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A POSITIVE POLITICAL THEORY OF RULES AND STANDARDS

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Abstract

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 be likely to 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.

Our 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 multi-member higher court.

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INTRODUCTION

In the 2009 Term, the U.S. Supreme Court issued a significant constitutional criminal procedure opinion in *Herring v. United States*. The fundamental issue in the case was whether the exclusionary rule should apply to prevent introduction of evidence obtained due to a careless government recordkeeping 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. 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.

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

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2 *Id* at 698.
commitment to a standard? *Herring* is but one example of these doctrinal questions, which 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, 3 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 will be preferable under given circumstances.

Our theory rests on several insights from the positive political theory 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. 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 positive political theory 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 non-idiosyncratic explanation of how they fit together.

Doctrine is both created and applied by courts at all levels of the judicial hierarchy. In the first section 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 significance of each of these determinants has been demonstrated. They operate in different ways, though, for the higher court that creates doctrine and the lower courts that apply it.

Our second section more closely examines the operational characteristics of judicial doctrine. Although there are many doctrinal variations, a central issue is whether

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3 See, e.g., Dale Nance, *Rules, Standards, and the Internal Point of View*, 75 Fordham L. Rev. 1287 (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).
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 important for our inquiry, their effects on the political control of the higher court over the lower court. Much of our positive political theory of the creation and application of doctrine rests on this background.

The third section 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 United States 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 will be 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 multi-judge 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 versus standards debate specifically, and for understanding the manner in which higher courts control lower courts more generally. Our analysis shows that 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 and 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 the fourth section, we return to the Court’s decision in *Herring v. United States*[^4] 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.

**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.[^5] Even the classics of the genre, as written by Frederick Schauer,[^6] Duncan Kennedy,[^7] Louis Kaplow,[^8] and

[^6]: *Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based*
Kathleen Sullivan9 have touched only fleetingly on the descriptive determinants of doctrinal content. Whereas while the positive political scholarship on judicial decision-making is also now voluminous, this research only recently has begun to account for the operation of legal doctrine.10 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.11 The following discussion examines the primary motivations of judges and how they may differ by 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.”12 Under extreme legal realism, where judges produce whatever outcomes they desire, without constraint, legal doctrine – and its various forms – would be irrelevant. However, such extreme realism does not

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11 Unlike most people, the economic motivation does not apply well to judges, whose 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) (observing that “theory has had some difficulty accounting for judicial behavior because the 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) (noting that the “inability to identify a plausible objective function to impute to judges has frustrated economic analysis from the outset”).
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. The materials of the law yield answers entirely independent of “a particular individual’s moral or political values.” 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. 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. Judges themselves regularly report their fealty to the materials of the law in decision-making. Thus, justices have proclaimed that “respect for precedent” is crucial. While such claims need not be taken at face value, they at least justify the consideration of the variable in decision-making models. It is surely possible that judges have legal preferences, such as those for “textual interpretation” that may override their other preferences.

15 See Frank B. Cross, Appellate Court Adherence to Precedent, 2 J. EMPIRICAL LEGAL STUDIES 369, 384-387 (arguing that the significance of this concern unfortunately is overlooked by research).
17 See, e.g., DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 21 (2002) (reporting that judges consistently report that reaching “legally correct” decisions is important to them); J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 156 (1981) (reporting survey findings that appellate court judges “felt obliged to obey the Supreme Court”).
19 This decision-making model is summarized in Frank B. Cross, Political Science and the New Legal Realism: An Unfortunate Case of Interdisciplinary Ignorance, 92 NW. U. L. REV. 251, 255-64 (1997).
The legally-oriented judge would “maximize[] utility by adhering faithfully to these internal rules, regardless of the external result.” While political scientists have been known to assume away the possibility that judges care about the law, there is no basis for this. It is likely that even if judges have strong preferences over outcomes, they may nevertheless also be strongly influenced by the content of doctrine and norms of legal obedience. 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. Some research indicates that “judges’ role orientations were strongly professional, much more professional, in fact, than political.” Because circumstances color preferences, the role of the judiciary could cause judges to value legal obedience. In this view, judges may be driven to do their “duty.” 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.” This role may be enforced by legal and public perceptions of the judge’s opinions. 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

22 Legal Doctrine and Political Control, supra note 10.
25 See LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 61 (1997) (suggesting that “it pleases judges to carry out what they conceive as the judges role”). See also RICHARD A. POSNER, OVERCOMING LAW 131 (1995) (reporting that the “pleasure of judging is bound up with compliance with certain self-limiting rules”).
26 Political Science and the New Legal Realism, supra note 19, at 296-97.
28 See Judicial Incentives and Indeterminacy, supra note 11 at 1058 (suggesting that “judges 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”).
or argue around existing doctrines.  

