A POSITIVE POLITICAL THEORY OF RULES AND STANDARDS

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How judges choose between rules and standards fundamentally shapes case outcomes and the development of broader doctrine. While the literature has much to say about the relative merits of rules versus standards, it has largely failed to produce a comprehensive explanation of how judges make that choice. This Article takes a novel approach, using Positive Political Theory to examine the incentives of higher court judges and the information available to them about how lower court judges will likely use those doctrinal tools. By taking seriously both how substantive and ideological judicial preferences shape the choice over doctrinal form as well as the value that judges place on legal obedience, we bridge the divide between the overt cynicism of legal realism and the credulity of much of the rules-standards debate.

This Article identifies the dominant factors in judicial decision making, at both the higher and lower court level—legal obedience and political ideology. Within that framework, we show how six factors determine higher court choice over rules versus standards: political alignment within the hierarchical judicial system, the distribution of case facts, the inherent control characteristics of rules versus standards, the effect of overlapping doctrines, the extent that lower court discretion is unavoidable, and the effect of political heterogeneity on a multimember higher court.

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TABLE OF CONTENTS

INTRODUCTION

In the 2009 Term, the U.S. Supreme Court issued a significant constitutional criminal procedure opinion in *Herring v. United States*.[1] The fundamental issue in the case was whether the exclusionary rule should apply to prevent the introduction of evidence obtained due to a careless government record-keeping mistake that made a warrant unauthorized. The Court split along conventional ideological lines, with the more conservative Justices forming a 5-4 majority coalition allowing the introduction of the evidence in the case.[2] The Court expressly rejected a rule excluding evidence for every Fourth Amendment violation and created a flexible case-by-case standard evaluating the "culpability of the police and the potential of exclusion to deter wrongful police conduct" before excluding evidence.[3] The conservative outcome of *Herring* was unexceptional, given the ideological makeup of the Court, but the nature of the opinion raises questions central to the understanding of the creation of legal doctrine. Why did the Court choose this vehicle, at this time, to render its decision? Specifically, why did the Court create a very flexible legal standard in its opinion, rather than a clear rule to bind lower courts? Why did Justice Scalia, a devout supporter of rules over flexible standards, join the opinion's commitment to a standard? *Herring* is but

1. 555 U.S. 135 (2009).
2. *Id.* at 136–37.
3. *Id.* at 137.

one example of these doctrinal questions that recur throughout Supreme Court jurisprudence, and we explore the Court's choices in this Article.

In this Article, we present a Positive Political Theory (PPT) of how and why the dominant doctrinal forms of rules and standards are created. In contrast to many scholars who claim that one approach is uniformly preferable to another,[4] we illustrate that rules and standards can each be advantageous. We identify a range of factors, including the political-ideological makeup of both higher and lower courts, that determine which doctrinal approach is preferable under given circumstances.

Our theory rests on several insights from the PPT movement—in particular, that judges behave strategically and such behavior is facilitated by the hierarchical structure of the judiciary—and from the "rules versus standards" literature in legal scholarship, which identifies the limits and opportunities of judicial discretion inherent in the language in law.[5] Elements of the legal model—judicial preferences to "obey" legal doctrine—are folded into the "political control" model presented here, illustrating that the two models—legal and political—are not at all times in conflict (nor the former irrelevant in positive analysis) as explanatory devices of judicial behavior.

Incorporating PPT into an analysis of doctrine allows us to bridge the divide between the overt cynicism of legal realism and the credulity of much of the rules-standards debate. Doctrine is neither a direct product of "what the judge ate for breakfast" nor neutral dictates handed down without reference to preferences over outcomes. Both law and politics matter; the formal theory of PPT allows us to provide a nonidiosyncratic explanation of how they fit together.

Doctrine is both created and applied by courts at all levels of the judicial hierarchy. In Part I of our analysis, we set out key factors that drive the creation of particular forms of legal doctrine set out by higher courts—specifically, the ideological preferences of the higher court creating the doctrine, the ideological preferences and normative roles of the lower courts expected to follow doctrine, and the boundaries of discretion inherent in the common forms of doctrinal expression. The signifi-

4. *See, e.g.*, Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 FORDHAM L. REV. 1287, 1288–90 (2006) (arguing rules are preferable to standards because they provide greater definiteness and thus are conducive to greater internalization of the law and consequently the democratic value of self-governments).

5. Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 349–50 (1999). *See also* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24 (2007); Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

cance of each of these determinants has been demonstrated.[6] They operate in different ways, though, for the higher court that creates doctrine and the lower courts that apply it.

Part II more closely examines the operational characteristics of judicial doctrine. Although there are many doctrinal variations, a central issue is whether to create a clear binding rule or a flexible standard that admits of greater discretion in its application by lower courts. We review the discussion of the different doctrinal approaches and, most importantly for our inquiry, their effects on the political control of the higher court over the lower court. Much of our PPT of the creation and application of doctrine rests on this background.

Part III presents the complete PPT model of legal doctrine in the judicial hierarchy. In a system where it is impossible for the higher court to extensively monitor all lower court decisions (as in the U.S. federal judiciary), the higher court must attempt to constrain or facilitate political decision making by lower courts though the crafting of doctrine in the forms of rules and standards. The choice among rules and standards is driven not only by ideological preferences of the Justices, but also the "error rate" of a doctrinal rule, the distribution of case facts and litigants, the inherent control characteristics of doctrines themselves, the interplay between overlapping doctrines, and the interplay between judges on a multijudge higher court.

Understanding both the variety of factors that determine whether higher courts will choose to utilize rules or standards and the complex interplay of the factors is important for the rules-standards debate specifically, and for understanding the manner in which higher courts control lower courts more generally. Our analysis shows it is unlikely that one approach will consistently be superior, and that, depending on the factors listed above, rules and standards can each be advantageous or disadvantageous. As such, our theory explains why a uniform approach is unlikely to be attractive to higher courts in the long run, and thus why we see a variety of doctrinal forms used by courts.

In Part IV, we return to the Court's decision in *Herring v. United States*[7] and analyze the Court's switch from an exclusionary rule to a de facto standard through the model we develop in the previous section. The political-control model explains the Court's decision in *Herring* as a product of shifting political alignments between the Supreme Court and lower courts, and of interactions between the Justices on a heterogeneous Supreme Court.

6. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326 (2007).

7. 555 U.S. 135 (2009).

I. JUDICIAL DECISION MAKING

While much has been written on the nature of legal doctrine, especially the contrast between rules and standards, the legal literature has largely overlooked the role of judicial decision making in shaping legal doctrine—specifically, how substantive and ideological judicial preferences shape the choice of doctrinal form.[8] Even the classics of the genre, as written by Frederick Schauer,[9] Duncan Kennedy,[10] Louis Kaplow,[11] and Kathleen Sullivan[12] have touched only fleetingly on the descriptive determinants of doctrinal content. While the positive political scholarship on judicial decision making is also now voluminous, this research has only recently begun to account for the operation of legal doctrine.[13] We aspire to incorporate essential features of legal doctrine—the doctrinal forms of rules and standards—into positive models of judicial decision making.

Our endeavor first requires an understanding of the features of judicial decision making. Any positive theory requires an understanding of what motivates judges, an understanding that has at times confounded analysts.[14] The following discussion examines the primary motivations of judges and how they may differ according to context.

A. Features of Judicial Decision Making

Understanding the nature of doctrine requires an understanding of how judges decide, or what might be called the "judicial maximand."[15] Under extreme legal realism, where judges produce whatever outcomes they desire, without constraint, legal doctrine—and its various forms—

8. Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 517 (2006).

9. SCHAUER, *supra* note 5.

10. Kennedy, *supra* note 5, at 1697.

11. Kaplow, *supra* note 5.

12. Sullivan, *supra* note 5, at 97–112.

13. Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS., 65, 77 (1994); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998); Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 327 (2007); Schanzenbach & Tiller, *supra* note 5, at 24; Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114, 114 (1998); Tiller & Spiller, *supra* note 5, at 349–50.

14. Unlike most people, the economic motivation does not apply well to judges, because their income has little if any relation to their decisions. *See* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1054 (1995) ("[T]heory has had some difficulty accounting for judicial behavior because the judiciary has been structured to sharply reduce the self-interested motivations typically identified with other political actors (e.g., financial rewards, promotion, reelection)."); *see also* Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT'L REV. L. & ECON. 169, 169 (1992) ("[I]nability to identify a plausible objective function to impute to judges has frustrated economic analysis from the outset.").

15. Judge Posner has touched on the question in Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

are irrelevant. Such extreme realism, however, does not characterize judicial decision making. While judges undoubtedly have numerous and varying decision-making objectives, we identify the two major interests that are critical to the choice of doctrine: legal obedience and ideological preferences.

1. Legal Obedience

Our first feature of judicial decision making is adherence to legal requirements as expressed in existing doctrine. In this model, judges reach decisions via reasoned analysis of factors entirely internal to the law, such as precedent. Judges are to use "neutral principles" to avoid political judging under the rubric of a certain formalism.[16] The materials of the law yield answers entirely independent of "a particular individual's moral or political values."[17] Lower courts would faithfully apply the rules created by higher courts, and the higher courts would be considerably constrained in their own decisions by the pattern of their past doctrinal precedents.

Although rational choice theorists often ignore this possibility, there is no reason to reject it a priori.[18] Because "judges are supposed to decide cases by following legal doctrine, the inclination to do so is part of their more general desire to act in the proper fashion," a "well-recognized motivation" of individuals.[19] Judges themselves regularly report their fealty to the materials of the law in decision making.[20] Thus, Justices have proclaimed that "respect for precedent" is crucial.[21] While such claims need not be taken at face value, they at least justify the consideration of the variable in decision-making models.[22] It is surely possible that judges have legal preferences, such as those for "textual interpretation" that may override their other preferences.[23]

16. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9–10 (1959).

17. Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 2 (1990).

18. *See* Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL LEGAL STUD. 369, 384–87 (2005) (arguing that the significance of judges' concern with adherence to precedent unfortunately is overlooked by research).

19. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 213 (1998).

20. *See, e.g.*, J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 156 (1981) (reporting survey findings that appellate court judges were influenced, in part, by a feeling of "oblig[ation] to obey the Supreme Court"); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 21 (2002) (noting that judges consistently report that reaching "legally correct" decisions is important to them).

21. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

22. This decision-making model is summarized in Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255–64 (1997).

23. Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 100 (1994).

The legally oriented judge "maximizes utility by adhering faithfully to these internal rules, regardless of the external result."[24] Although this view is anathema to the views of both legal realists and political science's attitudinalists, who have shown empirically that judges largely vote according to their substantial policy preferences,[25] it does not follow that we should assume away the possibility that judges care about the law. It is likely that even if judges have strong preferences over outcomes, they may nevertheless be strongly influenced by the content of doctrine and norms of legal obedience.[26] This preference for legal adherence could be like a preference for political outcomes.

Role theory could explain this preference. There is research suggesting that the role of judges reduces the influences of ideology on their decisions.[27] Some research indicates that "judges' role orientations were strongly professional, much more professional, in fact, than political."[28] Because circumstances color preferences, the role of the judiciary could cause judges to value legal obedience.[29] In this view, judges may be driven to do their "duty."[30] Justice Frankfurter thus asserted that the "judicial robe" changes the nature of decisions, causing judges to "lay aside private views in discharging their judicial functions."[31] This role may be enforced by legal and public perceptions of the judge's opinions.[32] Relatively unexplored, but consistent with the norm of obedience, is the time and decision cost efficiency for judges in following established doctrine. Indeed, to the extent that judges seek slack, obedience can be a powerful mechanism to reduce the mental exertion required for the complex reasoning often necessary to change or argue around existing doctrines.[33]

24. Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 755 (2002).

25. *See infra* Part I.A.2.

26. *See* Jacobi & Tiller, *supra* note 13, at 330–31.

27. *See* James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 918 (1978) (suggesting that the judicial role induces reliance on legal materials in decision making); James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. POL. 104, 114 (1981) (same); Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1997–99 (1996) (same).

28. Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 902 (1993).

29. *See* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 61 (1997) ("[I]t pleases judges to carry out what they conceive as the judge's role."); *see also* RICHARD A. POSNER, OVERCOMING LAW 131 (1995) ("The pleasure of judging is bound up with compliance with certain self-limiting rules . . . .").

30. Cross, *supra* note 22, at 296–97.

31. Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 466 (1952) (Frankfurter, J., recusing himself).

32. *See* Shapiro & Levy, *supra* note 14, at 1058 ("[J]udges who ignore clear craft norms in order to pursue an outcome orientation are likely to suffer a loss of respect among fellow jurists, lawyers, and the public.").

33. H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991) (arguing that it is institutionally unsustainable to decide each case according to a judge's owns substantive preferences, and that following rules enables judges to cope with their large caseloads); Posner, *supra* note 15, at 31–32 (arguing that judges rationally attempt to minimize their workload when making judicial decisions).

Participants in the legal process declare that even though preferences over outcomes may shape some decisions, legal doctrine determines outcomes in the vast majority of cases.[34] Legal obedience alone, however, does not drive all judicial decision making. Such classic formalism wholly internal to the law is no longer a plausible explanation for decisions.[35] While legal obedience may well be a factor that influences judicial preferences, the remainder of this Section considers other relevant objectives of judges who render decisions.

2. Ideological Preference

The objective commonly juxtaposed against legal obedience is judicial ideology. In this view, judges reach decisions because they produce ideologically amenable results. A liberal judge would thus reach a liberal decision in a case that a conservative judge would resolve differently. This theory is not necessarily political in the partisan sense (i.e., rewarding party members or aligned constituencies), but suggests that judges' political-ideological preferences reflect their beliefs about welfare maximization and welfare distribution.[36] To the extent they have discretion in applying the law, judges' decisions may also reflect their ideological policy preferences.

Traditional legal realists question whether the law governs the judiciary and suggests that decisions are driven overwhelmingly by their ideological or other predilections.[37] This effect need not be a conscious one for it to be a pervasive one. In this view, "the notion of precedent became a mere beard for the adoption of the outcome preferred by the judge."[38] A number of scholars illustrate how reasonable legal arguments can be found for any decision preferred by the Court.[39] Legal obedience hence becomes meaningless, leaving the field open for judges to apply their ideological policies to the case at hand. Judge Posner has noted

34. PERRY, *supra* note 33, at 274.

35. *See* Rubin & Feeley, *supra* note 19, at 1989 ("The old, self-justificatory bromide that judges do not make the law, but only find it, is generally rejected—even scorned—these days . . . .").

36. *See* Cross, *supra* note 22, at 290 (discussing how political scientists distinguish "partisanship (favoring a political party) and ideology (favoring a political philosophy)").

37. For a brief review of the history of legal realism, see Brian Leiter, *American Legal Realism* (Univ. Tex. Pub. Law Research Paper, Research Paper No. 042, 2002), *available at* http://ssrn.com/abstract=339562 (reviewing the theories propounded by the realists of the era).

38. Cross, *supra* note 22, at 257. Judge Posner warns readers not to "be so naive as to infer the nature of the judicial process from the rhetoric of judicial opinions." Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988).

39. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Cannons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) (providing a list of cannons and "counter-cannons"—cannons supporting the opposite approach of interpretation—in statutory interpretation); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793–804 (1983). Judge Kozinski explains that "[j]udges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted" but can be "equally ingenious in burying language" for rights they disfavor. Silveira v. Lockyer, 328 F.3d 567, 568 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

that judges' policy goals exert considerable influence upon their decisions.[40] Other judges have conceded that their decisions are inevitably influenced by their ideological preferences.[41] Former Judge Robert Bork contended that for contemporary courts "nothing matters beyond politically desirable results, however achieved."[42]

Judges exert the power of government, just like other politicians. Functionally, they are policy makers who may enforce laws more strongly or weakly or even invalidate those laws as being unconstitutional. The federal judicial selection process is colored by ideological concerns.[43] Many cases have direct ideological or political implications, and most others can be evaluated according to some individual sense of justice. Thus, it is unsurprising that personal ideology could influence judicial decisions.

An ideological judge is concerned with policy outcomes but not outcomes limited to the case under consideration. Such a judge strives to use legal doctrine to drive outcomes in future cases, decided by a variety of different judges. Thus, legal principles are "compatible with—and in fact explained by—judges' concerns with the external policy effects of their rulings."[44] Judges might therefore issue decisions that deviate from their preferred ideological outcome in the initial case in order to structure a body of doctrine that would better yield their ideological preferences in future decisions.[45]

Adhesion to ideological preferences might be considered an attempt to achieve a broader judicial objective—the maximization of societal welfare. In this sense, ideology represents an assumption of how welfare maximization is best achieved when information about the precise effects of any given policy is unknown or unknowable. When welfare outcomes from policy choices are known or knowable, one might expect judges to adopt a rule of Pareto optimality without reliance on decision drivers embedded in ideology.[46] If one doctrine were Pareto optimal, improving everyone's lot against the status quo, the judiciary would likely adopt the doctrine which would advance the interests of both liberals

40. POSNER, *supra* note 29, at 121. Judge Posner explains that judges wish to "impose their political vision on society" through their rulings. *Id.*

41. *See, e.g.*, HOWARD, *supra* note 20, at 164 tbl.6.2 (reporting a survey of judges who considered judges' political views to be an important determinant of their decisions); Patricia M. Wald, *Some Thoughts on Judging As Gleaned from One Hundred Years of the* Harvard Law Review *and Other Great Books*, 100 HARV. L. REV. 887, 895 (1987) ("[S]ubtly or unconsciously, the judge's political orientation *will* affect decisionmaking.").

42. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1 (1990).

43. *See* BAUM, *supra* note 29, at 63 (suggesting that the president's "emphasis on policy might favor the selection of judges who give a high priority to policy"); MICHAEL COMISKEY, SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES 5–8 (2004) (referring to ideology as the "supreme factor" in selecting Supreme Court nominees).

44. Bueno de Mesquita & Stephenson, *supra* note 24, at 755.

45. *See id.* at 755, 757–58.

46. Pareto optimal means everyone is better off.

and conservatives. Perhaps the same would be expected for a Kaldor-Hicks superior rule[47] that enhanced the overall welfare of society as a whole, even at a cost to some. But full information is rarely the case and judges rely on ideology to achieve their view of welfare maximization when legal doctrine allows them decision discretion.

B. The Significance of Hierarchical Context

The relative weight placed upon each of the judicial objectives we identify will vary by circumstances. Our concern is that of hierarchy—judges on a higher court of last resort may balance the concerns differently than those on subordinate levels of the judiciary. One might expect this to be especially true for the legal obedience concern, which might weigh more heavily upon lower courts. Thus, we theorize that "doctrine plays differing roles for the lower and higher courts and should be modeled as such."[48] This Section examines the significance of the objectives separately, for higher and lower courts.

1. High Courts (i.e., the Supreme Court)

Decision making by the highest court—the Supreme Court—has been very extensively studied, empirically and otherwise. The bulk of the social-scientific research has focused on ideology as a driver of Supreme Court decisions. This research has a long pedigree[49] but was most famously expounded by Jeffrey Segal and Harold Spaeth in their book studying Supreme Court decisions.[50] They reported an ability to predict seventy-four percent of all Court decisions, using just ideological determinants.[51] While this leaves some space for other factors, it suggests the predominance of ideology at the Supreme Court level. Considerable additional research has supported Segal and Spaeth's conclusions.[52]

47. Kaldor-Hicks optimality deems that a change should take place if, in aggregate, all players could be better off (superiority), or at least not worse off (efficiency), if those who gain from the change could compensate those who lose from the change and still be better off. It does not require that compensation actually be made, otherwise the change would be Pareto efficient. TIM WEITZEL, ECONOMICS OF STANDARDS IN INFORMATION NETWORKS (2004).

48. Tiller & Cross, *supra* note 8, at 531.

49. An early study found that the Justices of the Roosevelt Court were "motivated by their own preferences" and not the law. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947 xiii (1948).

50. SEGAL & SPAETH, *supra* note 6. The work was extremely popular and has been updated. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

51. SEGAL & SPAETH, *supra* note 6, at 229.

52. Founding works in attitudinalism include C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947 (1948); Glendon A. Schubert, *The Study of Judicial Decision-Making As an Aspect of Political Behavior* 52 AM. POL. SCI. REV. 1007 (1958). For more modern applications, see, for example, BAUM, *supra* note 29; Vanessa Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183, 238 (2009); Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. & ECON. 549 (1999); Cross & Tiller, *supra* note 13. For a com-

Given the evidence of ideological decision making at the Supreme Court, it could be easy to disregard the legal obedience rationale.[53] Yet the presence of numerous unanimous opinions, notwithstanding the ideologically diverse composition of the Court, suggests that ideology does not explain all the Justices' votes.[54] Moreover, a material number of cases exist in which a conservative would vote liberally while a more liberal Justice would vote more conservatively.[55]

The claim that Supreme Court Justices ignore the law seems implausible insofar as they consistently devote considerable resources to conforming their decisions to legal doctrine.[56] Justice Scalia has proclaimed that when "I adopt a general rule . . . I not only constrain lower courts, I constrain myself as well."[57] Yet there are those who suggest that "the Supreme Court has generated so much precedent that it is usually possible to find support for any conclusion."[58]

At least one study indicates that the Court's decisions structure the development of future cases, through "jurisprudential regimes."[59] The authors studied the creation of the content-neutrality standard in free speech cases and found a statistically significant effect for this standard in subsequent Court decisions.[60] Another recent study of the Court's treatment of certain civil rights, civil liberties, and economic cases found that precedent is an even more significant determinant of decisions than is ideological preference.[61] A review of abortion and death penalty cases similarly found that the Justices' ideologies do not rule their interpreta-

parison of how different approaches compare directly to one another, see Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, 75 (2009) (finding that a model that accounts for judicial ideology but that takes that ideology to be strategically pursued best accounts for Supreme Court votes from 1953 to 2008).

53. SEGAL & SPAETH, *supra* note 6.

54. This is assuming that the underlying case facts that a reviewing court faces lie within the ideological range of the court. If a lower court decision is to the extreme right or left of all the judges on the higher court, a unanimous opinion could arise even under a reviewing court with heterogeneous pref-erences. *See generally* Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411 (2009) (discussing coalition formation as a factor influencing Justices' votes).

55. Paul H. Edelman et al., *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 J. EMPIRICAL LEGAL STUD. 819, 833 (reporting that a substantial number of cases show such disordered voting); *see also* Pablo T. Spiller & Emerson H. Tiller, *Invitations to Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. & ECON. 503, 521 (1996).

56. *See* Bueno de Mesquita & Stephenson, *supra* note 24, at 764 (noting that if the Justices ignore doctrine, "it is hard to explain why they devote so much time and intellectual energy to it in their deliberations and why they place so much emphasis on it in most of their decisions").

57. Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

58. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 21 (2d ed. 1995); *see also* HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE U.S., ENGLAND, AND FRANCE 325 (6th ed. 1993) (suggesting that for the Court, stare decisis presents "a *choice* of precedents").

59. *See* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 308 (2002).

60. *Id.* at 314.

61. Kevin T. McGuire & Michael MacKuen, Precedent and Preferences on the U.S. Supreme Court (Feb. 20, 2002) (unpublished manuscript), http://www.unc.edu/~kmcguire/papers/precedent.pdf.

tion of precedent.[62] Similarly, a study of gay rights decisions in state and federal courts found that precedent is a significant determinant of judicial decisions, though lessened in significance at the level of higher courts.[63]

Thus, legal obedience appears to be a relevant factor, even at the Supreme Court level. The relative significance of law versus ideology, however, is lessened at the Supreme Court, as would be expected given its position in the judicial hierarchy and its case-selection ability.[64]

2. Lower Courts

Lower court judges face a different situation. While they too are judges with similar goals, the difference in their position in the judicial hierarchy gives them less freedom of choice among doctrinal forms. Circuit courts have some authority to create doctrine, in the broad interstices among Supreme Court rulings, but they should also apply the Supreme Court's doctrine when it governs a case.

