

Legal Doctrine and Political Control

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We model legal doctrine as an instrument of political control by higher courts over lower courts and the case outcomes they produce. We focus on the choice between determinate and indeterminate doctrines within a hierarchy of courts where political–ideological alignment between lower and higher courts varies. We show that the choice over doctrinal determinacy depends on the distribution of cases, the distribution of litigants, judicial types, and the level of policy alignment between higher and lower court judges. The model suggests the optimal doctrinal choice for a high court, given the political–ideological alignment between the high court and the lower court, the control characteristics of doctrines themselves, and the matching of doctrines to litigant pools. This has implications regarding preference divergence within the judicial hierarchy, the interaction of different doctrines, and interplay between doctrinal specificity and doctrinal reach.

1. Introduction

Legal doctrines serve various functions in the American legal system. At the most general level, they act as decision-making principles that stipulate, with varying degrees of specificity, outcomes that should follow from underlying fact patterns. Although the pronouncement of and adherence to doctrines undoubtedly serve normative goals, such as notice and fairness to potential litigants and decisional efficiency for judges, doctrines may also act as instruments of political control. In this article, we present a positive analysis of legal doctrine, modeling it as an instrument of political control by higher courts over lower courts and the case outcomes they produce. Specifically, we model a judicial hierarchy where political control is exercised by higher courts over lower courts through the choice between *determinate* doctrines (highly

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The authors thank Eric Posner and participants at the Law and Positive Political Theory conference at the Northwestern University Law School (April 2005) and the Formal Models of Judicial Politics Panel at the 2006 Midwest Political Science Association Meetings.

specified, rule-like directives) and *indeterminate* doctrines (weakly specified, standard-like directives).

The key determinants of doctrinal choice in our model are (1) the amount of policy preference alignment between lower and higher courts, (2) the characteristics of determinate and indeterminate doctrines themselves that aid higher court policy control, and (3) how a given doctrine maps on to the distribution of litigants over whom courts have preferences for success.

The model we present assumes that higher courts are policy-seeking actors who, within the limitations of professionalism and public legitimacy, manipulate the form of legal doctrines to maximize their own policy objectives. The critical question is what form of legal doctrine (in particular, determinate rule-like structures or indeterminate standard-like structures) and consequently how much policy discretion a higher court should create for lower courts when the higher court's goal is to maximize its policy preferences over the expected set of cases. The model assumes that lower court judges operate within the legitimate confines of legal doctrine; thus, we are not modeling "obedience" or "disobedience" by lower court judges to legal doctrine—we assume "legal obedience."¹ Legal obedience, however, does not always guarantee "political obedience" or, consequently, the policy outcomes desired by the higher court. Lower court judges may "obey" legal doctrine yet still be able to exercise discretion in a way contrary to higher court policy preferences, depending on how much policy discretion is associated with the legal doctrine chosen by the higher court. We show that under certain conditions, a larger grant of discretion to lower courts improves the likelihood of the higher court's policy preferences being realized, whereas in other circumstances it lowers that likelihood.

We first briefly review the relevant literature from which our framework draws insights: the legal "rules versus standards" debate and the insights from positive political theory, particularly the bureaucracy control and judicial politics literatures. We then present a model of judicial political control highlighting a higher court's choice between determinate and indeterminate legal doctrines. We expand the model by adding dimensions to lower court preferences, in particular separating out legal-ideological preferences from more partisan policy preferences. Numerical examples are provided to illustrate the models. Conclusions and suggestions for extensions follow.

2. Related Theories, Literatures, and Models

The well-established rules versus standards literature compares the different costs and benefits of using rules and standards as instruments to solve important legal and regulatory problems (Kennedy 1976; Schlag 1985; Schauer 1991; Kaplow 1992, 1995; Sullivan 1992, 1995; Sunstein 1995; Posner

1. There is a growing judicial politics literature on obedience to legal doctrine, which for the most part, does not distinguish disobedience to legal doctrine from political disobedience to higher court policy preferences. Our model captures a more nuanced perspective where political disobedience to higher court preferences may occur naturally with legal obedience to higher court doctrines.

1997; Korobkin 2000; Burk 2005). Key to that discussion is the degree of determinacy associated with each instrument and the ability of a given institution to administer it. As Kathleen Sullivan (1992) explains: “A legal directive is ‘rule’-like when it binds a decision-maker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decision-maker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere.” Rules make concrete directives that mandate a clear policy or outcome. A contract law doctrine in rule form may look like the following: “all minors lack capacity to make contracts and thus may disaffirm contracts.” There appears to be little room for the judge to exercise any discretion regarding a minor’s right to disaffirm a contract when this rule is in effect. Rules have been criticized as being overinclusive in some circumstances while being underinclusive in others (Sunstein 1995). Standards, by contrast, are more indeterminate, laying down broad decisional criterion and allowing for more fact-based decision making and value judgments by the judge. As such, standards typically vest substantial discretion in the lower court. A contract law doctrine in the form of a standard may look like the following: “in determining whether a minor may disaffirm a contract, the age of the minor must be balanced against the harm to the plaintiff.” The balancing terminology vests substantial discretion in the judge. Due to their indeterminacy and flexibility, standards are arguably more efficient than rules when the best outcome cannot be easily foreseen. Standards, however, offer little guidance as to expected behavior, thus generating some costs associated with uncertainty (Kaplow 1992).

Although the legal literature focuses more on decision errors primarily unrelated to political bias, the logic easily extends to political bias and control. The determinacy of rules helps to constrain political discretion of lower court judges; but rules are blunt instruments and in application will produce some number of “policy errors”—that is, policy outcomes disfavored by the higher court. Standards allow for flexible adaptation of principles to the particulars of a case, avoiding the policy errors caused by the rigidity of rules; however, the increased discretion associated with them makes standards more easily susceptible to value judgments and fact shading by lower courts and thus also may produce policy errors when the lower court has policy preferences different from the higher court.