Political scientists have been dubious of any role theory of legal preferences among judges, displaying an “almost pathological skepticism that law matters.” Nevertheless, 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.

Legal obedience is a concern of judges but alone does not drive all judicial decision-making. Such classic formalism wholly internal to the law is no longer a plausible explanation for decisions. Nevertheless, legal obedience may well be a factor that influences judicial preferences. The remainder of the 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. To the extent they have discretion in applying the law, judges’ decisions may also reflect their ideological policy preferences.

The traditional legal realists questioned whether the law governed the judiciary and suggested that decisions were driven overwhelmingly by their ideological or other predilections. 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.” Mark Tushnet argues that reasonable legal arguments can be

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29 What Do Judges and Justices Maximize?, supra note 12 (arguing judges rationally attempt to minimize their workload when making judicial decisions).

30 Barry Friedman, Taking Law Seriously, 4 Persp. Pol. 261, 265 (2006). Some, however, have conceded the presence of this effect at lower court levels. See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model 235 (1993).

31 H. W. Perry, Deciding to Decide: Agenda Setting in the United States Supreme Court (1991)

32 See Creating Legal Doctrine, supra note 23, at 1989 (noting that the “old self-justificatory bromide that judges do not make the law, but only find it, is generally rejected – even scorned – these days”).


34 Political Science and the New Legal Realism, supra note 19, at 257. Judge Posner warns readers not to
found for any decision preferred by the Court. 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 that judges’ “policy goals” exert considerable influence upon their decisions. Other judges have conceded that their decisions are inevitably influenced by their ideological preferences. Former judge Robert Bork contended that for contemporary courts “nothing matters beyond politically desirable results, however achieved.”

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. 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.” Judges might therefore “issue decisions that deviate” from their preferred ideological outcome in the initial case, in order to structure a body of


OVERCOMING LAW, supra note 25, at 372 (1995). He explained that judges wish to “impose their political vision on society” through their rulings.

See, e.g., 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) (noting that “subtly or unconsciously, the judge’s politics will affect decisionmaking” (emphasis original)); COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM, supra note 17, at 164 tbl. 6.2 (reporting a survey of judges who considered judges’ personal views to be an important determinant of their decisions).


See THE PUZZLE OF JUDICIAL BEHAVIOR, supra note 25, 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 5 (2004) (referring to ideology as the “supreme factor” in selecting Supreme Court nominees).

Informative Precedent and Intrajudicial Communication, supra note 21, at 755.
doctrine that would better yield their ideological preferences in future decisions.\textsuperscript{41}

Adhesion to ideological preferences might be considered as 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 is known or knowable, one might expect judges to adopt a rule of Pareto optimality without reliance on decision drivers embedded in ideology. 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 and conservatives. Perhaps the same would be expected for a Kaldor-Hicks superior rule 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 lower 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.”\textsuperscript{42}

This section of the Article examines the significance of the objectives separately, for higher and lower courts.

1. High Courts (i.e., 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,\textsuperscript{43} but was most famously expounded by Segal and Spaeth in their book studying Supreme Court decisions.\textsuperscript{44} They reported an ability to predict 74\% of all Court

\textsuperscript{41} Id.

\textsuperscript{42} What Is Legal Doctrine?, supra note 5, at 531.

\textsuperscript{43} 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 xiii (1948).

\textsuperscript{44} The Supreme Court and the Attitudinal Model, supra note 30. 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).
decisions, using just ideological determinants.\textsuperscript{45} 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.

Given the evidence of ideological decision-making at the Supreme Court, some overlook the legal obedience rationale. 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.\textsuperscript{46} Moreover, there is a material number of cases in which a conservative would vote liberally while a more liberal justice would cast a more conservative vote.\textsuperscript{47} Indeed, even the most committed attitudinalists acknowledge that a large number of decisions are not obviously explained by ideology.

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.\textsuperscript{48} Justice Scalia has proclaimed that when “I adopt a general rule . . . I not only constrain lower courts, I constrain myself as well.”\textsuperscript{49} 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.”\textsuperscript{50}

At least one study indicates that the Court’s decisions structure the development of future cases, through “jurisprudential regimes.”\textsuperscript{51} The authors studied the creation of

\textsuperscript{45} \textit{The Supreme Court and the Attitudinal Model}, supra note 30, at 229.

