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## What is Legal Doctrine

Emerson Tiller\*

Frank B. Cross†

\*Northwestern University School of Law, [tiller@law.northwestern.edu](mailto:tiller@law.northwestern.edu)

†University of Texas at Austin, School of Law, [crossf@mail.utexas.edu](mailto:crossf@mail.utexas.edu)

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Emerson Tiller and Frank B. Cross

## **Abstract**

Legal doctrine is the currency of the law. In many respects, doctrine is the law, at least as it comes from courts. Judicial opinions create the rules or standards that comprise legal doctrine. Yet the nature and effect of legal doctrine has been woefully understudied. Researchers from the legal academy and from political science departments have conducted extensive research on the law, but they have largely ignored the others' efforts. Part of the reason for this unfortunate disconnect is that neither has effectively come to grips with the descriptive meaning of legal doctrine. In this article, we attempt to describe the concept of legal doctrine and propound various theories of how legal doctrine may matter in judicial decision making and how those theories may be empirically tested.

# What Is Legal Doctrine?

Emerson H. Tiller\*  
Frank B. Cross\*\*

Legal doctrine is the currency of the law. In many respects, doctrine, or precedent, is the law, at least as it comes from courts. Judicial opinions create the rules or standards that comprise legal doctrine. Yet the nature and effect of legal doctrine has been woefully understudied. Researchers from the legal academy and from political science departments have conducted extensive research on the law, but they have largely ignored the others' efforts.<sup>1</sup> Unfortunately, neither has effectively come to grips with the descriptive meaning of legal doctrine. In this article, we propound various theories of how legal doctrine may matter and how those theories may be tested.

Legal doctrine sets the terms for future resolution of cases in an area. Doctrine may take many forms, it may be fact dependent, and therefore limited, or sweeping in its breadth. One doctrinal distinction commonly discussed in the law is the distinction between "rules" and "standards."<sup>2</sup> Rules are strict requirements that define the answer to a dispute, once the predicate facts are established. A rule is something like "any subsequent and unauthorized use of another's mark constitutes trademark infringement." Standards, by contrast, are more amorphous guides to resolving disputes, often listing a set of factors to be considered and balanced. A standard would be a law that directed "trademark infringement occurs when there is a likelihood of confusion between the senior and junior marks, as determined by weighing the following factors ...". Both doctrinal approaches are found in the law, but there is little analysis of why one might prefer a rule or a standard and what the subsequent effects of the two types of doctrine might be.<sup>3</sup> It is frequently presumed that standards leave space for more ideological judging, but this claim has never been demonstrated

Legal researchers have extensively dealt with doctrine as a normative matter, but have given little attention to the manner in which it actually functions. Social scientists, who have done important descriptive work about how courts actually function, have largely ignored the significance of legal doctrine. Consequently, we are left with a very

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\* Stanford Clinton Sr. Research Professor of Law, Northwestern University School of Law.

\*\* Herbert D. Kelleher Professor of Business Law, McCombs School of Business, University of Texas; Professor of Law, University of Texas Law School; Professor of Government, University of Texas at Austin.

<sup>1</sup> See, e.g., Frank B. Cross, *Political Science and the New Legal Realism: An Unfortunate Case of Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997).

<sup>2</sup> See, e.g., Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1991).

<sup>3</sup> See, however, Tonja Jacobi and Emerson H. Tiller, *Legal Doctrine and Political Control*, Working Paper, Northwestern University (April 29, 2005) for a theory of judicial choice between rules and standards based upon political dimensions of a judicial hierarchy.

poor understanding of the most central question about the law's functioning in society. Fortunately, recent years have seen the beginnings of rigorous research into this question. As legal researchers increasingly conduct quantitative empirical research and collaborate with social scientists, we may hope for an efflorescence of this research and a greatly enhanced understanding of legal doctrine. The necessary information requires the scientific study of legal doctrine. This article sketches a theoretical outline of how that research might proceed.

## I. Traditional Legal Views of Doctrine

The conventional legal approach to the law is all about doctrine. Legal academics understand that the language of judicial opinions represents the law. The classical form of legal scholarship was doctrinal analysis, in which a researcher examined the content of a legal opinion and evaluated whether it was effectively reasoned or explored its implications for future cases.<sup>4</sup> Doctrinal analysis was grounded in a descriptive premise that reasoned argument from doctrinal premises actually explained judicial decisions. This research was often evaluative and critical but implied only that courts had erred, such that a persuasive doctrinal analysis could show the judiciary the error of its ways and provoke a new course of legal reasoning.

Legal academics, unsurprisingly, have focused on the traditional legal model of judicial decision making based on "reasoned response to reasoned argument."<sup>5</sup> Through this process, one obtains "legal reasoning that can generate outcomes in controversial disputes independent of the political or economic ideology of the judge."<sup>6</sup> Central to this legal model is the basing of decisions on some neutral legal principles, free from any political or personal contamination. By its very nature, the identity of the judge should not determine the judicial outcome, if the law rules. In this legal model of judicial decision making, a judge identifies the facts of the case, identifies the legal rules that best govern those facts, and then applies those legal rules to the facts, with simple logic dictating the judge's decision.

