

# A Dynamic Model of Doctrinal Choice

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The United States federal court system divides functions among courts at different levels of the judicial hierarchy. The Supreme Court articulates legal doctrine that will guide decision-making by the lower federal courts. The lower courts are allocated the task of law application—they implement the guidance given by the Supreme Court in the form of legal doctrine by applying it to the myriad factual situations presented in actual cases. As a result, while the Supreme Court has the power to articulate broad principles, it must rely on the lower federal courts to determine outcomes across the mass of cases in accordance with its directions.

When deciding cases, the Supreme Court not only decides the outcome—which party wins—it also must choose how to articulate the doctrine that will govern similar, subsequent cases. That decision has been variously characterized as a choice between vagueness and specificity, narrowness and breadth, or, most famously, standards and rules. That choice in turn determines how much discretion lower courts will have when applying the precedent, thereby influencing the outcomes they reach.

This paper formally studies the choice of doctrinal form using a dynamic model of upper and lower court interactions. The aim is to understand how the Supreme Court's efforts to influence case outcomes in the lower courts will affect their choice of doctrinal form. In addition to considering the factors that influence an initial choice on the spectrum between rules and standards, we also explore the dynamics of changes in doctrinal form. Why might the Court shift from a rule-like command to a more open-ended standard; or transform a standard into a more rigid rule-like command?

[I]n practice, legal doctrine often shifts in form from a rule to a standard, or standard to a rule, sometimes cycling back again to an earlier form. In *Miranda v. Arizona*, for example, the Supreme Court replaced a “totality of the circumstances” test for the voluntariness of a confession with the hard-edged requirement that an explicit warning about the right to remain silent must be given in order for statements by a suspect to be ad-



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missible. Conversely, in *Planned Parenthood v. Casey*, the Court replaced *Roe v. Wade*'s trimester approach, which set sharp boundaries for determining when a woman has a right to terminate a pregnancy, with an undue burden standard that permits consideration of a wide variety of factors.

Up to now, little attention has been paid to how interactions between upper and lower courts influence doctrinal form. This neglect is surprising in some ways, because lower courts play a crucial role in implementing whatever rules or standards are laid down by the Supreme Court. For the vast majority of litigants, it is the decisions of the lower courts—how they apply established doctrines—that give meaning and force to the pronouncements of the Supreme Court. Nevertheless, the rules and standards literature pays little attention to the vertical relationship between courts. At the same time, judicial politics scholars, who do pay attention to institutional structure and inter-court dynamics, traditionally ignored the function and form of doctrine. For a long time, the only concern was judicial votes: doctrine and legal reasoning were viewed as merely cover for judges' policy preferences, the true drivers of decision-making.

[Our model] develops an endogenous account [of shifts from rules to standards], focusing on how repeated interactions between an upper and lower court might drive doctrinal change. The repeated game model predicts that doctrine will evolve endogenously as the Supreme Court learns that its prior doctrine is not producing the “correct” results in enough cases. More concretely, in an equilibrium of the repeated game, when the Supreme Court issues a standard, the lower court attempts to cooperate by only incorporating new information [into the case law] when the Supreme Court would want the information considered. Unfortunately, the lower court is occasionally mistaken about the Supreme Court's preferences. The Supreme Court responds to mistaken applications of precedent by shifting the doctrine to more rule-like commands. Such commands cabin or constrain the lower court's discretion. Too much constraint, however,

is costly to the Supreme Court, because in some cases new information that it would find relevant is excluded from consideration. Hence, the possibility of cycling back to a standard.

**THIS TYPE OF OSCILLATION** in doctrinal form is illustrated by the Supreme Court's recent cases interpreting the Sixth Amendment's Confrontation Clause. These cases raise the question whether the testimony of a witness who is not available for cross-examination at trial may constitutionally be used by the prosecution in a criminal trial. In 1980, the Supreme Court in *Ohio v. Roberts*, 448 U.S. 56 (1980) summed up the general approach it had been taking in these cases: when a witness is not available for cross-examination at trial, his statement is admissible "only if it bears adequate 'indicia of reliability.'"