\textsuperscript{46} This is assuming that the underlying case facts 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 preferences. \textit{See} Tonja Jacobi, \textit{Competing Theories of Coalition Formation and Case Outcome Determination}, 1 J. Legal Analysis 411, 458 (2009).

\textsuperscript{47} \textit{See} David E. Klein & Stefanie A. Lindquist, \textit{Measuring Disordered Voting Patterns on the U.S. Supreme Court: Implications for the Attitudinal Model of Judicial Behavior}, presented at the 2005 Annual Meeting of the American Political Science Association (reporting that a substantial number of cases show such disordered voting). \textit{See also} Pablo T. Spiller & Emerson H. Tiller, \textit{Invitations to Override: Congressional Reversal of Supreme Court Decisions}, 16 Int’l Rev. Law & Econ. 503 (1996)

\textsuperscript{48} \textit{See Informative Precedent and Intrajudicial Communication}, supra note 21, 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”).


\textsuperscript{51} Mark J. Richards & Herbert M. Kritzer, \textit{Jurisprudential Regimes in Supreme Court Decision Making}, 96 AM. POL. SCI. REV. 305 (2002).
the content-neutrality standard in free speech cases and found a statistically significant effect for this standard in subsequent Court decisions.\textsuperscript{52} Another recent study of the Court’s treatment of certain civil rights, civil liberties, and economic cases found that precedent was an even more significant determinant of decisions than was ideological preference.\textsuperscript{53} A review of abortion and death penalty cases similarly found that the justices’ ideology did not rule their interpretation of precedent.\textsuperscript{54} A study of gay rights decisions in state and federal courts similarly found that precedent was a significant determinant of judicial decisions, though lessened in significance at the level of higher courts.\textsuperscript{55}

Thus, legal obedience appears to be a relevant factor, even at the Supreme Court level. However, the relative significance of law versus ideology is lessened at the Supreme Court, as would be expected given its position in the judicial hierarchy and its case selection ability.\textsuperscript{56}

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. A study of the individual decisions involving doctrines contained in the \textit{Miranda} and \textit{New York Times} decisions found substantial compliance with the Supreme Court decision.\textsuperscript{57} An event history analysis of overruling decisions of the

\textsuperscript{52} \textit{Id.} at 314.


\textsuperscript{54} \textit{See generally}, LEE EPSTEIN & JOSEPH F. KOBYLKA, \textit{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.” \textit{Id.} at 310.

\textsuperscript{55} \textit{See DANIEL R. PINELLO, GAY RIGHTS AND AMERICAN LAW} 79-86 & 141(2003).

\textsuperscript{56} \textit{See THE PUZZLE OF JUDICIAL BEHAVIOR, supra} note 000, at 69 (suggesting that because of its hierarchical position and discretionary jurisdiction “scholars argue explicitly that the Court is unique in the dominance of policy over law”).

\textsuperscript{57} Donald R. Songer & Reginald S. Sheehan, \textit{Supreme Court Impact on Compliance and Outcomes}: \textit{Miranda} and \textit{New York Times in the United States Courts of Appeals}, 43 WESTERN POL. Q. 297
Warren Court found widespread compliance by lower courts, albeit not uniform or always immediate.\textsuperscript{58} A study of libel decisions confirmed the responsiveness to Supreme Court precedent.\textsuperscript{59} In general, the research has shown 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 a statistically significant degree.”\textsuperscript{60} 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.”\textsuperscript{61} One empirical examination found that the greatest determinant of circuit decisions was the law.\textsuperscript{62} Thus adherence to precedent “remains the everyday, working rule of American law, enabling appellate judges to control the premises of decisions of subordinates.”\textsuperscript{63}

Citation studies also indicate that lower courts heed the Supreme Court’s doctrinal choices.\textsuperscript{64} Examples of blatant lower court evasion of Supreme Court precedent are relatively rare,\textsuperscript{65} 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.\textsuperscript{66} Lower court judges “also have their own policy

\textsuperscript{58} See Sara C. Benesh & Malia Reddick, \textit{Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent}, 64 J. POL. 534 (2002). The authors found that Court unanimity, complexity, issue area, and age of the overruled precedent all influenced the rapidity of lower court compliance. \textit{Id.} at 548.


\textsuperscript{61} \textit{MAKING LAW IN THE UNITED STATES COURTS OF APPEALS, supra} note 000, at 7.


\textsuperscript{63} \textit{COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM, supra} note 000, at 187.

