

Why Do Courts Delay?*

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Abstract

Answering one question often begets another. We present a decision-theoretic model that describes how this dynamic sequences decisions over time. Because answering an easy question may raise a more difficult one, a rational decision-maker may delay resolution even if he has perfect information about the correct decision. Furthermore, because otherwise unrelated questions may raise similar follow-ups, he may optimally clump decisions together. Our theory thus generates an endogenous economy of scale in dispute resolution and contributes to the literature on punctuated equilibrium theory. We illustrate the results of our model with a case-study from legal history in the United States.

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Dispute resolution is a perpetual task. New problems continue to arise—sometimes, the very resolution of one issue can instigate another. How should a court—tasked with resolving disputes as they arise, but free to postpone resolution if necessary—behave if it is aware of this? In a vacuum, a court may prefer to resolve disputes as soon as possible; but this preference might be mitigated by the expected downstream consequences of resolving any given dispute. Sometimes action today begets more action tomorrow, potentially making the cure worse than the disease.

In this paper we explore these issues in the context of supervisory courts, which encounter many of the strategic dilemmas associated with dynamic dispute resolution. Many appellate courts have discretionary dockets that allows them to decide which cases to hear and when, including high courts in the US states (e.g., ?) and constitutional courts around the world (e.g., Fontana, 2011). The U.S. Supreme Court, which we use as an illustrative example, is one of the most widely studied such courts. The Supreme Court, and similarly organized apex courts, face the complex decision of structuring the sequence of cases it will hear over time. Since the common law tradition implies that subsequent disputes will be adjudicated in the context of previous decisions, this sequencing decision is important. Any disposition hinges on one or more clarifying questions and definitions that can travel to subsequent disputes.¹

As a step toward a general understanding of these, and related, aspects of sequential adjudication, we introduce the *dynamic resolution framework*. We analyze the dynamic quandary faced by a unitary actor making decisions over a finite period of time. First, our model highlights the cautionary effect of foresight. Oftentimes, courts decline to decide issues that on their own seem easy to solve. However, because resolving that dispute might (or will) raise subsequent disputes, the courts may decline to “wade into the waters.” Second, our model highlights a heretofore unexplored consideration for whether a case is ready to be resolved, that turns on shared progeny with other cases. In our model, some long-simmering disputes will be resolved because other disputes have arisen. These two findings help provide theoretical microfoundations for empirical patterns in the evolution and development of legal and political issues. Such patterns have been the subject of

¹Patty and Penn (2014) provide a positive model of the importance of explanations in policymaking—their theory investigates the collective implications and importance of the type of path-dependence that the theory presented in this article derives from first principles.

considerable interest in legal scholarship and empirical political science: for example, in the study of path dependence in the law (Kornhauser, 1992; Callander and Clark, Forthcoming), how political cleavages affect the way in which new issues or dimensions of a problem are incorporated into the law (Gennaioli and Shleifer, 2007), and how the stream of cases coming to the courts is shaped by the questions the courts have previously resolved (e.g., Baird, 2007).

More generally, the model yields theoretical and empirical insights about the path-dependent development of law, case selection, and the connections among cases. The findings reported here have implications for empirical studies concerned with the distributive politics of judicial policy-making, the ways courts and litigation can be used for social change, and strategic dynamics underlying case selection by collegial courts. Outside of the judiciary, though, the theoretical framework we develop also has substantive applications to myriad dispute-based policy-makers, such as administrative dispute resolvers, precedent-based committees, and other institutions.

1 Case Selection and the Evolution of Disputes

In virtually all common law systems, including the United States, courts make policy by resolving disputes. Because courts must wait for cases to be brought to them, they have limited capacity for setting their own agenda. “Litigants determine the flow of cases to the courts and no litigant or group of litigants has sufficient control over an issue to regulate the order in which sub-issues arise in the judicial system” (Kornhauser, 1992, 182). At the same time, apex courts often have wide discretion to pick which cases it will hear (as do many peak courts) (e.g., McGuire and Palmer, 1995, 1996; Fontana, 2011) or can create a sort of de-facto discretion through their doctrine (e.g., Rubio, Magaloni and Jaime, 1994). The practical consequence of these two realities is that supervisory common law courts have extensive discretion to set its docket from among a finite set of questions raised by litigants.² For sake of concreteness, we focus our analysis on the U.S. Supreme Court, though many of the results we describe generalize to other court systems, a subject to which we return in the discussion.

²Strategic litigants, in turn, may be able to respond to actions taken by the courts indicating which questions they are likely to be able to successfully litigate (Baird, 2004).

This discretion presents many issues for a justice to consider when deciding whether the time is right to hear a given case. From a bargaining perspective, is the ideological environment, both among her colleagues and in the public sphere, congruent with her own preferences? From the perspective of learning and percolation, have lower courts and litigants sufficiently interrogated the issue for her to confidently take it up? From a doctrinally foresighted perspective, what subsequent cases will arise from having resolved this case? Previous scholarship has shown that waiting for the right political environment and waiting for cases to percolate can lead the Supreme Court to delay resolution (see e.g. Rosenberg, 1991; Perry, 1991). In this paper, we show that even when concerns of bargaining and learning do not lead the court to delay, the impending consequences of resolution—a previously unexplored concern—can delay the decision to hear a case.

Three dynamic consequences interact to drive the sequence of adjudication. First, the resolution of some questions naturally closes off other questions but opens up still others. Second, courts anticipating a dynamic docket that evolves and changes as they resolve disputes must anticipate the downstream implications of their decisions as they triage and sequence their actions. Third, the particular consequences of any given dispute are a function of how litigants react and decide to set future dockets for the courts. We explore how the court sequences its decisions in the face of these dynamics.

One question begets another. In a famed children’s book, Laura Numeroff teaches us that “if you give a mouse a cookie,” he’s inevitably going to want something else. So, too, for courts answering litigants’ questions. Answering one question raises another. For example, when the US Supreme Court decided in *Roe v. Wade* (410 U.S. 113 1973) that states could not prohibit abortion during the first trimester of pregnancy, that precedent only raised more questions about whether a state could prohibit abortions from being performed at state-operated hospitals, whether parental and spousal notification laws are constitutional, and what guidelines were for the second and third trimesters. Lawyers refer to the sequence of cases that follow from a given precedent as that case’s *progeny*, connoting the idea that new questions follow as a *consequence* of the older ones.

It is a principle of the common law that early choices set the conditions under which subsequent

choices will be made. One decision defines the context in which subsequent decisions are made (see e.g. Kastellec, 2010). Some areas of the law are marked by complex progenies in which many diverse questions arise from the resolution of a single issue, whereas others might have simpler progenies in which a few questions emerge to simply “fill in” issues left unresolved (e.g., Clark and Lauderdale, 2012). Progeny can reinforce past decisions, in the sense of *increasing returns* (such as the consolidation of doctrine described in Landes and Posner (1976)); they can cause instability in the sense of *negative feedback* (such as the ambiguity described in Kornhauser (1989); Bueno de Mesquita and Stephenson (2002)); or they can shape the likelihood of possible future events.

Because current decisions shape the likelihood of future events happening, the process of dispute resolution is necessarily *path dependent* (Page, 2006). The law is argued to be path dependent in the sense that earlier decisions affect future decisions (Kornhauser, 1992; Hathaway, 2001). However, past scholarship on path dependence in the law generally focuses on case *results*—such as creating unanswered gaps in the law (e.g., Cameron, 1993; Baker and Mezetti, 2012; Callander and Clark, Forthcoming) or binding future decisions through *stare decisis* (e.g., Bueno de Mesquita and Stephenson, 2002). But path dependence can affect legal development more broadly than through the specific results of individual cases. It is not uncommon to find accounts that claim certain early cases “paved the way” for future cases simply through the questions they asked. Take, for example, the strategies employed by the NAACP during its mid-20th century litigation against segregation. When the group wanted to end segregation, it began by litigating cases in which they could show that the “separate” facilities provided in many states for whites and blacks were not “equal” and therefore could not satisfy the “separate but equal” doctrine the US Supreme Court had endorsed. With sufficient precedent established that, for example, separate graduate and professional schools were not equal, a question naturally arose about whether separate primary schools can possibly be equal. The history of the NAACP is one of strategic selection of claims to bring to the courts, followed by strategic selection of questions that the earlier cases implied (Greenberg, 2004) (though see Tushnet, 2004). In part, what this claim means is that earlier cases answered questions that be-
got new questions and provided the logical connections necessary for bringing new disputes to the courts.

Anticipating the path of the law. With an awareness of a case’s progeny, there is a challenging *forward*-looking problem in choosing whether and when to hear a case. The court must ask itself about the downstream consequences of resolution: “If I decide case *X* today, which cases will I have to choose from tomorrow? What issues are likely to arise as a consequence? Will I want to resolve those issues?” As an empirical matter, the Supreme Court is aware of the complexity of the issues raised in a given case and the extent to which deciding the case will raise additional questions. Legal scholars derisively describe concerns for a slippery slope as thinking that, “we ought not make a sound decision today, for fear of having to draw a sound distinction tomorrow” (Volokh, 2003). But our model points out that drawing a sound distinction tomorrow may be so difficult as to justify foregoing the sound decision today. As Perry describes in his study of the *certiorari* process, this reasoning sometimes occurs before the Justices even take a case: when deciding whether to review some decision, the Justices are thinking about what questions will be left open once they resolve the case before them (Perry, 1991).

These concerns about subsequent questions can be mitigated or aggravated by the legal context in which a decision is made. A decision may give rise to a new set of questions when issued alone, but when issued in conjunction with another decision, the implications for future litigation may be different. One case may generate no subsequent litigation or plentiful subsequent litigation, depending on the accompanying decisions. Concurrent decisions can mitigate or aggravate slippery slopes or confusion caused by any given decision. Therefore, when the Supreme Court chooses which cases to decide in a given year, that set of cases may be evaluated collectively—so the Supreme Court may make take a broad perspective when choosing that set of cases.