Our framework of judicial political control is also informed by the literature in positive political theory on how bureaucratic agencies are controlled by Congress and other political actors through exception reporting, ad hoc intervention, and responses to interest group demands, rather than comprehensive oversight (McCubbins and Schwarz 1984). This type of oversight is analogous to the mechanisms higher courts have of controlling lower courts. A primary mechanism available to higher courts to control lower courts without costly and comprehensive oversight is legal doctrine. Doctrine acts as a procedural mechanism to guide and discipline the behavior of lower courts, much like Administrative Procedures Acts shape the incentives of agencies to follow legislative preferences (McCubbins et al. 1987, 1989). Public disclosure

requirements, burdens of proof, information gathering requirements, and process directives, such as prohibiting *ex parte* communications, all aim to undermine rent seeking, capture, and other problems that lure agencies away from loyalty to their legislative masters. Similarly, the structure of judicial doctrines—in particular, the choice between determinate and indeterminate doctrines—can constrain lower court policy discretion when needed, or enable like-minded lower courts to advance policy interests preferred by the higher court.

The bureaucracy literature identifies a trade-off between political control and policy expertise when delegating power to agencies. Rigid statutory control ensures the greatest adherence to congressional preferences but necessarily constrains policy expertise that can be leveraged by allowing bureaucrats greater discretion (Bawn 1995; Epstein and O'Halloran 1999). Epstein and O'Halloran (1999) find that the trade-off between policy expertise and political control depends in part on political alignment and more specifically that Congress' delegation calculus depends in part on how closely aligned bureaucrats are with Congress' own policy preferences. In a similar manner, we explore how higher courts choose between close adherence to policy preferences that can be explicitly enunciated *ex ante* and enforced through specified determinate rules and the potentially closer approximation of unspecifiable higher court policy preferences when lower courts are given discretion in the form of more indeterminate doctrinal standards. That choice will hinge in large part upon the level of policy preference alignment between higher and lower courts.

The law and positive political theory field has largely approached the question of political control and judicial behavior from principal-agent theories of courts (Cameron et al. 2000; Spitzer and Talley 2000; George and Solimine 2001).² Whereas much of this literature treats doctrine as mere rhetoric, some of the work treats doctrines as operative. For example, building on Peter Strauss' (1987) insight that the Supreme Court's "opinions on the merits may be influenced by its management dilemmas" regarding appellate courts, Cohen and Spitzer (1994, 1996) present a principal-agent model of administrative law doctrine implicating the Supreme Court's political control of lower courts within a broader game between agencies, lower courts, Congress and the Supreme Court. Cohen and Spitzer show that patterns in administrative law can be explained as the Supreme Court's deliberate transfers of decision-making power back and forth between federal agencies and the circuit courts, depending on which decision makers the Supreme Court finds more

2. See also, Richards and Kritzer (2002) and Tiller (1998) who examine the effect of doctrinal regimes on case outcomes; Spiller and Spitzer (1992), Spiller and Tiller (1996), Tiller and Spiller (1999), Smith and Tiller (2002), and Schanzenbach and Tiller (forthcoming), who assess how choice between decision instruments (e.g., constitution, statutory interpretation, procedures, and facts) is influenced by fear of congressional override and higher court review; Epstein and Knight (1998) who assess how judges qualify their ideologically preferred outcomes to accommodate doctrinal requirements in order to legitimize their judicial authority. The internal court dynamics of doctrine persuasion have also been explored (Cross and Tiller 1998; Sunstein et al. 2004).

ideologically aligned with its own preferences at a given point in time.³ The Cohen–Spitzer model focuses specifically on the administrative law set up and does not address the more general features of doctrinal design (especially features of determinacy and indeterminacy) that we present in our model. Our model works completely within the judiciary, putting more emphasis on the structure of a doctrinal statement (a determinate rule versus an indeterminate standard) for lower court application.

3. Model

3.1 Simplifying Assumptions

Several simplifying assumptions underlie the framework and deserve further explanation. These include assumptions about obedience to doctrine by lower court judges and constraints on the shapes and number of doctrines available to the higher courts.

3.1.1 Legal Obedience and Policy Discretion. Our model addresses how higher courts choose between two levels of doctrinal specificity (represented broadly as determinate rules versus indeterminate standards) to enforce political obedience. In doing so, we assume that lower court judges display legal obedience: we model lower court judges as exercising their discretion within the legitimate confines of legal doctrines established by higher courts. There are reasons to expect some level of legal obedience by lower court judges. Arguably, American legal culture—law school training, clerkships, the practice of law, and the interaction with colleagues on the bench—socializes judges to obey the legal doctrines coming from higher courts as guides to case outcomes (Howard 1981). Furthermore, the value of doctrine as a decision heuristic that preserves precious time and limited resources of courts encourages the judicial norm of obeying doctrine (Perry 1994). More broadly, the norm of obeying doctrine is reinforced by judicial concerns for public legitimacy—that is, a concern by judges about a citizenry who wants consistent outcomes over similarly situated cases and who, if confidence is lost, will support legislative efforts to reform the judiciary, usually at a cost of lost power for the courts and the professional reputation cost for a lower court judge who fails to follow doctrine (Posner 1990; Caminker 1994).

However, legal obedience often comes at a cost to lower court judges in terms of achieving preferred policy outcomes. As such, legal obedience is unlikely to be as perfect as we assume here, although arguably it can be expected to be routine enough for higher courts to care about how they craft such doctrines for lower court adherence. We do not examine the full set of strategic

3. See also Bueno de Mesquita and Stephenson (2002) who demonstrate how the use of legal precedents by higher courts alleviates difficulties in communication between different levels of a hierarchical court system. Their focus is on adherence to precedence, whereas we focus on determinacy of doctrines.

responses available to the lower courts, many of which have been explored elsewhere,⁴ though we do discuss the implications for some of these strategies in our concluding sections. In short, assuming legal obedience allows us to examine the effect of legal constraints and how policy preferences can be pursued when “law” still matters.