The legal obedience of lower courts to Supreme Court doctrine has been extensively studied. A study of search and seizure decisions that examined particular fact patterns, for example, found a very high degree of conformity of circuit courts to Supreme Court rulings.[65] A study of the individual decisions involving doctrines contained in the *Miranda* and *New York Times* decisions found substantial compliance with the Supreme Court.[66] An event-history analysis of overruling decisions of the Warren Court found widespread compliance by lower courts, albeit not uniform or always immediate.[67] A study of libel decisions confirmed the responsiveness to Supreme Court precedent.[68] In general, the research shows that "after the Supreme Court made a major shift in policy, the decisional trends of the courts of appeals moved in the same direction to

62. *See generally* LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992). The authors found that "the language of the law seems to have a reality and motive force that shapes, to a large degree, the paths that the law enunciated by the Court takes." *Id.* at 310.

63. *See* DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW 79–86, 141–42 (2003).

64. *See* BAUM, *supra* note 29, at 69 (noting that because of its hierarchical position and discretionary jurisdiction "some scholars argue explicitly that the Court is unique in the dominance of policy over law").

65. *See* Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–1981*, 78 AM. POL. SCI. REV. 891 (1984).

66. Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes:* Miranda *and* New York Times *in the United States Courts of Appeals*, 43 W. POL. Q. 297, 298–99 (1990).

67. *See* Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 548 (2002) (finding that Court unanimity, complexity, issue area, and age of the overruled precedent all influenced the rapidity of lower court compliance).

68. *See* John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502, 504, 517–19 (1980).

a statistically significant degree."[69] There is "a highly credible body of evidence showing that circuit judges and other lower court judges are generally (though not perfectly) responsive to the policies announced by their superiors."[70] One empirical examination found that the greatest determinant of circuit decisions was the law.[71] Thus, "[a]dherence to precedent remains the everyday, working rule of American law, enabling appellate judges to control the premises of decisions of subordinates . . . ."[72]

Citation studies also indicate that lower courts heed the Supreme Court's doctrinal choices.[73] Examples of blatant lower court evasion of Supreme Court precedent are relatively rare,[74] but this does not mean that the lower courts are mere law-applying automatons. Despite their subordinate position, lower courts still retain considerable discretion in making decisions.[75] Lower court judges "also have their own policy preferences, which they may seek to follow to the extent possible."[76]

Empirical data also illuminates the ideological effect on lower court decisions. A study of D.C. Circuit rulings in environmental regulation cases found a pronounced difference in the decisions of judges appointed by Democratic presidents and those appointed by Republicans presidents.[77] Another study of review of administrative regulations under a deferential Supreme Court rule likewise found a significant ideological effect.[78] A broader study of decades of circuit court decisions across various legal areas found a statistically significant effect for the appointing party, though this only explained around five percent of the difference in decisions.[79] A recent study of circuit court decisions in several areas

69. Donald R. Songer, *The Circuit Courts of Appeals*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 35, 41 (John B. Gates & Charles A. Johnson eds., 1991). A study of randomly selected Supreme Court cases found that legal model variables better predicted subsequent lower court decisions than did political model variables. Charles A. Johnson, Note, *Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions*, 21 LAW & SOC'Y REV. 325, 325 (1987).

70. KLEIN, *supra* note 20, at 7.

71. *See* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1515 (2003) ("[T]he 'neutral principles' of the traditional legal model fare quite well as a descriptive model for judicial decisionmaking.").

72. HOWARD, *supra* note 20, at 187.

73. *See* THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 109–23 (2006) (showing how lower courts are responsive to citation choices of the Supreme Court).

74. Cross, *supra* note 18, at 382; *see also* Benesh & Reddick, *supra* note 67, at 536 (indicating that "little evidence of outright defiance has been found in the Courts of Appeals").

75. Thus, the lower court may interpret a precedent narrowly and distinguish its case from the Supreme Court's governing precedent or find alternative grounds for a decision or simply ignore the precedent's existence. Benesh & Reddick, *supra* note 67, at 536. These moves may be constrained by the nature of the Court's doctrine, though, as described in Part II.

76. Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 675 (1994).

77. Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717–19 (1997).

78. Cross & Tiller, *supra* note 13, at 2168–69.

79. Cross, *supra* note 71, at 1509.

found significant but varying effects of panel ideology on decisions.[80] A meta-analysis of numerous studies found a significant effect of ideology, as measured by party affiliation, on circuit court decisions, though at a level significantly less than for the Supreme Court.[81] One study integrated ideology with legal obedience and found that greater ideological homogeneity on a three-judge panel made it more likely that the court would disregard doctrinal commands.[82] There is ample evidence that lower court judges are influenced by their ideological preferences, but their greater level of legal obedience reduces this effect, as compared to the doctrine-creating higher court.[83]

In sum, numerous studies have confirmed that the two primary factors affecting judicial decision making that we identified above—legal obedience and political ideology—each influence both higher and lower court decision making. Legal obedience, however, appears to be a much stronger constraint on lower courts than higher courts, as expected given the nature of judicial hierarchy. As such, we expect that higher courts can curb the discretion of lower courts to some extent by establishing constraining doctrines that the lower courts are obliged to obey. The natural question then becomes: if constraining lower court judicial discretion is the aim of the higher court, what sort of legal doctrine best provides such constraint? The following Part considers the broad literature describing the difference between rules and standards, before Part III provides our more specific model of this doctrinal choice.

II. THE NATURE OF LEGAL DOCTRINE—RULES AND STANDARDS

The doctrine contained in a legal opinion is central to the working of the courts. The significance of appellate cases generally does not come from their outcomes but from the doctrinal precedents they set. Frederick Schauer urged that when lower courts use Supreme Court decisions, "it is not what the Supreme Court held that matters, but what it *said*."[84] Those precedents are meant to direct or at least guide future decisions, so their doctrinal content is of critical significance. The Court

80. *See* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006). Data on this effect are provided throughout the book, but see figure 2.2 on pages 26–27 for a good graphic summary.

81. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 234–36 tbl.3 (1999). Political scientists have refined their measures of judicial ideology beyond mere party of appointing president, but these produce only a very marginal improvement in predictive power. *See* Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 788–89 (2005).

82. Cross & Tiller, *supra* note 13, at 2161.

83. *See* HOWARD, *supra* note 20, at 185 (studying circuit court opinions and finding an association of ideology with decisions but reporting that it was not strong). The meta-analysis found the weight mean effect size of ideology for the Supreme Court was nearly three times as great as for circuit courts. Pinello, *supra* note 81, at 236.

84. Frederick Schauer, *Opinions As Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARRANT COURT (1985)).

may impose a clearly defined rule to govern future cases, or it may establish a more general discretionary standard.

In the context of doctrinal design, whether the Supreme Court chooses to apply a standard or a bright-line rule influences the response from lower courts.[85] Bright-line rules may "leave later judges little room to maneuver," in contrast to "vague doctrinal formulations."[86] A survey of circuit court judges found that they were most likely to adhere to a doctrine that was "clear."[87] While there has been little empirical study of this claim, the effect of doctrinal clarity follows from the evidence on lower court adherence to precedent.[88]

A great deal of theoretical jurisprudential analysis has been devoted to the nature and relative benefits or detriments of doctrinal rules and standards.[89] We do not aim to revisit this question but instead address the strategic descriptive use of the differing forms of doctrines. We present the distinction between rules and standards in the context of allowing greater subsequent discretionary application, though this is necessarily a simplification.[90]

> [A rule] involves adjudication in accordance with norms that specify in advance, and with considerable definiteness, the results of the necessary balancing, whereas [a standard] involves adjudication in accordance with a balancing of competing factors in the context of the particular case by some official after the occurrence of the events to which the standard is applied.[91]

A truly "pure rule" has a "hard empirical trigger and a hard determinate response."[92] It is apparent when the rule is invoked and it is clear what the consequences of its violation should be. With a rule, a decision maker is bound "to respond in a determinate way" to certain facts.[93] Judge Posner states a common description of rules and standards used by judges:

> A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at

85. *See* Jacobi & Tiller, *supra* note 13, at 328.

86. Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 377 (1988).

87. HOWARD, *supra* note 20, at 164 tbl.6.2.

88. One study of administrative agencies did find that they were more obedient to the Supreme Court as the specificity of its doctrine increased. James F. Spriggs, II, *The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact*, 40 AM. J. POL. SCI. 1122 (1996).

89. *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 1, 30 (2001) (discussing the complexities of creating legal rules to implement background moral principles); SCHAUER, *supra* note 9, at 104 n.35. (addressing what exactly a rule is and how it can be functionally implemented).

90. Kaplow, for example, observes that both rules and standards may have greater complexity in their specification, which would also influence the residual discretion, throughout. Kaplow, *supra* note 11, at 586–96.

91. Nance, *supra* note 4, at 1295–96.

92. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382 (1985).

93. EVA H. HANKS ET AL., ELEMENTS OF LAW 45 (1994).

> least most facts that are relevant to the standard's rationale. A speed limit is a rule; negligence is a standard. Rules have the advantage of being definite and of limiting factual inquiry but the disadvantage of being inflexible, even arbitrary, and thus overinclusive, or of being underinclusive and thus opening up loopholes (or of being *both* over- and underinclusive!). Standards are flexible, but vague and open-ended; they make business planning difficult, invite the sometimes unpredictable exercise of judicial discretion, and are more costly to adjudicate—and yet when based on lay intuition they may actually be more intelligible, and thus in a sense clearer and more precise, to the persons whose behavior they seek to guide than rules would be. No sensible person supposes that rules are always superior to standards, or vice versa, though some judges are drawn to the definiteness of rules and others to the flexibility of standards. But that is psychology; the important point is that some activities are better governed by rules, others by standards.[94]

For our purposes, the key difference between rules and standards is the "relative discretion they afford to the decisionmaker."[95] It is the form of the doctrine that determines the extent of discretion available to a lower court. The key feature of a rule, in contrast to a standard, is the high level of constraint it places on the decision maker.[96]

At the extreme, the difference between rules and standards is obvious. A driving "rule" would establish a maximum speed limit of sixty-five miles per hour. A "standard" would simply require that drivers maintain a "reasonable" speed under the circumstances.[97] Each approach has its distinct advantages, to be discussed below. The practical distinction between rules and standards is evident from antitrust law. In this field, courts have doctrinally defined certain actions as per se violations of the law, thus establishing their illegality as a rule.[98] Other actions have been judged by the more standard-like "rule of reason"[99]—these actions may be illegal or not, depending upon the circumstances.

94. Mindgames, Inc. v. W. Publ'g Co., 218 F.3d 652, 657 (7th Cir. 2000) (describing rules and standards in the context of contract damages).

95. *See* Sullivan, *supra* note 12, at 57; *see also* Jacobi & Tiller, *supra* note 13, at 328.

96. SCHAUER, *supra* note 9, at 231–32.

97. *See* Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155 (1999).

98. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (stating that vertical agreements hold the promise of increasing competitive effectiveness and, therefore, are judged under the rule of reason, while certain agreements such as horizontal price fixing and market allocation are thought to be so inherently anticompetitive that they are illegal per se).

99. Federal antitrust law prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. 15 U.S.C. § 1 (2006). Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332 (1982) (indicating that as early as 1898, the Supreme Court recognized that Congress could not have intended a literal interpretation of the word "every"); Nat'l Soc'y of Prof. Engineers v. United States, 435 U.S. 679 (1978) (stating that restraint is the essence of every contract and if read literally, section 1 of the Sherman Act would outlaw the entire body of contract law); Comment, *Leveling the Playing Field: Relevant Product Market Definition in Sports Franchise Relocation Cases*, 2000 U. CHI. LEGAL F. 245,

The differentiation between rules and standards can be subtle. Consider a command for equal treatment. In a rule-like form, such an equality dictate might be seen as a color-blind command that rejected any consideration of race. Framed as a standard, though, the command could allow for some racial considerations, such as affirmative action, regarded as necessary to further the objective of equality. Examples such as this one illustrate the great judicial choice in doctrine. A concept may be doctrinally structured in very different ways, with very different effects.