Thus, awareness of subsequent disputes creates complexity for the Supreme Court, that is largely unexplored. The main way lawyers often talk about ripeness is *retrospective* and focused on whether the necessary procedural and legal processes and hurdles have been met in order to justify adjudication; much of the literature on *certiorari* and “percolation” is also backward-looking. Many of the theoretical perspectives adopted in this research are about the Supreme Court—or justices—considering what has come before and whether it is prepared to resolve a current case, especially whether the Court has received sufficient information to confidently resolve the dispute (e.g., Perry,

1991; Grant, Hendrickson and Lynch, 2012) This is particularly crucial in the study of circuit splits in the United States, a literature in which scholars have investigated the determinants of the Supreme Court's decision to resolve (or not) conflicting legal interpretations among lower courts (Lindquist and Klein, 2006; Clark and Kastellec, 2013; Beim and Rader, 2016).

Our theory studies the consequences of *forward*-looking dynamics on the Court's agenda. We argue that there is a companion interpretation of how ready a case is to be resolved, that turns on *downstream* consequences of resolving an issue. In this view, a case is characterized in part by its progeny—the subsequent questions or disputes that the justices expect to be raised *by* its resolution. Courts ask not only whether a given case is presently prepared for resolution but also whether the effects of present resolution will be beneficial or detrimental. An integral part of that calculation is whether the resolution of a dispute will trigger a host of new disputes that otherwise would not require resolution. Importantly, we do not consider *how* the Court resolves a dispute—only *whether* it does. There is vigorous debate within judicial politics over whether justices feel bound by precedent or whether they allow ideology to fully govern their decision-making. In our model, justices do care about precedent—they believe that law matters in the sense that it can generate new questions to be answered.³ But we remain agnostic about whether law matters in the sense that previous decisions perfectly govern future outcomes. The theoretical framework we introduce explicitly models the interconnections among cases and legal issues and so can explain, prospectively, why courts may decline to answer seemingly easy legal questions or may finally decide to weigh in on issues that have been long simmering. In particular, courts might decline to answer seemingly easy questions because the downstream consequences—the clarifying questions and related subsequent litigation—would be too costly. At the same time, courts may finally decide to weigh in on long-simmering issues when companion disputes arise, creating an endogenous economy of scale. We now turn to the formal presentation of the model.

³This is similar to the conception of law mattering articulated in the literature on jurisprudential regimes, see e.g. Richards and Kritzer (2002); Lax and Rader (2009).

2 The Model

We consider a unitary court faced with choosing which disputes, if any, to resolve from a set of ongoing disputes. We remain agnostic about the nature of the dispute, in the sense that we focus exclusively on *whether* a case is heard and not *how* it is resolved. We assume that the Court will consider disputes over only two periods. This simplifies the presentation of our results and is sufficient to establish our substantive results. We present a more general, T -period, setting in Appendix A.

Disputes. Central to our theory is the notion of a *dispute*. We assume that there is an exogenous set of n disputes, which we denote by $\mathcal{D} = \{1, 2, \dots, n\}$. In each of the two periods, each dispute is either *active* or *inactive*. Active disputes are those that the Court must decide whether or not to resolve. Inactive disputes are currently not active but might become active in the future, depending on which disputes the Court resolves. (In our two-period setting, inactive disputes are relevant only in the first period—the game ends before they become relevant.) The set of disputes that are active in the first period is denoted by D_1 and those that are active in the second period is denoted by D_2 . We refer to D_1 and D_2 as the Court’s *docket* in the first and second periods, respectively.

The disputes we model can be thought of as “open legal questions” whose resolution may or may not imply additional questions to be answered in the future. Many of the foundational studies of docket construction in the U.S. Supreme Court, for example, conceive of the unresolved legal question as the central object with which the Court works (e.g., Perry, 1991; Baird, 2004). In this view of the courts, the docket comprises not just cases to be resolved but instead cases that are characterized by the legal question or interpretation to be handled. When the Court looks at the set of cases that have come before it, it sees not conflicts between opposing parties but instead questions of law that were not sufficiently resolved in previous case law for the lower courts to be able to dispose of these new cases.

For each active dispute, the Court must choose whether to resolve or leave unresolved. Each dispute $d \in \mathcal{D}$ is characterized by a positive, dispute-specific *cost of delay*, which we denote by $c(d) \geq 0$. If the Court does not resolve an active dispute, then the Court incurs a cost of $c(d)$. Thus,

disputes with higher values of $c(d)$ are more “pressing” than those with lower values. For any active dispute d , if the Court chooses to resolve the dispute, it pays a fixed cost of $k > 0$. Inactive disputes cannot be resolved and generate no cost of delay.

Substantively, these parameters can be thought of as measuring the extent to which the justices perceive a case as meriting resolution, simply on the merits of the case. As the literature on circuit splits has demonstrated, for example, the justices do not always resolve open legal questions when presented to them, perhaps because of political considerations or instead because of jurisprudential exigencies (e.g., Perry, 1991; Lindquist and Klein, 2006; Clark and Kestel, 2013). At the same time, the justices often confront jurisprudential incentives to resolve a new dispute. Failing to provide a concrete answer to an open legal question risks unpredictability in the application of the law, which can be both normatively and positively troubling. Normatively, the rule of law itself relies on the consistent and predictable application of the law. As a positive matter, unpredictability risks an increase in adverse outcomes.

More generally, we often see instances of supervisory courts exercising their discretion to avoid cases that its members would prefer not to resolve, as in the case of the Israeli High Court of Justice declining cases involving occupied territories (Fontana, 2011, 628-9). It is useful to note, moreover, that by fixing the cost of resolving a case at k and allowing the cost of delay, $c(d)$, to vary by case, we capture the full degree of richness in variation a court might perceive among individual cases with respect to their particular merits for resolution. This includes the notion of some cases being “good vehicles” for resolution (e.g., Estreicher and Sexton, 1986) as well as the notion that some cases just simply do not warrant the time and effort they would take to resolve.

It is also useful to note the ways in which our modeling structure relates to previous models of case selection. In one typical set-up, Cameron, Segal and Songer (2000) model the decision to accept a case for review in a static setting, assuming a fixed cost to review a case and a variable cost to not taking the case. In their model, the cost to not taking a case is driven by whether the lower court had resolved the case as the Supreme Court would have and so its realized value is probabilistic in equilibrium. In our model, the cost to either accepting or declining to answer a legal question is known and variable by case. As we will see below, though, in practice, the cost of deciding or

avoiding a case can change dynamically, as the case’s effect on the Court’s docket itself changes over time. We further explore this modeling assumption in the discussion.

Linkages Between Disputes. Our focus in this article is on dynamic dispute resolution. The key feature of our framework in this regard is the *linkage matrix*, which describes what new disputes, if any, will arise from the resolution of any given dispute. The linkage matrix, denoted by L , is an $n \times n$ matrix containing only 0s and 1s. This matrix is interpreted as follows. Suppose that d is an active dispute and j is an inactive dispute. If $L_{dj} = 1$, then resolving dispute d in the first period will result in dispute j being active in the second period.⁴ Note that, when this occurs, it is not the case that the Court must resolve the newly provoked dispute j . Rather, the Court will incur some cost unless it chooses to resolve dispute j .⁵

Substantively, we can think of a linkage matrix as a description of the expected logical steps that litigants will make as they bring new cases to develop a line of doctrine. Once the Supreme Court answers a question about racial discrimination in one kind of public accommodation, there will, as a consequence, arise a particular set of “follow-up” questions—whether discrimination is allowed in private enterprises, whether sexual discrimination is permissible in those public accommodations, etc., etc. Of course, judges can, and do, try to shape the linkage matrix by crafting decisions carefully so as to either minimize the number of follow-up questions that will arise or to invite particular new disputes (e.g. Baird, 2007; Perry, 1991). However, we assume the linkage matrix is exogenous and fixed. One way to understand this assumption is that it is the product of optimal decision-making by the court. In other words, the linkage matrix is the best-case scenario for the court. In the discussion below, we return to this assumption and discuss the likely consequences of its relaxation.

Given the linkage matrix L and any dispute d , the *successors* of a dispute d , denoted by $S_L(d)$, are those disputes that are provoked (*i.e.*, become active in the second period) when d is resolved in

⁴Conversely, if $L_{dj} = 0$, then resolving dispute d will not cause dispute j to be active in the second period, though dispute j might be activated by some other dispute resolved by the Court.

⁵Thus, we do not assume that the Court resolve cases because it feels bound by, say, legal obligations to resolve cases. As we come back to below, however, we do assume, however, that *not* resolving an active dispute is costly to the court. In this way, we remain agnostic about the foundations (*e.g.*, doctrinal or attitudinal) of the Court’s motivations.

the first period. Formally, the set of successors for dispute d is defined as follows:

$$S_L(d) = \{j \in \mathcal{D} : L_{dj} = 1\}.$$

In the context of a judicial dispute, the successors of a dispute can be thought of as questions that resolution of the dispute would naturally lead to. A dispute with a large number of successors might represent a question that is complicated in the sense that the disposing of the dispute will require defining new terms or using preexisting notions in new ways. In such situations, the new terms or new uses of the old notions will raise further disputes based upon the original resolution.

Given a linkage matrix L , a pair of disputes d and j are said to be *logically connected* if they share at least one successor: resolving one of the disputes will initiate one or more of the same subsequent disputes that would be initiated by resolution of the other dispute.

Definition. Two disputes are *logically connected* if resolution of either of the disputes initiates at least one dispute that would be initiated by resolution of the other. Formally, dispute d is logically connected to dispute j if $S_L(d) \cap S_L(j) \neq \emptyset$.

