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ARTICLES

Does Deference Depend on Distinction? Issue Salience and Judicial Decision-Making in Administrative Law Cases

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Judicial deference to administrative agencies is often viewed as a dichotomous choice between full deference and no deference, ignoring considerations of institutional and political context. I argue that a court's decision on whether to defer to an administrative agency is more complex and is conditional on the political salience of the substantive issue in the case. I test this theory in the context of the U.S. Courts of Appeals using a sample of cases decided between 1961 and 2002. The results show that when dealing with non-salient cases, the level of deference to agencies is static, but in salient cases the level of deference is strongly related to the ideological congruence between the court and the agency.

KEYWORDS: administrative law, judicial review, salience, Chevron deference, judicial ideology

Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defense [sic] of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.[1]

We accord deference to agencies . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.[2]

[1]Raja Azlan Shah Ag. CJ writing for the Federal Court of Kuala Lumpur [Malaysia] in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at 148.

[2]Scalia, J. for the Court in *Smiley v. Citibank*, 517 U.S. 735 at 740–741 (1996).

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The perspectives presented in the above quotes illustrate that jurists worldwide recognize the importance judicial deference to administrative agencies has both for the state of the law and for its impact on the daily lives of individual citizens. As with much of the existing scholarly research on the subject, they imply that deference is a dichotomous choice: Either courts are always deferential and allow agencies to become bureaucratic dictators running amok over the rights and liberties of individual citizens, or they overstep the judicial role in exerting high levels of oversight to the point that they are replacing bureaucratic judgment with their own. However, in practice things may not be quite so simple, as the decision of whether to defer in any given case may be conditional on the importance of the substantive issue in that case.

The key question then becomes: Under what conditions will courts give wholesale deference to administrative agencies, and under what conditions will they provide defense of individual liberties from bureaucratic interference? My principal argument is that deference depends on the importance of the issue in the case. The questions raised in administrative law cases regularly impact the everyday lives of ordinary citizens; however, many of those cases involve issues of interest only to the parties in the case and a select group of individuals in the "consumer population" (Canon and Johnson 1999). Conversely, other cases touch on issues of high political visibility that would be of interest to a larger proportion of the mass public. I argue that the political salience of the issues in these cases (i.e., how much the issue resonates with the general population) will condition how judges view the case. If the issue is a highly salient one, judges will recognize the importance and give the case greater consideration. In doing so, I argue they will rely heavily on ideological considerations in their decision calculus. Alternatively, when the issue is less politically relevant, judges will be more likely to adopt a deferential posture, consistent with the position illustrate in the above quote from the U.S. Supreme Court's decision in *Smiley v. Citibank*.

Existing research shows that salience impacts the decision to author separate opinions (Hettinger, Lindquist, and Martinek 2003, 2004), gender differences (Songer, Davis, and Haire 1994), and other aspects of judicial behavior on the U.S. Courts of Appeals. However, lacking from this existing work is a thorough conceptual definition of salience. Salience is a very broad term meaning a variety of things to different people at different times. At a basic level it is synonymous with importance, but it is more than that. Importance can take many forms and can itself vary across time and individuals, and there is no single definition (or measure) of salience appropriate for all situations. In other words, the concept of salience is context-dependent and must be defined consistent with the particular context of the research question. Therefore, while the theoretical focus herein is on the conditional impact of political salience on judicial review of administrative agency decisions, I also address important questions related to the broader need to ensure correspondence between our conceptual definitions of salience and how those concepts are operationalized.

THE LEGAL PROCESS AND THE INDIVIDUAL CITIZEN

The U.S. Constitution gives Congress the sole power to make law. Yet many of the statutes passed by Congress today have little direct impact on individual citizens. The genesis of this new reality is the development of the modern administrative state. As governments extend their reach into more aspects of a society, many of these areas require a degree of technical competence outside

the skill set of the average legislator. An early example of this is reflected in the passage of the Communications Act of 1934,[3] the purpose of which was:

> regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

As the language of the Communications Act illustrates, the development of new technologies and the growth of regulatory areas the federal government desired to bring within its purview necessitated the delegation of power to bureaucratic agencies.[4] Therefore, the quality of any public policy depends on the quality of bureaucratic implementation of a given statute as much as it does the intention of the legislative body that created it, or as Pressman and Wildavsky note, "many policies based on apparently sound ideas have encountered difficulty in practical application. A policy's value therefore must be measured . . . in light of its implementability" (1984, xv). From the prospective on the individual citizen, the actual text of any given law impacts their daily life very little—if at all—however, the implementation of that law by a given administrative agency possesses the potential to affect that individual in a substantially meaningful way.

While a variety of procedural safeguards exist under the Administrative Procedures Act[5] and other federal statutes, once an agency issues a final decision or determines a final course of action, dissatisfied individuals (or groups) often find themselves with no recourse apart from judicial review. However, when reviewing an agency action or decision, courts do not possess unlimited discretion. The reviewing court cannot simply "impose its own construction on the statute" but must give some deference to the agency's interpretation (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 1984).[6] Additionally, the court must consider the agency's potential response to any decision it renders. As judicial decisions are not self-enforcing, it is often the same agency whose initial decision is being reviewed who determines how to carry out a court's ruling. Therefore, the court must consider potential shirking by the agency and the possible institutional costs for having its decisions ignored. Moreover, agencies possess great discretion in implementing court rulings—thus even a favorable judicial decision does not guarantee final victory for the dissatisfied citizen.

