A Model of Cause Lawyering

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ABSTRACT

This paper is an economic analysis of cause lawyering, in which lawyers seek social change through the courts. The lawyer's litigation strategy consists of deciding how many steps in the law to ask the court to move at a single moment. We find that more intense advocates prefer to ask for a series of small steps to move the law. We also investigate how the Supreme Court's doctrine responds to advocacy in lower courts. We find that when facing intense advocates, a Supreme Court is more likely to issue constraining doctrine. We link the findings from the model to the National Association for the Advancement of Colored People's litigation strategy for eradicating the doctrine of separate but equal.

1. INTRODUCTION

Standard economic models of litigation contemplate parties motivated by financial payoffs. Cause lawyering, or advocating 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 interactions 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, instead of asking for large changes in the law in a single step.

For example, a cause lawyer might want to increase the protection for discrimination based on sexual orientation. Alternatively, she might

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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 should occur during that period. The court responds by ruling on the issues presented. This paper seeks to understand and predict the factors that influence the cause lawyer's litigation strategy. While cause lawyers are important drivers 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 a 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 start and, if turned down, fall back to the more modest 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. The analysis derives the conditions under which the cause lawyer prefers asking for the smallest possible step—no matter what happened in past litigation. The investigation demonstrates that the weaker the advocate's preferences for legal change, the less likely she is to employ such an incrementalist approach. That is, counterintuitively, the model predicts that for high discount factors—that is, 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, ultimately, 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, she would just bring the case that reflected that position—why waste time and effort doing anything else? As we discuss below, a judicial preference for two small steps over one larger, two-step move can be justified on rational choice grounds (a socially minded judge anticipates convex adjustment costs in the population from legal change) or behavioral grounds (the judge exhibits loss aversion).

Turning to intuition for the main result, let us identify the basic trade-off. Making a series of requests for small changes to the law gives 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 requests for small changes. As to costs, making multiple requests for small steps means 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 more modest utility gains from legal change do not pursue incrementalism. That is to say, we find conditions that separate advocate types into two groups: those who prefer incrementalism and those who do not. Both types of advocacy strategies are possible under our assumption that the court is more willing to grant a series of small-step requests than a single large-step request.

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 does not carry negative consequences. 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, we use an extension to consider 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 these principles as a cap on how far the advocate might potentially move the law in the appellate court. For example, a doctrinal principle might say that the Constitution does not require robust protection for a target group, while saying nothing about intermediate protection. The Supreme Court leaves the issue of whether the law provides intermediate protection 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 will not declare constitutional activities that the Supreme Court has said are unconstitutional. The appellate court might, however, declare unconstitutional an activity on which the Supreme Court has not spoken.

The Supreme Court's decision is nontrivial 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. In issuing constraining doctrine or principles, the Supreme Court is concerned that it will accidently 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's preferred resolution, perhaps significantly so.[1] Thus, the choice of doctrine presents a trade-off.

The extension finds that a Supreme Court with convex preferences is willing to issue unconstrained doctrine over a greater range of parameter values when the advocate harbors less intense preferences for legal change. 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. Because of 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 generating either a great deal of legal change or none at all. Fearing that the law will end up at the extremes, the Supreme Court more often constrains the doctrine when there is an intense advocate litigating in the lower courts. Ironically, we

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 that it does not like. Such a strategy, however, taxes judicial resources. The Supreme Court, in this model, constrains by setting doctrinal principles.

predict that the Court applies weaker doctrinal constraints—that is, allows the lower court more flexibility—when it knows that the advocate litigating in the lower court will ask that court for rapid change in a single period.

This work relates to a number of literatures. The first involves descriptive accounts, case studies, and empirical studies of the litigation strategies of cause lawyers (O'Connor 1980; Epstein and O'Connor 1983; Epstein and Kobylka 1992; Tushnet 1994; Sarat and Scheingold 2006). These studies document the reasons that cause lawyers give for selecting a particular case at a particular point in time. They also assess the strategies cause lawyers use to influence doctrine, be they amicus briefs or direct litigation; these papers do not formally investigate the strategy that cause lawyers might pursue or establish conditions under which they will ask for large changes or proceed cautiously.