This interpretation of the Confrontation Clause was clearly framed as a standard. The test afforded judges a great deal of discretion in determining the reliability of proffered testimony, and left them free to consider any of a number of factors that they might consider relevant to that inquiry.

In 2004, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Court repudiated its earlier approach and replaced it with something much closer to a rule. Specifically, the Court held that when it comes to "testimonial evidence," prior statements cannot be admitted at a criminal trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. As the Court put it, "the only indicium of reliability sufficient to satisfy constitutional demands is ... confrontation."

Thus, at least as to testimonial evidence, the Court's new test removed the discretion of judges to inquire into the reliability of out-of-court statements. The model suggests that the Supreme Court moved from the standard articulated in *Roberts* to the far more constraining *Crawford* rule, because it observed the lower courts applying the standard in ways it disagreed with, incorporating factors it believed irrelevant. Although the Supreme Court stated that it had "no doubt that the courts below were acting in utmost good faith" when assessing reliability, it explained that it was changing the doctrine because the prior standard left "too much discretion in judicial hands."

**IN THE VIEW OF THE COURT**, the standard was "amorphous," "unpredictable," and "manipulable," allowing "countless factors" to bear on the question of whether a statement was reliable. The Court reviewed dozens of lower court decisions to demonstrate how different courts treated the same factor in opposite ways, or relied on erroneous factors in deciding whether a statement was reliable.

The rule enunciated in *Crawford* was clearly intended to constrain lower courts, restricting their discretion to admit prior testimony that had not been tested

by cross-examination. However, the model suggests that imposition of a rule will be costly because it will constrain lower courts from considering new information, even when the Supreme Court would agree that it is relevant.

Thus, seven years after *Crawford*, the Supreme Court in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) decided another Confrontation Clause case that significantly moved the relevant test back in the direction of a more open-ended standard. While nominally accepting the framework established in *Crawford*, the Court in *Bryant* greatly expanded the discretion of judges to determine whether the prior statement of an unavailable witness could be admitted at a criminal trial. It did so by creating an open-ended standard for determining whether a statement was "testimonial evidence" subject to the requirement of cross-examination, or "non-testimonial" and therefore outside the concerns of the Confrontation Clause. According to the majority, this inquiry turned on the "primary purpose" for which a statement had been taken, which courts should determine by "looking to all of the relevant circumstances."

The dissenters in *Bryant* criticized the majority for moving back toward "open-ended" and "amorphous" inquiries into the "totality of the circumstances bearing upon reliability." Rejecting their criticisms that the new standard was unworkable, the majority asserted that "we ... are unwilling to sacrifice accuracy for simplicity."

The recent evolution of doctrine in the Confrontation Clause cases thus appears to fit the model well. Of course, there were significant changes in the membership of the Court between 2004 and 2011, but changing preferences alone do not offer a persuasive explanation for the doctrinal shifts. The *Crawford* Court's move to overturn *Roberts*, did not follow any significant ideological shift, but came after the Court's membership had been stable for 10 years. On the other hand, although *Bryant*'s move back toward a standard occurred after significant changes in the Court's membership, the Court's overall ideological composition did not shift dramatically.

Although four new justices joined the Court between the *Crawford* and *Bryant* decisions, these changes in membership did not dramatically shift the ideological balance of the Court. For the most part, the retiring justices were replaced by others with similar views. The most significant change in terms of ideological balance was the appointment of Justice Alito to fill Justice O'Connor's seat. This change was far less consequential than might be expected, because it had the effect of making Justice Kennedy the new median justice, resulting in a Court only moderately more conservative than before.

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In any case, with Scalia and Ginsberg in dissent, and Roberts and Alito joining Sotomayor's majority opinion, the votes in *Bryant* did not fall along traditional ideological lines. Interestingly, the two centrist judges—Kennedy and Breyer—joined the majority in both *Crawford* and *Bryant*. Thus, a traditional policy preference story cannot easily explain the shift from standard to rule back to standard in the Confrontation Clause cases.

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