3.1.2 Content (Shape) of Doctrines. For the reasons discussed above, we assume that although 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 nature or shape of those doctrines. The tradition of written judicial opinion 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.⁵ Although judicial preferences may be of any shape and even discontinuous or intransitive, legal doctrines cannot always mirror those preferences. We represent this constraint in Figure 1, which illustrates a judicial choice over dichotomous outcomes, x_1 and x_2 , in two policy dimensions, such as federalism and the environment. The higher court must devise a doctrine for lower courts to follow in determining which cases—the underlying facts of which may be distributed anywhere in the two-dimensional space—result in x_1 , and which result in x_2 .

Higher court preferences can be any shape but are illustrated for convenience in Figure 1 as a curved line. 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 . It may not be possible for a doctrine to be generated that perfectly reflects higher court preferences. Figure 1 illustrates that point by showing all doctrines to be linear. The court then has two options: first it can choose a determinate rule, represented by a straight 45° line in Figure 1. Then, 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 to result in x_2 .

The higher court’s alternative is to choose an indeterminate doctrine, or standard, represented by the gray-shaded region. Like rules, standards must

4. Tiller and Spiller (1999) model how lower courts can engage in strategic manipulation of fact finding to avoid constraints on their discretion. McCubbins et al. (1995) model how lower courts can exploit the higher court’s limited capacity to fully review every decision carefully, which creates a nontrivial probability of some level of discretion.

5. Cohen and Spitzer (1994) 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.” We agree.

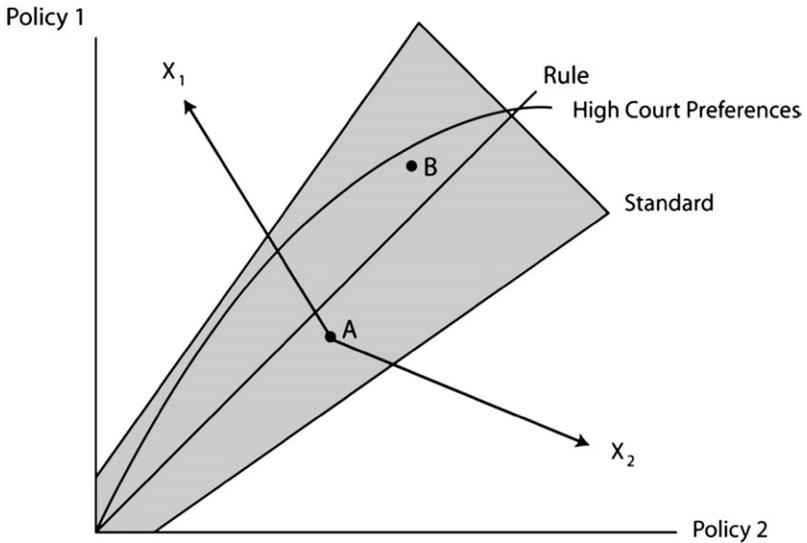


Figure 1. Choice of Legal Doctrine: Determinate Rules, Indeterminate Standards.

have some logical boundaries that hold across cases. Cases outside the shaded area will be decided automatically, as is the case under the rule, but within the shaded area, the higher court gives the lower court discretion. If the lower court shares the higher court's preferences, cases such as B will result in x_2 , as the higher court favors. But use of a standard also creates the danger for the higher court that if the lower court has opposing preferences, cases such as A can legitimately result in x_1 , even though such a result is contrary to higher court preferences—a result avoided by use of a determinate rule. Whether the higher court will prefer a standard or rule will depend on the expected distribution of cases in the shaded region and the preferences of the lower bench.

3.1.3 Discrete, Multiple, and Continuous Doctrinal Options. For analytical convenience, our model works under the simplified assumption that the best available rule will ultimately be weighed against the best available standard. In reality, there may be multiple rules or multiple standards from which to choose. Because our interest here is ultimately the delegation of discretion to the lower courts, that choice is best amplified by modeling the choice between the doctrinal types (indeterminate rule-like doctrines versus indeterminate standard-like doctrines) rather than choices within those types. We also assume the choice is fairly discrete—that is, the determinate and indeterminate doctrines are not so elastic that the higher court can tailor them to all possible and foreseeable circumstances and thus uniformly bind (or enable) the lower courts.

One reason for these constraints on options within doctrinal subtypes is that higher courts may be economizing by relying on previous lower court decisions that have framed the alternatives for other cases like the one presently before the court. Indeed, the costs associated with the creation of new doctrine

may be significant, in which case, given their budgetary and legitimacy constraints, a higher court may effectively be limited in the number of doctrinal changes it can reasonably make in a given time period. 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 (Bueno de Mesquita and Stephenson 2002). For these reasons, higher court choice over the content and number of doctrines may be limited.

3.2 Basic Framework—Simple Preferences and Outcomes

Some lower courts share the preferences of higher courts and so will be dutiful adherents of higher court policy preferences, even when given discretion to do otherwise. Other lower courts pursue outcomes that are inconsistent with the higher court's preferences, even when these courts are obeying the legal doctrine. The imperative for the higher court is to design doctrines that control this mix of lower courts in the most efficient manner, given the expected set of cases that could present themselves.⁶

Ideally, a legal doctrine could be written so that the higher court could always expect an outcome consistent with its preferences. As noted above, it is not always possible for higher court judges to craft rules that perfectly reflect their preferences. This is especially true for determinate 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 determinate doctrines there will be some policy errors, even from those lower court judges who have the same policy preferences as those in the higher court. The advantage for a higher court in choosing a determinate rule is that doing so constrains lower court judges who hold antithetical preferences more than an indeterminate doctrinal standard would, and thus overall will produce more desirable outcomes for the higher court than would be the case if a standard were used. 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 determinate doctrine will consistently match with politically desirable outcomes over the expected set of cases that may present themselves to courts.