\textsuperscript{64} See THOMAS G. HANSFORD & JAMES SPRIGGS II, \textit{THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT} 109-123 (2006) (showing how lower court are responsive to citation choices of the Supreme Court).

\textsuperscript{65} \textit{Appellate Court Adherence to Precedent, supra} note 000, at 382. \textit{See also Overruled, supra} note 000, at 536 (indicating that “little evidence of outright defiance has been found in the courts of appeals”).

\textsuperscript{66} Thus, the lower court may interpret a precedent narrowly and distinguish their case from the Supreme
preferences, which they may seek to follow to the extent possible.\footnote{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.\footnote{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.\footnote{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.}} Another study of review of administrative regulations under a deferential Supreme Court rule likewise found a significant ideological effect.\footnote{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.}}

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


\footnote{Frank B. Cross, \textit{Decisionmaking in the U.S. Courts of Appeals}, 91 CAL. L. REV. 1457, 1509 (2003).}

\footnote{See Cass R. Sunstein, \textit{et al.}, \textit{Are Judges Political} (2006). Data on this effect are provided throughout the book, but a good graphic summary is presented on pp.26-27.}


\footnote{See \textit{Courts of Appeals in the Federal Judicial System}, supra note 000, 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’s governing precedent or find alternative grounds for a decision or simply ignore the precedent’s existence. Overruled, supra note 000, at 536. These moves may be constrained by the nature of the Court’s doctrine, though, as described in the next major section.}
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. However, legal obedience 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 section considers the broad literature describing the difference between rules and standards, before section 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. Professor Schauer urged that when lower courts use Supreme Court decisions, “it is not what the Supreme Court held that matters, but what it said.” Those precedents are meant to direct or at least guide future decisions, so their doctrinal content is of critical significance. The Court 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. Bright line rules may “leave later judges little room to maneuver,” in contrast to “vague doctrinal formulations.” A survey of circuit court judges found that they were most likely to adhere to a doctrine that was “clear.” 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.

A great deal of theoretical jurisprudential analysis has been devoted to the nature
and relative benefits or detriments of doctrinal rules and standards. 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.

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.” A truly “pure rule” has a “hard empirical trigger and a hard determinate response.” 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. Judge Richard 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 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

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81 Kaplow, for example, observes that both rules and standards may have greater complexity in their specification, which would also influence the residual discretion, throughout Rules Versus Standards: An Economic Analysis, supra note 000.


84 EVA H. HANTS ET AL., ELEMENTS OF LAW 45 (1994).
psychology; the important point is that some activities are better governed by rules, others by standards.\textsuperscript{85}

For our purposes, the key difference between rules and standards is the “relative discretion they afford to the decision-maker.”\textsuperscript{86} 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.\textsuperscript{87}

At the extreme, the difference between rules and standards is obvious. A driving “rule” would establish a maximum speed of 65 mph. A “standard” would simply require that drivers maintain a “reasonable” speed under the circumstances.\textsuperscript{88} 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 \textit{per se} violations of the law and establish a rule of their illegality. Other actions, by contrast, are judged by the more standard-like “rule of reason” – in contrast, these actions may be illegal or not, depending upon the circumstances.

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. However, the term “reasonable,” 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, certain rule may be an impossible task.\textsuperscript{89} Even rules “will, at some point where their application


\textsuperscript{86} Legal Doctrine and Political Control, supra note 10; The Justices of Rules and Standards, supra note 000, at 57.

\textsuperscript{87} PLAYING BY THE RULES, supra note 000, at 231-232.


\textsuperscript{89} See Rules Versus Standards: An Economic Analysis, supra note 000, at 600 (observing that “another limitation on the ability to formulate laws as rules involves limitations of language”); Appellate Court Adherence to Precedent, supra note 000, at 392-393 (arguing that the precise dictates of doctrine cannot be “expressed linguistically in opinions and appreciated by readers”).
is in question, prove indeterminate.”

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. Many doctrines are actually a mix of rules and standards. While there may be “pure rules” and “pure standards,” most doctrines rest somewhere in between. Even the strictest rules may be overridden when circumstances are so “obvious” or “dramatic” as to make its application inappropriate. 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.

Despite this caveat, it is generally “possible to classify most legal pronouncements as standards or rules, based on their core characteristics.” 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.’”

