A Model of Cause Lawyering*

Scott Baker† and Gary Biglaiser‡

† School of Law, Washington University in St. Louis
‡ Department of Economics, University of North Carolina at Chapel Hill

May 29, 2013

Abstract

The paper presents the first formal economic analysis of cause lawyering. Rather than seeking to maximize her financial gain – like many of the litigants studied in the literature – our cause lawyer seeks to maximize the degree of social change achieved through the courts. The lawyer’s litigation strategy consists of deciding how many steps to ask the court to move in a single period. We find that more intense and patient advocates prefer to ask for a series of small steps moves in the law. We next consider an example with a tiered court structure involving a cause lawyer. We investigate how the Supreme Court’s doctrine responds to the intensity of the advocacy in the lower court. We find that, facing intense advocates, a Supreme Court with convex preferences is more likely to issue constraining doctrine. The reason is that intense advocates are more likely to bring about extremes in the law: either no legal change or lots of legal change. Such extremes are quite costly to the Supreme Court due to the convexity of its preferences. Throughout, we attempt to link the findings from the model to the NAACP’s litigation strategy for eradicating the doctrine of separate but equal.

*We thank the editor and anonymous referee for their very useful comments. For valuable feedback, we also thank Vijay Kishna, Saul Levmore, and workshop participants at the University of Chicago and the Washington University Conference on Theoretical Law and Economics.
1 Introduction

Standard economic models of litigation contemplate parties motivated by financial payoffs. Cause lawyering or advocates for social progress through litigation has become an important source of legal change. This paper presents the first formal economic analysis of cause lawyers and their interaction with courts. In the model, the cause lawyer chooses how large a degree of legal change to seek from a court, and we show that, ironically, the most passionate lawyers pursue a strategy of small steps or asking courts for incremental change, rather than asking for a large change in a single step.

As to examples, a cause lawyer might, for instance, want to increase the protection for discrimination based on sexual orientation. Alternatively, she might wish to expand the rights of private property owners against government takings or the rights of gun owners under the Second Amendment. To accomplish her goal, the cause lawyer picks cases. The sequence of cases – and the issues these cases present – reflects the cause lawyer’s litigation strategy. Through case selection, the advocate presents what are, in effect, "proposals" to the court about the extent of legal change that period. The court responds by ruling on the issues presented. This paper seeks to understand and predict the factors which influence the cause-lawyer’s litigation strategy. While cause lawyers are an important driver of policy, it is not well understood what might be expected from these advocates. It is not obvious, for example, when it is better for the cause lawyer to ask for series of small changes in the law, a few big changes, or some combination of the two.

Our analysis of cause lawyers turns on close attention to two institutional features of the judiciary. First, a court’s rejection of the cause lawyer’s proposal to move the law a certain distance creates precedent. If, say, the cause lawyer’s request for civil unions is denied today, the court will find it costly not to reject the same request tomorrow. Second, the cause lawyer’s victory in one case does not end matters. If the cause lawyer wins – achieving, say, civil unions – she can go back to court in the next period and ask for a constitutional right to gay marriage.

Given that rejection is precedential and acceptance is a window into even
more requests, how far should the advocate try to move the status quo in any one period? Should the cause lawyer ask for civil unions, and then, if successful, ask for gay marriage? Or should she ask for gay marriage from the get-go and, if turned down, fall back to the lesser request for civil unions? What determines the request size in each period? Does it matter, for instance, how intense the advocate’s preferences are? Is the presence of intense advocacy groups inconsistent with incremental legal change?

Using a simple formal model, we address these questions, assuming no limit on the cause lawyer’s potential to move the law. Specifically, the analysis derives the conditions under which the cause lawyer prefers asking for the smallest possible step – no matter what happened in the past litigation. The investigation demonstrates that the weaker the advocate’s preferences, the less likely she is to employ a such a incrementalist approach. Counter-intuitively, the model predicts that for high discount factors – i.e., patient advocates – the most passionate lawyers are also the most cautious in their advocacy.

Two assumptions drive this result. First, the advocate is uncertain about the court’s ultimate position on the legal issue. Second, the advocate anticipates that the court is more likely to grant a sequence of two one-step requests than a single two-step request: the court prefers slow to rapid change in the law, even if the law ends up in the same place. The first assumption rules out the trivial case. If the advocate knew the court’s ultimate position, it would just bring the case that reflected that position – why waste time and effort doing anything else? As we will say more below, a judicial preference for two small steps move over one larger, two-step move can be justified on rational choice grounds (a socially minded judge anticipates convex adjustment costs in the population as the law changes) or behavioral grounds (the judge exhibits loss aversion).

Turning to intuition for the main result, let us identify the basic trade-off. A series of requests for small changes to the law give the cause lawyer the best chance of eventually achieving, for example, robust legal protections of a target group, since by our second assumption the court is more willing to grant a sequence of small change requests. As to costs, small step requests
mean that the law is less likely to settle on an immediate level of protection –
the incremental advocate is more likely to end up with nothing. The intense
advocate willingly trades off a lower chance for immediate protection for a
greater chance of robust protection. The less intense advocate is unwilling
to make this same trade-off. Notably, the assumption that the court prefers
slow to rapid change is not sufficient to get all advocates who desire legal
change to prefer an incremental approach. Advocates exhibiting less extreme
preferences do not. That is to say, we find conditions that separate advocate
types into two groups: those that prefer incrementalism and those that don’t.
Both types of advocacy strategies are possible when the court is more willing
to grant a series of small step requests to a single large step request.

Notably, we do not assume learning over time. Advocates plausibly
might prefer small steps so that the public can become comfortable with
new legal doctrine: to see that the legal change doesn’t carry negative con-
sequences. We do not deny this effect. One goal here is to set this aside and
ask whether this learning story is necessary – it turns out not to be.

After establishing the main result, an extension considers a three-tiered
structure, consisting of a Supreme Court, an appellate court, and the cause
lawyer seeking to shape the law in the appellate court. The Supreme Court
sets forth "principles." The appellate court implements these principles by
ruling on the cases brought by the cause lawyer. We model "principles"
as a cap on how far the advocate might potentially move the law in the
appellate court. As an example, a doctrinal principle might say that the
Constitution does not require robust protection for a target group, while
saying nothing about intermediate protection. Whether the law provides
intermediate protection, the Supreme Court leaves to development in the
appellate court.

We assume that, perhaps because of reversal fears, the appellate court
will not grant a request to move the law beyond the principle set forth by the
Supreme Court. The appellate court won’t declare "constitutional" activ-
ities that the Supreme Court has said are unconstitutional. The appellate
court might however declare unconstitutional an activity upon which the
Supreme Court has not spoken.
The Supreme Court’s decision is non-trivial because it is initially uncertain where it wants the law to end up. As the Supreme Court issues a less and less constraining principle, it increases the chance that its ultimate preferred position (revealed after the appellate court has resolved the cases) will be among the set of possibilities. On one hand, with constraining doctrine, the Supreme Court’s worry is that it will accidentally eliminate from consideration in the appellate court what turns out to be its preferred resolution of the law ex post. On the other hand, unconstrained doctrine increases the chance that the appellate court will inadvertently move beyond the Supreme Court preferred resolution, perhaps significantly so.\(^1\) Thus, the choice of doctrine presents a tradeoff.