The differentiation is also complicated by the indefiniteness of meaning of English words. For example, the standard for negligence is simply that of the behavior of the "reasonable person," which appears rule-like. The term "reasonable," however, by its nature invites a more standard-like analysis of factual circumstances. Indeed, because of the inherent uncertainty associated with linguistic meaning, the creation of a true and certain rule may be an impossible task.[100] Even rules "will, at some point where their application is in question, prove indeterminate."[101]

While rules and standards are often considered antithetical, it is more accurate to consider them as ends of a continuum on which legal doctrine might lie.[102] Many doctrines are actually a mix of rules and standards.[103] While there may be "pure rules" and "pure standards," most doctrines rest somewhere in between.[104] Even the strictest rules may be overridden when circumstances are so "obvious" or "dramatic" as to make its application inappropriate.[105] The difficult cases may arise over the proper interpretation of a rule, even after accepting that it governs. In addition, any doctrine of any sort allows some zone of discretion, where its application is uncertain.[106]

Despite this caveat, it is generally "possible to classify most legal pronouncements as standards or rules, based on their core characteris-

249 n.16 ("The rule of reason has emerged as the proper test for evaluating sports leagues under section 1.").

100. Cross, *supra* note 18, at 392–93 (arguing that the precise dictates of doctrine cannot be "expressed linguistically in opinions and appreciated by readers"); Kaplow, *supra* note 11, at 600 ("[A]nother limitation on the ability to formulate laws as rules involves limitations of language.").

101. H.L.A. HART, THE CONCEPT OF LAW 124 (1961).

102. *See* Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828–32 (1991) (describing rules and standards as theoretical endpoints on a continuum); Sullivan, *supra* note 12, at 61 (referring to the "continuum" between a rule and a standard).

103. Kaplow, *supra* note 11, at 561.

104. *See* Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25–30 (2000) (suggesting that the concepts represent a spectrum rather than discrete categories).

105. SCHAUER, *supra* note 9, at 89–91 & n.21. Schauer argues for a "presumptive positivism" that assumes a midpoint on the continuum, where rules may be adapted when appropriate. *Id.* at 196–206.

106. *See* Cross, *supra* note 18, at 393–96 (characterizing doctrinal limitation as an s-shaped curve, in which the vertical spine of the "s" reflects a zone of discretion, which may be broader or narrower depending on the nature of the doctrine).

tics."[107] The concepts thus have meaning as a tool for categorizing doctrine. The "specificity-generality continuum" may be treated, for simplification, as "a dichotomy between 'rules' and 'standards.'"[108]

A standard involves the "direct application of the background principle or policy to a fact situation," allowing the lower court "decisionmaker to take into account all relevant factors or the totality of the circumstances."[109] A classical standard would be a "balancing test,"[110] under which a court considered the equities of both sides before deciding. Another common standard is the multifactorial test,[111] in which doctrine tells lower courts to consider a series of factors as relevant to the decision's outcome but provides no explicit instructions about how those factors are to be weighed. Many other formulations of standards are also possible.

In the traditional theoretical discussion of rules and standards, the forms are ascribed different "vices and virtues."[112] For example, rules are generally applauded as providing clear guidance to third parties, while standards are preferred for doing justice in the specific case. Our approach is a different one, examining the strategic determinants of courts' decisions to create particular doctrine.

III. POSITIVE POLITICAL THEORY OF LEGAL DOCTRINE

We now address how higher courts, such as the Supreme Court, create doctrine—in particular the form of doctrine as a rule or standard—to guide future legal outcomes.[113] There is an established literature about how doctrinal procedural rules can be used to influence results, such as selection of cases for appellate review.[114] Relatively little attention, however, has been given to the creation of substantive doctrine

107. Korobkin, *supra* note 104, at 30.

108. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974).

109. Sullivan, *supra* note 12, at 58–59.

110. For an example, see Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that in a case of an alleged violation of government employee speech, the court should "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

111. For an example, see Wells v. City & Cnty. of Denver, 257 F.3d 1132, 1136–37 (10th Cir. 2001), where the court laid out the prevalent multifactor test for distinguishing between government and private speech in forum context to determine if the establishment clause had been violated. The factors the court considered in deciding whether the city had created a forum for private speakers included (1) the purpose of the sign, (2) editorial control, (3) the literal speaker, and (4) ultimate responsibility for the content.

112. Schlag, *supra* note 92, at 400.

113. A similar analysis might apply to the circuit courts' creation of doctrine to govern district court decisions, or to the levels of the state court hierarchy, but they all are limited to some degree by the U.S. Supreme Court's doctrine.

114. *See, e.g.*, Mathew D. McCubbins et al., *Administrative Procedures As Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002); Tiller, *supra* note 13.

and how doctrinal form affects the content of case determinations. We now embark on that analysis.

A. Choice of Doctrine

Our analysis primarily relates to one mechanism by which higher courts may shape the decisions of lowers courts—namely, the choice between rules and standards. We explore how doctrine is used, not simply as a form of policy enunciation, but simultaneously as a form of hierarchical control by higher courts over lower courts. We also examine why the Supreme Court might choose a particular doctrinal approach in any given case.

A clear rule is not always the best approach to effectuate the Court's purposes. The Supreme Court has occasionally adopted clear rules,[115] but has more often disclaimed or "eschewed bright-line rules."[116] Our model shows how higher court judges can create a doctrine that is both a policy determination and a declaration of what *form* future policy determinations by lower courts shall take. Our model shows when higher courts will choose rules and when they will choose standards. Additionally, we show how this calculation changes when higher courts are considering multiple overlapping policies and when they are constituted as a multimember court.

In our model, we assume that lower court judges are obedient to legal doctrine enunciated by the higher court. We do this for two reasons. First, as discussed in Part I, we expect a high level of legal obedience from lower courts. Although lower court judges are influenced by ideology, which suggests that they should disobey to the extent that their punishment will not outweigh the gain from doing so, there are good reasons to expect a high level of legal obedience by lower court judges: legal professionalization socializes judges to obey the legal doctrines coming from higher courts as guides to case outcomes,[117] doctrine is a time-saving decision heuristic,[118] and following doctrine promotes public legitimacy.[119]

115. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (creating the rule that any fact that enhances criminal penalties must be proven beyond reasonable doubt to jury).

116. The Court has expressly "eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." Ohio v. Robinethe, 519 U.S. 33, 34 (1996). Likewise, the "complexity of the districting process" means that "bright-line rules are not available" for evaluations of constitutionality. Bush v. Vera, 517 U.S. 952, 984 (1996).

117. *See* Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 954 (2008) ("[J]udges, inculcated with professional norms regarding legal process, place objective value on the act of reaching an outcome through legal reasoning based on the application of precedent.").

118. *See, e.g.*, POSNER, *supra* note 29, at 124–25 (noting that reliance on precedent increases judicial leisure time).

119. *See generally* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 50–87 (2006) (discussing how legal adherence results from concerns for public perceptions and those of the other branches and judicial colleagues).

Second, we are concerned here primarily with the extent to which different doctrinal forms act as constraints on judicial discretion; that is, what the effect is of choosing a rule versus a standard on policy, given whatever level of judicial obedience occurs or does not occur. As such, our model poses the question: *even if* judges obey doctrinal commands, will policy-maximizing higher court judges still want to constrain judicial discretion, and if so, how will they do it? To explore this question, it only matters that judicial obedience can be expected to be routine enough for higher courts to care about how they craft such doctrines for lower court adherence. In short, assuming some level of legal obedience allows us to examine the effect of legal constraints on policy discretion, and how policy preferences can be pursued when "law" matters.

B. Limits on Judicial Doctrinal Choice

Even if we put aside the question of disobedience to doctrine and assume that lower courts follow doctrine, higher court judges cannot always ensure that the policy outcomes they prefer will be produced consistently in lower courts. This results in part from the inability of higher courts to craft doctrinal language that can be applied systematically to the host of factual situations that arise, and in part from varying perceptions of those factual situations by the lower court judges hearing the cases.

The tradition of written judicial opinions stems from an expectation that judicial mandates will be reasoned, logical, and consistent with past decisions. Writing doctrines that specify particular policy outcomes in place of reasoned and consistent application of neutral rules and principles would ultimately weaken the legitimacy of judicial power. Judicial preferences may be biased, discontinuous, or intransitive; thus legal doctrines cannot always mirror those preferences.[120] As such, while higher court judges may have broad discretion over the choice between determinate rules and indeterminate standards as governing doctrine, they are constrained more generally in the logic and consistency of those doctrines. We can model both higher court freedom of choice of doctrinal form and the constraint they face when attempting to perfectly tailor rules or standards to their policy preferences.

Figure 1A represents the first step in our model by illustrating this constraint on judicial choice over doctrine. Figure 1A provides a stripped-back model of judicial choice, where cases are affected by two

120. Cohen and Spitzer capture the constraints on judges in shaping doctrine in relation to administrative review:

> It is difficult for a court to announce a rule of process that is contingent on the *political direction* in which the agency exercises discretion. A decision that said "administrative agencies are more democratically accountable than courts if and only if the agencies exercise their discretion to interpret statutes in a conservative direction" would be laughable. Courts, we assert, try to avoid being laughingstocks.

Cohen & Spitzer, *supra* note 13, at 82.

policy dimensions, such as federal-state power and drug policy, or free speech and antidiscrimination law. Imagine that a higher court faces a choice between two dichotomous outcomes, which we call generically "x_1" and "x_2." In Figure 1A, x_1 might represent the claim of the respondents in *Gonzales v. Raich*[121]—advocating an outcome that is high on the federal-state y-axis, but giving little value to the drug enforcement x-axis—in contrast to the government's argument, x_2, which gives little value to states' rights but high value to the government's drug enforcement capacity. Or if the relevant policy dimensions were free speech and antidiscrimination claims, x_1 and x_2 would represent the type of outcomes favored by the majority and minority opinions in *Boy Scouts of America v. Dale*,[122] respectively. With many cases raising similar issues, the underlying facts of each case may be distributed anywhere in the two-dimensional space, with each case represented by a single point in the scatterplot. Cases near the middle will be difficult cases, and cases at the extremes will be more easy cases.

The role of doctrine is to determine which of these cases should result in outcome x_1 and which should result in outcome x_2; the higher court must craft a dividing line, such as a rule, or some less strict means of division, such as a set of factors or other standard. The higher court has preferences over which cases result in x_1 and which result in x_2, but for the reasons discussed, it cannot always devise a doctrine that perfectly reflects its preferences. The Justices' preferences over how to divide x_1 and x_2 may not be legitimately expressed in legal doctrine, for example, if their preferences are driven by bias or gut instinct. We illustrate this by drawing the higher court's preferences as differently shaped to the rules or standards that they need to articulate—here we illustrate them as a curved line, and we illustrate doctrine as requiring a straight-line rule. For any case above the curved line, the higher court would prefer x_1 to be the policy outcome, and for any case below the curved line, the higher court would prefer x_2.

121. 545 U.S. 1 (2005).
122. 530 U.S. 640 (2000).