A standard involves the “direct application of the background principle or policy to a fact situation,” allowing the lower court “decision-maker to take into account all relevant factors or the totality of circumstances.” A classical standard would be a “balancing test,” under which a court considered the equities of both sides before deciding. Another common standard is the multi-factorial test, in which doctrine tells lower courts to consider a series of factors as relevant to the decision’s outcome but

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91 See The Justices of Rules and Standards, supra note 000, at 61 (referring to the “continuum” between a rule and a standards); Margaret Jane Radin, Presumptive Positivism and Trivial Cases, 14 J.L. & PUB POL’Y 823-, 828-832 (describing rules and standards as theoretical endpoints on a continuum).

92 Rules vs. Standards: An Economic Analysis, supra note 000, at 561.


94 Playing by the Rules, supra note 000, at 89-90. Schauer argues for a “presumptive positivism” that assumes a midpoint on the continuum, where rules may be adapted when appropriate.

95 See Appellate Court Adherence to Precedent, supra note 000, at 394-396 (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).

96 Id. at 30.


98 The Justices of Rules and Standards, supra note 000, at 59.
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 “virtues and vices.”\textsuperscript{99} Rules are generally applauded as providing clear guidance to third parties, while standards are preferred for doing justice in the specific case, among other differing effects. 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.\textsuperscript{100} There is an established literature about how doctrinal procedural rules can be used to influence results, such as selection of cases for appellate review.\textsuperscript{101} However, relatively little attention has been given to the creation of substantive doctrine, and how doctrinal form affects the content of case determinations, and we now embark on that analysis.

#### A. Choice of Doctrine

The primary mechanism available to higher courts to shape the decisions of lower courts considered here is that of choosing 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, and why the Supreme Court might choose a particular doctrinal approach in any given case.

A clear rule is not always the best approach to effect the Court’s purposes. The Supreme Court has occasionally adopted clear rules\textsuperscript{102} but more often disclaimed or “eschewed bright-line rules.”\textsuperscript{103} Our model shows how higher court judges can create a

\textsuperscript{99} Rules and Standards, supra note 000, at 383.

\textsuperscript{100} 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.


\textsuperscript{102} See, e.g., Apprendi v. New Jersey, 530 U.S. 466 (2000) (creating rule that any fact that enhances criminal penalties must be proved beyond reasonable doubt to jury).

\textsuperscript{103} The Court has expressly “eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.” Ker v. California, 374 U.S. 23, 33 (1963). Likewise, the “complexity of the districting process” meant that “bright-line rules are not available” for evaluations of its
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 multi-member court.

In our model, we assume that lower court justices are obedient to legal doctrine enunciated by the higher court. We do this for two reasons. First, as discussed in section I, we expect a high level of legal obedience from lower courts. Although lower court justices 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, doctrine is a time-saving decision heuristic, and following doctrine promotes public legitimacy.

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.

104 We also do not examine other strategic responses available to the lower courts, many of which have been explored elsewhere. Tiller and Spiller model how lower courts can engage in strategic manipulation of fact finding to avoid constraints on their discretion – Invitations to Override, supra note 000. McCubbins et al. model how lower courts can exploit the higher court’s limited capacity to fully review every decision carefully, which creates a non-trivial probability of some level of discretion – Administrative Procedures as Instruments of Political Control, supra note 000.


106 See generally LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 50-87 (2006) (discussing how legal adherence results from concerns for public perceptions and those of the other branches and judicial colleagues).
1. 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, faced 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, and so legal doctrines cannot always mirror those preferences.\textsuperscript{108} 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 policy dimensions, such as federal-state power and drug policy, or free speech and anti-discrimination law. Imagine that a higher court faces a choice between two dichotomous outcomes, which we call generically “x\textsubscript{1}” and “x\textsubscript{2}.” In Figure 1A, x\textsubscript{1} might represent the claim of the respondents in Gonzales v. Raich\textsuperscript{109} – 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\textsubscript{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 anti-discrimination claims, x\textsubscript{1} and x\textsubscript{2} would represent the type of outcomes favored by the majority and minority opinions in Boy Scouts v. Dale, respectively.\textsuperscript{110} With many cases raising similar issues, the underlying facts of each case may be distributed anywhere in

\textsuperscript{108} 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 laughing stocks.” Solving the Chevron Puzzle, supra note 000.

\textsuperscript{109} 645 U.S. 1 (2005)

\textsuperscript{110} 530 U.S. 640 (2000).
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 its 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 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 \( x_2 \).

**Figure 1: Choosing Among Determinate and Indeterminate Doctrines**

1A. Shape of Doctrine Constraint

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 reflecting, 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\textsuperscript{111} – 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.