The extension finds that, with convex preferences, the Supreme Court is willing to issue unconstrained doctrine over a greater range of parameter values when the advocate harbors less intense preferences. The convexity of the preferences means that the Supreme Court prefers, in expectation, moderate legal change to either no legal change or lots of legal change. Due to their preferred advocacy style, less intense advocates present a greater chance of generating moderate legal change. Intense advocates – even though they move incrementally – present a much greater chance of either a great deal of legal change or none at all. Fearing the law ending up at the extremes, the Supreme Court more often constrained the doctrine when facing an intense advocate in the lower courts. Ironically, we predict that the Court issues unconstrained to the advocate who will then ask for rapid change in a single period.

This work relates to a number of literatures. The first involve descriptive accounts, case studies and empirical studies of the litigation strategies of cause lawyers (O’Connor 1980; Epstein & O’Connor 1982; Epstein & Kobylka 1992; Tushnet 1994; Sarat and Scheingold 2006). These studies document reasons cause lawyers give for selecting this case or that case at

\(^1\)Of course, the Supreme Court might use reversal to correct appellate court overshooting. The Supreme Court could, for instance, issue a broad standard and reverse any applications of the standard it doesn’t like. Such a strategy, however, taxes judicial resources. The Supreme Court, in this model, constrains with doctrine.
this or that point of time. They also assess the strategies cause lawyers use to influence doctrine, be it amicus briefs or direct litigation. This paper, to our knowledge, is the first to (1) formally investigate the strategy cause lawyers might pursue and (2) establish conditions when cause lawyers will go "big" and when they will proceed cautiously.

The second related literature asks two normative questions: First, How fast should courts move the law? As to this question, Sunstein (1999) advocates slow judicial changes in law; Baker & Mezzetti (2012) suggests that an infinite-lived court interested in the efficient use of its own resources will always rely on precedent, meaning cases close to ones previously decided won’t merit close attention. Fox & Vanberg (2013) demonstrate that a court seeking to learn might issue a broad decision to induce other institutional actors to bring more informative cases in the next period. Our paper takes a different approach to the issue of legal change: it asks when the court will see cases that allow it to move at a particular speed, assuming that is what it wishes to do.

The second questions is: What impact do repeat litigants have on the path of law?. Galanter (1974) advances reasons repeat litigants might do well in litigation. He does not consider our issue: the tradeoffs a repeat litigant faces when deciding between asking the court for small changes and big changes in law. Sterns (1995) studies how advocates might manipulate the order of cases that appear on the court’s docket. Sterns’ research is concerned with the agenda setting power of the advocate, given the prospect of doctrinal cycling in the courts. Our advocate also sets the court’s agenda. The focus, however, is on how intensity of the advocate’s preferences translates into case selection, setting aside the problem of cycling. Finally, Levmore (2010) considers how incremental change might reduce interest group opposition. By taking small steps, the advocate ensures only a subset of potential opponents lodge a counter. Yet once the step has been completed, that subset has little incentive to continue to object. In this way, proposals for incremental legal change can facilitate a divide and conquer strategy. We do not consider responses from other groups, but rather focus on the relationship between the advocate and the court system, given the precedential
effect of judicial rulings.

Finally, there is the negotiation literature. Some scholars in this field assert that negotiators will take extreme positions at first (Goodpaster 1996, p. 342; Riskin et. al. 2009, p. 190). Such positions anchor the discussion, pushing the settlement in the direction the negotiator prefers. In our model, the more intense advocate takes a less extreme position regarding each case he brings. He does so because it provides the best chance of achieving radical legal change. Unlike in the negotiation literature, the initial position of the advocate here does not signal any information to the court.

The paper unfolds as follows. Section 2 contains our motivating example, the path the NAACP took to ending Plessy v. Ferguson’s doctrine of "separate, but equal." Section 3 develops a numerical example that captures the tradeoffs the NAACP’s lawyers faced. Section 3 presents the general model. It derives conditions under which incrementalism is the best advocacy style. Section 4 adds the Supreme Court to the mix. It derives – in a three state example – the optimal principles for the Supreme Court, given the expected actions of the advocate. Section 5 concludes. All proofs can be found in the appendix.

2 Motivating Legal Example

In Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court found constitutional a Louisiana statute requiring railway companies to provide separate, but equal accommodations for white and African-American passengers. Although technically about railroad services, the Plessy Court rooted its decision by reference to the power of states to establish separate schools for white and African-American children. Some fifty years later in Brown v. Board of Education, 347 U.S. 483 (1954), the Supreme Court overruled Plessy, concluding "in the field of public education the doctrine of 'sepa-

\(^2\)In a meta-analysis study, Orr and Guthrie (2006) document that "[a]cross studies in our sample, we find a correlation of .497 between the initial anchor and the outcome of the negotiation . . . our finding is striking because it is unusually large." (p. 621).

\(^3\)163 U.S. 537 (1896).

\(^4\)This motivating legal example discussion relies predominately on Tushnet (1994).
rate but equal’ has no place. Separate educational facilities are inherently unequal.” *Id.* at 495. As explored in Tushnet (1994), the litigation strategy of the NAACP influenced the path from *Plessy* to *Brown*. A detailed examination of this litigation strategy motivates the formal work here.

The litigation arm of the NAACP is known as the legal defense fund (LDF). Through his work with LDF, Thurgood Marshall provided the blueprint for what it means to be a cause lawyer. In line with our model of cause lawyers, Marshall didn’t just represent individual clients. Marshall sought cases that "would generate substantial precedent that could benefit African Americans throughout the country." (Tushnet 1994, p. 46).

The LDF’s path to overruling "separate but equal" started with cases to equalize teacher salaries. In a teacher salary case, the LDF put forth evidence that African American teachers in a segregated public school system were paid substantially less than similarly situated white colleagues. LDF found these cases attractive. Unlike showing that separate facilities were, in practice, unequal, teacher salary cases were relatively easy to litigate. All the lawyers needed to demonstrate was that equally qualified African American teacher were paid less than white teachers. Further, the cases "did not challenge, and indeed could be seen as attempting to enforce, the separate but equal doctrine" (Tushnet 1994, p. 21). A teacher salary case maps onto a request for a small change the doctrine in the following model. Such cases did not chip away very much at the separate but equal precedent established in *Plessy*.

Next in line came cases where the state had established a white-only professional school and no African-American-only counterpart. Instead, to meet the then-existing constitutional requirement of separate, but equal, the state provided scholarship funds for the African-American to attend a segregated school in neighboring states. In *Missouri ex re. Gaines v. Canada*, 305 U.S. 337 (1938), the Supreme Court addressed this sort of challenge with respect to the University of Missouri law school.