FIGURE 1A:
SHAPE OF DOCTRINE CONSTRAINT

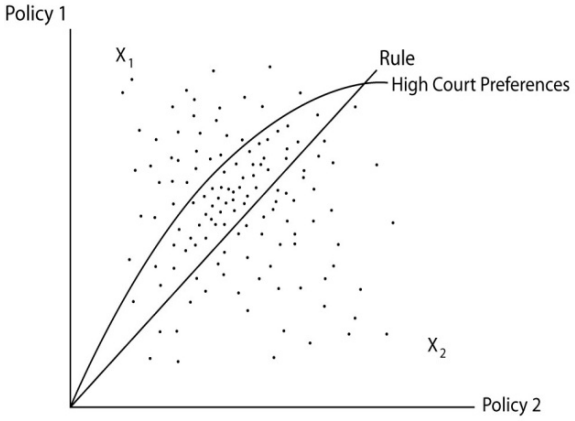
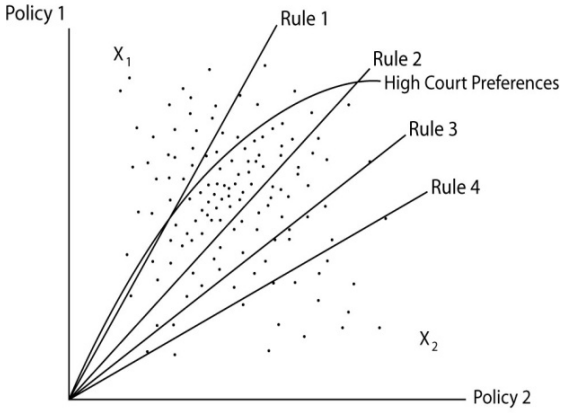


FIGURE 1B:
CHOICE AMONG RULES



What is the effect of the constraint that judges cannot craft doctrines to perfectly reflect their preferences? For cases above and to the left of both the line and the curve, outcomes will result in x_1—as the higher court desires. Similarly, for cases below and to the right of both the linear rule and the curve, outcomes will result in x_2. But for cases that lie in the gap between the higher court's preferences (the curved line) and the doctrine they can legitimately craft (the linear rule), the doctrine will result in the opposite outcomes to that which the higher court favors.

As such, the higher court will want to choose the rule that most closely approximates its preferences. Figure 1B represents the higher

court's choice *among* the various possible rules[123]—in devising a doctrine for lower courts to follow in determining which cases result in x_1 and which result in x_2, the higher court will choose the rule that is the best fit for its preferences over case outcomes. The court will undertake a similar analysis in choosing among various standards—in Figure 2 below, we represent standards as a region that allows lower court discretion, rather than a single dividing line. Next, we consider how the higher court chooses *between* the best rule and the best standard.

C. Choosing Between Rules and Standards

Having ascertained which rule and which standard each best reflects its own preferences, and consequently which rule and standard will result in the most number of cases being decided the way the higher court would itself decide each case, the higher court must now choose between a rule and a standard. In essence, the higher court faces a dilemma over how much, or how little, discretion—discretion that comes from the choice of doctrinal language[124]—should be granted to lower court judges.

When utilizing the highest level of doctrinal specificity such as a bright-line test, even with a sympathetic and obedient lower court—i.e., without lower court disobedience to doctrine—the principled application of doctrine will result in outcomes contrary to higher court preferences at some rate. This is because a rule cannot perfectly reflect the range of higher court preferences over the broader panoply of factual circumstances that will arise in cases. Moreover, should the lower court have preferences over policy outcomes that differ from those of the higher court, any doctrine by linguistic necessity may leave enough discretion for the lower court to achieve an outcome near its preference. Even if the lower court will always stay within the principled boundaries of the given doctrine, i.e., assuming perfect legal obedience, there will still be some lower court discretion. This discretion will allow the lower court to thwart the policy objectives of the higher court in some number of cases. Higher courts can, however, craft doctrine based on characteristics that can curb or expand the discretion of lower courts to produce particular

123. How many potential rules there are will depend on a number of factors. Higher courts may be constrained by the options generated by lower courts or prior law, which are in turn constrained by the vehicles that come before them in the form of cases. Furthermore, higher courts may be constrained in their doctrinal choice by preexisting doctrine: the costs associated with doctrinal change may be significant, in which case, given their budgetary constraints, higher courts may effectively be limited to incremental doctrinal changes. Also, the opportunity cost of doctrinal change may limit higher court choices. Furthermore, higher courts may be constrained in their doctrinal choice by the norm of respecting their own past precedents and the value that brings to communicating policy preferences to lower courts. Bueno de Mesquita & Stephenson, *supra* note 24, at 764. For these reasons, higher court choice over the content and number of doctrines may be limited.

124. Rowland and Carp find that rulings with more ambiguity create more discretion for lower courts, whereas more constrained, less ambiguous rulings constrain discretion. *See* C.K. Rowland & Robert A. Carp, *A Longitudinal Study of Party Effects on Federal District Court Policy Propensities*, 24 AM. J. POL. SCI. 291, 293 (1980).

outcomes, choosing between rules and standards according to how this discretion will be used. How much discretion higher courts will want to give lower courts is the central question we are concerned with here.

FIGURE 2:
CHOOSING *BETWEEN* DETERMINATE AND INDETERMINATE DOCTRINES

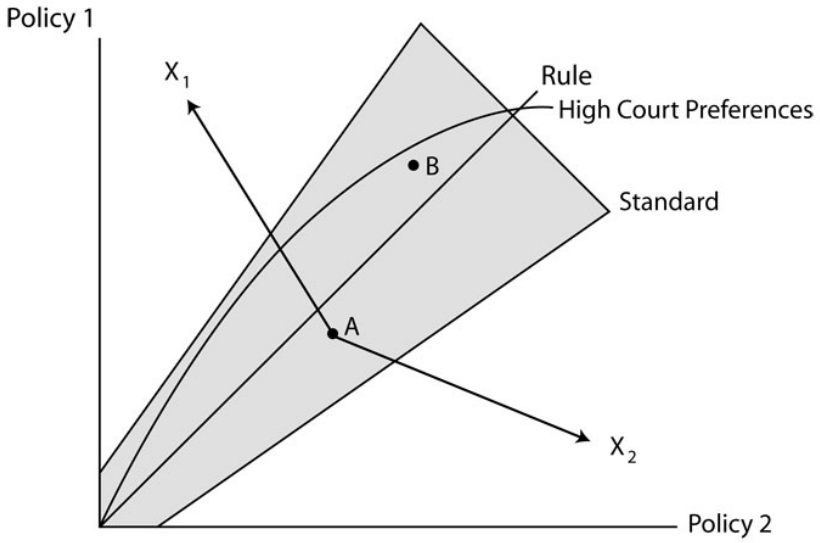


Figure 2 illustrates a judicial choice over outcomes x_1 and x_2 in two policy dimensions, but this time compares judicial choice over rules versus standards. Once again, the higher court's preferences over which cases should result in outcome x_1 and which should result in outcome x_2 are represented as a curved line dividing which cases result in x_1, and which result in x_2, but legitimate doctrine is necessarily a straight line. Now, the court has two options: First, it can again choose a rule, represented by the straight forty-five degree line, as in Figure 1. As we saw before, under the rule, any case, such as *A*, which falls below or to the right of the rule line results in x_2, and any case falling above or to the left of the rule line, such as *B*, results in x_1. This rule is closely correlated with higher court preferences, but the rule will cause some cases, such as *B*, to result in the outcome x_1, when the higher court would prefer that it result in x_2.

Second, the higher court has the option of choosing a standard. This is represented by the gray shaded region—similar to Songer, Segal, and Cameron's analogy of lower courts to a leashed dog.[125] Like rules, standards must have some logical boundaries that hold across cases: they cannot consist of shaded boxes covering the whole range of legal decision

125. Songer et al., *supra* note 76, at 675.

making. Rather, there are still some cases that are automatic, even under a standard: the "easy cases"—those cases lying outside the shaded area—will be decided automatically, as is the case under the rule. The difference is that within the shaded area, the higher court gives the lower court discretion.

We know that giving a lower court discretion creates the possibility that the lower court will use that discretion to undermine the higher court's preferences. If the lower court prefers, it can decide if cases such as *A* should legitimately result in x_1, even though such a result is contrary to the higher court's policy preferences—a result avoided by use of a rule. But, Figure 2 illustrates why the higher court may nevertheless wish to create a standard instead of a rule. In contrast to the situation under the rule, by giving the lower court discretion, the lower court is able to decide that cases such as *B* should result in x_2, as the higher court favors. This of course depends on the lower court sharing the higher court's preferences. Thus, whether the higher court will prefer a standard or rule will depend on the interplay of two facts that are largely beyond its control: the expected distribution of cases in the shaded region and the preferences of the lower bench.

Some lower courts share the policy preferences of the higher court, and so can be expected to dutifully represent the higher court's policy preferences, even when given discretion to do otherwise. There will also be lower courts who do not share the same policy preference as the higher court and who will use their discretion to make determinations that are inconsistent with the higher court's preferences. How often this will be a problem will depend on the second factor: the distribution of cases in the shaded region. How many cases arise in that zone of twilight between the higher court's preferences and the best-fitted doctrinal *rule* will determine how often a *standard* will allow a lower court to thwart the higher court when it otherwise could have been constrained by a rule.

Although the two factors that determine whether a standard or rule will achieve its desired goals—the distribution of cases and the preferences of the lower court—are beyond the higher court's control, the higher court is not impotent. It has knowledge or expectations over lower court preferences on many issues, and over the likely distribution of lower court cases. The imperative for the higher court is to design doctrines that control lower courts in the most efficient manner, given the expected set of cases that could present themselves and the expected distribution of lower court judges who share the higher court's ideology.

To summarize so far: it is not always possible for higher court judges to craft rules that perfectly reflect their preferences; this is especially true for rules that leave little discretion in application, meaning that for some set of factual circumstances an undesirable outcome from the higher court's perspective will result from the application of the doctrine by the lower court. Thus, with rules, there will be some unachievable policy

goals, even from those lower courts judges who have the same policy preferences as the higher court. The advantage for a higher court in choosing a rule is that doing so constrains lower court judges who hold antithetical policy preferences more than a standard would. The advantage of a standard is to allow lower court judges with policy-aligned preferences to follow the higher court's preferences even in cases that would come out differently under a rule. The higher court's optimal decision on doctrine is thus dependent upon the mix of policy-aligned and unaligned lower court judges as well as the frequency with which a rule will consistently match with politically desirable outcomes over the expected set of cases that may present themselves to courts.

D. Accounting for Doctrinal Overlap

The higher court's choice is complicated by the interplay of issues and doctrines. Any case may raise multiple procedural and substantive issues; each of those issues and their associated doctrinal bases may offer an alternative way of deciding the case.

We have seen that if the court prefers x_1, it will choose between a rule and a standard according to its determination of which will maximize the number of cases that result in x_1. The higher court will choose a rule if the application of the doctrine will result in x_1 with higher probability under the rule than it would under the standard—i.e., if $P(x_1)_{RULE} > P(x_1)_{STANDARD}$.

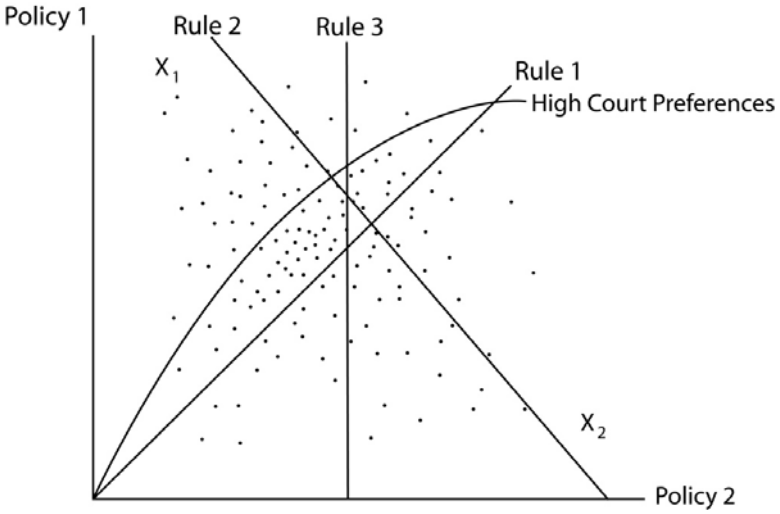
We know that the above inequality will be governed by the distribution of cases and the preferences of the lower court. But because multiple doctrines can affect the outcome of a case, the probability of x_1 arising either under a rule or a standard is made more complex than simply having expectations over these two factors. Consider the procedural issue of standing. We can conceive of standing as offering lower courts the choice between maintaining the status quo, through a rejection of standing, or moving to the merits of the case and applying the substantive doctrine, be it a rule or standard, through a grant of standing.