Substantively speaking, disputes are logically connected if there is some overlap between the downstream implications of their resolution. Logical connection of disputes will play an important role in optimal dynamic adjudication. Also important is a stronger notion of logical connection that occurs when resolution of one dispute, d , would initiate *all* of the disputes that would be initiated by resolution of another dispute, j . When this is the case, we refer to dispute j as being *ancillary to* dispute d .

Definition. One dispute j is *ancillary to* another dispute d if resolution of d initiates all of the disputes that would be initiated by resolution of dispute j . Formally, dispute d is ancillary to dispute j if $S_L(j) \subseteq S_L(d)$.

Substantively, the downstream implications of such a dispute d are unambiguously at least as “broad” as those of the ancillary dispute j .

Sequence of Play and The Court's Payoffs. At the beginning of the first period, the court observes the first period docket, D_1 . After this, the court can resolve (or “adjudicate”) as many available cases as it wants. As described above, we assume that each dispute costs $k > 0$ to adjudicate. Thus, if the court adjudicates x cases, it pays a direct cost of $kx > 0$.⁶ We denote the set of disputes the court adjudicates in the first period by $a_t \subseteq D_t$ and the set of active disputes not adjudicated is denoted by $r_t \equiv D_t \setminus a_t$. The first period payoff received by the court is equal to

$$U_1(a_1; D_1) = -k|a_1| - \sum_{d \in r_1} c(d).$$

The second period docket, D_2 , then consists of those cases that were active, but not resolved, in the first period, plus all the disputes that were inactive in the first period but were initiated by one or more of the cases adjudicated by the Court in the first period.⁷ After observing D_2 , the court decides which of these active disputes to adjudicate: this set is denoted by a_2 . After this choice, the Court receives its second period payoffs,

$$U_2(a_2; D_2) = -k|a_2| - \sum_{d \in r_2} c(d),$$

⁶Obviously, one could generalize the framework by allowing the cost of adjudicating a given dispute to depend on the dispute (or more complicated structures that allow the cost to depend on the exact set of disputes is adjudicates). Allowing for this heterogeneity will easily generate the possibility of seemingly counterintuitive optimal adjudication strategies. However, we demonstrate that such counterintuitive results emerge in a smaller, more restricted environment anyway, thereby rendering such additional complications superfluous for our purposes. This is because the actual, equilibrium, cost of optimally resolving different disputes is already heterogeneous in this framework due to the fact that disputes will generally differ with respect to the identities and characteristics of their successors. In a nutshell, optimally resolving a dispute requires accounting for the number of, and costs of not resolving, the disputes that would be initiated by resolving the dispute in question.

⁷Note, that we assume that any case that was adjudicated in the first period is inactive in the second period, even if one of the other disputes adjudicated in the first period would have initiated the dispute according to the linkage matrix, L .

and the process concludes. Given a pair of dockets, D_1 and D_2 , and a pair of sets of disputes adjudicated, a_1 and a_2 , the Court’s total payoff is simply the sum of its period payoffs:⁸

$$U(a_1, a_2; D_1, D_2) = U_1(a_1; D_1) + U_2(a_2; D_2). \quad (1)$$

Adjudication Strategies. An *adjudication strategy* for the Court is a function that maps each possible docket into a set of disputes to adjudicate, for each of the two periods.⁹ An optimal adjudication strategy is one that maximizes the Court’s total payoff as defined in Equation (1).¹⁰ In what follows, we denote the Court’s optimal adjudication for docket D_t in period t by $a_t^*(D_t)$.

With the basics of the theory laid out, we now turn to the characteristics of optimal adjudication. We then focus in turn on how optimal adjudication is affected by foresight, the costs of both adjudication and delay, and the linkages between disputes.

2.1 Constructing an Optimal Adjudication Strategy

For any first period docket D_1 , it is simple to derive the optimal first period adjudication strategy, a_1^* , by backward induction. By constructing the optimal second-period adjudication for every possible second-period docket, one can calculate the total payoff from every possible first period adjudication and choose the one that offers it the highest total payoff, as defined in Equation (1).

Optimal Adjudication in the Second Period. Given any second period docket, D_2 , deriving the optimal adjudication strategy is straightforward. In the second period, the Court should resolve any dispute that is more costly to endure than to resolve. Formally, resolve any dispute $d \in D_2$ for which

⁸That is, we assume that the Court values the two periods equally. This simplifies the presentation of our results. Discounting the future, which is allowed for in the more general framework laid out in Appendix A, does affect the Court’s optimal strategy, but does not affect the qualitative characteristics of optimal sequential adjudication we discuss in the body of the article.

⁹Formally, an adjudication strategy is a function $\alpha : 2^{\mathcal{D}} \times \{1, 2\} \rightarrow 2^{\mathcal{D}}$, where $2^{\mathcal{D}}$ denotes the set of all subsets of \mathcal{D} (*i.e.*, the set of all potential dockets).

¹⁰We prove in Appendix B that an optimal adjudication strategy always exists and is almost always unique (Proposition 4).

$c(d) > k$.¹¹ Thus, the optimal second period adjudication, given the docket D_2 , is

$$a_2^*(D_2) = \{d \in D_2 : c(d) > k.\}$$

The second period payoff for the Court for docket D_2 , given optimal adjudication, is

$$V_2^*(D_2) = -k|a_2^*(D_2)| - \sum_{d \in D_2 \setminus a_2^*(D_2)} c(d).$$

Optimal Adjudication in the First Period. For any first-period docket, D_1 and each possible adjudication a_1 , the linkage matrix L implies identifies the resulting second period docket, $D_2(a_1; D_1, L)$. The payoff from optimal adjudication of this second period docket is $V_2^*(D_2(a_1; D_1, L))$, and the Court's total payoff would be

$$V^*(a_1; D_1, L) = U_1(a_1; D_1) + V_2^*(D_2(a_1; D_1, L)). \quad (2)$$

The optimal first period adjudication, $a_1^*(D_1)$, is simply that which maximizes the “sequentially rational payoff” defined in Equation (2). We demonstrate these calculations and comparisons in the examples discussed below.

Some Disputes are Too Minor to Ever Be Resolved. Considering the baseline case in which no disputes are connected to each other (*i.e.*, if the linkage matrix, L , contains only zeroes), it is clear that the Court should resolve a dispute d in the first period *only* if $c(d) \geq \frac{k}{2}$. This motivates the next assumption, which simplifies the presentation of our results and requires only setting aside very low cost (*i.e.*, “minor”) disputes.

Assumption 1 *The cost of leaving any dispute $d \in \mathcal{D}$ unresolved for a period costs more than $k/2$:*

$$c(d) > \frac{k}{2}.$$

¹¹It is irrelevant whether the Court, in the second period, resolves a disputes about which it is indifferent.

Equivalently, the cost of adjudication is not too large:

$$k < 2 \min_{d \in \mathcal{D}} [c(d)].$$

Assumption 1 implies that it is optimal to resolve any dispute that is (1) active in the first period and (2) can not provoke any second disputes. Accordingly, Assumption 1 establishes a useful baseline: any dispute that is active in the first period but is optimally left unresolved is left unresolved precisely because of the dispute’s *dynamic* (or “downstream”) implications. Note that Assumption 1 does not imply that it is optimal to resolve every dispute in the second period. Every optimal adjudication strategy will leave dispute d unresolved if it is moderately costly to endure (*i.e.*, $c(d) \in (k/2, k)$).

3 Characteristics of Optimal Dynamic Adjudication

Analysis of our model gives rise to a host of rich results and implications across a variety of features of the dynamic resolution framework. Here, we focus attention on three sets of findings: (i) the ways in which the dynamic links among cases create an efficiency in delay, (ii) the static consequences of those dynamics, and (iii) the endogenous emergence of economies of scale in dynamic dispute resolution.

3.1 Efficient procrastination

Judicial decisions and interpretations are relevant to the court at least partially because the court will have to revisit them in the future. Accordingly, the court’s expectations about what it will (or will not) have to adjudicate in the future will affect its willingness to let even a seemingly pressing issue percolate. Our first result illustrates why the Court may sometimes rationally demur from resolving a seemingly easy or seemingly pressing issue—because the expected consequences of resolution are too costly. We begin illustration of this result with a simple example.

Example 1 Suppose that there are four potential disputes, $\mathcal{D} = \{1, 2, 3, 4\}$. The cost of delay for dispute 1 is 1, the cost of delay for dispute 2 is 2, the cost of delay for dispute 3 is 3, and the cost

of delay for dispute 4 is 4 (*i.e.*, $c(d) = d$). By Assumption 1, the cost of adjudication, k , is less than 2: $k < 2$. The linkages between the disputes are as displayed in Figure 7, where an arrow from one dispute i to another, j indicates that resolving the dispute i in the first period will result in dispute j arising in the second period. In other words, the linkage matrix is

$$L = \begin{bmatrix} 0 & 0 & 1 & 1 \\ 0 & 0 & 1 & 0 \\ 0 & 0 & 0 & 1 \\ 0 & 0 & 0 & 0 \end{bmatrix}.$$