The legal realists attacked this conventional wisdom in the first half of the 20<sup>th</sup> Century. They claimed that the traditional materials of the law, such as doctrine, did not determine judicial decisions.<sup>7</sup> For the realists, legal language was too indeterminate to answer judicial disputes, and judges had no self interest in relying on the law in decisions, as opposed to their personal preferences. The realists maintained that judges first identified their desired resolution of a case, perhaps due to personal ideological

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<sup>4</sup> For a review and defense of this form of scholarship, see Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378 (1985).

<sup>5</sup> David L. Shapiro, "In Defense of Judicial Candor," 100 *Harvard Law Review*, 731, 737 (1987).

<sup>6</sup> Philip Johnson, "Do You Sincerely Want To Be Radical?," 36 *Stanford Law Review* 247, 252 (1984).

<sup>7</sup> For a review of the legal realist movement, see Neil Duxbury, PATTERNS OF AMERICAN JURISPRUDENCE 65-159 (1995).

preferences, and then manipulated the available legal materials to support that conclusion.<sup>8</sup> In this vision, legal doctrine was mere window dressing.

Although subsequent legal research never fully came to grips with and refuted the descriptive claims of the legal realists, the theory's influence waned in the face of the "legal process" school. In this perspective, "the study of law became the study of a procedure by which judges, rather than simply apply doctrine in a mechanical fashion, use doctrine in the process of reasoning towards a decision."<sup>9</sup> The theory was sometimes associated with the use of "neutral principles," and it gave considerable attention to legal procedures, in addition to substantive rules.

Fundamentally, if implicitly, the legal process school did challenge the premises of legal realism, in its emphasis on the importance of procedure. There is no particular reason why an ideological judiciary would create such elaborate rules of procedure, and use them in decisions, rather than manipulating the substantive law to reach their preferred decisions. Consider the procedural rule requiring appellate courts to give deference to the factual findings of trial courts. This rule is orthogonal to ideology, as the lower court decision may be ideologically agreeable or disagreeable. Yet the rule of deference not only exists, it is widely adhered to. This legal rule is amenable to legal testing, as one can quantitatively code for reversals or affirmances. When such a study was conducted, it found that this procedural deference was a more significant determinant of circuit court outcomes than was judicial ideology.<sup>10</sup> Moreover, when doctrine commanded a higher or lower level of deference to the ruling below, the circuit court's probability of reversal corresponded with the level of deference it was to give.<sup>11</sup> The legal process theorists did not conduct such empirical analyses, of course, but their theory on this doctrine was falsifiable, and when confirmed on empirical testing undermined the more extreme claims of legal realism.

The legal process analysis was narrowly legal, though, and didn't consider the societal implications of doctrine. For example, a judge might reach the same result on a substantive or procedural basis and accordingly set a substantive or procedural precedent. The open question is why a judge would choose one path over the other and what the implications of that choice are for future decisions. A naïve legalist would assume that this choice was driven by the dictates of the law and only the law, but this assumption is unproved and in fact contradicted by considerable evidence that is discussed in the following section.

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<sup>8</sup> The more recent critical legal studies movement is the heir to this skepticism about the significance of law and doctrine. *See id. at* 421-509.

<sup>9</sup> NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 210 (1995).

<sup>10</sup> *See* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 *CAL. L. REV.* 1457, 1509 (2003).

<sup>11</sup> *See id. at* 1501 (observing that trial judgments were reversed at a lower rate than were summary judgment rulings, which in turn were reversed at a rate lower than j.n.o.v. appeals) and 1503 (finding that the rate of reversals of administrative agency decisions corresponded to the degree of deference those agency decisions were due under prevailing doctrine).

Many legal researchers now recognize that judicial ideology influences judicial decisions. Some have conducted empirical research that shows this effect.<sup>12</sup> This research has assumed some public policy significance as it has been cited by a member of Congress in a judicial confirmation debate.<sup>13</sup> The empirical analyses of ideology, including those performed by social scientists (as discussed below) has increasingly entered legal research. This recognition of ideology by legal researchers, though, does not involve a dismissal of the role of doctrine in decision making, though it unfortunately has caused the significance of legal doctrine to be overlooked.

Legal researchers have not entirely ignored the broader functioning of doctrine, and a few particular doctrines have even seen serious analysis. Perhaps the best example would be the law of standing and the doctrines relating to it. Richard Pierce has argued and presented some evidence that standing doctrines are entirely ideological, such that “a liberal judge would give standing to environmentalists, employees, and prisoners, but not to banks, while a conservative judge would give standing to banks, but not to environmentalists, employees or prisoners.”<sup>14</sup> A more recent study concluded that that “judges render law-abiding and predictable decisions where clear precedent and effective judicial oversight exist; where these variables are absent, however, standing decisions are more likely to be based on judges' personal ideologies.”<sup>15</sup> The most likely explanation for standing rules is a doctrinal attempt to influence the ideology of future lower court decisions. By adding a hurdle that plaintiffs must surmount, the doctrine makes it more difficult to sue the government, and easier for ideological judges to reject such lawsuits. If one assumes that access to court generally advances legal ends, one would expect judicial conservatives to press for a stricter standing doctrine, as they in fact have.<sup>16</sup>

Legal research has also begun to take the first steps toward a broader analysis of the role of decision structures in judicial decision making. Pablo Spiller and Matthew Spitzer, for example, have theorized that a judge might use a constitutional decision instrument to resolve a case, rather than a statutory one, in order to insulate that decision

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<sup>12</sup> A few of the more prominent studies in law reviews would include Frank B. Cross & Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, 107 *Yale Law Journal* 2155-2176 (1998); Gregory C. Sisk *et al.*, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 *N.Y.U. L. REV.* 1377 (1993); Cass R. Sunstein, *et al.*, *Ideological Judging on Federal Courts of Appeals: A Preliminary Investigation*, 90 *VA. L. REV.* 301 (2004); *Decisionmaking in the U.S. Circuit Courts of Appeals*, *supra* note 000.