Now, the outcome x_1 can arise in any case either because standing is granted and the court rules for outcome x_1, or because standing is denied and x_1 is the default position and is unchanged. But similarly, there are now two equivalent ways that x_2 can arise: if standing is granted and x_2 results or if standing is denied and x_2 is the default.

We label a grant of standing resulting in outcome x_1 as $P(x_1)_{S\text{-}granted}$ and the denial of standing resulting in outcome x_1 as $P(x_1)_{S\text{-}denied}$. With overlapping doctrines, the higher court chooses between a rule and a standard by weighing the prior two probabilities again, $P(x_1)_{RULE}$ and $P(x_1)_{STANDARD}$, but now each of those probabilities are made up of two elements each, so we have four possibilities resulting in x_1: $P(x_1)_{RULE\text{-}S\text{-}granted}$, $P(x_1)_{RULE\text{-}S\text{-}denied}$, $P(x_1)_{STANDARD\text{-}S\text{-}granted}$, and $P(x_1)_{STANDARD\text{-}S\text{-}denied}$.

The higher court has potential control not only over the doctrinal form of the substantive doctrine—be it drug enforcement and federalism or free speech and antidiscrimination law—but also over the doctrinal form of the standing doctrine: the higher court chooses not only between a rule and the standard for the substantive doctrine, but also between a rule and a standard for the standing doctrine. As such, the higher court must undertake the same weighing of probabilities, but considering the likelihood of x_1 given $P(x_1)_{RULE}$ and $P(x_1)_{STANDARD}$, *in combination with* $P(x_1)_{S\text{-}granted}$ and $P(x_1)_{S\text{-}denied}$.

FIGURE 3:
CHOOSING *AMONG* DETERMINATE AND INDETERMINATE DOCTRINES



The interaction between doctrines is not limited to the combination of a procedural mechanism and the substantive issue: cases can have multiple substantive issues. This suggests another reason why higher courts may prefer to use standards: with multiple overlapping doctrines to choose from, lower courts may have a high level of discretion even when acting under the doctrinal boundaries of multiple rules. This can be seen in Figure 3. With multiple bases for deciding cases, lower courts have enormous discretion, even when the higher court uses only rules. Whether any case in Figure 3 comes out as x_1 or x_2 depends on whether Rule 1, Rule 2, or Rule 3 is applied. As such, higher courts may prefer to use standards, so as to grant greater discretion to policy-aligned lower court judges, who can then maximize their ability to follow higher court preferences, with little expected cost from nonaligned lower court judges gaining any additional discretion.

To the extent that doctrines overlap, the weighing of probabilities becomes exponentially more complicated. Nevertheless, the same logic

applies: higher court judges must consider the likely distribution of cases and the political alignment between higher and lower courts. But the foregoing analysis suggests a third consideration: the extent that granting lower courts discretion is unavoidable even when utilizing rules.

E. Accounting for Divergent Views Among Multiple Judges on a Court

The final complicating factor that will affect how higher court judges choose between rules and standards is the divergent views of their colleagues. Just as we have considered the possibility of heterogeneity in views among lower courts, we must also consider the possibility that there will be heterogeneity of views *within* the higher court when crafting doctrine. This diversity within higher courts may make it difficult for a majority to agree upon a defined rule because of differences about what the most desirable rule would be.[126] In a different context, Epstein and O'Halloran note that a "coalition might be more easily constructed around a bill that delegates than one that enacts specific policies."[127]

It is important to recognize that higher courts are collective bodies with diverse preferences held by their members. This very diversity may make it difficult for a majority to agree upon a defined rule because of differences about what the most desirable rule would be.[128] Chief Justice Rehnquist addressed this issue when outlining how the bargaining process at the Supreme Court produces opinions: "There must be an effort to get an opinion for at least a majority of the Court . . . . To accomplish this, some give and take is inevitable, and doctrinal purity may be muddied in the process."[129] Because a Justice would prefer to establish a doctrine at his or her precise ideological preference, one would expect different Justices, with different preferences, to have difficulty agreeing on a doctrine. Figure 4 illustrates this effect. The higher court is now represented as made up of three judges, with differing preference curves: J_1, J_2, and J_3; we also show one possible position of the lower court.

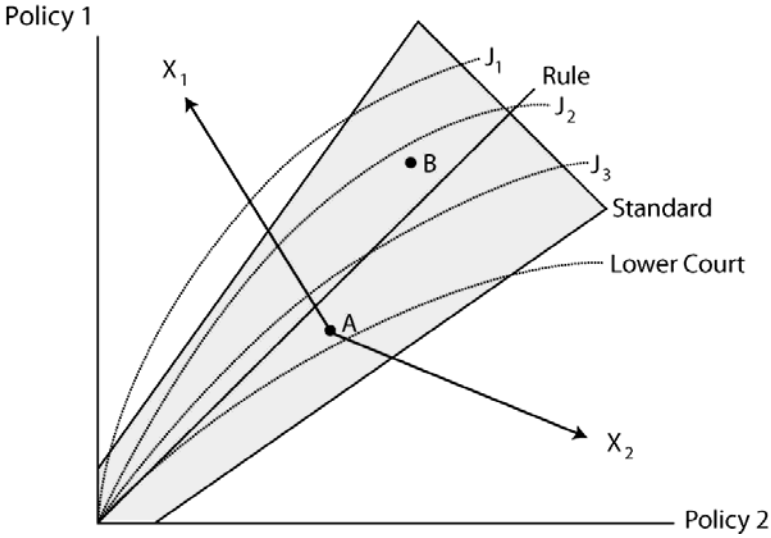
126. For a detailed model of how policy bargaining may occur at the Court, see THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT (2005).

127. DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 31 (1999).

128. *See supra* note 126 and accompanying text.

129. William H. Rehnquist, *Remarks on the Process of Judging*, 49 WASH. & LEE L. REV. 263, 270 (1992).

FIGURE 4:
RULES AND STANDARDS ON A MULTIMEMBER COURT



Since any doctrine will have to command at least two votes to become the governing doctrine, the chosen doctrine is likely to most closely reflect the preferences of the median judge, J_2. If the higher court judges do not know the ideological preferences of the lower court, then both J_1 and J_3 may prefer a standard to a rule, since any rule will reflect the preferences of the median.[130] J_1 and J_3 will each prefer a standard to a rule as long as the expected outcome in lower courts is at least as close to their own preferences as the rule that most closely reflects J_2's preferences would produce. If the judges do not know the position of the lower court, whether J_1 and J_3 will each prefer a rule or a standard will depend on their position relative to the breadth of the standard range. The closer each nonmedian judge is to the median (relative to the breadth of the standard range), the more favorable each will be to a rule over a standard.

If the higher court, however, knows the lower court's policy preferences, a different coalition may result—and we may see a different coalition forming for a rule versus for a standard. For example, Figure 4 shows the lower court as to the right of all the judges on the higher court. Knowing that the lower court now fairly closely approximates his or her preferences, in this case J_3 will now prefer a standard—because J_3 expects the lower court to use that discretion to decide cases in a way that ap-

130. The only way the rule would not reflect the preferences of the median is if the constraint that prevents any rule perfectly reflecting the court's preferences skews the resulting rule close to either J_1 or J_3's preferences, in which case that judge would prefer the rule, but then the median judge is likely to prefer a standard.

proximates J_3's own views. Whereas now J_1 will prefer a rule that approximates J_2's preferences, because such a doctrine will more closely resemble J_1's preferences than one affording greater discretion to the lower court. This is true even if the lower court's preferences lie in between the various preferences of the higher court judges. As long as the lower court is closer to J_3's preferences than J_2 is to J_3, J_3 will prefer a standard to a rule at J_2's ideal point, and J_1 will favor the opposite; their preferences will switch at the point at which the lower court is further from J_3's preferences than J_2.

Thus, we can see that our model provides a more nuanced answer to the question of when higher courts will create rules and when they will create standards than the existing literature does. The existing literature claims that standards "are easier to negotiate than rules"[131] because "[t]he need to accommodate . . . differing preferences may require that an opinion announcing the decision of the [c]ourt contain ambiguities in order to garner the support of a majority of its members."[132] Such a theory suggests that a more ideologically homogenous court is more likely to create rules as opposed to standards, and a more heterogeneous court will have more difficulty agreeing upon an ideological rule. But this logic does not hold up if the higher court has some expectation of the lower courts' preferences: in reality it says that a higher court would prefer a lottery to knowing with clarity what the lower court will do. Our model instead shows that it will be the relative position of the higher *and* the lower court's political preferences that determine whether a standard or rule is used.

We expect that judges will not act exactly as this model predicts, as judges may to some extent "sacrifice details of their convictions in the service of producing an outcome and opinion attributable to the court."[133] Judges may even engage in logrolling, wherein they trade doctrine in one area for another about which they have higher preference intensity (although Justices consistently deny this[134]). Our model, though, predicts tendencies in decision making on multimember courts influenced by ideological preferences, considering the significance of the relative positions of the higher court judges and the impact of the extent of political alignment between higher and lower court judges.

131. Kaplow, *supra* note 11, at 278.

132. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 414 (2007).

133. Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 52–53 (1993).

134. PERRY, *supra* note 33, at 207 ("[E]very justice denounced and denied any logrolling on cert.").

IV. A DOCTRINAL APPLICATION: THE NEW EXCLUSIONARY STANDARD

In this Section, we analyze the *Herring v. United States*[135] opinion discussed in the Introduction, and show how our theory explains the Supreme Court's development of an indeterminate standard in the exclusionary rule, which was previously dominated by determinate rules.

The question in *Herring* concerned whether the exclusionary rule should prevent admission of evidence that was obtained due to a careless government record-keeping mistake.[136] In *Herring*, an arrest was made on the basis of a warrant that appeared to be outstanding, but in fact had been rescinded.[137] The error arose due to the failure of a separate police department, independent of the arresting officers, to withdraw the warrant in the neighboring county's computer files.[138] The arresting police officers relied on the warrant in good faith and subsequently found methamphetamines and a gun on Herring, a felon.[139] The question for the Court was whether the exclusionary rule should apply to the introduction of evidence stemming from an unauthorized warrant.[140]

The exclusionary rule holds that evidence obtained in violation of the Fourth Amendment is ordinarily inadmissible in a criminal trial.[141] The exclusionary rule is referred to as a rule with good reason. For example, in *Mapp v. Ohio*,[142] the Supreme Court held that the exclusionary rule is constitutionally required in state courts as well as federal courts, reversing its position in *Wolf v. Colorado*.[143] The Court explained its reasoning, stating that after a dozen years of allowing state courts to be exempt from the federal rule, it felt bound to:

> [C]lose the *only* courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to *all* persons as a specific guarantee against that very same unlawful conduct. . . . *[A]ll* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.[144]

The Court considered that anything other than a strict rule of exclusion would render the assurance against unreasonable searches and seizures simply "'a form of words,' valueless and undeserving of mention in

135. 555 U.S. 135 (2009).
136. *Id.* at 136–37.
137. *Id.* at 137–38.
138. *Id.* at 138.
139. *Id.*
140. *Id.* at 139 (agreeing with the parties that "there was a Fourth Amendment violation" and that the issue was "whether the exclusionary rule should be applied" when an honest record-keeping mistake was made).
141. Weeks v. United States, 232 U.S. 383, 398 (1914).
142. 338 U.S. 25 (1949).
143. 367 U.S. 643, 653 (1961).
144. *Id.* at 654–55 (emphasis added).

a perpetual charter of inestimable human liberties."[145] Anything but a strict rule would effectively withhold a remedy for a violation of the right to be free from unconstitutional searches and seizures.[146]

Importantly for our purposes, the Supreme Court has always recognized that there are competing interests at stake in any decision of whether to exclude evidence under the Fourth Amendment. In *Mapp*, the Court recognized that in some cases a strict rule would mean that a criminal will go free, but it considered that harm to be a cost worth bearing when the alternative is a government failing to observe its own laws.[147] This latter harm was considered to be so great that, despite the inherent clash of dual legitimate interests in prosecuting criminals and ensuring privacy under the Fourth Amendment, there should be no balancing test in the exclusionary rule.[148] Justice Clark, in the Opinion of the Court, considered that the exclusionary rule should be treated like exclusion of coerced confessions, under which coerced confessions are strictly excluded without reference to a balancing test of the extent or frequency of misconduct by the police.[149] As such, *Mapp* applied and extended a strict rule of exclusion and rejected any balancing test or any other form of standard.

