

Deference Mistakes

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This Article begins with what should seem a relatively straightforward proposition: it is impossible to fully understand the holding of a case without understanding its "deference regime" - the standard of review or burden of proof that governs the case. If a court holds in the context of a habeas petition that a constitutional right was not "clearly established," that does not mean that the court would hold that the right does not exist were it writing on a blank slate. If a court refuses to invalidate a granted patent, which is presumed valid and can only be held invalid upon a showing of clear and convincing evidence, that does not mean that the court believes the patent should have been granted in the first place. And if an appellate court holds that a trial court's ruling was not "plain error," that does not mean that the appellate court believes the trial court necessarily reached the correct result or would have affirmed the ruling if the review were more searching. Yet in case after case, we find that judges (and their clerks) confuse one deference regime for another or ignore deference entirely. In so doing, they make what we term deference mistakes. Courts in standard criminal cases regularly rely upon habeas precedents holding that a federal right was not "clearly established" to conclude that the right does not exist. The Federal Circuit and the Patent and Trademark Office regularly rely on precedents involving granted patents (which are presumed valid) to justify granting new patents (which are not entitled to that presumption). And courts of appeals regularly rely upon "plain error" precedents to justify holdings in cases where the standard of review is less deferential. Although the problem of deference mistakes cuts across legal doctrines, it has been neither identified nor described in prior scholarship. Our article presents a multitude of examples of deference mistakes in practice and explains why they are likely to occur. Deference mistakes may seem relatively innocuous, particularly if they are confined to individual cases. But that appearance is misleading. We develop a theoretical model of how deference mistakes, coupled with particular asymmetries in adjudication, can generate systematic shifts in legal doctrine. Deference mistakes may have contributed to the current patent crisis by adding to the proliferation of bad patents. They may also be partly responsible for retrenchment in the law of constitutional criminal procedure rights or the pro-employer shift in employment discrimination law. After analyzing the potential for deference mistakes to affect the long-term evolution of the law, we discuss potential solutions.

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