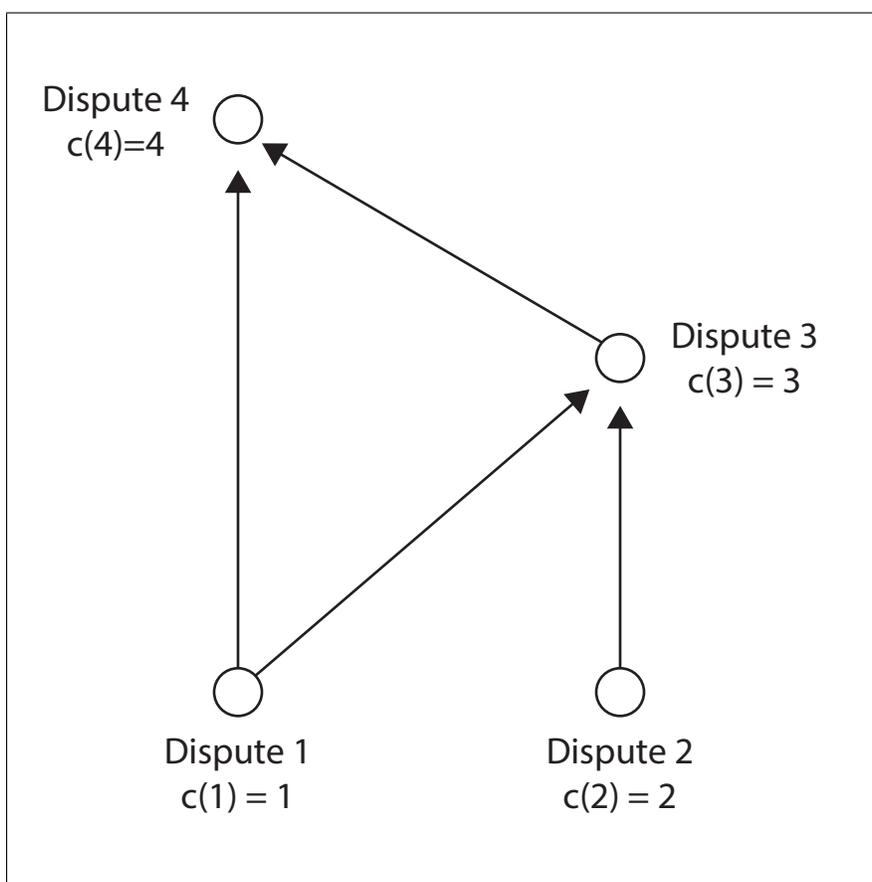


Figure 1: A Four Dispute Example. Resolving a dispute can cause others to arise, as shown by arrows.

Note that disputes 1 and 2 are logically connected by dispute 3. Furthermore, dispute 2 is ancillary to dispute 1: while resolving dispute 2 raises dispute 3, resolving dispute 1 raises both disputes 3 and 4. Similarly, disputes 1 and 3 are logically connected by dispute 4 and dispute 3 is

ancillary to dispute 1, but none of these facts play a role in this example.

We relegate the derivations of the optimal adjudication strategy to Appendix B and instead focus here on comparing the optimal adjudication strategy for three different first period dockets. Specifically, we consider the Court's optimal behavior when, in the first period, it faces either: (I) only dispute 1 (*i.e.*, $D_1 = \{1\}$), (II) only dispute 2 (*i.e.*, $D_1 = \{2\}$), or (III) both disputes 1 and 2 (*i.e.*, $D_1 = \{1, 2\}$),

Court Faces Only Dispute 1 in First Period. When the Court faces only dispute 1 in the first period, the Court's optimal adjudication strategy depends on the cost of adjudication, k . Resolving dispute 1 will trigger disputes 3 and 4 to be active in the next period.

- [*Adjudication is Inexpensive.*] When the cost of adjudication is very small ($k < 1/2$), the Court should resolve dispute 1 in the first period and then resolve both disputes 3 and 4 in the second period. Why? Because in the second period the Court would resolve any dispute on the docket (since $k < 1$). As a result, the Court can wait to resolve dispute 1 and face a payoff of $-1 - k$, or it can resolve dispute 1 in the first period then resolve disputes 3 and 4 in the second period, which yields $-3k$.
- [*Adjudication is Moderately Costly.*] When the cost of adjudication is moderate (specifically, $1/2 < k < 1$), the Court should demur in period 1 and then resolve dispute 1 in the second period.
- [*Adjudication is Very Costly.*] When adjudication is very costly ($k > 1$), the Court should demur in both periods and never resolve dispute 1.

Court Faces Only Dispute 2 in First Period. When the Court faces only dispute 2 in the first period, Assumption 1 ensures that the Court should resolve dispute 2 in the first period and then resolve dispute 3 in the second period.

Court Faces Both Disputes 1 and 2 in First Period. When the Court faces both disputes 1 and 2 in the first period, the Court's optimal adjudication strategy once again depends on the cost of

adjudication, k .

- [*Adjudication is Inexpensive.*] When the cost of adjudication is sufficiently inexpensive ($k < 1$), the Court should resolve both disputes 1 and 2 in the first period and then resolve both disputes 3 and 4 in the second period.
- [*Adjudication is Expensive.*] When adjudication is sufficiently costly ($k > 1$), the Court should resolve dispute 2 in the first period and then resolve both disputes 1 and 3 in the second period.

Figure 2 compares the optimal adjudication strategy when the first period docket contains only dispute 1 with the optimal strategy when the docket contains both disputes 1 and 2. The figure illustrates what we refer to as “endogenous ripeness”: specifically, whenever the cost of adjudication is moderate ($1/2 < k < 1$), the Court should resolve dispute 1 if and only if dispute 2 is also active in the first period. Dispute 2 is sufficiently costly to warrant resolution for all $k < 2$. Because dispute 2 is logically connected to dispute 1, this implies that the net *dynamic* cost of resolving dispute 1 in the first period—that is, the net cost of dispute 1’s downstream consequences—is reduced when dispute 2 is resolved in the first period. Thus, assuming that the cost of adjudication is unobserved, the Court will be more likely to resolve dispute 1 when dispute 2 is also in the docket. \triangle

Example 1 illustrates a core insight from our theory regarding how dynamic adjudication induces interdependencies between disputes. Note that when dispute 1 is “endogenously ripe” (*i.e.*, $1/2 < k < 1$), the Court would optimally resolve dispute 1 in a static framework, because the cost of adjudication is less than the cost of not resolving the dispute. But dispute 1 may have successors that lead the Court to forgo resolving dispute 1. Thus, the presence of dispute 2 restores the Court’s willingness to resolve dispute 1—it motivates the Court to resolve dispute 1 in situations in which, if one omits consideration of downstream disputes, the Court would appear to irrationally demur from resolving dispute 1.

		First Period Docket		
		Only Dispute 1	Both Disputes 1 and 2	
		Resolve Dispute 1 In First Period?	Resolve Dispute 1 In First Period?	Resolve Dispute 2 In First Period?
Cost of Adjudication, k	$k=0$	Yes.	Yes.	Yes.
	$k=1/2$	"Endogenous Ripeness" →	Yes.	Yes.
	$k=1$		No.	Yes.
	$k=2$	No.	No.	Yes.

Figure 2: Endogenous Ripeness. If $\frac{1}{2} < k < 1$, then dispute 1 is resolved if and only if dispute 2 is also on the first period docket.

3.2 Contingent Disputes

Dispute 1 in this example is a specific case of what we term a *contingent* dispute. A dispute is contingent if its resolution is contingent on the other disputes in the docket: it will be resolved in some dockets, but not others. That is, it is sometimes, but not always, optimal for the Court to leave a contingent dispute unresolved. Note that our assumption about adjudication costs (Assumption 1) ensures that the Court would resolve every dispute if all of the disputes are pending at once, so the notion of a contingent dispute essentially identifies disputes that are not sufficiently important to always warrant immediate resolution.

Definition. A dispute is *contingent* if there is some docket containing it in which it is optimal for the Court to leave it unresolved in the first period and another docket containing it in which it is optimal for the Court to resolve it in the first period.

Given that the Court is omniscient in our theory, “learning” by the Court plays no explanatory role within it. Thus, the fact that contingent disputes exist in our setting implies that delay in resolving, or “percolation” of, disputes can emerge for strategic reasons completely independent of learning (cf. Perry, 1991; Clark and Kastellec, 2013). Similarly, our Court is not collegial: it is a unitary actor making decisions in isolation. Thus, our theory provides an understanding of why delay might occur that is independent of motivations such as collegiality on the court, deference by the Court to other political actors, or a desire to wait for coordination by lower courts (cf. Caldeira and Wright, 1988; Perry, 1991; Epstein and Knight, 1998; Lax, 2003).

Proposition 1 *A dispute $d \in \mathcal{D}$ is contingent if and only if*

$$c(d) < k \left(1 + \frac{|S_L(d)|}{2} \right) - \min[k, c(d)]. \quad (3)$$

The condition in Proposition 1 (Inequality (3)) yields a few immediate conclusions.

1. In line with our focus on the impact of dynamic considerations, a dispute can be contingent only if it has successors. If a dispute has no successors—*i.e.*, its resolution has no downstream consequences for the Court—then *the optimality of its resolution is independent of both when it emerges and what other disputes are pending when it emerges.*

2. It is optimal to allow a dispute to simmer only if it is not too costly to leave unresolved. Intuitively, a dispute can be contingent only if it is not too pressing on its own.
3. Disputes that have more successors are more likely to be contingent. The condition expressed in Inequality (3) is a necessary condition for the Court to consider what other disputes are pending when deciding whether to resolve a given dispute d . That is, if Inequality (3) is not satisfied for a given dispute d , then the dispute is sufficiently costly to endure and has sufficiently few downstream consequences (*i.e.*, $|S_L(d)|$ is small) that the Court should resolve the dispute whenever it arises.

When Inequality (3) *is* satisfied we see how the downstream consequences of a dispute affect whether a Court is willing to resolve that dispute in any period. Costly downstream disputes discourage resolution—even if the dispute in question would be easy to resolve. However, the adverse side of those downstream consequences can be mitigated when there are other pending disputes that have the same downstream consequences. As our example illustrates, the cost-benefit balance is shifted as more cases with the same downstream consequences are presented, therefore not appreciably affecting the “cost” of resolving a dispute (*i.e.*, triggering new disputes) while increasing the cost of demurring (*i.e.*, leaving even more pending disputes unresolved).