[3] 47 U.S.C. §151 et seq.

[4] I do not explore herein the degree of discretion delegated by Congress to administrative agencies. There is a wide literature exploring the degree of control Congress attempts to maintain over bureaucratic decision-making (see, e.g., Huber and Shipan 2002; Weingast and Moran 1983; Wood and Waterman 1991); for my purposes, it is sufficient that a substantial degree of bureaucratic discretion exists. Thus, congressional action is treated as exogenous in my theoretical framework. Future research should relax this assumption by introducing an endogenous Congress into the theoretical framework I introduce.

[5] 5 U.S.C. §500 et seq.

[6] 467 U.S. 837 at 843 (1984).

A THEORY OF COURT–AGENCY INTERACTION

The existing literature on judicial review of administrative agencies has largely ignored the role of institutional structure and political context. In part, this is due to the importation of theories generated to explain the review of lower courts to the administrative law context. While we can learn much from these more general theories of judicial decision-making, it must also be recognized that administrative agencies are qualitatively different from lower courts. Therefore, existing general theories of judicial decision-making can only partially inform our understanding, and theories more specific to the administrative law context must be developed. This argument is not meant to disparage the value of broad, general theories but to recognize that the level of parsimony necessary to produce a general theory requires that certain applications will better fit the theory than others will. Some applications that do not fit within the general theory will be minor and relatively unimportant, while others will possess greater substantive importance. The interaction between courts and administrative agencies fits into the latter due to the role of these institutions and the interaction between them in shaping substantive public policy in the U.S. and many other nations.

The theoretical framework I present explicitly recognizes the unique nature of judicial review of administrative agencies. In doing so, it builds from one primary assumption common to previous research—both courts and agencies desire to impact the substance of public policy. Each actor wants policy to be set as close as possible to its own ideal of "good" policy, yet neither operates within a vacuum. As discussed above, the process by which policy forms involves considerable interaction between the two actors—thus in rendering a decision or making a determination as to the proper course of action, each must consider the constraints presented by the decision process and the preferences and behaviors of the other actor. Additionally, legal rules and institutional considerations also play a role in the decision calculus of each actor. Thus, to maximize the proximity of the final policy to their ideal preference, I further assume that both the court and agency will behave in a strategic fashion.

From this theoretical perspective, three major factors should influence the court's decision making. First, it considers the preferences of the agency. If the ideologies of the court and agency closely align, then the court's decision making is relatively simple—it can affirm the agency and achieve its desired policy goals. Conversely, if the ideologies of the two actors diverge, the court cannot achieve its policy goals without striking down the agency's decision. Second, the court considers the salience of the issue in a given case. Consistent with my assumption of courts as policy-motivated actors, I define salience conceptually in terms of political rather than legal salience.[7] For such a court, only salient cases will matter—thus, all else equal, the court should be much more deferential in areas of low salience.

Finally, as courts lack the power to enforce their decisions, they are dependent on the compliance of other actors and the mass public. Scholars have found that likelihood of compliance with a judicial ruling is largely a function of the legitimacy of the court (Gibson and Caldeira 1995; Murphy and Tanenhaus 1968), but other factors such as public perceptions of the "fairness" of the court's rulings" (Rohrschneider 2005; Tyler 1990) and the ability of the court to impose sanctions against actors who fail to follow its rulings (Spriggs 1996) are also relevant. If the decisions of a

[7]Most scholars distinguish between these two types of salience (see Brenner and Arrington 2002), with some even including both as separate covariates in a single model (Maltzman, Spriggs, and Wahlbeck 2000).

court are continually ignored, the court may lose its legitimacy, or, in the words of Rogers (2001), its "continuation" after the end of the process to review future agency action.[8] While Rogers (2001) assumes that the court will weight the preservation of its institutional reputation higher than achieving its desired policy in a single case in the court–legislature context, this assumption can be relaxed in the court–agency context. Specifically, in the arena of judicial review of agency action, while agencies may possess substantial freedom to pursue their own policy goals by shirking perfect implementation of court decisions (Canon and Johnson 1999; Spriggs 1996), as Spriggs (1997) shows, they nonetheless comply most of the time.

Moreover, this approach explicitly recognizes three qualitative differences between administrative agencies and trial courts that should impact the nature of appellate review. Agencies exist outside of the judicial hierarchy, and the interaction between courts and agencies reflects a relationship between separate political entities. Several aspects of this framework capture this in ways often overlooked in more traditional approaches that look at judicial review of agency decision-making through a theoretical lens developed to explain review of lower courts. First, there is no theoretical reason to expect appellate courts to give deference to trial courts based on how salient a given issue is to the trial court. Lower courts, unlike agencies, will see the same mix of issues as appellate courts, and issues that are (are not) salient to the appellate court are likely to be (not be) salient to the trial court as well. Thus, it is unlikely that appellate court review of trial courts will be independently impacted by concerns over where a given issue is important to the trial court but not to the appellate court. Conversely, agencies are created to work in a specific policy area, deal with issues falling within that narrow scope, and develop an expertise in the area that generalist courts lack. This makes it reasonable to expect administrative agencies collectively to consider all issues to be salient, as each agency individually deals only with one policy area about which they care dearly. Therefore, while appellate courts should be unconcerned with the salience of a given issue to a trial court whose decision it is reviewing, there is sufficient reason to believe they may be concerned with the salience of an issue to an agency whose decision it is reviewing.