Assume that a higher court and the lower courts under it have preferences over policy outcomes in X , where $X = x_1$ or x_2 , and where the higher court prefers x_1 to x_2 . For any legal issue, let there be a doctrinal framework (D) that the higher court can impose on the issue area. Let $D = D^d$ or D^i , where D^d represents a *determinate* (bright-line rule) doctrinal framework and D^i represents an *indeterminate* (standards/balancing test) doctrinal framework. The lower courts are "bound" to the doctrinal choice given by the higher court: that is, lower court judges only exercise the policy discretion associated with the doctrine selected by the higher court.

6. Although not explicitly modeled here, it is possible and likely that the expected set of cases brought by litigants are triggered in part by the doctrines chosen by the higher courts.

3.2.1 Determinate Doctrine (Rule). For D^d , a lower court has no discretion over the outcome, which is always determined by the direct application of the doctrine (e.g., minors may always disaffirm contracts, etc.). Over the distribution of cases, the application of D^d will produce both x_1 and x_2 outcomes in some proportion, represented by $P[D^d(x_1)]$ and $P[D^d(x_2)]$, respectively, and where $P[D^d(x_1)] = 1 - P[D^d(x_2)]$.

3.2.2 Indeterminate Doctrine (Standard). For doctrinal framework D^i , there is some percentage of cases where the lower court has no discretion D_n^i in choosing between x_1 and x_2 (much like the determinate doctrine situation). Let those outcomes under D_n^i be represented by $D_n^i(x_1)$ and $D_n^i(x_2)$. These outcomes are the result of the doctrine itself and not the lower court's discretion under D^i . For the remaining cases under D^i where the lower court does have discretion (D_s^i), the lower court will choose its most favored outcome which may be $D_s^i(x_1)$ or $D_s^i(x_2)$, depending upon its policy preferences. If the lower court is aligned with the higher court in terms of policy preferences—that is, they both prefer x_1 over x_2 —then the lower court will choose $D_s^i(x_1)$. If the lower court is not policy aligned with the higher court—that is, the higher court prefers x_1 while the lower court prefers x_2 —then the lower court will choose $D_s^i(x_2)$. This captures the difference, as discussed above, between political and legal obedience. Let $P[D_n^i]$ be the probability that a case is decided under D_n^i , where the lower court has no discretion, and $P[D_s^i]$ be the probability that a case is decided under D_s^i , where the lower court does have discretion, and let $P[D^i] = 1 - P[D_n^i]$.

If we let $P[D_s^i] = P[D_s^i(x_1)] + P[D_s^i(x_2)]$ and $P[D_n^i] = P[D_n^i(x_1)] + P[D_n^i(x_2)]$, then

$$P[D_s^i(x_1)] + P[D_s^i(x_2)] + P[D_n^i(x_1)] + P[D_n^i(x_2)] = 1$$

and,

$$P[D_s^i(x_1)] + P[D_n^i(x_1)] = 1 - P[D_s^i(x_2)] - P[D_n^i(x_2)].$$

If we let $P[D^i(x_1)] = P[D_s^i(x_1)] + P[D_n^i(x_1)]$, then

$$P[D^i(x_1)] = 1 - P[D_s^i(x_2)] - P[D_n^i(x_2)].$$

3.3.3 Choosing Between D^i and D^d . Assuming the higher court prefers policy x_1 to x_2 , if $P[D^d(x_1)] > P[D^i(x_1)]$, then the higher court will choose D^d as the doctrinal framework. If $P[D^d(x_1)] < P[D^i(x_1)]$, then the higher court will choose D^i as the doctrinal framework.

3.3.4 Numerical Example. A simple numerical example helps to illustrate. Assume that the higher and lower court's policy preferences are set by political ideology, for which party of the appointing president is a good proxy. Assume

a higher court that is Republican and lower courts that are split 75% Republican and 25% Democrat. Also assume that the application of a determinate doctrine D^d would produce the higher court's preferred policy x_1 in 70% of the lower court cases and x_2 in 30% of the cases. Assume that the application of an indeterminate doctrine (D^i) would produce discretionary results (D_n^i) in 20% of the cases and discretionary results (D_s^i) in 80% of the cases. In the non-discretionary cases, the expected number of policy outcomes of x_1 is again 70%, and 30% would be x_2 . For the discretionary cases, the breakdown of x_1 and x_2 outcomes follows the percentage of Republicans and Democrats on the lower courts, as they would have absolute discretion—thus, 75% for x_1 and 25% for x_2 . We calculate as follows:

$$P[D^d(x_1)] = 0.70$$

$$P[D^i(x_1)] = P[D_n^i(x_1)] + P[D_s^i(x_1)] = 0.2(0.7) + 0.8(0.75) = 0.74.$$

Since $P[D^d(x_1)] < P[D^i(x_1)]$, the higher court chooses D^i , the indeterminate doctrine.

3.3 Complex Preferences

Now consider a higher court whose preferences for outcomes in X depend on litigant status. For certain litigants the higher court prefers x_1 , for others it prefers x_2 . For example, a higher court may generally dislike racial distinctions and thus favor the rule-like “strict scrutiny” standard, commonly described as strict in theory and fatal in fact (Gunther 1972), but feel differently when a racial distinction benefits African-Americans; then a more flexible standard, such as “intermediate scrutiny,” under which benefit formulas that are aimed to remedy past discrimination are more acceptable would better fit the court's preferences. Another example is *Bush v. Gore*, 531 U.S. 98 (2000). It may be argued that the Supreme Court's majority and minority preferences over the outcome in that case were dependent on litigant category—Republican versus Democrat candidate; and arguably, the different coalitions' preferences over the outcome were even more narrowly tailored to fit only this case—that is, this particular litigant. Ideally, the court would like to write a rule that specifically assigns outcomes based on the identity type of the litigant, but as discussed, public legitimacy would be weakened by an explicit directive to treat similarly situated parties differently. The higher court must then consider whether a similar objective could be reached through the use of standards applied by the lower courts. If all the lower courts' preferences are fully aligned with the preferences of the higher court, then the higher court can depend on the lower court judges to make the desired litigant success choices (x_1 for some litigants and x_2 for others), given the discretion accompanying a standard. Problems may arise when the lower courts contain a mix of judges with aligned and opposing litigant preferences or if there is variation in the extent of lower court judges' willingness to make distinctions on the basis of litigant status. Then the choice of doctrine becomes more complicated.