Result 1 *Expectations about what an adjudicator will (or will not) have to adjudicate in the future will affect its willingness to let a dispute percolate.*

There are many reasons why a rational judge might choose to wait before resolving a given dispute. He may want to allow the issue to percolate more to gain more information, or he may want to await a favorable ideological climate or allies on the court. We show that even in the absence of ideological considerations and even when a judge has complete information, he *still* may prefer to wait. This is because there is a benefit to minimizing live but answered questions in the courts below.

3.3 Dynamically-Induced Resolution Interdependence

Example 1 demonstrates that the dynamic relationships between potential disputes can induce interdependence in the Court's optimal approach to dispute resolution. That is, when two disputes are logically connected through their downstream consequences, the Court might not resolve either of them unless both of them are active. This is easily illustrated by a simple example.

Example 2 Consider the three dispute example illustrated in Figure 3, where all three disputes are equally costly to endure and two of the disputes each initiate (and are hence logically connected through) the third dispute.¹² Assumption 1 implies that the cost of adjudication is less than 2 ($k < 2$). If this cost is large enough ($k > 1$), then it is not optimal to resolve dispute 1 if it is the only active dispute in the first period. The symmetry of the example means this is true for dispute 2 as well. In such a situation, the Court should never resolve the dispute. However, if both disputes are active in the first period, then the fact that $k < 2$ implies that it is optimal to resolve both disputes, after which the Court should resolve dispute 3 in the second period if $k < 1$. \triangle

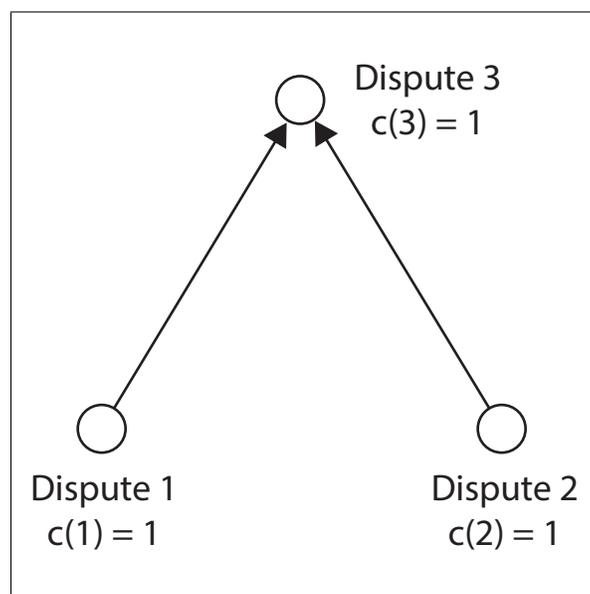


Figure 3: A Simple Example of Resolution Interdependence

The next result further illuminates the nature and origins of the interdependence of optimal resolution created by disputes' dynamic relationships. In particular, Proposition 2 states that if it is

¹²We generalize this example in Section 3.4.

optimal to resolve a dispute d in any given initial docket, then it is also optimal to simultaneously resolve any disputes ancillary to d .¹³

Proposition 2 *Suppose that dispute a is ancillary to d . If (1) both a and d are active in the first period and (2) it is optimal to resolve d , then it is optimal to also resolve a .*

The monotonicity established in Proposition 3 reveals a crucial source of static interdependence that arises from dynamic linkages. Two disputes that seem unrelated today may be connected by shared offspring. As a result, the decisions to resolve seemingly independent disputes may not be independent. In particular, judicial decisions and interpretations are relevant to the court at least partially because the court will have to revisit them in the future. Accordingly, the court’s consideration of what future cases will or will not arise can affect its willingness to let even a seemingly pressing issue percolate. Put more directly, our analysis illustrates the interdependence (or, “joint dependence”) of the court’s optimal adjudication strategy on the combination of various disputes eligible for resolution.

Result 2 *A strategic adjudicator will resolve (weakly) more disputes as the number of pending disputes increases.*

3.4 Downstream Consequences and Endogenous Economies of Scale

In line with our discussion of Proposition 1, whether a contingent dispute should be resolved is a function of how much overlap there is in the downstream consequences of logically related disputes. Proposition 2 demonstrates a strong result, that if a dispute’s downstream consequences are totally subsumed by another dispute—i.e., if a dispute is ancillary to another pending dispute—then it is optimal to resolve that ancillary dispute whenever it is optimal to resolve the other dispute.

One of the richer results that arises from that relationship is a form of endogenous economy of scale. Even while we assume constant, linear costs to adjudicating disputes, economies of scale arise endogenously in the dynamic resolution framework. This may produce episodic- or burst-style

¹³It is straightforward to see that the converse of Proposition 2 does not hold: if resolving a dispute is optimal in a docket and one adds a dispute to which that dispute is ancillary, it is not necessarily the case that resolving the newly added dispute is optimal, too—the newly added dispute might initiate an arbitrarily large number of disputes above and beyond those that the original dispute initiates.

adjudication, in which the court decides related cases in clusters. These economies arise because of the common downstream consequences that follow from resolving any given collection of disputes. To illustrate, this, consider another illustrative example.

Example 3 Consider the generalization of the three dispute setting from Example 2 pictured in Figure 4. Suppose that dispute 3 is not active in the first period. The optimal resolution strategy depends on the cost of adjudication. The four relevant circumstances are described below.

1. $k < c(1) < c(2) < 1$: In this case, it is always optimal for the Court to resolve dispute 1 and/or dispute 2 if either or both are active in the first period.
2. $c(1) < k < c(2) < 1$: For moderately low adjudication costs, it is optimal for the Court to resolve dispute 1 if and only if dispute 2 is also active, in which case it is optimal to resolve both disputes in the first period and then resolve dispute 3 in the second period. Otherwise, the Court should leave dispute 1 unresolved in both periods.
3. $c(1) < c(2) < k < 1$: When adjudication costs are moderately high, it is optimal for the Court to resolve dispute 1 if and only if
 - (a) Dispute 2 is also active and
 - (b) The sum of the costs of enduring disputes 1 and 2 is sufficiently large:¹⁴

$$c(1) + c(2) > \frac{3k}{2}.$$

If both of these conditions hold, then the optimal resolution strategy is to resolve both disputes 1 and 2 in the first period and then resolve dispute 3 in the second period. If either or both do not hold, then it is optimal for the Court to resolve no disputes in either period.

4. $c(1) < c(2) < 1 < k$: When adjudication costs are sufficiently high, then it is optimal for the Court to leave both dispute 1 and dispute 2 unresolved in both periods.

¹⁴This condition is consistent with Assumption 1. For example, let $k = 0.8$, $c(1) = 0.5$, and $c(2) = 0.75$. Then, consistent with Assumption 1, $k < 2c(1) = 1$ and $c(1) + c(2) = 1.25 > \frac{3}{2}0.8 = 1.2$.

For moderate adjudication costs ($c(1) < k < 1$), the optimal resolution of dispute 1 depends upon both whether dispute 2 is active and whether the Court resolves it in the first period (there is no situation in which the Court resolves dispute 1 while leaving dispute 2 active and unresolved). Furthermore, the fact that optimal dispute resolution depends on the sum of the costs of enduring disputes 1 and 2 for moderately high adjudications ($c(2) < k < 1$) represents a form of economy of scale: the optimal resolution of dispute 1 depends on characteristics of (namely, the cost of not resolving) dispute 2. △

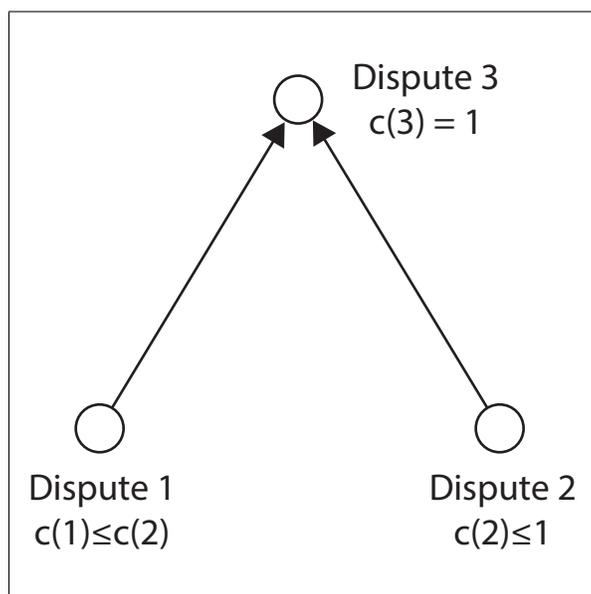


Figure 4: Endogenous Economies of Scale

Example 4 highlights the potential importance not only of what disputes are logically connected to each other—a point that follows from the discussion of downstream consequences—but also the costliness of allowing each of the logically connected disputes to remain unresolved. If a given dispute is logically connected to other disputes that are costly to endure, the dispute in question will be more likely to be resolved than if it is logically connected to less costly disputes. Analogously, if one holds fixed a dispute’s downstream consequences (*i.e.*, its set of successors), resolution of that dispute becomes more likely as the set of disputes to which it is logically connected grows: *enlarging the number of logical connections of a given dispute will increase the court’s incentive to resolve that dispute.*

Result 3 *Logical connections among cases affect their net downstream consequences. As a case becomes logically connected to a larger set of cases, the Court will become more likely to resolve that dispute, endogenously creating the appearance of an economy of scale in adjudication.*

3.5 Summary of Theoretical Predictions

Our model yields a variety of insights into how disputes ought to be resolved across time when cases have known downstream consequences. First the Court may prefer not to resolve a dispute today if resolution would raise too many costly subsequent disputes. Second, optimal dispute resolution depends on the relationships between pending disputes: when two or more disputes are linked to one or more subsequent disputes, the Court’s optimal resolution of any of those disputes may depend upon both whether the other disputes are pending and on their characteristics, including both how costly the disputes are to endure as well as how much their downstream consequences overlap. Thus, even though we assume a linear cost of adjudication, there is an apparent economy of scale in optimal resolution: related disputes are more likely to be resolved together. Substantively, even if the Court does not formally consolidate cases for resolution and hears each on its own, there is still cost-savings by resolving multiple disputes together. We now illustrate a key result from our theoretical analysis, using a case study from the US Supreme Court.