The *Gaines* Court held that

"By the operation of the laws of Missouri, a privilege has
been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the State; the Negro resident having the same qualifications is refused it there, and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege" Id. at 350.

Notably, Gaines did not address whether separate could ever be equal in professional school education. In other words, Gaines did not rule out that the state could meet its constitution obligation by establishing a professional school for African Americans only. To rid society of segregation, the next challenge for the LDF was to get the Supreme Court to accept that all separate education facilities – no matter how well funded – failed to satisfy the demands of the Fourteenth Amendment. In terms of strategy, the LDF had a few options. They could have attacked segregation in primary and secondary schools in one fell swoop. Or they could claim that segregated professional schools failed to pass constitutional muster; wait until that precedent was on the books before challenging segregation in primary and secondary education. Again, the LDF took the small step approach.

The plaintiff in the next case, Herman Sweatt, filed an application for admission to the University of Texas Law School, which was denied. During the litigation, Texas established both a temporary and permanent law school for African Americans (See Sweatt v. Painter, 339 U.S. 629, 633 (1950)). Marshall couched his argument to make the existence of these separate schools irrelevant. He argued that separate law schools could never be equal. (Tushnet p. 133). The argument rested on intangible aspects of legal education at the University of Texas – intangible aspects unlikely to be duplicated in the newly created segregated law school. According to the Supreme Court, these aspects included "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." (Sweatt, 339 U.S. at 634).

That said, Marshall’s argument in Sweatt provided the Supreme Court a way out. The justices could distinguish primary and secondary schools
from legal education by holding that the intangible aspects which rendered separate necessarily unequal in legal education did not apply more broadly. And, in that respect, the Supreme Court could limit the reach of any decision about the constitutionality of segregation.

Ruling in *Sweatt*, the Court found that segregated legal education violated the Fourteenth Amendment (339 U.S. at 635). Although Marshall provided the Court options to limit its holding, most of the justices nonetheless realized that the implications for the *Plessy* doctrine (Tushnet 1994 p. 141-142). And four years later, in *Brown*, the Court overruled *Plessy*.

Although not entirely linear, LDF’s strategy for eradicating the separate but equal doctrine consisted of a series of small steps: first equalization of teacher salaries; second, challenges to the constitutionality of professional schools where the state failed to offer a segregated alternative; third, challenges to the constitutionality of separated legal education where the state offered an African-American only alternative; fourth, challenges to the constitutionality of separate schools in primary and secondary education.

### 2.1 Numerical Example

In what follows, a numerical example and then a general model tries to capture the essence of the choices faced by the lawyers at the LDF. To fix ideas, suppose there exists potentially three levels of legal protection for a minority group: (1) none; (2) moderate; and (3) robust. The status quo is no legal protection. One can think of the status quo as the legal doctrine at the time of *Plessy*; moderate protection as the integration of professional schools and robust protection as the integration of all schools. The LDF cause lawyer prefers robust protection but will take, as a second best, moderate legal protection. The worst outcome is the status quo, no protection.

To help the analysis, we might attach some numbers to the cause lawyer’s preferences. Suppose she values robust legal protection at 100; moderate legal protection at 60; and no protection at 0.

Turn now to the court. The cause lawyer has a hunch about how the
court will rule, but faces some uncertainty. At the time of the *Sweatt* decision, the LDF did not know whether the Court would eventually order the integration of all public schools. The cause lawyer does understand, however, that the court prefers slow to rapid change. And so, a request for a large change in the law is less likely to be granted than a request for a small change in the law. Attaching some probability numbers to capture the court’s behavior, suppose the cause lawyer believes the court will grant a "one-step" request with probability 1/2 and a "two-step" request with probability 1/8.

Of course, the numbers for the probabilities and payoffs are arbitrary, for illustration only. The general model below shows that the example isn’t a special case. The results hold under a wide range of assumptions about probabilities and payoffs.

In terms of strategy, the cause lawyer can either "Go For Broke" or be incrementalist. Under the incrementalist strategy, the cause lawyer first asks the court to move from no legal protection to moderate legal protection. If successful, he next asks the court to move from moderate protection to robust protection. In other words, the cause lawyer follows the path charted by Thurgood Marshall and the LDF.

With "Go For Broke", the cause lawyer first ask the court to move from no legal protection to robust legal protection. If he is victorious, he gets his most preferred outcome. If he loses, the cause lawyer falls back and makes the lesser request for moderate legal protection in the next round. That’s the best he can do, given that precedent has ruled out robust protection. In other words, going for broke and asking for robust protection from the start can create negative precedent: it might lead the court to take robust protection off the table. Such fears were prevalent in the discussions surrounding the *Sweatt* litigation. Some suggested that Marshall should make plain that "*Sweatt* does not have anything to do with general education, or with elementary education or education in high schools." (Tushnet p. 138). The reason: "if [Marshall tried to argue the entire question now and lose, " the NAACP would suffer a ’serious set-back, which might take a generation or more to overcome.’" Id.
(1) Go For Broke

Under the "Go For Broke" strategy, the law settles at robust protection with probability 1/8. What about moderate protection? The probability the court rejects a request to move the law to robust protection is 7/8. But that ruling doesn’t settle the matter. The cause lawyer can still ask for moderate protection in the next period, a request that succeeds with probability 1/2. The probability of ending up with moderate protection is thus 7/16.

Combining the probabilities, the cause lawyer’s payoff from Going for Broke is

\[ \frac{1}{8} \times 100 + \frac{7}{16} \times 60 = 38.75 \]

(2) Incrementalism

Under incrementalism, the law settles at robust protection with probability 1/4 (the move from the status quo to the moderate protection succeeds with probability 1/2; likewise, the move from moderate to robust succeeds with probability 1/2). The law settles at moderate protection with probability 1/4 as well (the move from the status quo to the moderate protection succeeds with probability 1/2; the move from moderate to robust fails with probability 1/2). Combining the probabilities, the cause lawyer’s payoff from incrementalism is

\[ \frac{1}{4} \times 100 + \frac{1}{4} \times 60 = 40 \]

Comparing the two payoffs, it is immediate that incrementalism is the better approach.

Now tweak the payoffs a little and see what happens. Suppose that the cause lawyer values moderate protection at 40 and robust protection at 50. Now, both the advocate’s benefit from moderate protection and the incremental gain from moving from moderate to robust protection is smaller – she cares relatively more about moderate relative to robust protections.