The second related literature asks two questions about the creation of judge-made law: first, how fast should courts move the law? As to this question, Sunstein (1999) advocates slow judicial changes in the law; Baker and Mezzetti (2012) suggest that an infinite-lived court interested in the efficient use of its own resources will always rely on precedent, which means that cases similar to ones previously decided will not merit close attention. Fox and Vanberg (2011) 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 question is this: what impact do repeat litigants have on the path of law? Galanter (1974) advances reasons that 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 asking for large changes in law. Sterns (1995) studies how advocates might manipulate the order of cases that appear on the court's docket. Sterns's 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. Our focus, however, is on how the intensity of the advocate's preferences for legal change 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 that only a subset of potential opponents will lodge objections. 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.[2] 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 eventually achieving dramatic 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 National Association for the Advancement of Colored People (NAACP) took to ending *Plessy v. Ferguson*'s (163 U.S. 537 [1896]) doctrine of separate but equal. Section 2.1 develops a numerical example that captures the trade-offs 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 litigation strategy of the advocate. Section 5 concludes. All proofs can be found in the Appendix.

2. MOTIVATING LEGAL EXAMPLE

In *Plessy v. Ferguson,* the Supreme Court found constitutional a Louisiana statute requiring railway companies to provide separate but equal accommodations for white and African American passengers.[3] Although technically the ruling was about railroad services, the *Plessy* Court rooted its decision in the power of states to establish separate schools for white and African American children. Some 50 years later in *Brown v. Board of Education* (347 U.S. 483, 495 [1954]), the Supreme Court overruled *Plessy,* concluding that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational fa-

2. In a meta-analysis, Orr and Guthrie (2006, p. 621) 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."

3. This discussion relies on Tushnet (1994).

cilities are inherently unequal." As explored by Tushnet (1994), the litigation strategy of the NAACP influenced the path from *Plessy* to *Brown*. A detailed examination of this litigation strategy provides motivation for our formal work.

The litigation arm of the NAACP is known as the Legal Defense Fund (LDF). Through his work with the LDF, Thurgood Marshall provided the blueprint for what it means to be a cause lawyer. In line with our model of cause lawyers, Marshall did not 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 the separate-but-equal doctrine started with cases to equalize teachers' 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. The LDF found these cases attractive. Unlike a case 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 teachers 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 in our model. These cases did not chip away very much at the separate-but-equal precedent established in *Plessy*.

Next in line came cases in which 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 students to attend segregated schools in neighboring states. In *Missouri ex rel. Gaines v. Canada* (305 U.S. 337 [1938]), the Supreme Court addressed this sort of challenge with respect to the University of Missouri School of Law.

The *Gaines* Court held that "[b]y 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" (305 U.S. 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 constitutional 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 educational 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. It could have attacked segregation in primary and secondary schools in one fell swoop. Or it could claim that segregated professional schools failed to pass constitutional muster and 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, the state of Texas established both a temporary and a 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 1994, 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" (339 U.S. 634).

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

Ruling in *Sweatt,* the Court found that segregated legal education violated the Fourteenth Amendment (339 U.S. 635). Although Marshall provided the Court with options to limit its holding, most of the justices nonetheless realized the implications for the *Plessy* doctrine (Tushnet 1994, pp. 141–42); 4 years later, in *Brown,* the Court overruled *Plessy.*

Although not entirely linear, the 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 for which the state failed to offer a segregated alternative; third, challenges to the constitutionality of separate legal education in which the state offered an African American–only alternative; and fourth, challenges to the constitutionality of separate schools in primary and secondary education.

2.1. Numerical Example

In what follows, we provide a numerical example and then a general model to try to capture the essence of the choices faced by the lawyers at the LDF. To fix ideas, suppose that there exist potentially three levels of legal protection for a minority group: none, moderate, and 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 only, 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 with the analysis, we attach some numbers to the cause lawyer's preferences. Suppose that she values robust legal protection at 100, moderate legal protection at 60, and no protection at zero. Turn now to the courts. The cause lawyer has a hunch about how any court will rule but faces some uncertainty. At the time of the *Sweatt* decision, the LDF lawyers did not know whether the Supreme Court would eventually order the integration of all public schools. Our cause lawyer does understand, however, that the courts prefer 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. To attach some probabilities to capture a court's behavior, suppose that the cause lawyer believes that the court will grant a one-step request with a probability of $\frac{1}{2}$ and a two-step request with a probability of $\frac{1}{8}$.[4]

In terms of strategy, the cause lawyer can either "go for broke" or take an incrementalist approach. Under the incrementalist strategy, the cause lawyer first asks the court to move from no legal protection to moderate legal protection. If successful, she 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.