<sup>13</sup> Confirmation Hearings on Federal Appointments: Hearings Before the Senate Comm. on the Judiciary, 107th Cong. 765 (2002) (statement of Sen. Schumer) (addressing the Sunstein research).

<sup>14</sup> Richard J. Pierce, Jr., “Is Standing Law or Politics,” 77 *North Carolina Law Review* 1741, 1742 (1999).

<sup>15</sup> Nancy C. Staudt, *Modeling Standing*, 79 *N.Y.U. L. REV.* 612, 612 (2004).

<sup>16</sup> See, e.g., Gregory J. Rathjen & Harold J. Spaeth, *Denial of Access and Ideological Preferences: An Analysis of the Voting Behavior of the Burger Court Justices, 1969-1976*, in *STUDIES IN U.S. SUPREME COURT BEHAVIOR* 24, 37 Table 1.8 (Harold J. Spaeth & Saul Brenner eds. 1990) (reporting that conservative justices generally favored threshold access requirements for court, including standing).

from congressional override.<sup>17</sup> This is the type of more sophisticated doctrinal analysis that is needed, but it suffers from a certain naiveté about the law, as judges do not commonly have available such a choice between constitutional and statutory theories. Most statutory interpretation cases do not present constitutional issues.

Emerson Tiller and Pablo Spiller theorized that lower court judges may employ “instrument” choices – in their study, the choice between statutory interpretation and reasoning process as decision modes to reverse agency policies -- to insulate their decisions from higher court review when the lower court wishes to protect its decisions from the chance of higher court reversal.<sup>18</sup> Tiller and Joseph Smith examined circuit court administrative law decisions and a strategic association in connection with a judge’s choice of legal instruments (process or statutory) in administrative law cases.<sup>19</sup> They concluded that judges can use their choice among decision instruments to insulate their case outcomes from reversal by an ideologically contrary higher court. Subsequent research into the judicial application of sentencing guidelines reached similar findings about the doctrinal choices of judges.<sup>20</sup>

Frank Cross and Emerson Tiller examined the role of doctrine on three judge panels of the circuit courts and found that doctrine played a key role when (1) the panel was made up of both democrat and republican appointees (rather than being unified in political ideology), and (2) the political-minority judge had the doctrine supporting his position.<sup>21</sup> In such case, the panel majority followed doctrine rather than the panel majority’s assumed political policy preference. By contrast, when the panel was politically unified, doctrine was systematically ignored if it conflicted with the desired policy outcome of the majority.

Frank Cross also has embarked on some empirical analysis of the actual effect of legal doctrine. With Stefanie Lindquist, he has sought to measure if and when doctrine controls the decisions of the courts.<sup>22</sup> This study initially examined cases of first impression, without doctrinal direction, and found that judges in such cases were in fact more ideological than in cases governed by precedent. As precedent developed over

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<sup>17</sup> See Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J. LAW ECON. & ORG. (1992); See Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J. L. ECON. & ORG. 349 (1999).

<sup>18</sup> Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J. Law, Econ. & Organization, 349 (1999).

<sup>19</sup> Joseph H. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002).

<sup>20</sup> Schanzenbach, Max Matthew and Emerson H. Tiller, "Strategic Judging Under the United States Sentencing Guidelines: Instrument Choice Theory and Evidence" (November 11, 2004). Northwestern Law & Econ Research Paper No. 05-06. <http://ssrn.com/abstract=700183>

<sup>21</sup> Frank B. Cross and Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155 (1998).

<sup>22</sup> Stefanie Lindquist & Frank B. Cross, Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent, 80 *New York University Law Review* \_\_\_\_\_ (2005).

time, however, it did not exercise an increased constraint on judges. Indeed, the expansion of precedents appeared to have some effect of liberating judges to be more ideological. Doctrine, it appears, may be either constraining or not. The next step must be to study the specific content of doctrine.

Legal academics' view of doctrine has evolved. For many, doctrine represents the legal rules faithfully applied by judges. However, there has grown a recognition that the law is not applied with perfect neutrality, but its application is influenced by external concerns, such as judicial ideology. Rubin and Feeley have explored the creation of new doctrine, which they argue is a product of both judicial ideology and the preexisting legal principles on which the judges must build.<sup>23</sup> The legal view increasingly recognizes that the law is not everything but insists that it is still something important.

## II. Social Scientific Views of Doctrine

In stark contrast to legal research, many social scientists have disregarded the significance of doctrine entirely.<sup>24</sup> This disregard is borne of a presumption that the law, as understood by legal academics, doesn't really matter to judges. The quantitative social scientific research has been carried out by political scientists who have generally embraced an *a priori* position that judges are fundamentally ideological in their approach to making decisions. In addition, social scientists insist that theories be falsifiable, which causes a devaluation of the historic path of legal research. The best test for falsifiable theories is statistical empirical analysis, which is commonly used among social scientific studies of judicial behavior.