Thus, *Mapp* provides a nice illustration of our PPT model. Recognizing the harm to justice of allowing criminals to go free, in an ideal world, the Court would have liked to craft a doctrine that guaranteed privacy while not inappropriately freeing criminals—a curved line. While such a determination may be able to be made in any individual case, Justice Clark considered it impossible to craft a generalizable doctrine that would guarantee such perfect application.[150] Instead, the Court chose a rule that most closely reflected its preferences—preferences that valued protection of privacy over ensuring effective prosecution in every case—and chose a straight-line rule.

Since our theory concerns in part the ideological alignment between higher and lower courts, we need a measure of judicial preferences. Andrew Martin and Kevin Quinn have developed an objective score of judicial preferences that is continuous (rather than dichotomous, such as liberal-conservative or Democrat-Republican).[151] The Martin-Quinn scores are based on a standard scale, so they allow for historical comparisons of Justices across time, even those Justices who never served together.[152]

145. *Id.* at 655.
146. *Id.* at 656.
147. *Id.* at 659.
148. *Id.* at 660.
149. *Id.* at 656.
150. *Id.*
151. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002).
152. *Id.*

The scores are also updated annually.[153] On the Martin-Quinn scores, liberal preferences are negative and conservative preferences are positive. Since 1953, the Martin-Quinn scores have had a historic average for the Justices of zero and range of -6.33 (Justice Douglas in 1974) to 4.31 (then Justice Rehnquist in 1975).[154] Jacobi has shown theoretically,[155] and Jacobi and Sag have shown empirically,[156] that a sound and rigorous way of measuring case outcomes is to use the mean of the majority coalition, aggregating Martin-Quinn scores for each majority Justice. This makes intuitive sense: an opinion will be the product of the different views of the Justices who can agree to join an opinion.

The majority in *Mapp* was moderately liberal, consisting of Chief Justice Warren and Justices Clark, Black, Douglas, Brennan, and Stewart.[157] The *Mapp* coalition had an average preference score of -.57. To give this context, the average score for a case coalition between the years 1953 and 2006 was 0.33, with a standard deviation of 0.75.[158] Thus, the majority coalition in *Mapp* was a full standard deviation more liberal than the average majority coalition in the fifty-three years between 1953 and 2006. In 1961, after eight years of the Eisenhower administration filling lower court vacancies, the *Mapp* majority would have had good reason to think that the lower courts might be considerably more conservative than they themselves were. As such, a strict liberal rule makes a lot of sense under our model: a liberal coalition recognized that some cases would come out more liberal than they would like—letting some criminals go free—but overall a liberal rule would be preferable to allowing a conservative group of lower court judges greater discretion to limit privacy, contrary to the liberal coalition's preference.

Mapp did not end litigation about the exclusionary rule; rather, the debate shifted to the scope of that rule, and the Court made some exceptions to the rule. One such exception was created in *United States v. Leon*, in which the Court recognized a good-faith exception to the exclusionary rule in cases in which a magistrate erred in granting a warrant and a police officer relied on the warrant in good faith.[159] The justification for this exception was that the exclusionary rule is intended to act as a deterrent against police misconduct, rather than as a personal right of aggrieved defendants, or to punish magistrates or judges for their er-

153. Andrew D. Martin & Kevin M. Quinn, *Martin-Quinn Scores: Measures*, WASH. U. ST. LOUIS, http://mqscores.wustl.edu/measures.php (last visited Oct. 21, 2011).

154. Note that when Justice Rehnquist became Chief Justice, he became more moderate, with an average score of 1.48. The most consistently conservative Justice on the Court has been Justice Thomas, with a score of 3.77.

155. Jacobi, *supra* note 54, at 452.

156. Jacobi & Sag, *supra* note 52, at 75.

157. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

158. Jacobi & Sag, *supra* note 52, at 30.

159. 468 U.S. 897 (1984).

rors.[160] As such, a rule that exempts good-faith execution of a warrant issued by a "detached and neutral magistrate"[161] fits within the basic contours of the exclusionary rule.

Although *Leon* created an exception to the exclusionary rule, it did so in a way that is nevertheless best characterized as a rule itself and not a standard. The Court justified the exception on the grounds that there is no deterrent effect on police misconduct if the police action is in fact lawful and reasonable.[162] The Court contrasted this with the situation where a warrant is "so facially deficient" that the police officers cannot reasonably be presumed to have thought it valid.[163] Essentially, this means that the police have to be acting in good faith for the exception to apply. The Court acknowledged that the good-faith requirement means that the exception turns on objective reasonableness and thus involves some reviewing discretion in the assessment.[164] The Court, however, considered that this should not make it difficult to apply in practice: "When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time."[165] That is, the exception itself is also a straightforward rule, based on an objective criterion, and not an indeterminate standard, based on a subjective criterion.

Note, however, that the Court itself in developing the doctrine conducted a sort of balancing analysis. Returning to *Mapp*'s discussion of the costs and benefits of allowing criminals to go free, the Court considered relevant whether the enforcement officers' transgressions were minor and contrasted a small violation with the potentially great magnitude of the windfall to a criminal of having evidence excluded.[166] Although the Court conducted balancing analysis to determine how the rule should be *crafted*, it did not conclude that similar balancing analysis by a judge in any given case was appropriate. Instead, it chose a conservative rule as an exception to a liberal rule of general application.

Again, this makes sense under our model, given what we know of the majority coalition's preferences. In contrast to *Mapp*, *Leon* was a highly conservative coalition. The opinion was written by Justice White, who in fact was only moderately conservative (with a Martin-Quinn

160. *Id.* at 906 ("The rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

161. *Id.* at 913; *see also* United States v. Peltier, 422 U.S. 531, 537 (1975) ("[I]f the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.").

162. Leon, 468 U.S. at 918–19.

163. *Id.* at 923.

164. *Id.* at 924–25.

165. *Id.* at 924.

166. *Id.* at 907–08 (citing Stone v. Powell, 428 U.S. 465, 490 (1976)).

score of 0.93) and only the fourth most conservative Justice on the Court in 1984; but the remainder of the coalition consisted of Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and O'Connor.[167] Together, this coalition had an average ideology of 1.36, i.e., two-thirds of a standard deviation more conservative than the historically average majority coalition. Arising toward the middle of the Reagan administration, the lower courts were becoming more conservative,[168] and so the Supreme Court Justices were no doubt confident in their ability to trust the lower courts with discretion in the form of a standard. Given, however, that the status quo was a very liberal rule—the exclusionary rule—the conservative *Leon* majority may well have felt that only a conservative exception rule could overcome the liberal effect of the exclusionary rule.

This brings us to *Herring*. Prior to *Herring*, the *Leon* exception rule to the exclusionary rule had not been extended to nonpolice conduct. In *Arizona v. Evans*, in holding that *Leon* "supports a categorical exception to the exclusionary rule for clerical errors of court employees," the Court distinguished the incentive of police officers to potentially subvert the Fourth Amendment from that of independent court officers, for whom the Court did not consider such a motivation existed.[169] *Herring*, however, extended the *Leon* exception to errors made by police officers under certain circumstances.[170] Although in terms of doctrinal content *Herring* merely extended *Leon*, it stands in sharp contrast to *Leon* in terms of the nature of the doctrine it developed. In contrast to *Leon*—as well as *Weeks*, *Mapp*, and *Evans*—*Herring* established an exclusionary rule exception in the form of a standard. Our model explains why.

In *Herring*, like in *Leon*, the arresting police officers had not committed the administrative error.[171] But in *Herring*, the police had nonetheless relied on the actions of another police department, which had erred.[172] As such, the question was whether the evidence found after the defendant was arrested was admissible, given that the warrant that initi-

167. *Id.*; Martin & Quinn, *supra* note 152.

168. David M. O'Brien, *Federal Judgeships in Retrospect*, *in* THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES 327, 335–36 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003) (noting that "the Reagan administration's meticulous screening of judicial nominees and hard-line positions with moderate Republicans . . . strengthened presidential control over judicial selection" and that "Reagan achieved remarkable success" in conservatively reforming the federal judiciary through his judicial appointments).

169. Arizona v. Evans, 514 U.S. 1, 15–17 (1995); *see also* United States v. Clarkson, 551 F.3d 1196 (10th Cir. 2009) (finding that the good-faith exception cannot apply to a circumstance in which an improper search was conducted based on police error—here conducting a search with an untrained or unreliable dog—since that would not effectively deter police misconduct, such as ensuring that a dog was actually trained or reliable before deploying it). In *Herring*, Justice Breyer maintained that *Evans* was "premised on a distinction between judicial errors and police errors," Herring v. United States, 555 U.S. 135, 158 (2009) (Breyer, J., dissenting), but the Opinion of the Court rejected that view. *Id.* at 143 n.3 (majority opinion).

170. *Herring*, 555 U.S. at 144–48.

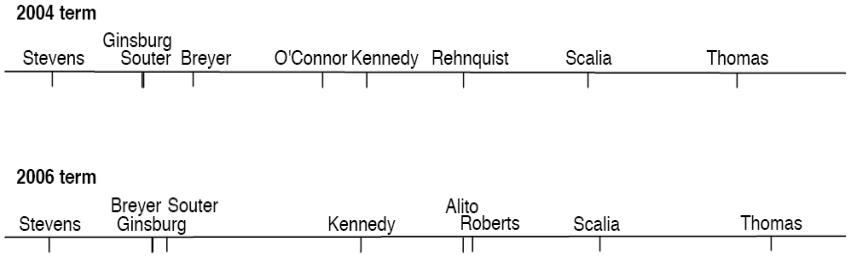
171. *Id.* at 136–38.

172. *Id.*

ated the arrest was unlawful as a result of the negligence of the police as a whole.[173]

The Court split 5-4 along conventional ideological lines, with Chief Justice Roberts and Justices Alito, Scalia, Thomas, and Kennedy allowing the evidence, with the more liberal Justices dissenting.[174] In terms of constitutional criminal procedure, the conservative outcome in *Herring* is unexceptional, given the ideological makeup of the Court. Martin-Quinn scores of the Roberts Court show that the Roberts Court is historically somewhat conservative. Figure 5 shows the positions of the Justices in the Roberts Court, and also illustrates the final year of the Rehnquist Court, by way of context. Justice O'Connor's score in 2004 is at the approximate historic mean of zero.[175]

FIGURE 5:
MARTIN-QUINN SCORES FOR THE 2004 AND 2006
SUPREME COURT TERMS



The Court became more conservative under Chief Justice Roberts not because Roberts replaced Chief Justice Rehnquist—they have almost identical Martin-Quinn scores—but because Justice O'Connor was replaced by Justice Alito. In that switch, not only did the middling conservative Alito replace the mildly conservative O'Connor, but also in that process the somewhat more conservative Justice Kennedy became the new Court median.[176] Thus the *Herring* majority coalition has an extremely conservative score of 2.24—more than a whole standard deviation to the right of the mean coalition score. On a normal distribution, on which Supreme Court cases as a whole lie on this measure,[177] that

173. Justice Ginsburg, dissenting, suggested that the actions of the police officers must be assessed altogether. *Id.* at 153–57 (Ginsburg, J., dissenting).