4. Of course, the numbers for the probabilities and cause lawyer's payoffs are arbitrary and are for illustration only. The general model given below shows that the example is not a special case. The results hold under a wide range of assumptions about probabilities and payoffs.

With the go-for-broke strategy, the cause lawyer first asks the court to move from no legal protection to robust legal protection. If she is victorious, she gets her most preferred outcome. If she loses, she falls back and makes the lesser request for moderate legal protection in the next round. That is the best she 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 1994, p. 138). The reason was put forward to Marshall: "'if you 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'" (quoted in Tushnet 1994, p. 138).

2.2. Two Strategies

2.2.1. Go for Broke. Under the go-for-broke strategy, the law settles at robust protection with a probability of $\frac{1}{8}$. What about moderate protection? The probability that the court rejects a request to move the law to robust protection is $\frac{7}{8}$. But that ruling does not settle the matter. The cause lawyer can still ask for moderate protection in the next period, a request that succeeds with a probability of $\frac{1}{2}$. The probability of ending up with moderate protection is thus $\frac{7}{16}$.

Combining the probabilities, we find that the cause lawyer's payoff from going for broke is

$$\frac{1}{8} \times 100 + \frac{7}{16} \times 60 = 38.75.$$

2.2.2. Incrementalism. Under incrementalism, the law settles at robust protection with a probability of $\frac{1}{4}$ (the move from the status quo to moderate protection succeeds with a probability of $\frac{1}{2}$; likewise, the move from moderate to robust protection succeeds with a probability of $\frac{1}{2}$). The law settles at moderate protection with a probability of $\frac{1}{4}$ as well (the move from the status quo to moderate protection succeeds with a probability of $\frac{1}{2}$; the move from moderate to robust protection fails with a probability of $\frac{1}{2}$). Combining the probabilities, we see that the cause lawyer's payoff from incrementalism is

$$\frac{1}{4} \times 100 + \frac{1}{4} \times 60 = 40.$$

When comparing the two payoffs, it is immediately apparent 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. With these payoffs, both the advocate's benefit from moderate protection and the incremental gain from moving from moderate to robust protection are smaller—the latter implies that she cares relatively more about moderate protection than about robust protection.

With these new preferences, the cause lawyer's payoff from going for broke is 23.75. The cause lawyer's payoff from incrementalism is 22.5. Thus, such a litigant prefers the go-for-broke strategy to incrementalism.

The numerical example generates a prediction: more passionate cause lawyers will tend to pursue incremental changes in the law. 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 no protection rather than moderate protection is higher. This is true 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 she asks for two steps and loses and then 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 lesser chance at moderate protection for a greater chance at robust protection. The less passionate advocate is not.

3. THE GENERAL ADVOCACY MODEL

Now that the simple numerical example is solved, 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 λ^{s+1}, where $\lambda \in (0, \overline{\lambda}]$. Note that the value of $\overline{\lambda}$ can be greater than 1. We thus allow convex and concave payoffs for the advocate. A more intense advocate has a higher value of λ. The advocate's payoff might flow from the direct effect that changes in legal rules have on the primary behavior of others in society. Alternatively, the advocate's payoff might come from the expressive function of the law, in which 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:

$$U(0) = 0,$$

$$U(1) = \lambda,$$

$$U(2) = \lambda + \lambda^2,$$

$$U(3) = \lambda + \lambda^2 + \lambda^3,$$

$$\dots$$

$$U(s) = \sum_{j=1}^{s} \lambda^j.$$

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

The advocate selects her request to maximize her expected discounted stream of per-period payoffs. Each request is a function of the number of remaining states—which have not yet been ruled on—and the current state. So, in general, we 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 all $R_t^*(x, y)$ terms 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 that the advocate seeks to move from the current state; p_t is the probability that the appellate court will grant a request to move the law t states. We make two assumptions about these reduced-form movement probabilities.

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

Second, we assume that a sequence of one-step requests yields a higher probability of eventually moving the law t states than a request to move t states in one swoop. Formally, $p_1^t > p_t$.