With these new preferences, the cause lawyer’s payoff from "going for broke" is 23.75. The cause lawyer’s payoff to incrementalism is 22.5. Thus, such a litigant prefers to Go For Broke to incrementalism.
So, the numerical example generates a prediction: more passionate cause lawyers will tend to pursue incremental changes in the law. Why is this the case? The intense advocate cares deeply about achieving robust protection. The incrementalist strategy provides the best chance of the law settling at this state. Yet this strategy carries a price tag. Under incrementalism, the probability of ending up with the no protection rather than moderate protection is higher. This happens because the incrementalist might ask for a single step and lose. On the other hand, the Go for Broke litigant ends up with no protection only if (1) he asks for two steps and loses and then (2) asks for one step and loses. The latter is always a lower probability event.

In short, the intense advocate is willing to give up a lower chance at moderate protection for a greater chance at robust protection. The less passionate advocate is not.

3 The General Advocacy Model

Having solved the simple numerical example, now consider the more general case. At the outset, the Supreme Court sets forth a principle that defines a number of potential states of legal protection \( s \in \{0, 1, 2, 3, \ldots, n\} \). The advocate wants to move the status quo the maximum number of states: the higher the state, say, the more robust the legal protection. The advocate’s marginal payoff from moving from state \( s \) to state \( s+1 \) is \( \lambda^s \), where \( \lambda \in (0, \bar{\lambda}] \). Note that \( \bar{\lambda} \) can be greater than one. We thus allow convex and concave payoffs for the advocate. A more intense advocate has a higher value of \( \lambda \). The advocate’s payoff might flow from the direct effect changes in legal rules have on the primary behavior of others in society. Alternatively, the advocate’s payoff might come from expressive function of the law, where a court decision to move the law influences and changes the views of others in society.
The advocate’s per period payoff in each state is as follows:

\[ U(0) = 0 \]
\[ U(1) = \lambda \]
\[ U(2) = \lambda + \lambda^2 \]
\[ U(3) = \lambda + \lambda^2 + \lambda^3 \]
\[ \vdots \]
\[ U(s) = \sum_{j=1}^{s} \lambda^j \]

The advocate’s discount factor is \( \delta \). Each period, the advocate makes a request, \( R_t \) where \( t \in \{0, 1, 2, 3, \ldots, n\} \). The request represents the number of states (from the status quo), the advocate asks the decisionmaker to move. \( R_1 \) is a request that the decisionmaker move the status quo one level of protection, one additional state; \( R_t \) is a request that decisionmaker move the status quo \( t \) additional states.

The advocate selects her request to maximize the expected discounted stream of per period payoffs. Each request is a function of number of remaining states – that have not yet been ruled upon – and the current state. So, in general, write a request as \( R_t(x; y) \) where \( x \) is the current state and \( y \) is the remaining states. The optimal strategy is a list of \( R_t^*(x; y) \)'s for every value of \( x \) and \( y \).

Define \( p_t \) as the movement probability of the appellate court, where \( t \) is the number of states the advocate seeks to move from the current state. We make two assumptions about these reduced-form movement probabilities.

First, to capture the idea that the court is more likely to reject "bigger" requests, assume that \( p_t > p_{t+1} \) for all \( t \). The movement probability does not depend on the current state. The probability the court grants, say, a five state more in the law or request is the same whether currently the status quo sits at state 1 or state 7.

Second, we assume that a sequence of one steps requests yields a higher probability of eventually moving the law \( t \) states than a request to move \( t \)
states in one swoop. Formally, \( p_t^1 > p_t \).

Given the critical nature of these two assumptions to the analysis, prudence dictates we pause here and ask what might motivate them. Consider first the assumption that the court is more likely to reject bigger requests. The assumption can be justified if the advocate does not know the "type" of judge hearing his case. Imagine judges vary in their receptiveness to legal change. Some judges are extreme. They agree with the advocate that the law should move to the nth state. More important, extreme judges are willing to move as fast as possible: They will grant any request the advocate makes, even one for an n-step move. Judges of this type make up \( p_n \) percent of the judicial population. Other judges agree that the law should move to nth state, but are unwilling to grant an n-step request because it moves the law too quickly. These judges – the less extreme ones – are more respectful of precedent and will only grant advocate requests to move the law n-1 states or less.

On the one hand, an advocate’s request to move n-1 steps will be granted if the court consists of (1) an extreme judge or (2) a slightly less extreme judge. On the other hand, the advocate’s request to move the law n steps will be granted if the court consists of only an extreme judge. Based on having different types of judges in the population, the court will be more likely to reject the "bigger" request. Proceeding backwards, one can think of \( p_t \) as the proportion of judges who will allow the law to move \( t \) or less states at a time. The cause lawyer uses this proportion as the basis for his strategy calculations because he is uncertain as to what type of judge is hearing the case.\(^5\)

Next, consider the assumption that a judge would allow the law to move one step a period over two periods, but not be willing to allow two steps within a single period. Why might this be so? First, individuals could have adjustment costs to changes in the law. If the adjustment cost is strictly convex in the number of states that the law moves in a period, each incremental step is increasingly costly for individuals. Anticipating this cost

---

\(^5\) We might think of the court as a three judge panel. Even if the advocate knows the preferences of each judge, he doesn’t know how the deliberations will go.
structure, a socially-minded judge may allow one step a period, but not allow
two or more steps. In other words, by reducing the speed of change in the
law, the judge allows individuals to better cope with changes that disrupt
their activities. indeed, it may be efficient to have the law move slowly over
time to say step \( n \), but not to jump to state \( n \) immediately relative to the
status quo.

Second, the assumption can be justified using insights from behavioral
economics. In particular, take the work on prospect theory by Khaneman
and Tversky (1979). In that theory, an individual takes the status quo
as a reference point. He then compares the gains and losses from taking
a decision vis à vis this reference point. Further, prospect theory predicts
that individuals will be loss averse, they will weight losses more heavily than
gains. A judge with preferences that satisfy prospect theory will care about
the distance between the current state of the law (his reference point) and
the state he moves the law to. Loss aversion implies that far moves – which
turn out to be mistakes – result in large losses to utility. Fear of such losses
might push the judge to forgo making large changes to the law relative to
the current state. By contrast, the same judge may be willing to take small,
incremental steps. Doing so changes the judge’s reference point after each
successful step. Then, even if mistaken, a small move to the final state will
not change the law much relative to reference point, as a result, not induce
significant losses in utility.

This interpretation fits well with our assumption of how judges make
decisions in our model. Indeed, even if judges follow the traditional rational
actor model, many of them are elected. If voters preferences follow prospect
theory, then it may be rational for judges to only allow small movements in
the law at a time. That way, the judge avoids upsetting voters who may be
quite sensitive to the potential losses from mistakes in the development of
the law.\(^6\)

\(^6\)Some social scientists have also identified the subtle power of a series of small requests.
Labeled the “foot in the door” technique, the idea is to get customer to agree with a rather
trivial request first, perhaps a sale on an item with a low profit margin. Once they do so,
the customer feels that agreeing to, say, purchase something more isn’t that big of a deal.
For details and examples, see Cialdini (2007 pp. 69-75).
In this model, any rejection by the court reduces the number of available states; there is a strong deference to precedent. At the start, for instance, suppose it is optimal for the advocate to request a move to state seven in one swoop (i.e., \( R^*_t(0,n) = R_7 \)). Suppose the decisionmaker rejects this request. In the next period, the number of available state is six; the new environment is \( x = 0, y = 6 \). A respect for precedent means that the decisionmaker will summarily reject any request to move past state 6. The problem ends when the advocate runs out of room: she has no more available states – i.e., levels of legal protection that have not been ruled upon. For notational convenience, define a incrementalist advocacy style as a strategy where \( R^*_t(x,y) = R_1 \) for all \( x \) and \( y \).