3.3.1 Interaction Between Policy Preferences and Litigant Preferences. - Assume that the higher court faces two categories of litigant in L , where $L = l_1$ or l_2 . Now the higher court no longer has simple preferences over outcomes X , but its preference for x_1 is dependent on the type of litigant making that claim. Instead of consistently preferring x_1 to x_2 , the higher court only prefers x_1 to x_2 if it is brought by l_1 (i.e., the higher court seeks to maximize $P(x_1 | l_1$ and $x_2 | l_2)$).⁷ Now the higher court's preference for an indeterminate doctrine over a determinate doctrine looks similar to its preferences over simple policy outcomes, but contingent on the type of litigant.

$$P[D_s^i(x_1 | l_1)] + P[D_s^i(x_1 | l_2)] + P[D_s^i(x_2 | l_1)] + P[D_s^i(x_2 | l_2)] + P[D_n^i(x_1 | l_1)] \\ + P[D_n^i(x_1 | l_2)] + P[D_n^i(x_2 | l_1)] + P[D_n^i(x_2 | l_2)] = 1$$

and,

$$P[D^i(x_1 | l_1 \text{ and } x_2 | l_2)] = 1 - P[D_s^i(x_1 | l_2)] - P[D_s^i(x_2 | l_1)] \\ - P[D_n^i(x_1 | l_2)] - P[D_n^i(x_2 | l_1)].$$

The higher court chooses between D^i and D^d so as to maximize $P(x_1 | l_1$ and $x_2 | l_2)$, and so chooses D^d if $P[D^d(x_1 | l_1$ and $x_2 | l_2)] > P[D^i(x_1 | l_1$ and $x_2 | l_2)]$; it chooses D^i otherwise.

3.3.2 Partial Alignment of Interests Between Higher Court and Lower Court. - Judges having preferences over outcomes that are dependent on litigant type raises the possibility that although their policy preferences may be shared by lower courts, their full interactive preferences between outcomes and litigants may not. Put another way, lower court judges may share higher court ideological preferences, but not necessarily their biases in litigant outcomes.

Return to the example of *Bush v. Gore*. Arguably in that case, the majority may have preferred to limit expansion of equal protection, except when brought by a Republican candidate, or this candidate (and vice versa for the minority), but could not expound such a doctrine explicitly. We can think of the majority's preferences as favoring $[(x_1 | L = \text{Bush})$ and $(x_2 | L = \sim\text{Bush})]$, whereas the lower courts may simply favor x_1 regardless of the litigants involved.⁸

Spatial Representation. Figure 2 again represents the judicial choice over dichotomous outcomes x_1 and x_2 in two dimensions. However, now the higher court's preferences are less consistent, varying by litigant. This is represented

7. Note that for the higher court to favor $x_1 | l_1$ and $x_1 | l_2$ would be the same as simply always favoring x_1 . For the higher court to favor $x_1 | l_1$ and $x_2 | l_1$ would be the same as favoring a litigant category, regardless of outcome. Thus, we consider here a higher court that favors x_1 to x_2 only if it is brought by l_1 .

8. Subsequent lower court reliance on the case, despite the Supreme Court's disclaimer of precedent value, suggests that lower courts may favor some sort of doctrine to guide them in future similar cases, regardless of their litigant preferences. A Sheppard's search reveals lower court citing references as of August 2, 2006, as: distinguished: 21; limited: 1; followed: 6; concurring opinion: 5. dissenting opinion: 14; and explained: 9.

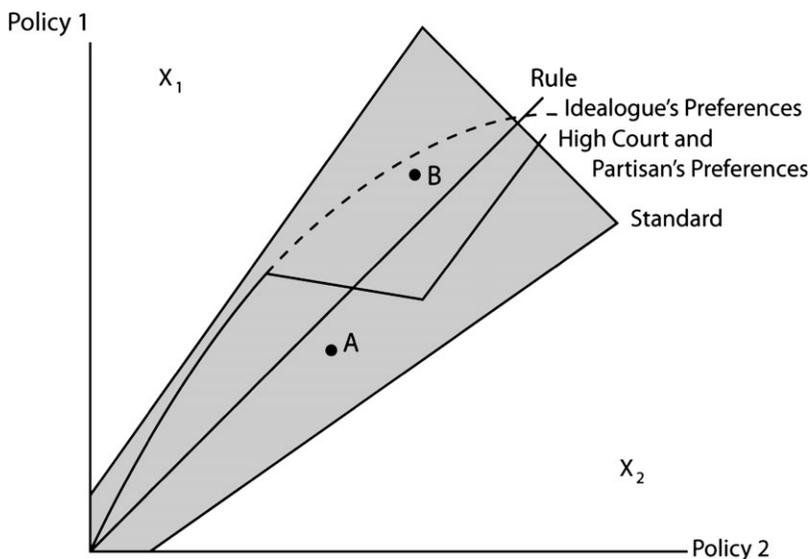


Figure 2. Choice over Doctrine with Complex Higher Court Preferences.

in Figure 2 by the dogleg in the shape of higher court preferences (but could equally be a discontinuous utility function).