Given the critical nature of these two assumptions to the analysis, prudence dictates that we pause here and ask what might motivate them. Consider first the assumption that the court is more likely to reject larger requests. The assumption can be justified if the advocate does not know the type of judge hearing her case. Imagine that judges vary in their receptiveness to legal change. Some judges are extreme. They agree with the advocate that the law should be moved to the *n*th 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. Some other judges agree that the law should move to the *n*th 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 grant advocate requests to move the law only $n - 1$ states or less.

The advocate's request to move the law n steps will be granted if the court consists of only an extreme judge. On the one hand, an advocate's request to move $n - 1$ steps will be granted if the court consists of an extreme judge or a slightly less extreme judge. Because there are different types of judges in the population, the court will be more likely to reject the larger request. Proceeding backward, one can think of p_t as the proportion of judges who will allow the law to move t or fewer states at a time. The cause lawyer uses this proportion as the basis for her strategy calculations because she 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 would 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 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 by using insights from be-

5. We might think of the court as a three-judge panel. Even if the advocate knows the preferences of each judge, she does not know how the deliberations will go.

havioral economics. In particular, take the work on prospect theory by Kahneman 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 weigh 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 (the reference point) and the state to which the law would be moved. Loss aversion implies that large 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. Taking small steps changes the judge's reference point after each successful step. Then, even if the final resting place of the law turns out to be mistaken, the last small move to that state will not change the law much relative to the reference point and, as a result, will 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 allow only 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]

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 that it is optimal for the advocate to request a move to state 7 in one swoop (that is, $R_t^*(0, n) = R_7$). Suppose that the decision maker rejects this request. In the next period, the number of available states is six; the new environment is $x = 0, y = 6$. A respect for precedent means that the decision maker will summarily reject any request to move past state 6. The problem ends when the advocate runs out of room: there are no more available states—that is, levels of legal protection that have not been ruled on. For notational convenience, we define a incre-

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 a customer to agree with a rather trivial request first, perhaps to buy a sale item with a low profit margin. Once a customer does so, agreeing to, say, purchase something more does not seem like such a large step. For details and examples, see Cialdini (2007, pp. 69–75).

mentalist advocacy style as a strategy in which $R_t^*(x, y) = R_1$ 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, ask 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 a probability of p_1, the advocate gets an immediate payoff of λ. In the next period, the advocate attempts to move the law to state 2. If she succeeds, which again occurs with a probability of p_1, she gets a payoff of $\lambda + \lambda^2$ forever. If she fails, which occurs with a probability of $1 - p_1$, she gets a payoff of λ from that point on.

This expression 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 with her two-step request, she gets a payoff of $\lambda + \lambda^2$ forever. If she fails, then she will attempt to move to state 1 in the next period and with a probability of p_1 will succeed and get that payoff forever.

Comparing the payoffs from the two litigation strategies, we find that 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 $\delta \rightarrow 1$, 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 that we impose by assumption.[7] If the advocate cared only 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 for which incrementalism is the best approach shrinks. Second, p_2^* increases in λ: the more intense the advocate, the greater the range of values for which incrementalism is the best approach. This result relies on the value of δ being sufficiently large. Thus, among patient advocates, those with strong preferences for increasing legal protections are more likely to choose incrementalism. Those advocates with more modest utility gains from legal change do not. 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 zero and the number of available states is some 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 under which 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 $p_2 \leq p_2^*$ and consider the choice with three states remaining. If the advocate goes for broke and loses with three states remaining, she plays incrementalism thereafter (because of the assumption on p_2).

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

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

Likewise, after multiplying by $1 - \delta$ and letting δ go to 1, the expected payoff from incrementalism with three states is

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

If we compare the payoffs from the two strategies, we see that incrementalism dominates if

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.

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

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

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

The expected payoff to incrementalism is

$$\sum_{j=1}^{t}p_1^j\lambda^j.$$

Comparing and solving, we find that incrementalism dominates whenever

$$p_t < p_t^* = \frac{p_1^t\lambda^t}{\lambda^t + \sum_{j=1}^{t-1}(1-p_1^j)\lambda^j}.$$

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 $j \leq t$.