2. 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 which comes from the choice of doctrinal language\textsuperscript{112} – 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

\textsuperscript{111} 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. Additionally, higher courts may be constrained in their doctrinal choice by pre-existing 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. Additionally, 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 – Ethan Bueno de Mesquita and Matthew Stephenson, \textit{Informative Precedent and Intrajudicial Communication}, 96 Am. Poli. Sci. Rev. 755 (2002). For these reasons, higher court choice over the content and number of doctrines may be limited.

\textsuperscript{112} 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 and Robert A. Carp, \textit{A Longitudinal Study of Party Effects on Federal District Court Policy Propensities}, 24 Am. J. Poli. Sci. 291 (1980).
particular 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 comparing 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 $45^\circ$ 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 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.\textsuperscript{113} 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-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

\textsuperscript{113} Donald R. Songer, et al., supra note 81 at 675.
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 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. Even assuming lower court obedience to doctrine, lower courts have discretion under a standard, and so there will also be lower courts who do not share the same policy preference as the high court and who will 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 will have 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, which 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, then, is dependent upon the mix of policy-aligned and -unaligned lower court judges, and 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.

3. 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 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

\[
P(x_1)_{\text{RULE}} > P(x_1)_{\text{STANDARD}}.
\]

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, and 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, \( P(x_1)_{\text{RULE}} \) and \( P(x_1)_{\text{STANDARD}} \), but now each of those probabilities are made up of two elements each, so we have four possibilities resulting in \( x_1 \): \( P(x_1)_{\text{RULE-S-granted}} \), \( P(x_1)_{\text{RULE-S-denied}} \), \( P(x_1)_{\text{STANDARD-S-granted}} \) and \( P(x_1)_{\text{STANDARD-S-denied}} \).

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 \(P(x_1)_{\text{RULE}}\) and \(P(x_1)_{\text{STANDARD}}\), in combination with \(P(x_1)_{\text{S-granted}}\) and \(P(x_1)_{\text{S-denied}}\).

**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, to maximize their ability to follow higher court preferences, with little expected cost from non-aligned 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.

4. 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 the 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. In a different context, Epstein and O’Halloran note that “coalitions might be more easily constructed around options that delegate than those that enact specific policies.”

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. 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.”

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: J₁, J₂ and J₃; we also show one possible position of the lower court.

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114 For a detailed model of how policy bargaining may occur at the Court, see STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT.

115 DELEGATING POWERS, supra note 000, at 31.

116 For a detailed model of how policy bargaining may occur at the Court, see STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME 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, J₂. If the higher court judges do not know the ideological preferences of the lower court, then both J₁ and J₃ may prefer a standard to a rule, since any rule will reflect the preferences of the median.¹¹⁸ J₁ and J₃ 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 J₂’s preferences is. Since we do not know the position of the lower court at this stage, whether J₁ and J₃ will each prefer a rule or a standard will depend on their relative position to the breadth of the standard range. Thus the closer each non-median 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.

However, if the higher court knows the lower courts 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 J₃ will now prefer a standard – because J₃ expects the lower court to use that discretion to decide cases in a way that

¹¹⁸ 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 J₁ or J₃’s preferences, in which case that judge would prefer the rule, but then the median judge is likely to prefer a standard.
approximates $J_3$’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 will occur if greater discretion is given 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 $J_2$ is.

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”\textsuperscript{119} because “the need to accommodate differing preferences may require that an opinion announcing the decision of the Court contain ambiguities in order to garner the support of a majority of its members.”\textsuperscript{120} 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 court’s 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 courts’ 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.”\textsuperscript{121} Judges may even engage in logrolling, wherein they trade doctrine in one area for another about which they have higher preference intensity. Our model, though, predicts tendencies in decision-making on multi-member 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.

IV. A DOCTRINAL APPLICATION: THE NEW EXCLUSIONARY STANDARD

In this section, we analyze the \textit{Herring v. United States}\textsuperscript{122} opinion discussed in our 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

\textsuperscript{119} Rules vs. Standards in International Environmental Law, supra note 000, at 278.

\textsuperscript{120} Pauline Kim, \textit{Lower Court Discretion}, 82 NYU L. REV. 383, 414 (2007).


\textsuperscript{122} 129 S.Ct. 695 (2009).
determinate rules.