Whether the higher court should use a determinate rule or indeterminate standard will now depend not only on the overall complementarity of lower court judges' policy preferences but also on whether lower court judges also share the higher court's biases over litigants. That is, of lower court judges who share the higher court's overall direction of policy preferences, some may share the higher court's biases over litigants—we call them partisans (Pt)—and others may have preferences only over policy—we call them ideologues (Id). Ideologues have a consistent direction of their preferences (e.g., always preferring to limit equal protection; profederalism, etc.), whereas partisans' preferences hinge on the favored status of groups (e.g., preferring to limit equal protection, except when claims are brought by a favored group; respecting states' rights except when claims are brought by certain religious groups, etc.). In Figure 2, partisans' preferences are identical to higher court preferences—both change shape and direction, conditional on litigant status—whereas ideologues' preferences are monotonic, as the higher court's preferences were in the simple model in Section 3.2.

Now the higher court prefers cases such as B to result in outcome x_1 , as do lower court partisans, but lower court ideologues will cause B to result in outcome x_2 . The effect of using a rule is unchanged from the above analysis, but the benefit to the higher court of using a standard depends not only on the extent of the alignment of outcome preferences with lower court judges but also on the extent those preferences fully mirror the conditionality on litigant status. The choice between a rule and standard will also depend on the distribution of potential litigants, as that distribution determines the extent of divergence between higher

court litigant preferences and lower court ideologues' preferences. In other words, the more likely that litigant status is routinely associated with a particular policy choice, the less problematic the presence of lower court ideologues will be for a higher court with strong litigant preferences.

3.3.3 Formal Analysis. Assume that the higher court seeks to maximize $P(x_1 | I_1 \text{ and } x_2 | I_2)$. Assume also there are two sorts of lower court judges with some alignment with higher court preferences—ideologues (Id) aligned with higher court policy preferences but indifferent toward litigants and partisans (Pt) aligned with higher court policy preferences conditioned on litigant status. When ideologues have discretion under an indeterminate doctrine, they always prefer x_1 to x_2 :

$$P[D_{sId}^i(x_1)] = P[D_{sId}^i(x_1 | I_1)] + P[D_{sId}^i(x_1 | I_2)].$$

Whereas partisans, like the higher court, only prefer x_1 to x_2 if $L = I_1$:

$$P[D_{sPt}^i(x_1)] = P[D_{sPt}^i(x_1 | I_1)].$$

The higher court wishes to choose a doctrine which will maximize $P(x_1 | I_1 \text{ and } x_2 | I_2)$. With a determinate doctrine, lower court judges have no discretion, and so:

$$\begin{aligned} P[D^d(x_1 | I_1 \text{ or } x_2 | I_2)] &= P[D_{Pt}^d(x_1 | I_1)] + P[D_{Id}^d(x_1 | I_1)] \\ &\quad + P[D_{Pt}^d(x_2 | I_2)] + P[D_{Id}^d(x_2 | I_2)] \\ &= P(I_1) \cdot P[D^d(x_1)] + P(I_2) \cdot P[D^d(x_2)]. \end{aligned}$$

Under an indeterminate doctrine:

$$\begin{aligned} P[D^i(x_1 | I_1 \text{ or } x_2 | I_2)] &= P[D_n^i(x_1 | I_1)] + P[D_s^i(x_1 | I_1)] + P[D_n^i(x_2 | I_2)] \\ &\quad + P[D_s^i(x_2 | I_2)], \end{aligned}$$

where $P[D_s^i(x_1 | I_1)] = P(I_1) \cdot P[D_{sId}^i(x_1)] + P[D_{sPt}^i(x_1 | I_1)]$ and $P[D_s^i(x_2 | I_2)] = P(I_2) \cdot P[D_{sId}^i(x_2)] + P[D_{sPt}^i(x_2 | I_2)]$.

Thus,

$$\begin{aligned} P[D^i(x_1 | I_1)] &= P[D_n^i(x_1 | I_1)] + P(I_1) \cdot P[D_{sId}^i(x_1)] + P[D_{sPt}^i(x_1 | I_1)] \\ &\quad + P[D_n^i(x_2 | I_2)] + P(I_2) \cdot P[D_{sId}^i(x_2)] + P[D_{sPt}^i(x_2 | I_2)]. \end{aligned}$$

Choosing Between D^i and D^d : A Numerical Example. Returning to the example above, assume the same division of Democrat and Republican district court judges, (75% Republican, 25% Democrat) but additionally, the underlying litigant pool L is split 60% I_1 and 40% I_2 . Also, assume that of the lower court judges, 65% are partisan, 35% are ideologues

$$P[D^d(x_1 | I_1 \text{ or } x_2 | I_2)] = .7(.6) + .3(.4) = .54.$$

Whereas,

$$\begin{aligned}
 P[D^i(x_1 | I_1 \text{ or } x_2 | I_2)] &= P[D_n^i(x_1 | I_1)] + P(I_1) \cdot P[D_{sId}^i(x_1)] \\
 &\quad + P[D_{sPt}^i(x_1 | I_1)] + P[D_n^i(x_2 | I_2)] \\
 &\quad + P(I_2) \cdot P[D_{sId}^i(x_2)] + P[D_{sPt}^i(x_2 | I_2)] \\
 &= .2(.7)(.6) + .8(.75)(.6)(.35) \\
 &\quad + .8(.65)(.6) + .2(.3)(.4) \\
 &\quad + .8(.25)(.65)(.4) + .8(.65)(.6) \\
 &= .91.
 \end{aligned}$$

Since $P[D^d(x_1)] < P[D^i(x_1)]$, the higher court chooses D^i , the indeterminate doctrine.

If the litigant pool is split 40% I_1 and 60% I_2 , and of the lower court judges, 20% are partisan 80% are ideologues. Then, $P[D^d(x_1)] = .46$ and $P[D^i(x_1)] = .436$. As such, $P[D^d(x_1)] > P[D^i(x_1)]$, and due to the imperfect alignment of interests subject to the litigant mix, the higher court will be more likely to choose a determinate doctrine, D^d .