As gestured to above, we prove this proposition by an induction argument. First, we assume that for an arbitrary number of states t, incrementalism dominates any other strategy for all states less than or equal to t. Then we demonstrate that if there are $t + 1$ states and incrementalism dominates going for broke, then incrementalism dominates choosing any other strategy under which the advocate chooses to request fewer than $t + 1$ 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 λ,

$$\frac{\partial p_t^*}{\partial \lambda} = \frac{t p_1^t \lambda^{t-1}}{\lambda^t + \sum_{j=1}^{t-1}(1-p_1^j)\lambda^j} - \frac{p_1^t \lambda^t [t\lambda^{t-1} + \sum_{j=1}^{t-1} j(1-p_1^j)\lambda^{j-1}]}{[\lambda^t + \sum_{j=1}^{t-1}(1-p_1^j)\lambda^j]^2}.$$

Reducing, we get

$$\frac{t p_1^t \lambda^{t-1}[\sum_{j=1}^{t-1}(1-p_1^j)\lambda^j] - p_1^t \lambda^t [\sum_{j=1}^{t-1} j(1-p_1^j)\lambda^{j-1}]}{[\lambda^t + \sum_{j=1}^{t-1}(1-p_1^j)\lambda^j]^2}$$

or

$$\frac{p_1^t \lambda^t [\sum_{j=1}^{t-1}(t-j)(1-p_1^j)\lambda^{j-1}]}{[\lambda^t + \sum_{j=1}^{t-1}(1-p_1^j)\lambda^j]^2}.$$

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 the value of λ, the larger the set of probabilities for which incrementalism is the optimal strategy.

More intense preferences imply a larger set of movement probabilities (the list of p_1, p_2, . . ., p_n) for which 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 doing so.

Together, propositions 1 and 2 provide 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, an advocacy group 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 setting unfavorable precedents.

Finally, opponents of the cause lawyer will make slippery-slope arguments in court (Volokh 2003). Here our cause lawyer with intense preferences proceeds down the legal slope one step at a time. She 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 those opposing legal change will raise the possibility of the slippery slope when an intense advocacy group seeks legal change through the judiciary.[8]

4. THE SETTING OF PRINCIPLES

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

The issue addressed is the relationship between the likely advocacy style in the appellate courts and the degree of discretion in Supreme Court doctrine. Under what conditions will the Supreme Court grant a loose principle: when the advocate plays an incrementalist strategy or when the advocate plays another strategy in the appellate court?

To make matters interesting, assume that the Supreme Court does not know its 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 θ is the optimal state. Thus, because of the quadratic loss function, large differences between the optimal state and the realized state are very costly to the Supreme Court.

4.1. A Three-State Example

We restrict attention to a three-state example.[9] With three states, there are only two strategies that an advocate might use—incrementalism and going for broke. This simplification makes the problem that the Supreme Court faces clearer. The Supreme Court's choice reduces to selecting $n = 0$, 1, or 2. In our 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 we noted, the

8. Some 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, . . . I am unable to see why a state would have any further right to segregate its pupils in the grounds of sex . . . age or . . . mental capacity'" (quoted in Tushnet 1994, p. 178).

9. Given 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.

Supreme Court does not 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, and r_2 as the probability that the final state is 0, 1, or 2, respectively, given the advocacy strategy of the cause lawyer.

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

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

The first line is the expected loss when the Supreme Court thinks the optimal state is state 0 (which occurs with a probability of 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 a probability of r_1. The realized state is state 2 with a probability of 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 of $(1 - 0)^2$. Thus, 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 that 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 state 2, respectively. The loss function reduces to

$$L = q_0(r_1 + 4r_2) + q_1(r_0 + r_2) + q_2(4r_0 + r_1). \tag{1}$$

The choice of principles (n) induces a distribution on the probability that each state is reached (the r terms). 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

$$r_0 = 1 - p_1, \qquad r_1 = p_1, \qquad r_2 = 0.$$

Given that the doctrine eliminates the 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 a probability of $1 - p_1 = r_0$, the advocate loses on this request. With a probability of $p_1 = r_1$, the advocate wins and moderate protection—state 1—is the final state. Given the doctrinal constraint, the advocate can never reach state 2 ($r_2 = 0$). Substituting these values for each r of equation (1), we see that the Supreme Court's loss from setting the doctrinal limit at moderate protection is

$$L(1) = q_0 p_1 + q_1(1 - p_1) + q_2[4(1 - p_1) + p_1].$$

If instead the Supreme Court sets the doctrinal limit at robust protection ($n = 2$), its loss depends on whether the advocate plays the incrementalist or the go-for-broke strategy. If the advocate plays incrementalism, the induced distribution over outcomes is

$$r_0^{\text{INC}} = 1 - p_1, \qquad r_1^{\text{INC}} = p_1(1 - p_1), \qquad r_2^{\text{INC}} = p_1^2.$$