The question in *Herring* concerned whether the exclusionary rule should prevent admission of evidence that was obtained due to a careless government recordkeeping mistake.\(^{123}\) In the case, an arrest was made on the basis of a warrant that appeared to be outstanding, but in fact had been rescinded. 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. The arresting police officers relied on the warrant in good faith, and subsequently found methamphetamines and a gun on Herring, a felon. The question for the Court was whether the exclusionary rule should apply to the introduction of evidence stemming from an unauthorized warrant.\(^{124}\)

The exclusionary rule holds that evidence obtained in violation of the Fourth Amendment is ordinarily inadmissible in a criminal trial.\(^{125}\) The exclusionary rule is referred to as a rule with good reason. For example, in *Mapp v. Ohio*,\(^{126}\) 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*.\(^{127}\) The Court explained its reasoning, stating that after a dozen years allowing state courts to be exempt from the federal rule, it felt bound to:

…close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserve to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.\(^{128}\)

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 a perpetual charter of inestimable human liberty.”\(^{129}\) Anything but a strict rule would effectively grant the right to be free from

\(^{123}\) *Id*, 698.

\(^{124}\) *Id*, at 699 (“we accept the parties’ assumption that there was a Fourth Amendment violation. The issue is whether the exclusionary rule should be applied” when an honest recordkeeping mistake was made).

\(^{125}\) *Weeks v. United States* 232 U.S. 383 (1914).


\(^{127}\) 338 U.S. 25 (1949).


\(^{129}\) *Id*, at 654.
unconstitutional searches and seizures while in reality withholding a remedy.\textsuperscript{130}

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 \textit{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 was a government failing to observe its own laws.\textsuperscript{131} 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. 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.\textsuperscript{132} As such, \textit{Mapp} applied and extended a strict rule of exclusion, and rejected any balancing test or any other form of standard.

Thus \textit{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 like to craft a doctrine that guaranteed privacy while not inappropriately freeing criminals – a curved line. However, 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. Instead, the Court chose a rule that most closely reflected its preferences – preferences which 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). 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.\textsuperscript{133} The scores are also updated annually. 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).\textsuperscript{134} Jacobi has shown theoretically,\textsuperscript{135} and Jacobi

\textsuperscript{130} \textit{Id}, at 656.

\textsuperscript{131} \textit{Id}, at 659.

\textsuperscript{132} \textit{Id}, at 656.


\textsuperscript{134} Note that when Rehnquist became Chief Justice, he became more moderate, with an average score of
and Sag have shown empirically, that a sound and rigorous way of measuring case outcomes is to use the mean of the majority coalition, aggregating Martin and 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, Justices Clark, Douglas, Brennan, White, Whitaker and Frankfurter. The *Mapp* coalition had an average preference score of -.57. To give this context, the average score for a case coalition is 0.33, with a standard deviation of 0.75. Thus the majority coalition in *Mapp* was a full standard deviation more liberal than the average majority coalition in the last 55 years. 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 did make 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. 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 errors. As such, a rule that exempts good faith execution of a warrant issued by a “detached and neutral magistrate” fits within the basic

1.48. The most consistently conservative Justice on the Court has been Justice Thomas, with a score of 3.77.

135 Tonja Jacobi, *Competing Theories of Coalition Formation and Case Outcome Determination*, 2 J. LEGAL ANALYSIS (forthcoming 2009).


137 Jacobi and Sag, *supra* note X.


139 *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 (1974) at 348.).

140 *Id*, at 913. See *also* United States v. Peltier, 422 U.S. 531, 538 (1975) (“If the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the
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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. 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.141 Essentially, this meant that the police had to be acting in good faith for the exception to apply. The Court acknowledged that the good faith requirement meant that the exception turns on objective reasonableness, and thus involves some reviewing discretion in the assessment.142 However, the Court 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.”143 That is, the exception itself is also a straightforward rule, based on an objective criterion, and not an indeterminate standard, all 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.144 But 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 score of 0.93) and only the fourth most conservative Justice on the Court in 1984; but the remainder of the coalition was Chief Justice Burger, Justices Blackmun, Powell, Rehnquist and O’Connor. Together, this coalition had an average ideology of 1.36 i.e. two-thirds of a standard deviation more conservative than 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.”).

141 Id at 923.
142 Id at 924.
143 Id.
144 Id at 908.
historically average majority coalition. Arising toward the middle of the Reagan administration, the lower courts were becoming more conservative, and so the Supreme Court were no doubt confident in their ability to trust the lower courts with discretion in the form of a standard. However, given 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 non-police 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.\textsuperscript{145} Herring, however, extended the Leon exception to errors made by police officers under certain circumstances. 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. But in Herring, the police had nonetheless relied on the actions of another police department, which had erred. As such, the question was whether the evidence found after the defendant was arrested was admissible, given that the warrant that initiated the arrest was unlawful as a result of the negligence of the police as a whole.\textsuperscript{146}

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. 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.