Second, the impact of ideology is different. Unlike lower courts, which are legal entities, agencies are inherently political. Their decisions and actions, while bound by statutes and legal precedent, are motivated principally by the desire to promote a particular political agenda. As such, reviewing courts can recognize an agency decision as a sincere reflection of their policy preferences, rather than as a function of law, politics, and other factors as with review of lower courts. An appellate court is able to pay greater attention to the political positions taken by the agency, as legal principles of deference to agencies offer them some flexibility in reviewing agency interpretation of law. This makes the key ideological consideration not simply the ideological congruence between the reviewing court and the directionality of the decision (as with review of lower courts), but the ideological congruence between reviewing court and the sincere preferences of the agency. Finally, agencies possess great discretion in the implementation of court decisions on remand compared to lower courts. While agencies often follow the court's ruling as to the immediate effect on the parties in the case, they may interpret the ruling in such a manner that it shirks implementation of broader policy changes dictated by the court. This shirking by either muting the impact

[8]Rogers's (2001) model was is the context of Supreme Court–Congress interaction, but the implication is the same—institutional costs paid when another actor fails to abide by its rulings threatens its ability to act in opposition to that actor in the future.

of the court's decision on long-term policy or even interpreting it in a way that impacts policy in a manner totally inconsistent with the court's intent poses a threat to the court's legitimacy.

MEASURING SALIENCE

The judicial politics literature is rife with discussions of issue salience, yet much of this work neglects definitional precision at a conceptual level. Operationalizing an undefined or underdefined theoretical concept is problematic. Even if a measure receives consensus acceptance from the scholarly community, conceptual definitions of vacuous concepts vary in important details from one theory to the next. Therefore, for a measuring instrument to validly measure what it is intended to measure, there must be a connection between that measure and the concept that it represents that is defined with some degree of theory-specific exactitude (Carmines and Zeller 1979). This is especially prevalent with respect to the concept of salience, which, as Wlezien observes, "means different things to different people and nothing in particular at all to others" (2005, 557).

At its most basic level, salience refers to importance. This definition is consistent with the classic usage of the concept in the political science literature. Yet, importance itself is a concept so large as to be rather vacuous—thus defining salience simply as a set of important issues fails to add conceptual clarity. Importance cannot exist independent of context; therefore, at a conceptual level a workable definition of salience needs close correspondence to theory. Specifically, any definition of salience—and, by extension, any measurement instrument used to operationalize that definition—is enhanced when placed in the context of the unique theoretical question addressed. Given my theoretical framework, I adopt the following conceptual definition of salience for this article: *A given case is defined as being salient if and only if it involves an issue that possesses political overtones or potential to impact public policy in a key policy area in the current political environment.*

The key to avoiding measurement error lies in maintaining an explicit connection between a given measure and theory (King, Keohane, and Verba 1994). In determining a proper measuring instrument for salience, this requires a direct connection between the measure and the conceptual definition utilized in the study. Specifically, a measure consistent with my theory must (1) account for the political importance of issues, (2) be contemporaneous to the judge's decision, (3) view importance in terms of the broader political environment of which the judiciary is a part, and (4) focus on issues rather than individual cases. Of the measures of salience currently used by judicial politics scholars, none meet all four necessary criteria for my theoretical purposes. This is not meant as a broad criticism of existing measures in general. Rather, consistent with my above discussion, it is an acknowledgment that existing measures fail to meet the necessary features of the conceptual definition utilized in this study. To find a more appropriate measure for my purposes, I rely on data on public perceptions of the most important problem facing the country taken from the Recoded Most Important Problem Data Set (Feeley, Jones, and Larsen 2001).[9]

[9]This data set contains categorized annual responses to the Gallup Most Important Problem Surveys for each year from 1946 to 2007. The individual responses to each of the Gallup surveys within a given year are coded by general issue area according to the Policy Agendas Project's major topic categories. Yearly aggregate proportions of response falling into each category are then created. Further information, data, and codebook are available from the Policy Agendas

While a public opinion measure of salience is uncommon in the judicial politics literature, such a measure possesses several desirable qualities. First, it is clearly focused on political importance. Derived from surveys of the American public conducted by the Gallup organization, the measure is designed to be a barometer of what issues the public views as particularly salient at a given time. Second, such a measure is contemporaneous to a judge's decision. Rather than providing an indication of salience after the fact, it provides a moving indicator of what issues are important at a given point in time. Finally, it captures the issues that are most prevalent in the broader political environment and places the focus on issues rather than individual cases.