If the advocate wins her first case but loses her second, then the final state of the law is state 1. This course of events occurs with a probability of $r_1^{\text{INC}} = p_1(1 - p_1)$. If the advocate wins both cases, then the final state is state 2. This course of events occurs with a probability of $r_2^{\text{INC}} = p_1^2$. Using equation (1), we can write the Court's expected loss from allowing robust protection, assuming that the advocate takes an incrementalist approach, as

$$\begin{aligned} L^{\text{INC}}(2) = {} & q_0[p_1(1 - p_1) + 4p_1^2] \\ & + \ q_1[(1 - p_1) + p_1^2] \\ & + \ q_2[4(1 - p_1) + p_1(1 - p_1)]. \end{aligned}$$

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:

$$r_0^{\text{GFB}} = (1 - p_1)(1 - p_2), \qquad r_1^{\text{GFB}} = (1 - p_2)p_1, \qquad r_2^{\text{GFB}} = p_2.$$

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 steps in the initial round, then she asks for one step as a fallback in the next round. If successful, the advocate must stop, and the final state is state 1. This sequence of events transpires with a probability of $r_1^{\text{GFB}} = (1 - p_2)p_1$. Now, as we did before, we substitute the probability that each state was realized into the Court's loss function. Doing so yields

$$\begin{aligned} L^{\text{GFB}}(2) = {} & q_0[p_1(1 - p_2) + 4p_2] \\ & + \ q_1[(1 - p_2)(1 - p_1) + p_2] \\ & + \ q_2[4(1 - p_1)(1 - p_2) + (1 - p_2)p_1]. \end{aligned}$$

To see the different effects that the two advocacy strategies have on the Supreme Court's loss function, it is useful to compare the induced distributions when the advocate uses the incrementalist versus the go-for-broke strategy, assuming that robust protection is possible. The go-for-broke strategy results in a smaller probability of extreme outcomes than incrementalism. Under the go-for-broke strategy, the probability that the final state is state 0 is $r_0^{\mathrm{GFB}} = (1 - p_1)(1 - p_2)$. Under incrementalism, the probability that the final state is state 0 is $r_2^{\mathrm{INC}} = 1 - p_1$, which is strictly larger. Under the go-for-broke strategy, the probability that the final state is state 2 is $r_2^{\mathrm{GFB}} = p_2$. Under incrementalism, that probability is $r_2^{\mathrm{INC}} = p_1^2$, which is also strictly larger by assumption.

In contrast, incrementalism has a lower chance of the end state being state 2 ($r_1^{\mathrm{GFB}} = (1 - p_2)p_1 > p_1(1 - p_1) = r_1^{\mathrm{INC}}$). Because of the Supreme Court's convex loss function, extreme differences between the optimal state and the final state impose a large utility loss (that is, the Court suffers greatly when it is optimal to have state 0 and the final state is state 2; the Court suffers a lot under the reverse scenario as well).

Because incrementalism is more apt to generate extreme outcomes, intense advocates pursue incrementalism, and the Supreme Court does not 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.

This result can be seen algebraically by comparing the expressions for $L(1)$ with those for $L^{\mathrm{INC}}(2)$ and $L^{\mathrm{GFB}}(2)$. First compare the equations for $L^{\mathrm{INC}}(2)$ and $L(1)$. The Court's loss from allowing for the possibility of robust protection, assuming that the advocate uses a incrementalist strategy, is smaller than when it takes robust protection off the table if

$$3q_0 + q_1 \equiv q_2^{\mathrm{INC}} < q_2.$$

Next, compare the equations for $L^{\mathrm{GFB}}(2)$ and $L(1)$. The Court's loss from allowing for the possibility of robust protection, assuming that the advocate uses a go-for-broke strategy, is smaller than when it takes robust protection off the table if