4 Historical example: Downstream Consequences and Readiness for Resolution

We illustrate the dynamic of ‘delaying the problem’ with the use of statistics as evidence in judicial proceedings. Lawyers have offered statistical evidence in litigation since at least the mid-19th century, but courts have only established doctrine guiding the use of statistics very recently. As early as 1868, in *Robinson v. Mandell*, (20 F. Cas. 1027)—a case concerning handwriting analysis that is regarded as the first attempt to present statistical evidence in court (Barnes and Conley, 1986, 5)—Circuit Justice Clifford wrote, “Some of the questions discussed were new, and it must be admitted that they are highly important as affecting the rules of evidence.” But beginning to outline a doc-

trine on when and how statistics constitute evidence would have raised too many difficult follow-up questions, so Justice Clifford declined to to prescribe any doctrine for using statistical evidence. In fact, it was almost 100 years before these questions regarding the use of statistics as evidence were answered. That century saw a dramatic increase in the use of statistics in court, driven in large part by developments in the social sciences and the rise of behavioral sciences more generally. By the 1950s and 1960s, social-scientific approaches and statistical evidence were popular (for example, social science experiments were famously presented in *Brown v. Board of Education*) and the high costs of not having a doctrine on the use of statistics was clear by the. Despite these costs, the court procrastinated issuing a doctrine on the use of statistics. So, the use of statistics in court was increasingly frequent but suspect, and very little law governed its use (Fienberg, 1989, 6-7). Our model provides a theoretical foundation for why the Court tolerated this century-long ambiguity: it realized that the *resulting* ambiguity from issuing a doctrine would be even more severe. If the Court issued a doctrine on when statistical evidence could be admitted, resulting questions on what qualified as statistical evidence, what qualified as statistical significance, and so on would overwhelm the courts.

Beginning in the 1970s, there was a “sharp increase” in the use of statistics in court (Fienberg, 1989, 211). That sharp increase was not itself driven by a demand for doctrine on statistical evidence (at least not directly). Rather, the increase can be attributed to progressive legislation such as the Equal Pay Act of 1963 and the Civil Rights Act of 1964, which created legal questions about how to prove discrimination (Kuhn, 1987). This abundance of cases provided the Court with the opportunity to bundle separate examples of statistical evidence together and resolve these seemingly separate disputes at once. The Court knew resolution of any of these would raise clarifying questions, and knew these clarifying questions would still be difficult and plentiful. But now multiple questions raised similar clarifying questions, thereby offering an economy of scale. The Supreme Court took advantage of this opportunity when, in its 1971 decision of *Griggs v. Duke Power Co.*, it noted that a test was discriminatory in part because it “disqualify Negroes at a substantially higher rate than white applicants.” Although it dealt minimally with the statistical evidence underlying that claim, its decision quietly “opened the door to statistical proof” (Barnes and Conley, 1986, 10). As expected,

the Court's decision in *Griggs* invited further disputes. These subsequent disputes included how to identify exactly when statistical evidence is admissible, exactly when it is proof of discrimination, and how it should be treated by the various actors in the judicial process. We argue the Court *foresaw* these interconnected disputes and waited until it could answer many at once.

If the Court decides statistics are valid evidence in employment discrimination cases, subsequent disputes naturally arise—what the appropriate reference group is, whether such evidence is fully supportive on its own or whether it should be buttressed with evidence specific to the case at hand. But these questions also arise for other kinds of discrimination—jury selection, school composition, and so on. In 1977, the Court addressed the admissibility of statistical evidence in three decisions on discrimination: *Castaneda v. Partida*, *Teamsters v. United States*, and *Hazelwood School District v. United States*. These cases established the principles for using statistics to demonstrate discrimination in jury selection, employment and union practices, and hiring practices, respectively. By corraling these three cases, the court was able to resolve a collection of questions about what kinds of legal claims can be made with statistical evidence. However, as we depict in Figure 5, resolving those cases gave rise to *further* subsequent issues that had to be worked out. For example, what constitutes statistical significance? In 1983, exemplifying the costs of leaving such a question unresolved, The Fourth Circuit wrote that, “The Supreme Court itself, though disclaiming any intention ‘to suggest that precise calculations of statistical significance are necessary in employing statistical proof,’ has stated that standard deviations of more than ‘two or three’ represent a minimum for statistical significance” *E.E.O.C. v. Federal Reserve Bank of Richmond* 698 F.2d 633. These, any many more questions, were more pertinent because of the Supreme Court's three 1977 decisions.

Result 3 and Example 1 above formally show the cautionary effect of foresight. Once the Court decides to resolve a dispute, it will “sweep up” many logically connected, ancillary disputes. Once the Court decided to set a standard for using statistics to show discrimination, it collected all of the then-pending questions (jury discrimination, employment discrimination, and jury selection) and resolved them virtually at the same time. Allowing statistical evidence to establish a *prima facie* case for discrimination would allow the court to resolve the cases at hand, but it would raise further

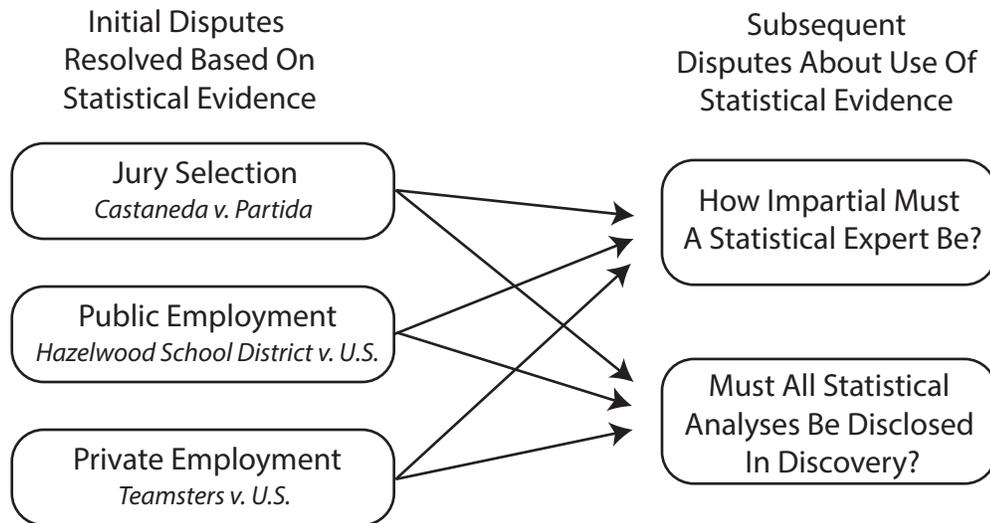


Figure 5: *Illustration of linkages among cases involving statistical evidence.* On the left is a set of cases concerning the types of claims of discrimination for which statistical evidence can be presented. On the right are subsequent issues that arose about how to evaluate and handle statistical evidence in a trial.

(and more technical) questions about what kinds of statistical evidence should suffice. In 1868, when the Court first had the opportunity to address the use of statistics in court, the costs of these ancillary questions was arguably too much to bear. But by the late 1970s, the ancillary questions were implicated in a sufficiently large number of pressing cases about statistical evidence that the Court found it worthwhile to raise them.

5 Discussion and Conclusion

Policy making is a strategic, dynamic, path-dependent process. Scholarship on policy-making has documented the strategy behind sequential steps taken in the crafting of individual policies, and also the long-run sequential nature of political movements that encompass many individual policy achievements. However, this literature does not include a robust theory of the general, predictive, systematic features of dynamic policy making. We have proposed one such theory, tailored in particular to the setting in which policy is made through the adjudication of individual disputes. The model yields implications about how a strategic policy-maker will sequence various questions posed in light of the salience or import of the questions and especially the inter-linkages among the various

questions.

While we focus on the U.S. Supreme Court as the sequential decision-maker, our model's insights are applicable more broadly. For example, the model helps us to understand executive leadership and the construction of a leader's agenda. Scholarship on the Presidency understands the agenda-setting problem as one of sequential adjudication. Every decision the President makes is "only the beginning. For each new decision sets a precedent, begetting new decisions, foreclosing others, and causing reactions which require counteractions" (Sorenson, 1963, pp. 20). The costs and benefits of an immediate fight are reduced down through a black box, but the model allows us to understand when an executive chooses to take up an issue and when he chooses to wait, based on what consequences he expects his decision to have.

Non-informational percolation. Much has been written about why courts, especially the US Supreme Court, demur from resolving seemingly pressing questions. Some normative theorists (e.g., Bickel, 1962; Ely, 1980; Sunstein, 1999) contend courts should avoid answering too many questions, in order to leave as much authority as possible in the hands of more democratically-accountable institutions. Other researchers have argued that courts need to allow issues to percolate in order to observe how disputes play out and thereby learn what resolution is best suited to the problem (e.g., Tiberi, 1993; Clark and Kestel, 2013). Still others claim that it is too demanding to select which disputes to resolve and how much effort to put into any given question, so courts must rely on cues from the political world to navigate the mass of disputes that come before them (e.g., Caldeira and Wright, 1988). Our model demonstrates that courts might allow issues to percolate and remain unresolved even absent any of these concerns. By enduring an unresolved dispute, a court might forestall significant downstream consequences, such as a flood of new questions or issues. Indeed, it is a common understanding in the literature on litigation—especially concerning the definition of rights—that once the Supreme Court wades into an issue area, it often provokes a massive flood of new questions implied by its resolution of the initial dispute.

