	10.099*	7.315	7.408
	[0.081]	[0.223]	[0.225]
Constant	-0.337	-1.650***	-1.700***
	[0.705]	[0.005]	[0.005]
Observations	998	998	998
Wald Chi-squared	88.36***	22.46*	20.51*
	[0.000]	[0.070]	[0.071]
Chi-squared exogeneity test	2.58	1.12	0.45
	[0.108]	[0.294]	[0.502]

Table 7: Stare Decisis Regressions

This table contains IVPROBIT regressions where the dependent variable is an indicator variable that equals 1 if the majority or concurring judgments explicitly relied on common law doctrines or stare decisis in their decisions. The key control variable is the deference variable that equals 1 if the court adopts low-level deference, medium-level deference or high-level deference. The models control for endogeneity in the deference variables. Brackets contain p-values calculated using robust standard errors clustered by year and subject-matter of the interpretation. Superscripts ***, **, and * represent significance at 1%, 5%, and 10%, respectively.

Dependent Variable		I(Stare Decisis)	
Deference Variable	Low Level Deference	Medium Level Deference	High Level Deference
	(1)	(2)	(3)
I(Low Level Deference)	2.581***		
	[0.000]		
I(Medium Level Deference)		-1.309***	
		[0.000]	
I(High Level Deference)			-6.232***
			[0.000]
$p(Purposive)_{t-1}$	0.2	-0.122	-1.117
	[0.753]	[0.866]	[0.106]
$p(Text)_{t-1}$	-0.669	-0.24	0.581
	[0.175]	[0.729]	[0.373]
$p(Whole\ Act)_{t-1}$	-0.682	0.372	-0.307
	[0.182]	[0.621]	[0.635]
$p(Whole\ Code)_{t-1}$	-0.005	-1.331	-0.831
	[0.997]	[0.395]	[0.593]
$p(Histories)_{t-1}$	-0.176	0.273	-0.19
	[0.668]	[0.637]	[0.708]
$p(Stare\ Decisis)_{t-1}$	-1.954**	1.507	0.216
	[0.020]	[0.124]	[0.824]
$p(Other\ Canons)_{t-1}$	-0.439	-0.393	-0.781
	[0.489]	[0.645]	[0.340]
$p(Legislative\ Acquiescence)_{t-1}$	-0.595	-0.013	1.185
	[0.620]	[0.993]	[0.374]
$p(Common\ Law)_{t-1}$	0.824	1.283	0.109
	[0.596]	[0.506]	[0.948]
$p(Federalism)_{t-1}$	2.004	1.582	-2.023
	[0.197]	[0.486]	[0.320]

$p(\text{Avoidance})_{t-1}$	-1.057	0.271	0.64
	[0.351]	[0.863]	[0.624]
$p(\text{Due Process})_{t-1}$	1.396	4.812*	2.666
	[0.521]	[0.059]	[0.303]
$p(\text{Separation of Powers})_{t-1}$	6.259	1.49	-1.512
	[0.264]	[0.812]	[0.812]
Constant	0.986*	-0.525	0.543
	[0.074]	[0.447]	[0.450]
Observations	998	998	998
Wald Chi-squared	1404.29***	33.71***	50.29***
	[0.000]	[0.002]	[0.000]
Chi-squared exogeneity test	0.46	2.73	9.82***
	[0.499]	[0.100]	[0.002]

Table 8: Due process and conflict avoidance regressions

This table contains IVPROBIT regressions where the dependent variable is an indicator variable that equals 1 if the majority or concurring judgments explicitly relied on due process or constitutional conflict avoidance in their decisions. The key control variable is the deference variable that equals 1 if the court adopts low-level deference, medium-level deference or high-level deference. The models control for endogeneity in the deference variables.. Brackets contain p-values calculated using robust standard errors clustered by year and subject-matter of the interpretation. Superscripts ***, **, and * represent significance at 1%, 5%, and 10%, respectively.

Dependent Variable		I(Doctrines)	
Deference Variable	Low Level Deference	Deference Variable	Low Level Deference
	(1)	(2)	(3)
I(Low Level Deference)	2.565***		
	[0.000]		
I(Medium Level Deference)		-1.825***	
		[0.000]	
I(High Level Deference)			-6.729***
			[0.000]
$p(Purposive)_{t-1}$	0.193	0.031	-1.191
	[0.761]	[0.973]	[0.119]
$p(Text)_{t-1}$	-0.64	0.133	0.918
	[0.204]	[0.868]	[0.138]
$p(Whole\ Act)_{t-1}$	-0.696	-0.292	-0.771
	[0.162]	[0.768]	[0.226]
$p(Whole\ Code)_{t-1}$	0.000	-1.724	-0.699
	[1.000]	[0.360]	[0.663]
$p(Histories)_{t-1}$	-0.191	-0.05	-0.442
	[0.644]	[0.945]	[0.415]
$p(Stare\ Decisis)_{t-1}$	-1.978***	0.386	-0.656
	[0.010]	[0.749]	[0.488]
$p(Other\ Canons)_{t-1}$	-0.443	-0.152	-0.77
	[0.477]	[0.888]	[0.368]
$p(Legislative\ Acquiescence)_{t-1}$	-0.68	-3.903*	-0.393
	[0.573]	[0.092]	[0.778]
$p(Common\ Law)_{t-1}$	0.796	1.534	-0.208
	[0.596]	[0.535]	[0.906]
$p(Federalism)_{t-1}$	1.851	-1.72	-4.303**
	[0.258]	[0.518]	[0.034]
$p(Avoidance)_{t-1}$	-1.051	-0.082	0.558
	[0.351]	[0.970]	[0.695]
$p(Due\ Process)_{t-1}$	1.347	3.972	1.452
	[0.495]	[0.211]	[0.569]
$p(Separation\ of\ Powers)_{t-1}$	6.019	-2.242	-4.09

	[0.285]	[0.787]	[0.579]
Constant	0.970*	-0.877	0.6
	[0.091]	[0.283]	[0.371]
Observations	998	998	998
Wald Chi-squared	775.99***	29.40***	103.23***
	[0.000]	[0.009]	[0.000]