$$\frac{q_0(4 - p_1) + q_1 p_1}{4–3p_1} \equiv q_2^{\mathrm{GFB}} < q_2.$$

So for the Court to allow the possibility for robust protection, the probability of q_2 must be sufficiently large whether the advocate plays the incrementalist or the go-for-broke strategy. 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 $q_2^{\mathrm{GFB}} < q_2^{\mathrm{INC}}$. 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 incrementalist strategy. The reason is that the probabilities of the law settling at 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 incrementalist 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 incrementalist 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 that drive it. First, the example assumes that the Court knows which advocates harbor intense preferences and which 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 possible advocate preferences. It would then select the optimal doctrine on the basis of 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 through the choice of initial cases. 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 that the intense group is more likely to achieve a great deal of legal change. Instead, the Supreme Court fears both a lot of legal change and no legal change. Both outcomes are more likely with an intense advocate. Either extreme is costly to the 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 a small degree of movement in the law will lead to much more movement eventually. That is, after all, what the intense advocate does; she ultimately achieves a dramatic change in the law by making a series of requests for small changes in the law. And opponents of the cause will want to make that behavior evident. 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's preferences for extreme states are not that strong, then he might very well go for broke, knowing that, despite a loss, the fallback, more moderate position is still obtainable.

In many areas of law, certain litigants bringing cases repeatedly. A natural question is what areas of law are most prone to the kind of advocacy modeled here. Our results cover areas in which the assumptions of the model are most likely to hold: the advocate is patient, the advocate places greater (perhaps increasingly greater) weight on more dramatic legal change, and the court is reluctant to make significant legal changes in any single decision. Cases involving the typical cause lawyer, such as the ones working for the LDF, meet these requirements.

The paper leaves many questions open. We mention a few in closing. We have assumed that advocates have perfect information about the benefits of moving the law beyond the status quo and the probabilities that they 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 advance. Advocates would then update their assumptions about the court's preference for changes in the law. This could lead to an interesting Bayesian decision problem for advocates. Furthermore, it might be that the court learns: perhaps each decision teaches the court something about the benefits to society of changes to the law, and learning by the court makes it more amenable to further changes in the law.

The model assumes a single advocate in the process. There are many situations in which two sets of advocates have diametrically opposed preferences 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 in which there are two advocates with the possibility of advancing the law in their preferred directions via 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 riskier. 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 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 has its own preferences and the advocate can learn them by bringing a series of cases? How might the advocate react? These questions we leave for future research.

APPENDIX: PROOFS

Proof of Proposition 1

First, we prove that if $p_j \le p_j^*$ for all $j \le t$, 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. Now assume that there are three steps. If $p_3 < p_3^*$, then incrementalism dominates the go-for-broke strategy. Now there are two other strategies available. One is to take one step, with three states remaining. But if that one step is successful, there will be two states available, and since $p_2 < p_2^*$, incrementalism is optimal. The other strategy is to take two steps and, if successful, take the one remaining step, but if not take one step in 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

$$\frac{\lambda p_1 + \delta\lambda^2 p_1^2 + \delta^2 p_1^3 \lambda^3}{1-\delta}.$$

If we let $\delta \to 1$, incrementalism is an optimal strategy if

$$p_2 \le p_2^c \equiv \frac{\lambda p_1^2(1 + \lambda p_1)}{1 + \lambda - p_1(1 - \lambda^2)},$$

where p^c is the cutoff probability in a comparison between incrementalism and going t steps. Straightforward algebra shows that $p_2^c > p_2^*$; thus, if $p_2 \leq p_2^*$ and $p_3 \leq p_3^*$, then incrementalism is the optimal strategy if there are three states remaining.

Now take the case in which there are an arbitrary number of t states remaining and assume that incrementalism is optimal if there are strictly fewer than t states remaining. If $p_t \leq p_t^*$, then incrementalism generates a higher payoff than the go-for-broke strategy. The other set of strategies that an advocate could choose is to first take fewer than t steps. By hypothesis, if the advocate is successful, then she will use a incrementalist strategy from then on. Define $W(0, y)$ as the payoff from incrementalism with y states remaining. With 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 equation simplifies to

$$\frac{\sum_{j=k}^{t}\lambda^j p_1^j}{\sum_{j=1}^{k}\lambda^j - \sum_{j=1}^{k-1}\lambda^j p_1^j + \sum_{j=1}^{t-k}\lambda^{k+j}p_1^j} \geq p_k.$$

Define p_k^c as the cutoff probability that makes this expression an equality. Then, $p_k^c > p_k^*$ if and only if

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

and if and only if

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

and if and only if

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

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

Proof of Proposition 2

This proof is straightforward from the computation of the derivative.

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