Ideally, a measure of salience would directly measure the perspective of individual judges to ascertain which issues they consider most salient at the time a given case is decided (Black, Bryan, and Johnson 2011; Brenner 1998). However, lacking the ability to see into the minds of the hundreds of judges who have sat on the Courts of Appeals over the past few decades, a reasonable proxy is required. As Epstein and Segal (2000) note, this requires the assumption that judges share the perception of what is salient with the individual or group whose perspective is actually being measured. Assumptions of this nature—either explicit or implicit—dominate scholarship on the impact of salience on judicial decision-making. For example, previous measures common in the literature evaluate salience from the perspective of newspaper editors (Collins and Cooper 2012; Epstein and Segal 2000; Vining and Wilhelm 2011), academics and other legal experts (Epstein and Knight 1998; Flemming, Bohte, and Wood 1997; Rohde 1972; Segal and Spaeth 1996; Slotnick 1979; Wahlbeck, Spriggs, and Maltzman 1998), and interest groups (Collins, 2008; Maltzman and Wahlbeck 1996; Maltzman, Spriggs, and Wahlbeck 2000). Moreover, as the conceptual focus is on importance to the broader political environment, it seems intuitive that judges—like the rest of the population—will possess a shared perspective on the key political issues of the day.[10] Therefore, it is likely that judges—even those of regional courts—will pay increased attention to cases involving issues at the forefront of the national political dialog. As such, drawing on this connection between judges and the mass public for an indicator of issue salience offers a reasonable alternative given the near impossibility of directly measuring the perceptions of judges themselves.[11]

RESEARCH DESIGN

With a conceptual definition of salience specified and an appropriate measure instrument located, I can now specify testable hypotheses drawing from my theoretical framework. Due to the variation

Project at the University of Texas at Austin (http://www.policyagendas.org/). Details on Gallup's methodology can be found at www.gallup.com.

[10]While little work directly explores the link between the public's evaluation of what issues are most important and a similar evaluation of issue importance by judges, Baird's (2004) work on information signaling by the Supreme Court provides some evidence of shared perspectives.

[11]One potential issue with this measure—and any measure that captures salience at the issue rather than case level—is that within any particular issue area the individual characteristics of some cases make them more politically relevant than others of a more mundane or routine nature. While this is probably true, it is also likely that when a given issue is particularly relevant in the political environment of the time, judges will give extra attention to even the most routine cases relating to that particular issue. This is specifically relevant in a study of judicial review of administrative agency decisions, where the vast majority of cases will never attract the attention of policy makers or the mass public, but which impact policy in areas that do possess a high degree of relevance to these groups.

in the importance of the substantive issues in cases before the Courts of Appeals in general, and in administrative law cases in particular, the degree of deference to agencies by the courts should be impacted by the salience of the case. However, the impact of salience on judicial decision-making is not direct; rather, it conditions the impact of ideology. Generally, the greater the policy divergence (convergence) between the court and the agency it is reviewing, the less likely (more likely) the court is to defer to the agency's decision. Due to the nature of administrative law cases, courts are likely to consider ideological factors only in salient cases, not in non-salient cases. This conditional relationship between salience and ideology is reflected in the following hypotheses:

> **Conditional Ideology Hypothesis A**: In salient cases, as the ideological distance between a court and an agency increases, the probability a court will defer to an agency decision decreases, *ceteris paribus*.
>
> **Conditional Ideology Hypothesis B**: In non-salient cases, the ideological distance between a court and agency should have no impact on the probability a court will defer to an agency decision, *ceteris paribus*.

To evaluate whether issue salience impacts judicial review of administrative agency decisions, I examine a sample of administrative law cases in the U.S. Courts of Appeals decided between 1961 and 2002. Specifically, I rely on data from the Court of Appeals database, originally compiled by Donald Songer and updated by Ashlyn Kuersten and Susan Haire.[12] Limiting my analysis to all cases involving judicial review of an agency decision or action yields 852 cases for my analysis.

Since my theoretical interest focuses on the impact of salience on the level of deference granted to agencies by a court, the dependent variable measures whether the court ruled in favor of the agency. This variable is coded "1" if the court held for the agency, "0" otherwise. In a handful of cases, both parties were government agencies; these cases were eliminated from the data during the construction of the data set. Additionally, cases where there was no clear indication of the agency's position on the primary substantive issue in the case were also eliminated from the data set.

The primary explanatory variable of interest is *salient issue*. As discussed above, I operationalize salience in reference to public opinion regarding the "most important problem" facing the country. Data for this variable is taken from the Recoded MIP Data Set (Feeley, Jones, and Larsen 2001). Specifically, I code *salient issue* with a dichotomous indicator that is set equal to "1" for issue/years where at least five percent of all respondents classified a given issue area as the nation's most important problem, and "0" otherwise. Figure 1 below provides a visual depiction of variation in importance across issues and time.[13] While the decision to convert a continuous measure into a dichotomous one always involves "throwing away" variation in the data, it is necessary in this case due to a substantial amount of noise in the raw measure.[14] Moreover, the choice of a cutpoint for establishing the dichotomous indicator requires a degree of subjectivity that could potentially impact the quality of inference (Epstein and Martin 2004). However, the

[12]Both the original Court of Appeals database and the update are archived at the University of South Carolina's Judicial Research Initiative, which is located at http://www.cas.sc.edu/poli/juri/.

[13]Appendix A provides information on my matching of issue codes between the MIP and Court of Appeals data sets.

[14]This measurement choice does not influence the substantive conclusions of my analyses, as a re-estimation of my empirical models utilizing the raw percentages as a continuous measure of salience rather than the dichotomized indicator reveals no changes in the significance or directionality of the coefficients; however, the 95 percent confidence interval for the coefficient for the alternative salience measure become extremely large due to the noise introduced by the measure.