Connected disputes and strategic dilemmas. American courts make policy only through the adjudication of individual cases. They cannot articulate rules ad hoc: courts establish rules through the

individual cases they hear and through analogies among them (e.g., Fox and Vanberg, 2014; Callander and Clark, Forthcoming). If a court must make policy through cases, what constitutes a good case by which to articulate a doctrine or rule? Much theoretical research interrogates which cases the Supreme Court chooses to review, but that work typically focuses on case-level, static factors that make disposing of the individual case appealing. (Such factors include the ideological relationship to the lower court, the composition of the current court, signals like dissents or briefs that indicate a case's importance, or the relationship to the broader political sphere (see e.g. Cameron, Segal and Songer, 2000; Lax, 2003; Clark, 2009; Beim, Hirsch and Kstellec, 2014).) Our analysis reveals that dynamic considerations—specifically the anticipated path of disputes—can make seemingly equal disputes more or less attractive vehicles for policy-making. The consequence is that a description of agenda-setting, including a study of *certiorari*, is only complete if it considers dynamic linkages among disputes.

Questions presented. Our analysis focuses on a particular dynamic problem—how an adjudicator compares the downstream consequences of resolving problems against the cost of delaying resolution—to the exclusion of a number of other dynamics that might complicate the logic we study. Allowing cases to percolate to gain more information, or awaiting a favorable ideological climate, can lead judges to delay absent consideration for downstream consequences. Even if we focus only on our own considerations for downstream consequences, our model leaves room for further development. Questions left unresolved by a court or bureaucracy might create political incentives for a legislature to take up the issue, thereby creating an alternative set of dynamic costs associated with delay. Complementarily, resolving a dispute might “take the wind out” of a politically salient policy debate: resolving a dispute may remove future disputes from the docket. These possibilities, which we expand a bit upon below, are intriguing and present promising future extensions to the model; our framework can naturally handle them.

Costly resolution. It is also worth noting we assume that resolving a case is costly to the Court, while clearly it is reasonable to suppose that the Court might benefit directly from resolving a dispute. The most natural situation in which this might shape our analysis is when a dispute itself has

a large net benefit to being resolved but triggers an arbitrarily large set of successor disputes. We do not consider that possibility here for parsimony. However, it can be seen that allowing the Court to directly enjoy resolving a dispute would not change our qualitative results as long as there are some disputes that the Court finds costly to resolve.¹⁵ In the example of the case the court wants to resolve but triggers a large number of costly successor disputes, then the same dynamics we describe in this paper would apply—the court would face an incentive to demur in order to avoid the large downstream consequences. Were enough other pending disputes to arise that have similar downstream consequences, that incentive would be mitigated, and the court might consider resolving the initial dispute. We anticipate an extension of this model could directly incorporate this possibility.

Strategic litigation. We also do not explore the role of litigants in setting the docket, but research suggests signals sent by litigants can communicate to the Court the importance of a given case (e.g., McGuire and Caldeira, 1993; McGuire, 1994; Boucher and Segal, 1995; Spriggs and Wahlbeck, 1997). Our framework has implications for how interested, potentially strategic, litigants can influence the mix of issues available for resolution at any given time. While our theory is deliberately stark and omits consideration of strategic litigants and other actors—the theory considers only the incentives of a court facing a set of disputes with exogenous linkages—it provides the theoretical underpinnings for a fuller consideration of the incentives such actors would face.

If the Court is sensitive to the anticipated consequences of resolution—even of resolution of *another* dispute—then litigants might increase the likelihood their case is heard by manipulating the *whole docket* over time. A variety of questions in political science concerning distributive politics are implicitly motivated by this concern, most notably in the study of the development of rights through litigation (e.g., Epp, 1998; Kersch, 2004; Sanders, 1999). Moreover, this type of strategy is not just a feature of long trends in special interest litigation. Administrative agencies specifically identify the links among cases as a component of their strategic calculus. An OECD report on competition between the US Federal Trade Commission and the Department of Justice notes, “The Commission

¹⁵Furthermore, if the Court directly enjoys resolving all disputes, then its optimal strategy is trivial: resolve all pending disputes in every time period. Simple intuition and the fact that we do not see courts doing this jointly implies that this is a rare situation empirically.

sometimes brings cases not only because of the immediate market impact, but also because the case may help clarify the law. . . . [T]he value of enforcement action goes beyond the specific case by clarifying the law and in turn guiding the broader business community” (*Roundtable on Competition Authorities’ Enforcement Priorities*, 1999).

In this paper we assume that the initial docket is exogenous, and that subsequent dockets are a function of strategic choices made only by the Court. In reality, the probabilistic connections among cases are a rich strategic game involving litigants, courts, and special interests, among other actors. Future extensions to the modeling framework could consider how actors such as interest groups, lower courts, executives, and legislatures might use their various tools (*e.g.*, lawsuits, interpretation of precedent, prosecutions, and legislation) to create and alter links between current and future disputes. In a sense, while our theory is merely one of many ways in which issue linkages can be conceptualized, a framework such as the one we provide is arguably necessary for any full theoretical treatment of how phenomena such as issue networks (Hecklo, 1978) emerge, as well as understanding more generally how and why interest groups attempt to tie issues together when lobbying legislatures and the public (Baumgartner and Leech, 1998, 2001; Hurwitz, Moiles and Rohde, 2001; Baumgartner and Jones, 1993, 2009).

Strategic Opinions: Control of the Linkage Matrix. Just as the dockets that arise are presumably a function of strategic behavior, it is reasonable to suppose that the linkage between disputes—the downstream implications of dispute resolution—is also the product of strategic behavior. From an empirical standpoint, the Court has some control over the scope and nature of the downstream implications of its decision (*e.g.*, how it crafts its opinion may limit or expand the scope of the decision). We do not explicitly model this mostly because of space constraints. Allowing the Court to choose the downstream implications of its decision without limitation would lead to a trivial optimal strategy: resolve every pending dispute, and ensure that the resolution of each dispute has zero downstream implications. Because this is an unrealistic prediction, the implication is that Courts must be constrained in their ability to entirely foreclose downstream consequences: some disputes, regardless of how they are resolved, will necessarily raise subsequent disputes. Theorizing about

how different resolutions of a given dispute affects the scope and nature of subsequent disputes is a fascinating topic, but we must leave it for future work.¹⁶

The Punctuated Nature of Policymaking. Our results show that legal questions raised as matters ancillary to more important questions will be resolved sooner than otherwise similar issues that are connected to less important questions. Our theoretical framework provides an understanding for why dispute resolution can appear “clumpy” as a result of the Court not resolving any seemingly pressing issues in a domain for a significant period of time and then, in one fell swoop, resolves a host of related issues. More specifically, the theory provides an explanation for this behavior that does not depend on the importance of the pending issues varying across time. Rather, the key causal mechanism in our theory is the emergence of a sufficient number of disputes with common “downstream” consequences.

This helps us to understand two ubiquitous, but seemingly contradictory, attributes of political processes within mature institutions—“a plethora of small accommodations and a significant number of radical departures from the past” (Baumgartner, Jones and Mortensen, 2014, page 60) *Punctuated Equilibrium Theory* explains the coexistence of these phenomena by emphasizing issue definition and agenda setting, and by arguing that “reinforcement creates great obstacles to anything but modest change, whereas questioning policies at the most fundamental levels creates opportunities for major reversals” (Baumgartner, Jones and Mortensen, 2014, page 60). Our theory complements this tradition. In particular, our theory explains both stasis and “punctuations” in a single framework, but it does so without relying on ancillary concepts such as bounded rationality or limited attention.¹⁷ Our theory’s complementary perspective is based on the interactive effect of both foresight—some disputes should be delayed while awaiting others to “play out”—and the possibility that multiple decisions might have common dynamic effects. These dynamic interconnections are the key to our theory’s prediction of periods of relative quiet being interrupted intermittently by

¹⁶It is also possible to view our linkage matrix as that which would arise given that the Court optimally limits each dispute’s downstream implications given the (unmodeled) constraints on its ability to do this. While this is true, an objection to this (and reason for more work on this topic) is that it is possible that the optimal limitation on a given dispute’s downstream implications will depend on the Court’s adjudication strategy.

¹⁷Our theory is not inconsistent with these concepts, and indeed one could utilize such concepts to build a model of where the linkage matrix—the connections between disputes—comes from. But we leave that for future work.

bursts of multiple decisions at once.

References

- Baird, Vanessa A. 2004. "The effect of politically salient decisions on the US Supreme Court's agenda." *Journal of Politics* 66(3):755–772.
- Baird, Vanessa A. 2007. *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda*. Charlottesville: University of Virginia Press.
- Baker, Scott and Claudio Mezetti. 2012. "A Theory of Rational Jurisprudence." *Journal of Political Economy* 120(3):513–551.
- Barnes, David W. and John M. Conley. 1986. *Statistical Evidence in Litigation*. Boston: Little, Brown and Company.
- Baumgartner, Frank R. and Beth L. Leech. 1998. *Basic Interests: The Importance of Groups in Politics and in Political Science*. Princeton, NJ: Princeton University Press.
- Baumgartner, Frank R. and Beth L. Leech. 2001. "Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics." *Journal of Politics* 63(4):1191–1213.
- Baumgartner, Frank R. and Bryan D. Jones. 1993. *Agendas and Instability in American Politics*. Chicago, IL: The University of Chicago Press.
- Baumgartner, Frank R. and Bryan D. Jones. 2009. *Agendas and Instability in American Politics*. 2 ed. Chicago, IL: The University of Chicago Press.
- Baumgartner, Frank R., Bryan D. Jones and Peter B. Mortensen. 2014. Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policy. In *Theories of the Policy Process*, ed. Sabatier and Weible. Third ed. Boulder, CO: Westview Press pp. 59–103.
- Beim, Deborah, Alexander V. Hirsch and Jonathan P. Kastellec. 2014. "Whistleblowing and Compliance in the Judicial Hierarchy." *American Journal of Political Science* 58(4):904–918.
- Beim, Deborah and Kelly Rader. 2016. "Evolution of Conflict on the Courts of Appeals." Working paper.