3.4 Implications

The simple and complex models described above have implications for doctrinal choice and doctrinal change. One of the main implications relates to doctrinal change in terms of clarity of law—that is, a move to bright-line rules and away from standards or highly discretionary tests should accompany preference divergence between higher and lower courts. In the federal court system, as the lower courts become more aligned with the higher court through the change associated with political turnover in the executive and legislative branches, and thus changing judicial appointments, the doctrinal guidance from higher courts should be less, rather than more, clear—that is, more indeterminate rather than determinate doctrines. Indeed, the higher courts would be expected to leave more discretion with the lower courts by choosing doctrinal standards more often.⁹ When lower courts and higher courts become less aligned through political turnover and judicial appointments, a higher court would be expected to issue more determinate doctrines that provide greater legal clarity.

This testable implication may be difficult to operationalize because doctrine is typically evolutionary rather than revolutionary in nature, and so can be expected to change more slowly than political change occurs. However, a similar but more exploitable testable implication arises in relation to horizontal comparisons within the judiciary, as we should expect to see a similar variation by circuit or appellate jurisdiction. Jurisdictions where courts tend to be dominated by one party or a dominant ideology are more likely to favor standards,

9. It may be that the higher court first reverses old precedent with what appears to be a clear new rule, but then lets aligned lower courts create exceptions—thus creating indeterminate standards—as needed. The speed and extent of this change will depend in part on the expected litigant pool.

as lower court judges can be expected to be more aligned with higher court preferences than more mixed jurisdictions (district or lower courts not politically aligned with the circuit or appellate courts).

Additionally, doctrine may change over time, not simply due to changes in court composition, but arising from changes in litigant distribution. Some doctrines may initially be relied on primarily by one group of litigants and only later be exploited by a different group. This is likely to be particularly common for doctrines associated with social change; for example, use by white litigants of 14th Amendment prohibitions on racial discrimination came after considerable doctrinal development by African-American litigants.

4. Doctrinal Overlap

4.1 Procedural Doctrines

The higher court's choice is further 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. Consider the procedural issue of standing. We can conceive of standing as offering lower courts the choice between maintaining the status quo (S_Q), through a rejection of standing (S_R), or moving to the merit of the case and applying the substantive doctrine, be it a determinate rule or indeterminate standard, through a grant of standing (S_G).

If S_R , $x = x_1$ if $SQ = x_1$ (we will call this Q_1),
 $x = x_2$ if $SQ = x_2$ (we will call this Q_2).

If S_G , $x = x_1$ if $D(x_1)$,
 $x = x_2$ if $D(x_2)$.

For the sake of clarity and parsimony, let us return to simple preferences and assume again that the higher court always prefers x_1 .

$$P(x_1) = P(S_R | Q_1) + P(S_G | Q_1) \cdot P[D(x_1)] + P(S_G | Q_2) \cdot P[D(x_1)],$$

$$P(x_1) = P(S_R | Q_1) + [1 - P(S_R)] \cdot P[D(x_1)].$$

The higher court can choose between a determinate and indeterminate substantive doctrine, given the complication of standing:

$$P(x_1 | D^d) = P(S_R | Q_1) + [1 - P(S_R)] \cdot P[D^d(x_1)],$$

$$P(x_1 | D^i) = P(S_R | Q_1) + [1 - P(S_R)] \cdot \{P[D_s^i(x_1)] + P[D_n^i(x_1)]\}.$$

The higher court has potential control not only over the doctrinal form of $P[D(x_1)]$ but also over the doctrinal form of $P(S_R)$: the higher court chooses not only between a determinate and indeterminate substantive doctrine but also between a determinate and indeterminate standing doctrine. The higher court also will have expectations over $P(S_R | x_1)$ for a given $P(S_R)$. As such, the higher court can undertake a substantially similar analysis in choosing between

a determinate rule and an indeterminate standard governing standing, weighing the relative probabilities:

$$P(x_1 | D^d, S^d), P(x_1 | D^d, S^i), P(x_1 | D^i, S^d), \quad \text{and} \quad P(x_1 | D^i, S^i).$$

When expanded, these terms are:

$$P(x_1 | D^d, S^d) = P(S_R^d | Q_1) + \{[1 - P(S_R^d)] \cdot P[D^d(x_1)]\}$$

$$P(x_1 | D^d, S^i) = P(S_{sR}^i(x_1)) + P(S_{nR}^i(x_1)) \\ + \{[1 - P(S_{sR}^i(x_1)) - P(S_{nR}^i(x_1))] \cdot P[D^d(x_1)]\}$$

$$P(x_1 | D^i, S^d) = P(S_R^d | Q_1) + \{1 - P(S_R^d)\} \cdot \{P[D_s^i(x_1)] + P[D_n^i(x_1)]\}$$

$$P(x_1 | D^i, S^i) = P(S_{sR}^i(x_1)) + P(S_{nR}^i(x_1)) + \{1 - P(S_{sR}^i(x_1)) \\ - P(S_{nR}^i(x_1))\} \cdot \{P[D_s^i(x_1)] + P[D_n^i(x_1)]\}.$$

The court will choose whichever of the four above equations yield the highest probability of x_1 occurring.

Standing doctrines, however, do not simply apply to the case, or case type, at hand; they potentially affect many other cases with different substantive issues and associated doctrines. As such, in choosing between a determinate and indeterminate standing doctrine, the high court must simultaneously weigh the effect of the standing doctrine on multiple substantive doctrines. For example, the standing rule that a plaintiff must show a personal stake in the outcome limits administrative law challenges, just as it limits tort claims.