### 3.1 The Two State Example

When \( n = 2 \), an incrementalist strategy is defined as \( R^*_t(0,2) = R_1 \) and \( R^*_t(1,2) = R_1 \). The alternative "Go for Broke" strategy is to request a two state move first and, if that fails, asking for a one state move \( (R^*_t(0,2) = R_2 \) and \( R^*_t(0,1) = R_1) \). The payoff to incrementalism is

\[
 p_1 \left[ \lambda + \frac{\delta p_1}{1 - \delta} (\lambda + \lambda^2) + \frac{\delta (1 - p_1) \lambda}{1 - \delta} \right].
\]

So, with probability \( p_1 \), the advocate gets an immediate payoff of \( \lambda \). The next period, the advocate attempts to move the state to 2. If he succeeds, which again occurs with probability \( p_1 \), he gets a payoff of \( \lambda + \lambda^2 \) forever. If he fails, which occurs with probability \( 1 - p_1 \), he gets a payoff of \( \lambda \) from that point on.

This reduces to

\[
 \frac{p_1 \lambda (1 + \delta p_1 \lambda)}{1 - \delta}
\]

The payoff to going for broke is

\[
 \frac{p_2 (\lambda + \lambda^2)}{1 - \delta} + \frac{(1 - p_2) \delta p_1 \lambda}{1 - \delta}.
\]

If the advocate succeeds, he gets a payoff of \( \lambda + \lambda^2 \) forever. If he fails, then
he attempts to move to state 1 next period and with probability $p_1$ he will succeed and get that payoff forever.

Incrementalism results in a higher expected payoff if

$$p_1 + p_1^2 \lambda > p_2 (1 + \lambda - \delta p_1) + \delta p_1$$

which occurs if and only if

$$p_2 < \frac{p_1 (1 - \delta) + p_1^2 \lambda}{1 + \lambda - \delta p_1}$$

As $\delta \to 1$, then incrementalism results in the higher expected payoff if

$$p_2 \leq p_2^* \equiv \left( \frac{\lambda}{1 + \lambda - p_1} \right) p_1^2$$

A couple of insights flow from this inequality. First, notice that $p_2^*$ must be strictly less than $p_1^2$ for incrementalism to be optimal, a condition we impose by assumption.\(^7\) If the advocate only cared about reaching state 2, she would select incrementalism whenever $p_1^2 > p_2$. When she cares about reaching state 1 and state 2, the range of values of $p_2$ where incrementalism is the best approach shrinks. Second, $p_2^*$ increases in $\lambda$: the more intense the advocate the greater the range of values where incrementalism is best approach. This result relies on $\delta$ being sufficiently large. Thus, among patient advocates, those with strong preferences for robust legal protections are more likely choose incrementalism. By definition, the more intense advocate places a (relatively) greater value on reaching state 2. And incrementalism provides a better chance of reaching this state.

### 3.2 The N-State Model

Without loss of generality, we restrict attention to uncovering the advocacy-style when the status quo is 0 and the number of available states is some

\(^7\)Notice that if $p_2 > p_1^2$, all advocates – no matter their preferences – prefer to go for broke. To get variety in litigation strategy in this model thus requires the court to prefer gradual change to rapid change.
arbitrary $t$. Suppose for now, in addition, that the advocacy choice for any $t$ reduces to a choice between incrementalism and "Going for Broke" and, if there is a loss, pursuit of incrementalism thereafter. After deriving the conditions where incrementalism is preferred, in the proof of Proposition 1, we will go back and check that those same conditions ensure that incrementalism must also beat all other strategies.

We obtain our results by induction on $t$. The condition for incrementalism with two states remaining is given above. Assume that $p_2 \leq p_3^*$ and consider the choice with three states remaining. If the advocate goes-for-broke and loses with 3 states, she plays incrementalism thereafter (due to the assumption on $p_2$).

After multiplying by $1 - \delta$ and letting $\delta$ go to 1, the expected payoff from going for broke with three states remaining is

$$p_3[\lambda + \lambda^2 + \lambda^3] + (1 - p_3)(p_1\lambda + p_1^2\lambda^2)$$

The expected payoff from incrementalism with 3 states is

$$p_1\lambda + p_1^2\lambda^2 + p_1^3\lambda^3$$

incrementalism dominates if

$$p_3 \leq p_3^* = \frac{p_1^3\lambda^3}{\lambda^3 + (1 - p_1)\lambda + (1 - p_1^2)\lambda^2}$$

Now consider the arbitrary $t$, where $p_{t-1} \leq p_{t-1}^*$. The latter condition ensures that incrementalism is optimal in the event the advocate loses on Going for Broke when $t$ states are available. After multiplying by $1 - \delta$ and letting $\delta$ go to 1, the expected payoff from go-for-broke is

$$p_t \left( \sum_{j=1}^{t} \lambda^j \right) + (1 - p_t) \left( \sum_{j=1}^{t-1} p_1 \lambda^j \right)$$

19
The expected payoff to incrementalism is
\[ \sum_{j=1}^{t} p_j^t \lambda^j \]

Solving, incrementalism dominates whenever
\[ p_t < p_t^* = \frac{p_t^t \lambda^t}{\lambda^t + \sum_{j=1}^{t-1} (1 - p_j^t) \lambda^j} \]

With these thresholds in hand, the first proposition can be formally stated as follows:

**Proposition 1** Suppose that there are \( t \) states available. For sufficiently patient advocates, incrementalism is the optimal advocate strategy if and only if \( p_j \leq p_j^* \) for all \( j \leq t \).

We prove this proposition by an induction argument. First, we assume that for an arbitrary number of states \( n \), incrementalism dominates any other strategy for all states less than or equal to \( n \). Then, we demonstrate that if there are \( n + 1 \) states and incrementalism dominates Go for Broke, then incrementalism dominates choosing any other strategy where the advocate chooses to request less than \( n + 1 \) states.