Quantitative analysis, which provides scientific rigor to studies of the law, requires the reduction of law to numbers of some sort. The most readily available numeric reduction involved case outcomes. The outcomes of cases could easily be coded on a binary scale (as conservative or liberal, affirmance or reversal, etc.), and outcomes analysis became the default tool for quantitative social scientific studies of judicial decision making. Moreover, as the outcomes analyses proceeded, social scientists obtained a reasoned basis for ignoring the content of opinions.

Political scientists who conducted studies of judicial outcomes found that they had a statistically significant association with the apparent ideologies of the deciding judges (sometimes called the "attitudinal model"). In 1993, Jeff Segal and Harold Spaeth set out the case for this approach in the now famous *The Supreme Court and the Attitudinal Model*,<sup>25</sup> since updated.<sup>26</sup> The book identified ideological positions for the

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<sup>23</sup> See Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989 (1996).

<sup>24</sup> The "many" in this sentence is an important qualifier. Some political scientists have respected the significance of doctrine. See, e.g., Howard Gilman, *What's Law Got To Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001). However, the group of researchers doing quantitative studies of the law have frequently ignored the doctrinal content of opinions.

<sup>25</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).



justices of the Supreme Court and demonstrated that those ideologies frequently correlated with the votes cast by those justices. Scores of additional studies have confirmed this association. A meta-analysis of the available comparable research to date found that ideology was a statistically significant determinant of decisions for every level of courts, though the power of the ideological effect varied by type of case and quite dramatically by type of court (*e.g.*, the effect is much more powerful in the U.S. Supreme Court than in lower federal courts).<sup>27</sup>

While these studies have consistently shown some role for judicial ideology, they have measured only decisional outcomes, as in which party prevailed in the case and whether it took a conservative or liberal position. The case outcome is obviously important for the immediate parties to the action but carries no particular significance for others. The language of the opinion at least purports to establish the rules to govern future cases, but political science researchers have generally disregarded the significance of this language. The general outlook was captured in a very early statement by Harold Spaeth, who said: “I find the key to judicial behavior in what justices do, Professor Mendelson in what they say. I focus upon their votes, he upon their opinions.”<sup>28</sup>

While one cannot dispute the practical significance of outcomes, a decision to ignore opinions misses the law. Consider the Supreme Court’s ruling on abortion rights in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>29</sup> in which the Court declined to overrule its holding in *Roe v. Wade*, but modified its trimester analysis in favor of an “undue burden” approach for analyzing the constitutionality of state restrictions on abortion. The Court’s decision in *Casey* was grounded substantially in the importance of adhering to precedent. The opinion in *Casey* substantially modified the rule set forth in *Roe* and generally reduced constitutional rights to an abortion. Because *Casey* upheld certain Pennsylvania limitations on abortions, it would be coded as having a conservative outcome by political scientists doing quantitative analysis of decisions. This coding is accurate inasmuch as the decision represented a shift from *Roe* in a conservative direction. However, a decision overruling *Roe* would have been vastly more significant, yet would have received the identical coding. The outcome of *Casey* was certainly important, but doctrine it created for future application was far more significant. As Chief Justice Vinson observed: “What the Court is interested in is the actual practical effect of the disputed decision – its consequences for other litigants and in other situations.”<sup>30</sup> Merely coding for the outcome misses most of the importance of the judicial decision.

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<sup>26</sup> JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002). The updated version was more focused on certain constitutional questions and gave some consideration to the legal model.

<sup>27</sup> See Daniel R. Pinello, “Linking Party to Judicial Ideology in American Courts: A Meta-Analysis,” 20 *Justice System Journal*, 219 (1999).

<sup>28</sup> Harold Spaeth, *Jurimetrics and Professor Mendelson: A Troubled Relationship*, 27 *J. POL.* 875 (1965).

<sup>29</sup> 505 U.S. 833 (1992)

<sup>30</sup> Fred M. Vinson, *Work of the U.S. Supreme Court*, 12 *TEX. BAR J.* 551, 552 (1949)

Once they concluded that case outcomes were indeed determined by judicial ideology, political scientists could easily jump to the conclusion that the content of legal opinions in fact did not matter. Judges of different ideologies would produce different decisions, even when operating from the same legal doctrine. With this finding, political scientists could dismiss doctrine as nothing more than a beard hiding the true basis for judicial decisions. They argued that doctrine was substantively meaningless, because it did not determine any future decisions. Their research became a disciplined case for the claims of traditional legal realism.