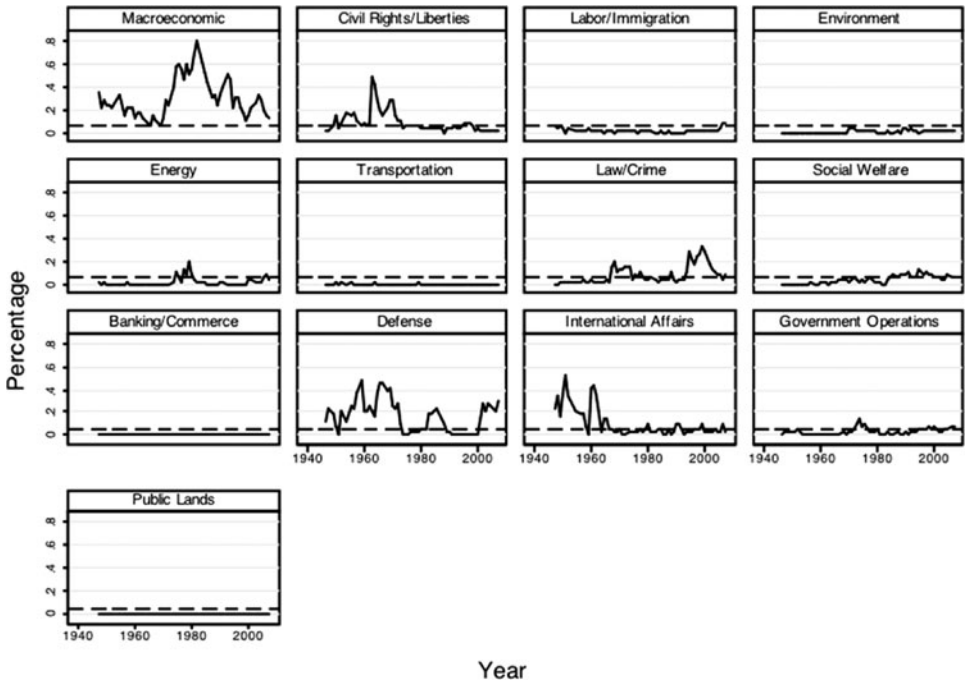

FIGURE 1 Variation in Issue Salience Across Time.
Note. The dashed horizontal line represents the 5 percent threshold used it determining whether an issue was coded as salient for a given year.

choice of five percent is due to the low number of issues that are deemed "most important" by more than a handful of individuals in any given year as illustrated in Figure 1, and the results are robust to changes in this threshold.[15]

In measuring salience in this manner, I rely on two assumptions. First, that judges are like any other member of the general population in that they will pay increased attention to issues that are highly relevant in the political environment at a given moment in time.[16] While this

[15]When the models are re-estimated using four or six percent as the cutpoint, no significant changes in the results occur.

[16]Two alternative measures of salience were also created and utilized in combination with the measure described above in alternative model specifications. The first was a measure of judicial expertise, where expertise was defined as at least one judge on the panel having prior professional experience in a position relevant to a given issue. For example, judges with previous experience as state prosecutors, service on the U.S. Sentencing Commission, or other relevant positions were coded as experts in criminal issues. Data on previous experience was taken from the Attributes of U.S. Appeals Court Judges Database compiled by Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski and available from the JuRI project (http://www.cas.sc.edu/poli/juri/attributes.htm).

The second measure utilized amicus participation as an indicator of political salience (Maltzman and Wahlbeck, 1996; Maltzman, Spriggs, and Wahlbeck 2000). As recent work by Collins (2008) suggests, *amicus* participation may be best conceptualized as an indicator of case complexity rather than salience, at least with respect the U.S. Supreme Court. While this issue has yet to be directly addressed in the context of the U.S. Court of Appeals, the theoretically appropriateness of

assumption is not directly tested—and is potentially untestable—it seems reasonable that judges would be aware of the dominant politically issues of the day. Moreover, understanding their ability to impact policy through their decisions, it seems reasonable to assume that judges would pay particularly close attention to cases involving these issues.[17] The second assumption relates to the use of a measure of national public opinion as an indicator of issue salience for regional courts. While it is possible that certain issues may be politically salient in certain geographic regions of the country but less important in other areas and that these issues will be missed by the use of the MIP measure, it should be rare that issues of this nature should overshadow key nationally relevant issues. This should be especially true in the modern era as news media and popular political discussion have shifted to a focus on national issues over local and regional ones. Additionally, the fact that judicial review of many agencies is exclusively within the jurisdiction of the DC Circuit illustrates a desire of Congress to achieve national uniformity of administrative law, providing confidence that even if this assumption is problematic in some studies of judicial decision-making, that concern should be muted in the administrative law arena.