The next question is the relationship between the advocacy style and the likelihood of incrementalism. Does the result from the two-state example (intense advocates will be more cautious) translate to the more general case? To see the result, take the derivative of the threshold probability \( p_t^* \) with respect to \( \lambda \).

\[ \frac{\partial p_t^*}{\partial \lambda} = \frac{tp_t^t \lambda^{t-1}}{\lambda^t + \sum_{j=1}^{t-1} (1 - p_j^t) \lambda^j} \left( t \lambda^{t-1} + \sum_{j=1}^{t-1} j (1 - p_j^t) \lambda^{j-1} \right) - \frac{p_t^t \lambda^t \left( t \lambda^{t-1} + \sum_{j=1}^{t-1} j (1 - p_j^t) \lambda^{j-1} \right)}{\left( \lambda^t + \sum_{j=1}^{t-1} (1 - p_j^t) \lambda^j \right)^2} \]
Reducing we get

\[ tp_t^{t-1} \left( \sum_{j=1}^{t-1} (1 - p_j^t) \lambda^j \right) - p_t^t \lambda^t \left( \sum_{j=1}^{t-1} j (1 - p_j^t) \lambda^{j-1} \right) \]

\[ \left( \lambda^t + \sum_{j=1}^{t-1} (1 - p_j^t) \lambda^j \right)^2 \]

or

\[ p_t^t \lambda^t \left( \sum_{j=1}^{t-1} (t - j) (1 - p_j^t) \lambda^{j-1} \right) \]

\[ \left( \lambda^t + \sum_{j=1}^{t-1} (1 - p_j^t) \lambda^j \right)^2 \]

The numerator must be positive since \( t > j \) for all values of \( j \).

Thus, we have

**Proposition 2** For sufficiently patient advocates, the more intense an advocate’s preference, the higher \( \lambda \), the larger the set of probabilities where incrementalism is the optimal strategy.

More intense preferences imply a bigger set of movement probabilities (the list of \( p_1, p_2, \ldots, p_n \)) where incrementalism is the optimal advocacy style. The intuition is the same as above. The more intense advocate places a higher (relative) value on reaching each additional state and incrementalism increases the chance of so doing.

Together, Propositions 1 and 2 provides predictions – some intuitive, others not. First, the degree of advocate intensity will translate into different final outcomes, or resting places of the law. The intense advocate generates, in expectation, lots of legal change, but at a slow pace. Second, we would expect to see advocacy groups blame other plaintiffs for bringing cases that push the legal frontier too far at any one time. In light of this fear, advocacy groups will seek to control all the litigation on an issue. In so doing, the group can prevent the courts from seeing cases too soon, thereby creating the risk of unfavorable precedent.
Finally, opponents of the cause lawyer will make slippery slope arguments in court (Volokh 2003). Here the cause lawyer proceeds down the legal "slope" one step at a time. He does so precisely because this practice creates the best opportunity for dramatic legal change. Any opponent will likely understand as much. The model thus predicts that opposing arguments based on slippery slopes will be more prevalent when an advocacy group seeks legal change through the judiciary.8

4 The Setting of Principles

Now suppose the Supreme Court must decide on $n$, the greatest possible state that the advocate can reach. After the principle is set, the advocate plays his optimal strategy. Due to resource constraints, the Supreme Court cannot directly control the appellate court: it cannot reverse every case it doesn’t approve of. Instead, the Supreme Court relies on doctrine to constrain.

The issue addressed is the relationship between the likely advocacy style and the degree of discretion in doctrine. Under what conditions, will the Supreme Court grant a loose principle, when the advocate plays incrementalism or when the advocate plays something else in the appellate court?

To make matters interesting, assume that the Supreme Court does not know his preferred state when setting the principle. The Supreme Court’s loss from the difference between the final state and the optimal state is $(x - \theta)^2$, where $x$ is the final state reached and $\theta$ is the optimal state. Thus, due to the quadratic loss function, large differences in the optimal and realized state are very costly to the court.

8Some anecdotal evidence consistent with this prediction comes from the oral arguments in Brown v. Board of Education. The lawyer representing the state of South Carolina (favoring segregation) made the following argument: "If [Thurgood] Marshall’s argument prevailed, [Davis] said, I am unable yo see why a state would have any further right to segregate its pupils in the grounds of sex . . . age or . . . mental capacity." (Tushnet 1994, p. 178).
4.1 A Three State Example

We restrict attention to a three-state example. With three states, there are only two strategies that an advocate can have - incrementalism and Go-For-Broke - and this will make the problem that the Supreme Court faces clearer. The Supreme Court’s choice reduces to selecting $n = 0$, 1, or 2. To link back to the numerical example, the Supreme Court draws a line with its doctrine. That line might be no protection ($n = 0$), modest protection ($n = 1$), or robust protection ($n = 2$). As noted, the Supreme Court doesn’t know which kind of protection it prefers ex ante (otherwise it would just set the law there at the outset). Let $q_i$ be the Supreme Court’s ex-ante belief that state $i$ is optimal and denote $r_0$, $r_1$, $r_2$, as the probability the final state is 0, 1, or 2, given the advocacy strategy of the cause lawyer.

In this example, the Supreme Court’s expected loss is

\[
L = q_0 \left[ r_1(1 - 0)^2 + r_2(2 - 0)^2 \right] + q_1 \left[ r_0(0 - 1)^2 + r_2(2 - 1)^2 \right] + q_2 \left[ r_0(0 - 2)^2 + r_1(1 - 2)^2 \right].
\]

The first line is the expected loss when the Supreme court thinks the optimal state is state 0 (which occurs with probability $q_0$) and the end state that eventually materializes is either state 1 or state 2. To say a little more, the realized state is state 1 with probability $r_1$. The realized state is state 2 with probability $r_2$. If the realized state is state 2 and the preferred state turns out to be state 0, then the Supreme Court suffers a loss of $(2 - 0)^2$. Similarly, if the realized state is state 1 and the preferred state turns out to be state 0, the Supreme Court suffers a loss $(1 - 0)^2$. The Supreme Court’s preferences are convex. The first line computes the expected loss over all realizations of the eventual resting place of the law, given the preferred state turns out to be state 0. The second and third lines are the corresponding losses when the preferred state turns out to be state 1 and 2, respectively.