The quantitative evidence about ideology and judicial decision making was far too weak, however, to support this conclusion. While the studies often demonstrated a statistically significant correlation between judicial ideology and judicial decisions, ideology did not predict the vast majority of decisions. In fact, the effect at judicial levels below the Supreme Court is quite modest.<sup>31</sup> Not only was the effect of ideology limited, the studies very rarely contained any doctrinal variable to control for the independent effects of the law on ideology. Finally, the political science research focused overwhelmingly on Supreme Court decisions, which are unrepresentative, involving only a tiny fraction of the functioning law, and often on an even smaller subset of Supreme Court cases involving controversial issues of civil liberties.<sup>32</sup>

As the social scientific study of law has progressed, it has begun to acknowledge that the content of judicial opinions, legal doctrine, is worthy of examination. The earliest prominent study came from attitudinalists, seeking to show that doctrine did not in fact influence subsequent judicial decisions. Segal and Spaeth recently undertook a study of the Supreme Court's use of precedent. They started with a number of landmark Supreme Court decisions that contained dissenting opinions and then identified the "progeny" of those cases.<sup>33</sup> They then examined the behavior of the justices who dissented from the original ruling and found that those justices consistently continued their initial dissenting position on the legal question, regardless of the precedent set by the original opinion.<sup>34</sup> The study is important for its empirical exploration of doctrine, but its findings have been disputed,<sup>35</sup> and it addressed only the Supreme Court's

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<sup>31</sup> See, e.g., Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 770-774 (2005). They note that in Pinello's meta-analysis, *supra* note 000, ideology only explained about 7% of the overall voting in federal courts (though ideology explained nearly half the variance in a subset of these studies). *Id.* at 771. They reviewed other research and concluded that the effect of ideology was "more moderate than large." *Id.* at 772. Donald R. Songer, Reginald S. Sheehan & Susan B. Haire, *Continuity and Change on the United States Courts of Appeals* 115 (2000) (finding a difference of 6.4% in liberal voting on civil rights/liberties issues between Democratic- and Republican-appointed judges).

<sup>32</sup> See, e.g., Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1740 (2003) (critiquing this reliance on Supreme Court decisions).

<sup>33</sup> HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL* (1999).

<sup>34</sup> See *id.* at 288 (finding that the justices deferred to that precedent only 11.9% of the time).

<sup>35</sup> Some reexamined the Segal and Spaeth data and claimed that it could support a contrary conclusion, that precedent did influence the votes of the justices.

application of its own horizontal precedent in the most controversial of cases.<sup>36</sup> The true power of Supreme Court doctrine lies in its ability to influence the vast mass of cases decided at lower levels of the judiciary.

In contrast to the Segal and Spaeth findings, Mark Richards and Bert Kritzer found that certain Supreme Court decisions established new “jurisprudential regimes” that dictated the structure of subsequent decisions.<sup>37</sup> The decisions had influence by “establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors.”<sup>38</sup> This approach came close to a true study of doctrine and found some effect even at the Supreme Court level. The research did not address the questions of why the justices crafted specific language or exactly how different language mattered, but it established the very important point that doctrine *does* matter in future decisions.

As noted above, the primary power of doctrine lies in its ability to influence decisions by lower courts. A number of political scientists have studied this particular question and found that Supreme Court doctrine does appear to drive subsequent lower court opinions. Lower court apparently faithfully followed Supreme Court decisions on issues such as defamation and the first amendment,<sup>39</sup> obscenity,<sup>40</sup> and search and seizure law.<sup>41</sup> These findings are salient in their showing that the Supreme Court’s precedents do in fact influence lower courts, but they shed little light on the intriguing details of why particular doctrines are adopted and how different formulations of doctrine may have different effects.

An important book by Lee Epstein and Jack Knight acknowledged that doctrine did matter to Supreme Court justices and discussed how they might strategically use precedents.<sup>42</sup> Like other political scientists, they assume that justices’ goals are entirely

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Other researchers have analyzed the problem from a different perspective, with different data. They found that significant Supreme Court decisions created “jurisprudential regimes” that effectively set the standards and directed the outcomes of future decisions “by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors.” See Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305 (2002).

<sup>36</sup> With its small docket, the Supreme Court does not accept certiorari in clear cases. Consequently, it is unlikely that the outcome of the progeny case was so plainly compelled by the earlier decision.

<sup>37</sup> Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

<sup>38</sup> *Id.* at 305.

<sup>39</sup> See John Gruhl, *The Supreme Court’s Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502 (1990).

<sup>40</sup> See Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM.J. POL. SCI. 963 (1992).

<sup>41</sup> Donald R. Songer, *et al.*, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 688 (1994).

<sup>42</sup> LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

ideological. However, they argue that adherence to doctrine is necessary to legitimize judicial authority, so justices consequently do attend to doctrine. Thus, the justices will “strategically modify their position” to take account of precedent and try to reach a decision as close as possible to their preferred ideology, within the constraints of legal requirements.<sup>43</sup> While the books’ theory of judicial decision making is somewhat limited, it does suggest that the content of doctrine is important to the path of the law and that decisions are not utterly ideological.

A book by Thomas Hansford and James Spriggs takes a broader approach to the study of Supreme Court doctrine.<sup>44</sup> Their study tries to identify when doctrine is affirmed and when it is limited and the degree to which that decision is affected by justices’ ideologies or by the strength of the precedent being interpreted. This research is an important breakthrough in the quantitative analysis of doctrine, but it suffers from some of the limitations common to past political science research. It is Supreme Court-centric, focuses on ideology, and ignores the actual content of opinions. Nevertheless, it produces some significant findings, such as the discovery that ideological justices will go after the strongest, best accepted, existing but ideologically contrary precedents and try to limit their application in subsequent opinions. And the book is but the beginning of empirical research into doctrine and its meaning.