As my theoretical expectation with respect to issue salience focuses on its conditioning effect on ideological voting, it is necessary to include a measure of ideology. To operationalize a measure of the ideological distance between the two actors, I first require a measure of the ideology of each. In contrast to the U.S. Supreme Court, where sophisticated measures of justice ideology exist (Martin and Quinn 2002; Segal and Cover 1989), for judges of the Courts of Appeals similar measures are lacking. Thus, for panel ideology, I rely on the measure of appeals court judge ideology developed by Giles, Hettinger, and Peppers (2001). This measure takes account of the ideology of the appointing president as measured by Poole (1998), as well as the Poole and Rosenthal (1997) common space score of the relevant senator or senators when senatorial courtesy was operative at the time of the judge's appointment (Giles, Hettinger, and Peppers 2001, 631).

As more nuanced measures of agency ideology are unavailable for all the agencies in my data over the time frame of the analysis,[18] the ideology of the appointing president of the agency head will be used as a proxy.[19] Because my theoretical model predicts that judges should consider agency ideology as an indicator of whether the agency is likely to shirk or faithfully implement the court's decision in the future, I measure the ideology of the agency at the time of the court decision, rather than at the time the initial agency decision was made or action taken. Thus, my measure of *court–agency distance* is simply the absolute value of the distance between the two ideology measures, where larger values correspond to greater ideological divergence and smaller values correspond to ideological congruence.

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using *amicus* participation as a measure of salience has at least been questioned here as well (Collins and Martinek 2010, footnote 3). The inclusion of either (or both) of these alternative measures did not alter the estimates for the impact of the other variables in the model. Also, neither of these alternative measures achieved statistical significance in any of the alternative models. Results of a series of Hausman specification tests confirmed the appropriateness of excluding these measures from the primary models.

[17]If my assumption is incorrect and judges pay less attention to the more mundane or routine cases even when they involve a particularly salient issue, then the measurement error will systematically bias against finding support for my salience hypothesis.

[18]Two better measures of agency ideology exist; however, both have limitations that make them inappropriate for this study. Clinton et al. (2012) developed a measure of agency ideology via surveys of bureaucrats. Unfortunately, this measure captures agency ideology at a single point in time. Nixon (2004) presents a temporally dynamic measure of agency ideology, but it is only available for a handful of agencies.

[19]For agencies headed by a panel, rather than a single individual, the median ideology score is used.

To examine the hypothesized relationship between ideology and judicial deference conditional on issue salience, I next generate an interaction term between *salient issue* and *court-agency distance*. If the hypothesized relationship exists, then there should be a negative relationship between the interaction term and the dependent variable, and the coefficient on the term *court-agency distance* should be statistically insignificant. In other words, when the court is faced with a case involving a salient issue (i.e., *salient issue* = 1), greater ideological distance should decrease the likelihood of deference, but when the court is dealing with a non-salient issues (i.e., *salient issue* = 0), then ideology should have no impact on the likelihood the court will defer to the agency.

While my theoretical interest focuses on the ideology of the agency due to its potential future actions and the resulting strategic considerations judges may undertake, it is nonetheless important to account for the ideological directionality of the initial agency decision or action that the court is reviewing. To account for this, I include an indicator of *liberal agency decision*, coded "1" if the decision or action being reviewed is in a liberal direction and "0" if it is in a conservative direction. Cases in which the initial agency action or decision lacks a clear ideological directionality are excluded. Because agency turnover is generally limited to changes in presidential administrations, in many cases the agency that issued the initial decision or action will be ideologically identical to the agency charged with implementing the court's decision. Therefore, a failure to control for this variable could result in omitted variable bias.

I also include two control variables that the existing literature on judicial review of administrative agencies suggests are of theoretical importance: *DC Circuit* and *Post-Chevron*. *DC Circuit* is a dummy indicator of whether the case was heard by the DC Circuit or by one of the other circuit courts. In the area of administrative law generally, the DC Circuit holds a special position as appeals for many agencies go directly to this circuit regardless of where the action at issue occurred. As such, the DC Circuit gets the lion's share of administrative law cases.[20] Due to its unusual position in administrative law, it is possible that the decision of the DC Circuit will be systematically different from those of the other circuits. Finally, *Post-Chevron* captures whether the case occurred after the Supreme Court issued its decision requiring federal court judges to grant greater deference to agency interpretation of federal statutes; it is coded "1" if was decided after 1984 (the year the U.S. Supreme Court issued its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*)[21] and "0" otherwise.

EMPIRICAL RESULTS

Since the dependent variable for the analysis is dichotomous, I utilize logistic regression to estimate my empirical model. Figure 2 presents estimates of the logit coefficients and 95 percent confidence intervals for the model.

Figure 2 reveals that, as hypothesized, the impact of ideology on the likelihood of judicial deference to administrative agency decisions is conditioned upon the political salience of the issue in the case. The negative coefficient on the interaction term, *salient issue*court-agency distance* implies that when the court is confronted with a case involving a salient issue, the likelihood the

[20]This is true in my sample as well. Out of 852 total cases, 209, or 24.52 percent, were heard by the DC Circuit. No other single circuit heard more than 10 percent of the cases in the sample.

[21]476 U.S. 836 (1984).