Let us assume that standing affects cases under doctrines (D_a, D_b, \dots, D_k) and that the court prefers outcomes $x_{a1}, x_{b1}, \dots, x_{k1}$. Then for each doctrinal choice, the probability of the higher court achieving its preferred outcomes ($x_{a1}, x_{b1}, \dots, x_{k1}$) are:

$$P(x_{a1}, x_{b1}, \dots, x_{k1}) = P(S_R | x_{a1}) + P(S_G) \cdot P[D(x_{a1})] \\ + P(S_R | x_{b1}) + P(S_G) \cdot P[D(x_{b1})] + \dots + P(S_R | x_{k1}) \\ + P(S_G) \cdot P[D(x_{k1})],$$

where each term is that expanded in the four equations above, except that there are 2^k equations to weigh against one another.

Thus we have a formula for the interaction of multiple doctrines, albeit with exponentially more complicated calculations.

4.2 Overlapping Substantive Doctrines and Implications

The interaction between doctrines is not limited to the procedural–substantive issue match outlined above. A case with multiple substantive issues may offer a lower court an interactive choice among substantive doctrines for resolving

the case in favor of its preferred litigant or policy—one doctrine on a particular case issue may provide the lower court with the policy and litigant outcome discretion that a doctrine applying to another issue in the same case would not. As case issues are commonly paired in certain case types (e.g., statutory interpretation and reasoned decision-making issues are commonly paired in administrative law cases, with each issue having its own doctrinal base), an incongruent doctrine match among commonly paired issues in a given case type could systematically lead to the higher court’s litigant preferences being unfulfilled for those case types.¹⁰

One consequence of overlapping substantive doctrines is that in addition to choosing whether to craft a determinate or indeterminate doctrine, the higher court may wish to narrow the reach of a given doctrine over case types or issues, so as to avoid this problem. There may be limits to the extent that the higher court can achieve this narrowing. Legitimacy constraints, of the type discussed above, that restrict judges from perfectly mirroring their preferences in legal doctrines may also prevent the higher court from precisely limiting the reach of each issue or case type for the doctrine it develops. Additionally, the nature of the doctrine itself may make it difficult to confine: the constitutional nature of certain doctrines, for example, may hamper the higher court’s ability to limit their application to a narrow issue or case type.

To the extent that the higher court cannot narrow the reach of doctrines, doctrines will overlap. This potentially means that lower courts will have greater discretion, in their ability to choose which doctrine to follow by choosing which issue area is determinative. Even if the higher court chooses two determinate doctrines (a rule for each issue), to the extent that they are not identical in their application to the facts of the given case, the lower court will effectively have some policy choice.

The interactive and overlapping nature of doctrines discussed here and above yields insights into the system of legal doctrines and decision making as a complex whole. One implication of this extended analysis relates to situations when it is difficult for the higher court to sufficiently narrow the reach of overlapping doctrines and thus almost impossible to avoid granting lower courts policy or litigant discretion, as the lower courts may choose among case issues as a way to choose among doctrinal types (and consequently choose favored policy or decide for favored litigants). As such, it may benefit higher court judges to grant greater discretion in the form of an indeterminate doctrine, to maximize the discretion of policy-aligned lower court judges to most accurately reflect the preference of the higher court judges, with little additional cost in granting the same discretion to nonaligned lower court judges.

10. The Supreme Court’s Chevron and State Farm doctrines relating to statutory and “hard look” review of agency action, respectively, are commonly paired in a case, with Chevron generally considered more determinate (and constraining) and State Farm less determinate (and not constraining) on lower (appellate) court discretion. *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). Note, however, that the determinate and constraining character of Chevron has been challenged in the academic literature. See Merrill (1992).

Whether this will be the case will depend on the same factors outlined above: the distribution of cases, litigants, and judges; the potential inevitability of some level of discretion through doctrinal choice is simply another factor affecting the expected outcomes from providing greater discretion in the form of an indeterminate doctrine.

5. Extensions

The model we present above focuses on the choice between determinate and indeterminate legal doctrines and how that choice affects higher court control over lower courts. In explaining judicial choice over doctrinal specificity, this model offers several contributions. First, unlike much work that treats doctrine as exogenously generated and mostly rhetorical, our model treats doctrine as operative. Specifically, legal doctrine is a binding legal directive that either constrains the lower courts' ability to exercise policy discretion (determinate doctrine) or enables them to exercise discretion and make policy choices (indeterminate doctrine). In general terms, the choice of the level of determinacy and thus discretion granted to lower courts depend on the policy alignment between the lower and higher courts, the policy error rate of the available determinate doctrine, and the balance of partisans and ideologues in the lower courts. Our model also addresses some of the complexities of higher court choice within the broader and more complex system of legal doctrines and judicial decision making. In particular, we show that multiple case issues and overlapping doctrines (whether procedural or substantive in nature) call for more complex and sophisticated approaches by the higher courts.

The model presented here serves as a starting point and introduction for analyzing the use of legal doctrine as a mechanism of political control. Many extensions are possible, including those that further dimensionalize legal doctrine. For example, when the higher court is uncertain about the outcome likely to arise from given doctrines, because of uncertainties about lower court preferences, or perhaps the likely litigant pool, the higher court may wish to increase monitoring over the lower courts (and thus limit discretion) with information-revealing doctrines rather than creating more determinate bright-line doctrines. The higher court may write doctrines that force the lower court to reveal information about the individual case (certain facts about the issue or the parties, or the preferences or logic the lower court is using to arrive at the outcome). This may come, for example, in a multipart test where certain conclusions must be explicitly made and stated by the lower court to achieve a certain case outcome. Such transparency makes monitoring and selective interventions easier for higher court judges.

This suggests that there are other dimensions beyond the level of doctrinal determinacy that may play large in the use of legal doctrine for political control by higher courts over lower courts. Other extensions might include the following: adding a more critical role for "precedent"—perhaps showing the trade-offs and distinctions between adhering to determinate or indeterminate precedents and abandoning precedent for a new doctrine with a different level of

determinacy—or examining the role of doctrinal determinacy on political obedience when the strong assumption of “legal obedience” is loosened. We leave these and other explorations for future work.

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