---

9Given all the possible doctrinal choices available for the Supreme Court with $n$ possible states available, it is very difficult to solve for the optimal setting of principles for the general case.
The loss function reduces to

\[ L = q_o(r_1 + 4r_2) + q_1(r_0 + r_2) + q_2(4r_0 + r_1) \]  \hspace{1cm} (1)

The choice of principles \( (n) \) induces a distribution on the probability each state is reached (the \( r' \)'s). This distribution, in turn, determines the Supreme Court’s expected loss. If, for example, the Court takes robust protection off the table and draws the line at only modest protection \( (n = 1) \), the induced distribution is

\[
\begin{align*}
  r_0 &= 1 - p_1 \\
  r_1 &= p_1 \\
  r_2 &= 0
\end{align*}
\]

Given the doctrine eliminates prospect of robust protection, the advocate’s only option is to ask the lower court for a one step move – a change in the law from no protection to moderate protection. With probability \( 1 - p_1 = r_0 \), the advocate loses on this request. With probability \( p_1 = r_1 \), the advocate wins and moderate protection – state 1 – is the final state. Given the doctrinal constraint, the advocate can never reach state 2 \( (r_2 = 0) \). Plugging these values in for each \( r \) of equation (1), the Supreme Court’s loss from setting the doctrinal limit at moderate protection is

\[
L(1) = q_o p_1 + q_1 (1 - p_1) + q_2 [4(1 - p_1) + p_1]
\]

If instead the Supreme Court sets the doctrinal limit at robust protection \( (n = 2) \) – it doesn’t rule out any potential state – its loss depends on whether the advocate plays incrementalism or Go-For-Broke. If the advocate plays incrementalism, the induced distribution over outcomes is

\[
\begin{align*}
  r_0^{INC} &= 1 - p_1 \\
  r_1^{INC} &= p_1(1 - p_1) \\
  r_2^{INC} &= p_1^2
\end{align*}
\]
If the advocate wins its first case, but loses its second, then the final state is 1. This course of events occurs with probability $r_{1}^{INC} = p_{1}(1 - p_{1})$. If the advocate wins both its cases then the final state is state 2. This course of events occurs with probability $r_{2}^{INC} = p_{2}^{2}$. Using equation (1), we can write the Court’s expected loss as

$$L^{INC}(2) = q_{0}[p_{1}(1 - p_{1}) + 4p_{1}^{2}] + q_{1}[(1 - p_{1}) + p_{1}^{2}] + q_{2}[4(1 - p_{1}) + p_{1}(1 - p_{1})]$$

As a point of comparison, next suppose that the advocate plays go-for-broke. This advocacy style induces the following distribution over the end states.

$$r_{0}^{GFB} = (1 - p_{1})(1 - p_{2})$$
$$r_{1}^{GFB} = (1 - p_{2})p_{1}$$
$$r_{2}^{GFB} = p_{2}$$

Given this style, the advocate’s first case attempts to move the law two steps. If she wins then the final state is $r_{2}^{GFB}$. If the go-for-broke advocate loses going for two in the initial round, then she asks for one step as a fallback in the next round. If successful, she must stop and the final state is 1. This sequence of events transpires with probability $r_{1}^{GFB} = (1 - p_{2})p_{1}$. Now, like we did above, plug in the probabilities that each state realized into the Court’s loss function. Doing so yields.

$$L^{GFB}(2) = q_{0}[p_{1}(1 - p_{2}) + 4p_{2}] + q_{1}[(1 - p_{2})(1 - p_{1}) + p_{2}] + q_{2}[4(1 - p_{1})(1 - p_{2}) + (1 - p_{2})p_{1}]$$

To see the different effects to two advocacy strategies have on the Supreme Court’s loss function, it is useful to compare the induced distributions when the advocate uses incrementalism versus the Go-For-Broke strategy, assuming that robust protection is possible. Go-for-broke results in a smaller probability of extreme outcomes than incrementalism. Under Go-For-Broke, the probability of the final state is state 0 is $r_{0}^{GFB} = (1 - p_{1})(1 - p_{2})$. Under incrementalism, the probability the final state is state 0 is $r_{2}^{INC} = 1 - p_{1}$, which is strictly larger. Under Go-For-Broke, the probability that the final
state is state 2 is \(r_2^{GFB} = p_2\). Under incrementalism, that probability is \(r_2^{INC} = p_1^2\), which is also strictly larger by assumption.

On the other hand, incrementalism brings a lower chance of the end state being state 2 \((r_1^{GFB} = (1 - p_2)p_1 > p_1(1 - p_1))\). Due to the Supreme Court’s convex loss function, extreme differences between the optimal state and the final states impose a large utility loss (that is, the Court suffers a lot when it is optimal to have state 0 and the final state is 2 and the reverse).

Because (1) incrementalism is more apt to generate extreme outcomes; (2) intense advocates pursue incrementalism, and (3) the Supreme Court doesn’t like extreme outcomes given that the optimal state may be the other extreme, the Supreme Court is more hesitant to give the intense advocate the freedom to pursue robust protection.

In terms of the math, this result can be seen algebraically by comparing \(L(1)\) with \(L^{INC}(2)\) and \(L^{GFB}(2)\).

First compare the equations for \(L^{INC}(2)\) and \(L(1)\). The Court’s loss from allowing for the possibility of robust protection when the advocate uses a incrementalism strategy is smaller than when it takes robust protection off the table if

\[
3q_o + q_1 \equiv q_2^{INC} < q_2
\]

Next, compare equations for \(L^{GFB}(2)\) and \(L(1)\). The Court’s loss from allowing for the possibility of robust protection when the advocate uses a Go-For-Broke strategy is smaller than when it takes robust protection off the table if

\[
\frac{q_0(4 - p_1) + q_1p_1}{4 - 3p_1} \equiv q_2^{GFB} < q_2
\]

So, for the court to allow the possibility for robust protection, the probability \(q_2\) must be sufficiently large whether the advocate plays incrementalism or Go-For-Broke. In other words, the court’s ex-ante belief that state 2 is optimal must be sufficiently strong or else the court prefers to eliminate robust protection from the set of possibilities in the lower court. Simple manipulation demonstrates that \(q_2^{GFB} < q_2^{INC}\). The cutoff on the ex-ante belief that the preferred state is state 2 is smaller if the advocate uses the Go For Broke strategy instead of the incrementalism strategy. The reason:
The probability of both states 0 and 2 are lower when the advocate uses the Go For Broke strategy and thus the possibility of a bad mismatch between the final state and the optimal state is likewise smaller. Furthermore, since from Proposition 2 we know that more intense advocates are more likely to use the incrementalism strategy, the Supreme Court will make the possibility of robust protection less likely if it thinks that the advocate has intense preferences. Thus, we have

**Proposition 3** *In a three state model, the Supreme Court is more likely to allow for the possibility of robust protection if the advocate is more likely to use the Go-For-Broke strategy instead of an incrementalism strategy. As a consequence, if the Supreme Court thinks that the advocate has intense preferences, then it is less likely to allow for the possibility of robust protection.*

Having established this result, we highlight now some of the assumptions which drive it. First, the example assumes that the Court knows which advocates harbor intense preferences and which ones harbor less intense preferences. The assumption that the Supreme Court knows for sure the preferences of the advocate is not required. The Supreme Court might simply have some beliefs or a probability distribution over the advocate possible preferences. It would then select the optimal doctrine based on these beliefs. What does not happen in our setting is any judicial learning. For example, the Supreme Court might learn something about the advocate’s preferences from the sequence of cases she brings. Further, anticipating the chance for learning might alter the kind of doctrine the Supreme Court promulgates in the first place. Of course, the advocate may try to manipulate the court’s beliefs by its choice of the initial cases that it brings. Thus, this could generate a very complicated dynamic signaling game. Second, it is important to notice that the Supreme Court does not restrict doctrine more readily given intense advocacy groups solely because it believes the intense group is more likely to achieve a great deal of legal change. Instead, the Supreme Court fears both much legal change and no legal change. Both outcomes are more possible with an intense advocate. Either extreme is costly to a Supreme Court if the optimal state is the opposite extreme.
5 Conclusion

This paper derives the relationship between advocate preferences, advocacy style, and the setting of principles. The results help rationalize why cause lawyers, in particular, build toward large victories by bringing a series of smaller cases. It can also explain why those who disfavor the cause make plain the slippery slope argument. That is, after all, what the intense advocate does. And opponents of the cause will want to call them out on it. But, as we have shown, arguments requesting a series of small changes are not without costs: they decrease the chance of reaching the lesser immediate states of protection. If the advocate preferences for extreme state are not that strong, then he might very well Go-For-Broke, knowing that, if he loses, the fall-back, more moderate position is still obtainable.