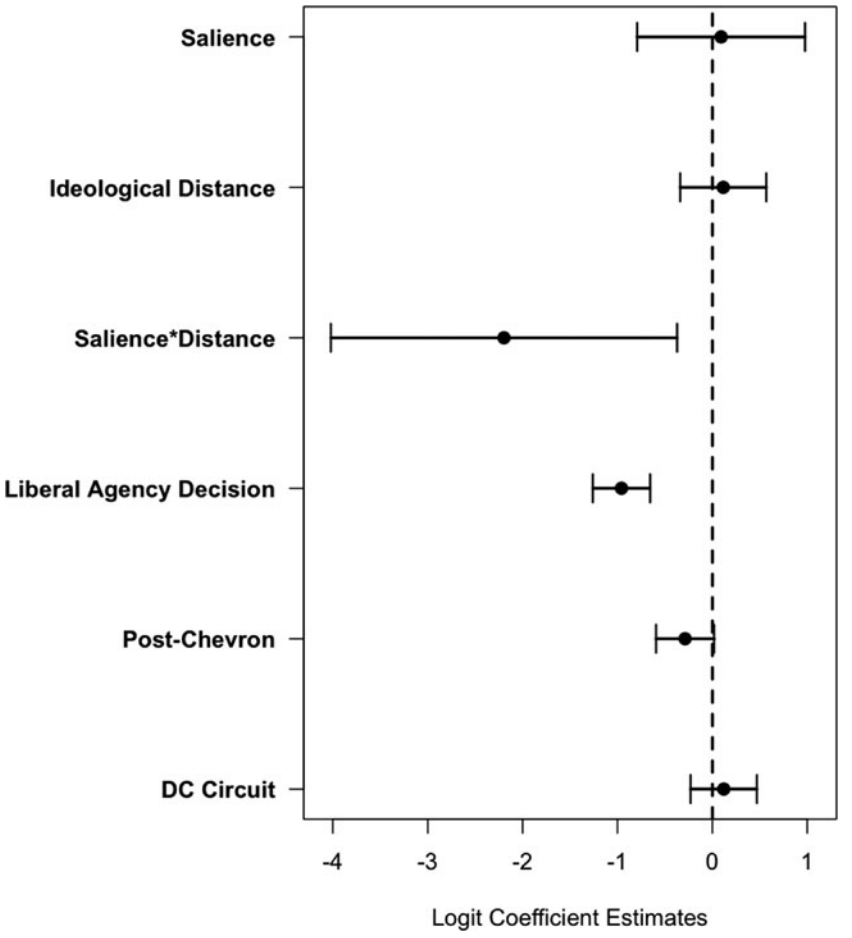

FIGURE 2 Conditional Impact of ideology and Issue Salience.
Note. The dots represent logit coefficient estimates. The errors bars represent a 95% confidence interval. Estimates for the constant term (not shown) are 0.226 [−0.121, −0.574]. $N = 852$, $\chi^2 = 54.00$, PRE = 0.123.

court will rule in the agency's favor decreases as the ideological distance between the court and agency increase. Conversely, when the case involves an issue that lacks political salience, we see that the impact of ideology on the likelihood of deference disappears based on the failure of the *ideological distance* term to achieve statistical significance at conventional levels ($p = 0.619$).

While this finding is interesting, the substantive impact of the interaction effect cannot be inferred from Figure 2 due to the inability to directly interpret logit coefficients. To provide some substantive meaning for these results, the conditional effect of ideology on the likelihood of judicial deference is presented graphically in Figure 4. As the figure illustrates, in cases involving a non-salient issue (the dashed line), the probability of deference is largely unchanged regardless of the ideological distance between the court and agency. In contrast, when the case

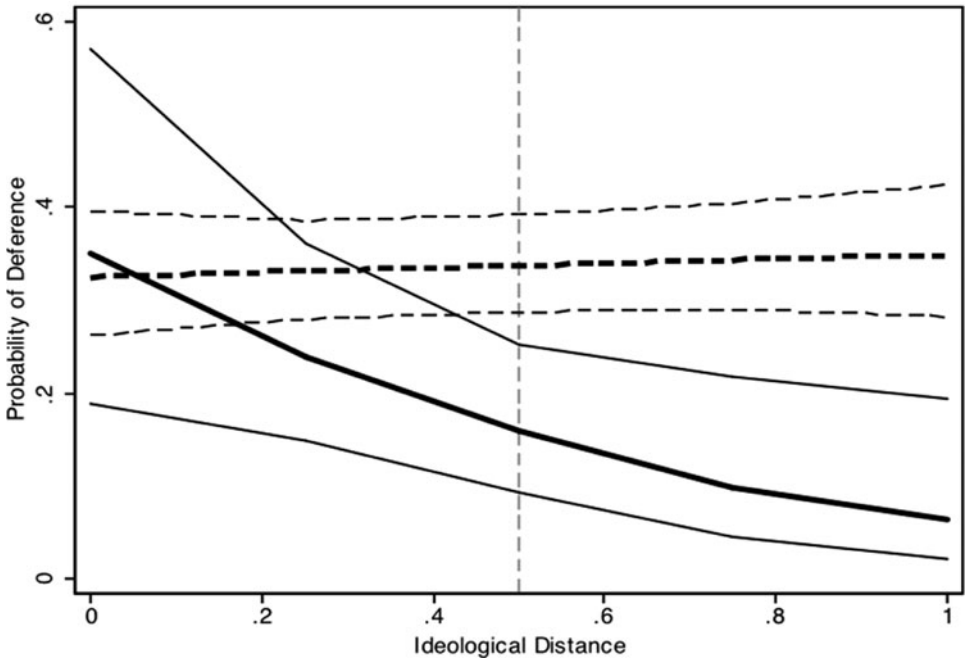

FIGURE 3 Impact of Ideology Conditional on Issue Salience.
Note. The thick solid line represents the median predicted values for salient cases and the thin solid lines represent the 2.5 and 97.5 percentiles for these cases. The thick dashed line represents the median predicted values for non-salient cases and the thin dashed lines represent the 2.5 and 97.5 percentiles for these cases. Predicted values were calculated holding all other independent variables at their medians. The dashed vertical line shows the median value of Ideological Distance.