Social scientists have indirectly theorized about doctrine in connection with their analyses of the judicial hierarchy. They have theorized about how higher courts use the prospect of reversal to discipline lower courts to adhere to the preferences of the higher courts. Doctrinal language is one way of signaling those preferences to lower courts. McNollgast have propounded an interesting theory of how the Supreme Court may enhance lower court compliance through use of a “doctrinal interval” and random sampling that allows modest departures from its preferences.<sup>45</sup> The authors did not attempt to empirically test the theories, though, and Cross has argued that the prospect of reversal cannot support a general theory of judicial decision making.<sup>46</sup>

Social scientific research seems to be evolving in the direction of increased recognition of the independent significance of legal doctrine.<sup>47</sup> While the political

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<sup>43</sup> *Id.* at 544.

<sup>44</sup> THOMAS G. HANSFORD & JAMES F. SPRIGGS, II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* (2006).

<sup>45</sup> McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 SO. CAL. L. REV. 1631 (1995).

<sup>46</sup> *See Appellate Court Adherence to Precedent, supra* note 000 (discussing the very low probability of reversal and how this means that the risk will not substantially affect judicial decisionmaking and empirically demonstrating that reversal risk does not appear to influence circuit court decisions).

<sup>47</sup> One interesting recent article seeks to integrate policy orientation with legal orientation and stresses doctrine as a means of communicating preferences. *See* Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755 (2002).

scientists remain focused on ideology as the driving force behind judicial outcomes, they increasingly acknowledge that the opinions are not irrelevancies. Their research is making important strides enabling the quantitative capture of legal doctrine, to more rigorously test for its meaning. As the research has developed, it appears that law professors and social scientists are slowly moving together in their understanding of the law's operation.

As evident from the above references and those of the first section, the value of the scientific study of legal doctrine is increasingly recognized. Moreover, there is ample empirical support for a general claim that doctrinal choices in fact matter in judicial decision making. To date, this emerging research has proceeded in a rather haphazard fashion, though, without much of a coordinating theoretical framework. Much of the research is undertheorized, and the predominant theoretical construct for analyzing the choice of doctrine has been avoidance of reversal. While this approach is theoretically sound, the prospect of reversal is sufficiently low that the theory can explain only a fragment of the doctrinal choices made by courts. The following section presents some theoretical considerations to guide future research.

### III. Theoretical and Empirical Considerations for Analyzing the Role of Legal Doctrine

Neither the straightforward legal nor political approaches capture the concept of doctrine and its importance in the working of the law. It should be clear from the research that the law is both legal and political. Political researchers have too often focused on outcomes and ignored doctrine. Legal researchers have studied doctrine as pure legal reasoning, without recognizing its political component. It is this intersection of law and politics that demands further study. The remainder of this article sets out factors that are important to this study.

#### A. Decision Structures: Instruments and Doctrines

Understanding the role of legal doctrine first requires identification of the basic decision structures involved in judicial decision making and appearing in judicial opinions. These structures include substantive decision instruments (such as statutory interpretation, constitutional review, or reasoning process review), procedural decision instruments (such as standing, ripeness, or statute of limitations review), and legal doctrines that attach to these decision instruments as guidance in how to apply the instruments in the given case (the particular doctrinal language). There are often multiple decision instruments that come into play in a given case. It is typical, for example, in a court's review of an administrative agency case to consider both statutory interpretation and procedural/process instruments.<sup>48</sup> There also may be multiple, and sometimes competing, doctrines for a given instrument (such as the plain meaning rule and the *Chevron* doctrine<sup>49</sup> for statutory interpretation). The court is left with a set of instrument-doctrine matches from which to choose in making a decision. Understanding these

<sup>48</sup> Tiller and Spiller (1999), *supra*, note \*\*\*.

<sup>49</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

instrument-doctrine options as part of the broader decision making structure of a case is critical to understanding the work of judges and the strategic opportunities or limitations they face.

As an example, consider a policy oriented judge who wishes to defeat a plaintiff's statutory cause of action. The court can effectively terminate the cause of action by finding for the defendant either on a procedural issue (e.g., the plaintiff lacks standing to bring the suit) or on the merits (e.g., the plaintiff's interpretation of the statute is wrong). To terminate the case, the judge need only find for the defendant on one of these decision instruments. The choice about which to use to achieve this outcome, or perhaps to use both, would be modulated by the available doctrines that attach to each of the instruments. Suppose that the prevailing doctrine for statutory interpretation in that jurisdiction was the plain meaning doctrine, and suppose that plain meaning actually worked in favor of the plaintiff's interpretation rather than the defendant's interpretation. Also suppose that there are competing doctrines (one working for the plaintiff, one working for the defendant) available on the standing issue such that the court could apply either doctrine and appear to have engaged in principled decision making. The sophisticated court would apply the pro-defendant doctrine on the standing issue rather than defying the doctrinal guidance on the statutory interpretation issue and risk higher court reversal or loss of public legitimacy.

Sometimes, doctrine will compel a court to reach an outcome other than the one it desires. At other times, the prevailing legal doctrine may compel a court to choose a particular instrument in order to reach the outcome it desires, because other instruments yield the contrary outcome. On yet other occasions, the court might have a choice of reaching its desired outcome through more than one doctrinal instrument. Thus, while doctrine can constrain future courts, it can also liberate them to reach desired outcomes. The issue is complicated further by the fact that the court's decision itself may create some sort of doctrine, and it has an incentive to choose the instrument and language that will be most powerful in influencing future courts. The impact of its decision feeds into the calculus of the judicial doctrinal choice.