Many areas of law experience certain litigants bringing cases repeatedly. So, a natural question is what areas of law are most prone to the kind of advocacy modeled here. Our results cover areas where the assumptions of the model are most likely to hold: (1) the advocate is patient; (2) the advocate places greater (perhaps increasingly greater) weight on more radical legal change; and (3) the court is reluctant to make significant legal changes in any single decision. Cases involving the typical cause lawyer, like the ones working for LDF, meet these requirements.

The paper leaves many questions open. We mention a few in closing. We have assumed that the advocates have perfect information about the benefits of moving the law beyond the status quo and the probabilities that it will be able to move the law. Clearly, these are stark assumptions. It would be very interesting to investigate when, for example, the advocates learn the probabilities that the court will allow the law to move forward. The advocate would then update its prior about the court’s preference for changes in the law. This could lead to an interesting Bayesian decision problem for the advocate. Furthermore, it might be that the court that learns: perhaps each decision teaches the court something about the benefits to society of changes to the law. And that learning in the courts makes it more amenable to further changes in the law.
The model assumes a single advocate in the process. There are many situations where there are two sets of advocates which have diametrically opposed preference regarding the state of the law. Furthermore, advocates may take their arguments to the legislature to advance the law. We are currently working on a model where there are two advocates with the possibility of advancing the law in their preferred directions via either the legislature and or the courts. Another interesting twist occurs when outside funding is needed to keep the cause alive. It is not clear whether outside funders would prefer small steps or large steps. A large step victory might attract lots of funding, given the publicity. Then again, large steps are more risky. Perhaps funders will want to stand behind the cause lawyer who is more cautious, recognizing that small steps increase the odds of a large victory.

Finally, in the setting of principles, what if, say, there are competing cause lawyers, one on each side of the issue? Will the Supreme Court render a broader or narrower initial principle? What if the appellate court had its own preferences and the advocate could learn them by bringing a series of cases? How might the advocate react? These questions we leave for future research.

6 Appendix

Proof of Proposition 1

First we prove that if \( p_j \leq p_j^* \) for all \( j \leq t \), then incrementalism is the optimal strategy. Suppose that there are two states available. Then, by definition of \( p_2 < p_2^* \), incrementalism is the optimal strategy. If \( p_3 < p_3^* \), then incrementalism dominates Going for Broke. Now, there are two other strategies available. One is to take one step, with 3 states remaining. But, if successful, there will be two states available, and since \( p_2 < p_2^* \), then incrementalism is optimal. The other strategy, is to take two steps, and if successful take the one remaining step, and if not take one step the following
period. The payoff from this strategy is
\[ p_2 \left[ \frac{\lambda + \lambda^2 + \delta p_1 \lambda^3}{1 - \delta} \right] + (1 - p_2) \frac{\lambda}{1 - \delta}. \]

The payoff from incrementalism is
\[ \frac{\lambda p_1 + \delta \lambda^2 p_2^2 + \delta^2 p_2^3 \lambda^3}{1 - \delta}. \]

Letting \( \delta \to 1 \), incrementalism is an optimal strategy if
\[ p_2 < p_2^c = \frac{\lambda p_1^2 (1 + \lambda p_1)}{1 + \lambda - p_1 (1 - \lambda^2)}. \]

Straightforward algebra shows that \( p_2^c > p_2^* \), thus if \( p_2 < p_2^* \) and \( p_3 < p_3^* \), then incrementalism is the optimal strategy if there are 3 states remaining.

Now, take the case where there are an arbitrary number of \( t \) states remaining, assuming that incrementalism is optimal if there are strictly less than \( t \) states remaining. If \( p_t < p_t^* \), then incrementalism generates a higher payoff than Go for Broke. The other set of strategies that an advocate could choose are take less than \( t \) steps. By hypothesis, if the advocate is successful, then he will use an incrementalist strategy from then on. Define \( W(0, y) \) as the payoff from incrementalism with \( y \) states remaining. Using this notation, the payoff of moving \( k \) steps is
\[ p_k \left[ \sum_{j=1}^{k} \frac{\lambda^j}{1 - \delta} + \delta \lambda^k W(0, t - k) \right] + (1 - p_k) \delta W(0, k - 1) \]
incrementalism yields a higher expected payoff if
\[ W(0, t) - \delta W(0, k - 1) \geq p_k \left[ \sum_{j=1}^{k} \frac{\lambda^j}{1 - \delta} - \delta W(0, k - 1) + \delta \lambda^k W(0, t - k) \right] \]
As $\delta \to 1$, this simplifies to

$$\sum_{j=k}^{t} \lambda^j p_1^j \geq p^c_k$$

$p^c_k > p^*_k$ if and only if

$$\sum_{j=k}^{t} \lambda^j p_1^j \left[ \lambda^k + \sum_{j=1}^{k-1} (1 - p_1^j) \lambda^j \right] > p_1^k \lambda^k \left[ \sum_{j=1}^{k} \lambda^j - \sum_{j=1}^{k-1} \lambda^j p_1^j + \sum_{j=1}^{t-k} \lambda^{k+j} p_1^j \right]$$

iff

$$\sum_{j=1}^{k} \lambda^j \left[ \sum_{j=k+1}^{t} \lambda^j p_1^j \right] - \sum_{j=k+1}^{t} \lambda^j p_1^j \left[ \sum_{j=1}^{k} \lambda^j p_1^j \right] > p_1^k \lambda^k \sum_{j=1}^{t-k} \lambda^{k+j} p_1^j$$

iff

$$\left[ \sum_{j=k+1}^{t} \lambda^j p_1^j \right] \left[ \lambda^k + \sum_{j=1}^{k-1} \lambda^j (1 - p_1^j) \right] > \lambda^k \sum_{j=k+1}^{t} \lambda^j p_1^j$$

which always holds. Thus, since $p_k < p^*_k$, then $p_k < p^c_k$. Since this holds for all $k$, then incrementalism is the optimal strategy when there are $t$ states available.

**Proof of Proposition 2**

Straightforward from the computation of the derivative.

**References**


Case Citations