174. *Id.*

175. Martin and Quinn, *supra* note 152.

176. In 2004, O'Connor held the position of median Justice with a Martin-Quinn score of 0.08; with her retirement and the death of Rehnquist, Kennedy has become the median Justice, with a Martin-Quinn score of 0.49. Media portraits of Kennedy as the new "swing vote" on the Court fit very well with the Martin-Quinn analysis. *See, e.g.*, Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle; Court's 5 to 4 Decisions Underscore His Power*, WASH. POST, May 13, 2007, at A1; Robert Barnes, *In Second Term, Roberts Court Defines Itself; Many 5 to 4 Decisions Reflect Narrowly Split Court That Leans Conservative*, WASH. POST, June 25, 2007, at A3.

177. Jacobi & Sag, *supra* note 52, at 25–28.

translates to the *Herring* coalition being in the most conservative five percent of all Supreme Court cases in the last half century.

Segal and Spaeth show that judicial attitudes to search and seizure jurisprudence are highly predictable on the basis of a Justice's ideological scores;[178] so much so that when they revisited the topic in 2002 they predicted that, since the Court was becoming more conservative, "[t]his suggests that the exclusionary rule may soon be overturned directly, or simply made irrelevant because so few searches are ruled unreasonable."[179] Clearly then, the extremely conservative *Herring* coalition would want to establish a very conservative doctrine, ensuring that the vast majority of cases come out conservatively—that is, against privacy and in favor of police prosecutions. But what is the best doctrinal mechanism of achieving that effect?

Certainly the majority coalition achieved its overall goal of crafting a more conservative doctrine. Relying on the *Leon* notion of effective deterrence of police misconduct, the Chief Justice, writing for the conservative majority, emphasized that police misconduct had to be deliberate in order for exclusion to meaningfully deter it.[180] He contrasted this to police mistakes made as a result of negligence that are not systemic or reckless, such that "any marginal deterrence does not 'pay its way.'"[181] But the Court could easily have crafted a simple extension rule to the *Leon* exception rule—as we have seen, an exception can still be a rule. Such a rule could have been provided by rewriting *Leon*'s exception rule to extend to good-faith execution of a warrant when that warrant was mistakenly issued or maintained by a "detached and neutral" *police officer*.

Arguably, however, the Court is more ambitious in its conservative aims in search and seizure jurisprudence than just seeking to craft another exception to the exclusionary rule. Both new appointees, Chief Justice Roberts and Justice Alito, in memoranda written before their entry to the Court, expressed strong aims to undermine the exclusionary rule. Roberts authored a memorandum in which he expressed support for "the campaign to amend or abolish the exclusionary rule,"[182] and Alito reportedly stated that his interest in the law had been motivated "in large part by disagreement with Warren Court decisions, particularly in the areas of

178. SEGAL & SPAETH, *supra* note 6, at 67–68, 216–21.

179. SEGAL & SPAETH, *supra* note 50, at 319.

180. Herring v. United States, 555 U.S. 135, 144 (2009).

181. *Id.* at 147–48. Note that Justice Ginsburg questioned how isolated the error was in the case at hand, *id.* at 150–51 (Ginsburg, J., dissenting), and argued that the risk of false positives from electronic databases is increasing exponentially. *Id.* at 155.

182. Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1; Memorandum from John G. Roberts, Assoc. Counsel to the President, to T. Kenneth Cribb, Jr., Assistant Counselor to the President (Jan. 4, 1983), http://www.reagan.utexas.edu/roberts/Box24JGRExclusionaryRule1.pdf.

criminal procedure," and others.[183] As such, at least the ideological center of the majority seemingly sought a more radical departure from the exclusionary rule.

This is in fact what the *Herring* decision did. Rather than assuming that the cost of letting criminals go free is one worth bearing for the sake of the criminal justice system, in *Herring*, the Chief Justice explicitly considered whether the cost of "letting guilty and possibly dangerous defendants go free" was a price worth paying when police conduct was insufficiently culpable or deterrence low.[184] The majority in *Herring* was unwilling to assume that such a cost-benefit analysis always came out in favor of exclusion.

If such an across-the-board assumption is not to be made, how then should such questions be assessed? The Court expressly rejected Justice Breyer's call in dissent for "the need for a clear line,"[185] a rule excluding evidence for every Fourth Amendment violation, and instead created a flexible case-by-case standard evaluating the "culpability of the police and the potential of exclusion to deter wrongful police conduct" before excluding evidence.[186] Instead of crafting a further exception rule, *Herring* establishes an exception standard, involving balancing and case-by-case evaluations of the good-faith exception to the exclusionary rule, the extent of culpability of law enforcement, and the degree of attenuation between the misconduct and the discovery of evidence, an undertaking that leaves much discretion in lower courts.[187]

Given the extremely conservative nature of the coalition, the majority Justices no doubt would ideally have liked to create a clear rule that would have bound all lower courts in a conservative direction (perhaps even the elimination of the exclusionary rule). But they needed five votes to create such a rule, and as the Court's median Justice, Justice Kennedy, drives the Court outcomes on 5-4 cases.[188] The majority needed Justice Kennedy's vote, and he was seemingly unwilling to join such a hard conservative rule. Justice Kennedy joined the opinion in *Dickerson v. United States*, reaffirming the validity of the exclusionary rule.[189] And when the Court allowed a scaling back of the "knock and announce rule," Justice Kennedy joined the majority opinion but wrote a separate

183. Adam Cohen, Editorial, *Question for Judge Alito: What About One Person One Vote?*, N.Y. TIMES, Jan. 3, 2006, at A16; Liptak, *supra* note 182.

184. *Herring*, 555 U.S. at 141–42.

185. *Id.* at 141 (Breyer, J., dissenting).

186. *Id.* at 137.

187. *Id.* at 139, 142.

188. For the power of the median generally, and Justice Kennedy's role as a historically exceptionally powerful median on the Roberts Court, see generally Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37 (2008). In relation to the exclusionary rule specifically, see Liptak, *supra* note 182 ("The fate of the rule seems to turn on the views of Justice Anthony M. Kennedy . . . .").

189. 530 U.S. 428, 430 (2000).

concurrence reaffirming "the continued operation of the exclusionary rule."[190]

Looking back to Figure 4, which considers the heterogeneity of a multimember panel, we see the majority's dilemma. The majority of the majority coalition—Justices Roberts and Alito by their own words, and Justices Scalia and Thomas by implication of their strong conservative leanings—can be assumed to prefer a very strong conservative position. With the prospect of potentially significant changes in lower federal court makeup as President Obama selects more liberal circuit court judges, and probable high variation in state courts, given the variegated makeup of both sitting state court judges and state administrations, we might expect that these four Justices would prefer a conservative rule. But with Justice Kennedy having taken a more moderate position, these four Justices no doubt faced the reality of the inability to create a strong conservative rule that would garner majority support. Thus, a moderate doctrine would be a great improvement from their perspective over the current status quo of *Mapp*'s extremely liberal rule and *Leon*'s limited exception.

Given their inability to create a strong conservative rule, and facing the status quo of a liberal rule, the conservative Justices were left with the choice of an ideologically more moderate rule or a flexible standard. The problem with a moderate rule, from these conservative Justices' perspectives, is twofold. First, it is hard to craft a binding moderate rule that is anything other than extremely narrow. Consider the possibility raised above: extending the *Leon* exception rule to include non-negligent, good-faith police error. This would certainly achieve the desired outcome in the given case at hand, but would do little to revolutionize search and seizure jurisprudence more generally. Second, a moderate rule would have locked the Court into a moderate policy on the exclusionary rule that would be difficult to change if the Supreme Court eventually became more conservative. Put explicitly in terms of our model, a moderate rule would restrict like-minded lower court judges from ruling as the conservative majority coalition would like in future cases, and would also leave less leeway resulting from changes on the higher court panel.

In contrast, a flexible standard overcomes both of these problems. First, by creating a flexible standard, the Court empowered contemporaneous conservatives on the circuit and state courts to apply this standard in a conservative way. Of course this also allows liberal lower court judges to continue to use their discretion to achieve liberal outcomes, but liberal outcomes would have arisen in the vast majority of cases under a moderate exception rule, given the overwhelmingly liberal flavor of the overall exclusionary rule. Second, the *Herring* opinion strategically cre-

190. Hudson v. Michigan, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").

ated a doctrine to best effect the conservative majority's goals, subject to the constraint of needing an opinion acceptable to five Justices.

Indeed, in the first lower court decision to apply *Herring*'s analysis,[191] a district court noted that under *Herring*, for exclusion to be appropriate, "the deterrence benefits must outweigh its social costs, which include impeding the search for truth and, sometimes, setting the guilty free."[192] The district court found that law enforcement had made repeated efforts, "albeit sometimes botched," to obtain judicial approval of its investigative procedures, and that "the errors committed by law enforcement in obtaining and executing the search warrants are more in line with negligence than with a reckless disregard of the *Fourth Amendment*."[193] As such, the law enforcement misconduct did not rise to the level of culpability that *Herring* held necessary to serve a deterrent purpose and outweigh the cost of suppressing evidence.[194]

And so we see how our model answers the questions put in the Introduction. Why did the Court create a very flexible legal standard in its opinion, rather than a clear rule to bind lower courts? Because a moderate standard would bring about the maximum number of lower court conservative holdings on the exclusionary rule, given the liberal status quo. In these circumstances, even such a generally rule-favoring Justice as Justice Scalia would prefer to establish a flexible standard. This application makes clear why higher court judges cannot always craft a rule that perfectly fits their preferences, why higher court-lower court ideological alignment is the key to whether the higher court judges will prefer a rule or a standard and how those preferences interact with the reality of heterogeneity on the higher court panel.

CONCLUSION

The nature of judicial doctrine defines much of U.S. law. Yet the understanding of doctrinal creation has seen little examination. Doctrine operates in a legal system that has aspects of traditional legal stare decisis but also has aspects of legal realism's discretionary ideological decision making. Creators of doctrine, at the Supreme Court level, understand its

191. Note, however, that *Herring* has also been distinguished by lower courts. In United States v. Green, No. 1:08-CR-0041, 2009 WL 230890, at *9–10 (M.D. Pa. Jan. 30, 2009), the district court held that *Herring*'s limitation on the exclusionary rule applied only to police misconduct that is "attenuated" from the arrest, and thus does not apply to a pat-down search of an individual in the absence of reasonable suspicion that the individual was involved in criminal activity, based on the officers' on-the-scene observations. And similarly, in United States v. Thomas, No. 08-cr-87-bbc-02, 2009 WL 151180, at *6 (W.D. Wis. Jan. 20, 2009), a trap and trace order issued at least partly in reliance on a misstated material fact was not exempted from the exclusionary rule.

192. United States v. Stabile, No. 08-145 (SRC), 2009 U.S. Dist. LEXIS 4263, at *31 (D.N.J. Jan. 21, 2009).

193. *Id.* at *32–33.

194. *Id.* at *33–34.

operation and must craft their doctrinal commands in the context of this reality.

Our Article identifies the dominant factors in judicial decision making at both the higher and lower court level—legal obedience and political ideology.[195] On the basis of the importance and extent of these concerns, we modeled the six factors that primarily determine higher court choice of rules versus standards: political alignment within the hierarchical judicial system, the distribution of case facts, the inherent control characteristics of rules versus standards, the effect of overlapping doctrines, the extent that lower court discretion is unavoidable, and the effect of political heterogeneity on the multimember higher court.[196]

Considerable prior research has addressed the creation of rules or standards as the preferable form of doctrine.[197] Unfortunately, this research has consistently assumed that the choice involves a naïve assessment of the benefits of a rule versus a standard in the abstract. In truth, the choice requires an evaluation of the operation of the two legal approaches in a real world of legal and ideological influences on decisions applying the Court's doctrine. A Justice might prefer a doctrinal standard in the abstract but nevertheless create a rule, because of concerns for the standard's application by ideologically contrary lower courts.

The extensive debate over the external value of rules and standards, or their philosophical merit, has value but little practical meaning absent an understanding of why and how doctrine is created. Addressing the latter, descriptive question is important in its own regard, for understanding how the law works is crucial to any normative assessment of doctrine that hopes to have any real-world importance.

195. *See supra* Part I.A.1–2.
196. *See supra* Part III.
197. *See supra* Part III.