involves a politically charged issue (the solid line), the probability of deference decreases from approximately 0.36, when the court and agency are perfectly aligned ideologically, to less than 0.1, when the two actors are completely divergent ideologically. While the 95 percent confidence bands reveal a degree of uncertainty with the exact substantive magnitude of this effect, there is a clear difference in the predicted likelihood of deference across the two types of cases at higher levels of ideological distance, where we would expect variation between salient and non-salient cases to occur. Specifically, for all values of ideological distance greater than its mean (the dashed vertical line), the probability of deference is significantly less likely in salient than in non-salient cases, in line with Conditional Ideology Hypothesis A.

IMPLICATIONS AND CONCLUSION

This article explores the fact that judges do not judge in a vacuum. Rather, they are acutely aware of the current political environment both in terms of the preferences of the other actors in the political system, but also in a more contextual perspective in acknowledging that at any given moment certain issues are going to possess a higher importance or salience. As courts must be

cognizant of the potential threats to their legitimacy if their decisions are repeatedly ignored, accounting for variation in importance provides a mechanism for understanding when it is worth the risk for courts to rule against agencies. When the case deals with a relatively unimportant issue, the court is strategically advantaged by utilizing a more lax standard of scrutiny and engaging in greater deference. Alternatively, when the case touches on a more important issue, then the court can take the risk and be less deferential, weighting ideological factors more heavily in its decision calculus.

The empirical analysis strongly supports the theoretical predictions regarding the conditional impact of ideology and issue salience on judicial deference to administrative agencies. The results conform to expectations and show that while ideology appears to have no impact in non-salient cases, it has a strong impact in salient ones, as the likelihood of deference decreases by about 25 percent when comparing an ideologically congruent court and agency with a court and agency whose views completely diverge. These results provide strong evidence confirming the predictions of the theoretical model under the set of assumptions built into the theory.

These results have important implications for our understanding of court–bureaucracy interactions generally, and whether courts effective in defending the "liberty of the subject against departmental aggression" or simply acting as rubber stamps for agency action operating under the aegis of administrative deference. These results indicate that courts provide the strict supervision of administrative agencies in cases dealing with issues of particular importance to the mass public. However, individual citizens are most likely to seek judicial review of a bureaucratic decision for something related to social security, a land-use permit request, or some other concern that is trivial on the national political radar. Therefore, we are left with a disconnect between the macro and micro levels. While the courts are more likely to engage in strict bureaucratic oversight in those cases dealing with issues of particular importance to the public as a whole, the issues most important to individual citizens in their daily lives are the ones in which courts will be the most deferential.

In addition to the theoretical contribution of this article, I suggest an alternative measure of salience to those commonly utilized in the judicial politics literature. Opposed to measures that focus on the importance of individual cases, I utilize a public opinion-based measure that captures fluctuations over time in the overall political importance of a given issue. Recognizing that not all cases in a given issue area will share equal importance, it is likely that when an issue is a particularly hot-button topic, judges will pay special attention to all cases touching on that issue. While rarely used in the judicial politics literature, the Most Important Problem survey conducted by Gallup is routinely used in public opinion research as an indicator of issue importance to the mass public and ideal for my application and potentially for many others in this area. This measure could be especially useful in studies related to judicial responsiveness to the public, studies of longitudinal shifts in judicial policy in particular issue areas, and studies for which a measure of issue salience is needed that is directly comparable across multiple political institutions.

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APPENDIX A: ISSUE SALIENCE CODING CONVERSION

COA Codes			*MIP Codes*	
GENISS	*Description*	*CASETYP1*	*MAJORTOPIC*	*Description*
1	Criminal	ALL	12	Law/Crime
2	Civil Rights	ALL	2	Civil Rights/Liberties
3	1st Amendment	ALL	2	Civil Rights/Liberties
4	Due Process	ALL	2	Civil Rights/Liberties
5	Privacy	ALL	2	Civil Rights/Liberties
6	Labor	ALL	5	Labor/Employment/Immigration
7	Economic	701–706	1	Macroeconomics
		725	5	Labor/Employment/Immigration
		771	2	Civil Rights/Liberties
		765–766	7	Environment
		757–758	8	Energy
		756, 761–764	10	Transportation
		760, 773–774	12	Law/Crime
		750–751, 755	13	Social Welfare
		710–722, 726–731, 733–737, 739–748, 752–754, 759, 770, 772	15	Banking/Commerce
		723–724, 732, 738	20	Government Operations
9	Miscellaneous	921	5	Labor/Employment/Immigration
		903	12	Law/Crime
		922–923	16	Defense
		920	19	International Affairs
		901–902, 904–906	20	Government Operations
		910–916	21	Public Lands