To be sure, there are sub-instruments and sub-doctrines and the boundaries between them can easily melt away when one deconstructs the nature and role each structure plays in a given case. And some instruments can even be created by doctrines.<sup>50</sup> Indeed the creation of doctrinal instruments is an important topic to study. When courts create new doctrinal instruments, they are to some degree providing greater discretion to future courts, by providing additional instrumental options for ideologically preferred instruments. They might be expected to take such action when the court system is ideologically aligned with the court creating the doctrinal instrument. An even better strategy, though, would be to mold the doctrinal instrument in a manner that has a systematic tendency to favor the preferred side.<sup>51</sup> Designing such instruments is not easy but would be optimal for a court seeking to project its ideology.<sup>52</sup>

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<sup>50</sup> See, e.g., *Motor Vehicles Manufacturing Ass'n v. State Farm*, 436 U.S. 29 (1983).

<sup>51</sup> See Eric R. Claeys, *The Article II, Section 2 Games: A Game-Theoretic Account of Standing and Other Justiciability Doctrines*, 67 S. CAL. L. REV. 1321, 1345 (1994) (observing that "procedures can confer disproportionate advantage to one type of interest over another" and when "one side in a substantive political debate can use procedure repeatedly to frustrate the other side's attempts to influence policy to its political preferences, the procedure has political consequences").

Moreover, the fact patterns that must exist to make various decision instruments available to judges and the role of the plaintiff's argumentation in presenting the issues are important factors to consider and pose challenges to any analysis or measurement of doctrinal use. Nonetheless, attempts to isolate the structures, understand their interdependence, and measure empirically their impact on decision making, is critical to the enterprise of understanding legal doctrine and its role in judicial decision making.

## B. Models of the Judicial Mind

Another key to understanding the role of legal doctrine is the adoption of a better model of the judicial mind than has currently been offered. How judges internalize or utilize legal doctrine in their mental operations is one of the least understood aspects of judicial decision making, but may be key to understanding the relationship of legal preferences and policy attitudes. Proponents of the legal and the attitudinal models have so far offered up black boxes, telling us little more than that judges have preferences (either for obeying precedent or for certain policies). A more micro-analytic model of the judicial mind that considers psychological, sociological, and economic aspects is needed. It may be, for example, that internalization of legal model preferences come from the socialization of judges through law school training, clerkships, law practice, and fellowship with other judges. Operating in that mode ensures social-professional acceptance by, and credibility within, the judge's community of peers. One would also ask whether de-socialization occurs at some point, perhaps as judges reach higher levels within the judicial hierarchy and view themselves more as policy makers than adjudicators of a specific case.

From an economics of psychology perspective, a judge's preference for legal model analysis may be induced by decision cost efficiencies resulting from the decision heuristics that legal doctrine presents. In such case, doctrines are mentally economical, allowing for quicker resolution of cases because judges need not rethink the logical underpinnings of fairness and equity for the given factual situation. Or yet, legal doctrines may mirror deeper psychological aspects, such as religious or other value systems already inculcated upon a judge's mind and, thus, allow a judge to actualize these psychological preferences in decision contexts that seem tailor made for such use.

A more micro-analytic model of the judicial mind could yield great finds in analyzing legal doctrine. For example, if the adoption of legal doctrine as a decision mechanism is related to decision cost efficiencies for the judge, then one might postulate that higher courts in setting doctrines for lower court obedience (and perhaps political

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<sup>52</sup> Such "biasing" of doctrine can be tricky. For example, the doctrine of standing was first developed by the New Deal Supreme Court as a doctrinal tool to protect liberal legislation from being struck down by conservative lower court judges. See Maxwell L. Stearns, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 218 (2000) (reporting that "Justice Louis Brandeis and then-professor Felix Frankfurter developed standing to shield progressive regulatory programs, culminating in the New Deal, from attack in the federal courts"). Over time, however, standing has become a conservative doctrine that prevents liberal interest groups from enforcing laws such as those protecting the environment.

control by the higher court) may design doctrines that improve decision cost efficiency as a way to induce obedience by lower courts. This may mean bright line rules over standards in certain instances. If courts wish to discourage lower court activism, a doctrine could be created that, although appearing externally legitimate and principled, in application is complex and time consuming, thereby discouraging lower court initiative on the issue. When judges are confronted with alternative high and low cost instruments, they may choose the lower cost instrument, even if it yields an ideologically contrary result, because of the time pressures that those judges face.<sup>53</sup> This may even create a natural incentive of the system toward greater reliance on simple rules. If a judge chooses the “plain meaning” doctrine rather than delving into legislative history, that judge not only saves his or her own time, the resulting decision also creates doctrine regarding the proper doctrine for future controversies.