\textsuperscript{145} Arizona v. Evans, 514 U.S. 1 (1995). See also U.S. 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 129 S.Ct. 695 (2009) at 710 (Breyer J dissenting) – but the Opinion of the Court rejected that view – \textit{Id} at 701.

\textsuperscript{146} Justice Ginsburg, in dissent, suggested that the actions of the police officers must be assessed altogether. Herring v. United States 129 S.Ct. 695 (2009) at 706 (Ginsburg dissenting).
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. 147 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, 148 that translates to the *Herring* coalition being in the most conservative 5% of all Supreme Court cases in the last half century.

Segal and Spaeth showed that judicial attitudes to search and seizure jurisprudence are highly predictable on the basis of a Justice’s ideological scores; 149 so much so that when they revisited the topic in 2002 they predicted that, since the Court was becoming more conservative, “this suggests that the exclusionary rule may soon be overturned directly or simply made irrelevant because so few searches are ruled unreasonable.” 150 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

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147 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 Martin and Quinn’s analysis. See, e.g., Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle; Court’s 5 to 4 Decisions Underscore His Power*, THE WASHINGTON POST, May 13, 2007; Robert Barnes, *In Second Term, Roberts Court Defines Itself; Many 5 to 4 Decisions Reflect Narrowly Split Court That Leans Conservative*, THE WASHINGTON POST, June 25, 2007.

148 Jacobi and Sag, *supra* note X.


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.\(^{151}\) 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.’”\(^{152}\) 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 reportedly authored a memorandum entitled “the campaign to amend or abolish the exclusionary rule,”\(^{153}\) and Alito wrote that his interest in the law had been “motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure” and others.\(^{154}\) As such, at least part of the majority seemingly sought a more radical departure from the exclusionary rule.

This is in fact was 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.\(^{155}\) 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

\(^{151}\) Herring v. United States 129 S.Ct. 695 (2009) at 702.

\(^{152}\) Id at 704. Note that Justice Ginsburg questioned how isolated the error was in the case at hand – Id at 706 (Ginsburg dissenting) – and argued that the risk of false positives from electronic databases is increasing exponentially – Id at 709 (Ginsburg dissenting).


questions be assessed? The Court expressly rejected Justice Breyer’s call in dissent for “the need for a clear line,”156 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.157 Instead of crafting a further exception rule, Herring instead 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.

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.158 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,159 reaffirming the validity of the exclusionary rule. And when the Court allowed a scaling back of the ‘knock and announce rule,’ Justice Kennedy joined the majority opinion but wrote a separate concurrence reaffirming “the continued operation of the exclusionary rule.”160

Looking back to Figure 4, which considers the heterogeneity of a multi-Justice panel, we see the majority’s dilemma. The majority of the majority coalition – 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 potential 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 make up 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

156 Id at 711 (Breyer dissenting).
157 Id at 698.
158 For the power of the median generally, and Justice Kennedy’s role as a historically exceptionally powerful median on the Roberts Court, see Lee Epstein and Tonja Jacobi, Super Medians, 61 STANFORD LAW REVIEW 37 (2008); in relation to the exclusionary rule specifically, see Liptak, supra note X, at A5 (observing that the “fate of the rule seems to turn on the views of Justice Anthony M. Kennedy”).
160 Hudson v. Michigan, 547 U.S. 586, 603 (U.S. 2006) (Kennedy concurring) (“The continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”).
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 moderate 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 the 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 created 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\(^\text{161}\) to apply Herring’s analysis,\(^\text{162}\) 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.”\(^\text{163}\) The district court found that law enforcement had

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\(\text{161}\) A Shepardize Lexis search as of February 20, 2009 revealed only one case following Herring so far.

\(\text{162}\) Note, however, that Herring has also been distinguished by lower courts. In United States v. Green, 2009 U.S. Dist. LEXIS 6860 (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, 2009 U.S. Dist. LEXIS 4389 (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.

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.” As such, the law enforcement misconduct did not rise to the level of culpability that Herring held necessary to serve a deterrent purposes and outweigh the cost of suppressing evidence.164

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.

V. CONCLUSION

The nature of judicial doctrine defines much of this country’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 operation and must craft their doctrinal commands in the context of this reality.

Our Article identified the dominant factors in judicial decision-making, at both the higher and lower court level – legal obedience and political ideology. 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.

Considerable prior research has debated the creation of rules or standards as the preferable form of doctrine. 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

164 Id at 33-34.
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, and its comprehension is crucial to any normative assessment of doctrine that hopes to have any real world importance.