### C. Judicial Hierarchies and Political Linguistics

Legal doctrine exists within a decision making hierarchy, where outcomes by lower courts are subject to review by higher courts. For a lower court, legal doctrine is utilized to resolve the particular case in front of that court. The institutional role of a lower court is to look for guidance coming from precedents and statements of doctrine by the higher court. In reviewing a case on appeal, the higher court’s role is to consider more broadly the future effects of its decision and doctrinal pronouncements as they carry direct and indirect implications for the courts beneath it, and indicate a commitment for the high court’s own future behavior. Even if the doctrine choice produces for the high court an undesirable outcome in the instant case, it may provide greater policy utility over the broader set of cases yet to come to the lower courts. In sum, doctrine plays differing roles for the lower and higher courts and should be modeled as such.<sup>54</sup> If the higher court is more concerned about the implications for many outcomes over a variety of issue areas, then measuring the particular case outcome of the higher court (that is, coding who wins or loses the particular case), may not capture the work of the court. The legal outcome – that is, the choice or endorsement of a particular doctrine -- may, in fact, be more critical, as the effects of the doctrinal statement for future cases to come will produce continuing policy impact.

Recognizing the role of hierarchy is also important because it invites an examination of the political-ideological makeup of each level within the hierarchy, whether there is political-ideological alignment between the lower and higher levels, and how legal doctrine reflects these alignments or nonalignments. The design of legal doctrine (the words, syntax, and structure of the written opinions) may have serious

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<sup>53</sup> This might help explain the Supreme Court’s “incredibly shrinking” docket, which has confounded analysts. See David M. O’Brien, *Join-3 Votes, the Rule of Four, The Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket*, 13 J. L. & POL. 779 (1997). By reducing its docket, the Supreme Court can avoid being trapped by this time pressure and become able to strategically and ideologically create the doctrine it most favors.

<sup>54</sup> A good example of such modeling is Hugo M. Mialon, Paul H. Rubin and Joel L. Schrag, *Judicial Hierarchies and the Rule Individual Tradeoff*, Emory Law and Economics Research Paper No. 05-5 (December 17, 2004).



implications for the ability of higher courts to control the behavior of lower courts.<sup>55</sup> When there is less alignment between the lower and higher courts, doctrinal statements may be more determinate (looking like rules rather than standards), leaving little discretion for the lower courts; when there is more alignment, then doctrinal statements from the higher levels may be less determinate, looking more like standards or balancing tests that give the lower courts vast discretion. An aligned court system also should mean providing lower court judges with an expanding set of doctrinal instruments to use, in their discretion.

#### D. Political Saliency

The role of doctrine may also vary by the political saliency of the issue area. Routine issues that lack political saliency would more likely be resolved by a judge's strict adherence to legal doctrine. The majority of cases before the courts most likely fit this profile. Political-ideological preferences would not play the same role as they would in cases where the issues are high on the political agendas of legislators and the President, and thus the political agendas of the courts (e.g., war powers, abortion, civil rights, and federalism issues). The judges' psychological interests in applying the law conventionally would exceed their ideological interests in the case outcome, where saliency is low. Where political saliency is high, the power of legal doctrine as a guide for decision making may weaken, and the threat of high court reversal strengthen, as disciplining devices. Political models of judicial behavior that do not admit to saliency concerns may be overbroad as general theory and invite empirical inquiries that fail to test the true power of the models.

### IV. Conclusion

This article called for greater attention to the core elements of legal analysis and how they relate to a more sophisticated model of judicial behavior. In short, we ask "what is legal doctrine" – in terms of its power as both a legal and political tool for judicial decisionmakers. Such an inquiry will require collaborative efforts between legal scholars who understand the legal meaning and implications of doctrine, and social scientists who can formalize models of individual and institutional judicial behavior and who also can quantify and measure characteristics of legal doctrine in the context of such models. The research dimensions presented here offer some guidance about where to go next. Undoubtedly, there are many other aspects of legal doctrine impacting judicial behavior that will need to be addressed as the study progresses. For example, what role does legal doctrine play with respect to the willingness of potential litigants to bring cases? To what degree might litigants be able to manipulate doctrinal development through their selection of cases to bring before the courts? To what extent can the legislature control legal doctrine with statutory pronouncements? To what extent can judges affect legislative or administrative agency decisions through doctrine on matters like statutory interpretation? Do legal scholars play a role in limiting the use of certain legal doctrines

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Jacobi and Tiller, *supra* note \*\*\*

or, perhaps, introducing or endorsing legal doctrines that courts will use? How do we capture the multiple dimensionality of doctrines -- those doctrines that cut across more than one issue area, or over multiple instruments, of decision making? Efforts to address these and related questions will bring controversy, but also a greater number of scholars with the tools to unpack and evaluate the complex social phenomenon we know as law. We are optimistic about the enterprise and the likely normative implications from such research.<sup>56</sup>

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<sup>56</sup> For an example of a normative proposal based on positive analysis of legal doctrine and judicial behavior, see, Emerson H. Tiller and Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 Colum. L. Rev. 215 (1999) (proposing new procedures for federal circuit court judge assignment based on a politically informed theory, and empirical test, of legal doctrine). For critical responses by judges to such approaches, see Patricia M. Wald, *A Response to Tiller and Cross*, 99 Colum. L. Rev. 235 (1999) (challenging Tiller and Cross's conclusion that judges vote ideologically and criticizing the circuit court reform proposal), and Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 Va. L. Rev. 1335 (1998) (denying the influence of ideology on judging and contesting the empirical findings of Tiller and Cross's article on legal doctrine and circuit court behavior).