- Bickel, Alexander M. 1962. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven, CT: Yale University Press.
- Boucher, Robert L., Jr. and Jeffrey A. Segal. 1995. "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court." *Journal of Politics* 57(3):824–837.
- Bueno de Mesquita, Ethan and Matthew Stephenson. 2002. "Informative Precedent and Intrajudicial Communication." *American Political Science Review* 96(4):1–12.
- Caldeira, Gregory A. and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *The American Political Science Review* 82(4):1109–1127.
- Callander, Steven and Tom S. Clark. Forthcoming. "Precedent and Doctrine in a Complicated World." *American Political Science Review* .
- Cameron, Charles M. 1993. "New Avenues for Modeling Judicial Politics.". Prepared for delivery at the Conference on the Political Economy of Public Law, Rochester, N.Y.
URL: <http://www.princeton.edu/ccameron/NewAvenues.pdf>
- Cameron, Charles M., Jeffrey A. Segal and Donald R. Songer. 2000. "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions." *American Political Science Review* 94:101–16.
- Clark, Tom S. 2009. "The Separation of Powers, Court-curbing and Judicial Legitimacy." *American Journal of Political Science* 53(4):971–989.
- Clark, Tom S. and Benjamin E. Lauderdale. 2012. "The Genealogy of Law." *Political Analysis* 20(3):329–350.
- Clark, Tom S. and Jonathan P. Kastellec. 2013. "The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model." *Journal of Politics* 75(1).
- Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.

- Epp, Charles R. 1998. *The Rights Revolution*. University of Chicago Press.
- Epstein, Lee and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: C.Q. Press.
- Estreicher, Samuel and John Sexton. 1986. *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process*. New Haven: Yale University Press.
- Fienberg, Stephen E., ed. 1989. *The Evolving Role of Statistical Assessments as Evidence in the Courts*. New York: Springer-Verlag.
- Fishburn, Peter. 1977. "Condorcet Social Choice Functions." *SIAM Journal on Applied Mathematics* 33:469–489.
- Fontana, David. 2011. *Docket Control and the Success of Constitutional Courts*. Edward Elgar.
- Fox, Justin and Georg Vanberg. 2014. "Narrow versus Broad Judicial Decisions." *Journal of Theoretical Politics* 26:355–383.
- Gennaioli, Nicola and Andrei Shleifer. 2007. "The Evolution of Common Law." *Journal of Political Economy* 115(1):43–68.
- Grant, Emily, Scott A. Hendrickson and Michael S. Lynch. 2012. "The Ideological Divide: Conflict and the Supreme Court's Certiorari Decision." *Cleveland State Law Review* 60:559–583.
- Greenberg, Jack. 2004. *Crusaders in the Courts: Legal Battles of the Civil Rights Movement*. Twelve Tables Press.
- Hathaway, Oona A. 2001. "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System." *Iowa Law Review* 86:601–661.
- Hecklo, Hugh. 1978. Issue Networks and the Executive Establishment. In *The New American Political Enterprise*, ed. Anthony King. Washington, DC: American Enterprise Institute.
- Hurwitz, Mark S., Roger J. Moiles and David W. Rohde. 2001. "Distributive and Partisan Issues in Agriculture Policy in the 104th House." *American Political Science Review* 95(4):911–922.

- Kastellec, Jonathan P. 2010. "The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees." *Journal of Empirical Legal Studies* 7(2):202–30.
- Kersch, Ken I. 2004. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*. New York: Cambridge University Press.
- Kornhauser, Lewis A. 1989. "An Economic Perspective on Stare Decisis." *Chicago-Kent Law Review* 65(1):63–92.
- Kornhauser, Lewis. A. 1992. "Modeling Collegial Courts I: Path Dependence." *International Review of Law and Economics* 12:169–85.
- Kuhn, Peter. 1987. "Sex Discrimination in Labor Markets: The Role of Statistical Evidence." *American Economic Review* 77(4):567–583.
- Landes, William M. and Richard A. Posner. 1976. "Legal Precedent: A Theoretical and Empirical Analysis." *Journal of Law and Economics* .
- Lax, Jeffrey R. 2003. "Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation, and the Rule of Four." *Journal of Theoretical Politics* 15(1):61–86.
- Lax, Jeffrey R and Kelly T. Rader. 2009. "Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?" *Journal of Politics* Forthcoming.
- Lindquist, Stephanie and David E. Klein. 2006. "The Influence of Jurisprudential Considerations on Supreme Court Decision Making: A Study of Conflict Cases." *Law & Society Review* 40(1):135–62.
- McGuire, Kevin T. 1994. "Amici Curiae and Strategies for Gaining Access to the Supreme Court." *Political Research Quarterly* 47(4):821–837.
- McGuire, Kevin T. and Barbara Palmer. 1995. "Issue Fluidity on the U.S. Supreme Court." *American Political Science Review* 89(3):691–702.

- McGuire, Kevin T. and Barbara Palmer. 1996. "Issues, Agendas, and Decision Making on the Supreme Court." *American Political Science Review* 90(4):853–865. x.
- McGuire, Kevin T. and Gregory A. Caldeira. 1993. "Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court." *American Political Science Review* 87(3):717–726.
- McKelvey, Richard D. 1986. "Covering, Dominance, and Institution-Free Properties of Social Choice." *American Journal of Political Science* 30:283–314.
- Miller, Nicholas R. 1980. "A New Solution Set for Tournaments and Majority Voting: Further Graph-Theoretical Approaches to the Theory of Voting." *American Journal of Political Science* 24(1):68–96.
- Page, Scott E. 2006. "Path Dependence." *Quarterly Journal of Political Science* 1:87–115.
- Patty, John W. and Elizabeth Maggie Penn. 2014. *Social Choice and Legitimacy: The Possibilities of Impossibility*. New York, NY: Cambridge University Press.
- Perry, Jr., H.W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
- Richards, Mark J. and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96(2):305–20.
- Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.
- Roundtable on Competition Authorities' Enforcement Priorities*. 1999. In *Committee on Competition Law and Policy, Directorate for Financial, Fiscal and Enterprise Affairs, OECD*. Vol. DAF/CLP/WD(99)43.
- Rubio, Luis, Beatriz Magaloni and Edna Jaime. 1994. *A la puerta de la ley: El estado de derecho en México*. Cal y Arena.

- Sanders, Elizabeth. 1999. *Roots of Reform*. University of Chicago Press.
- Sorenson, Theodore C. 1963. *Decision-Making in the White House: The Olive Branch or the Arrows*. New York: Columbia University Press.
- Spriggs, II, James F. and Paul J. Wahlbeck. 1997. "Amicus Curiae and the Role of Information at the Supreme Court." *Political Research Quarterly* 50(2):365–386.
- Sunstein, Cass R. 1999. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Harvard University Press.
- Tiberi, Todd J. 1993. "Supreme Court Denials of Certiorari in Conflict Cases: Percolation or Procrastination?" *University of Pittsburgh Law Review* 54:861–892.
- Tushnet, Mark V. 2004. *The NAACP's Legal Strategy Against Segregated Education, 1925-1950*. University of North Carolina Press.
- Volokh, Eugene. 2003. "The Mechanisms of the Slippery Slope." *Harvard Law Review* .

A The General T -period Model

We present here a more general formulation of our theoretical framework in which the number of time periods is arbitrary but finite. That is, in the setting presented here, the Court adjudicates disputes across $T \geq 1$ discrete periods, where T is finite (but may be arbitrarily large).

Disputes and Linkages. Each dispute d is characterized by a dispute-specific cost of delay, $c(d) \geq 0$. We focus on dynamic linkages between disputes—that is, which subsequent disputes any given dispute will provoke, and which other disputes will provoke those same follow-ups—and seek to understand how these dynamic linkages impact the incentives of the Court to resolve any given dispute. The set of all n possible disputes is denoted by \mathcal{D} . The (exogenous) linkages between disputes are represented by a $n \times n$ linkage matrix, L . The probability that resolving dispute d will provoke some dispute j is denoted by $L_{dj} \in [0, 1]$, with the additional restriction $L_{dd} = 0$: resolving any given dispute does not (immediately) lead to the recurrence of that dispute. Thus, L defines a weighted graph on \mathcal{D} . In order to keep presentation as parsimonious as possible, we focus on the case in which linkages are deterministic: $L_{dj} \in \{0, 1\}$ for each distinct pair of disputes d and j . Part of the reason this decision makes the presentation parsimonious is that it allows us to unambiguously refer to the “predecessors” and “successors” for any dispute $d \in \mathcal{D}$, given the linkage matrix L . The *predecessors* of a dispute d , denoted by $P_L(d)$ are those disputes that, when resolved, provoke dispute d :

$$P_L(d) = \{j \in \mathcal{D} : L_{jd} = 1\},$$

and the *successors* of a dispute d , denoted by $S_L(d)$, or simply $S(d)$, are those disputes that are provoked when d is resolved:

$$S_L(d) = \{j \in \mathcal{D} : L_{dj} = 1\}.$$

Sequence of Play and The Court’s Payoffs. At the beginning of each period t , the Court observes the (possibly empty) set of disputes that are available for resolution, $D_t \subseteq \mathcal{D}$. We call D_t the Court’s *docket*. Following observation of D_t , the Court can adjudicate as many available cases as it wants. We assume that the direct cost of adjudication is a linear function of the number of cases adjudicated:

if the Court adjudicates x cases, it pays a direct cost of kx , for $k \geq 0$.¹⁸ The set of cases the Court adjudicates in period t is denoted by $a_t \subseteq D_t$ and the set of cases remaining to be disposed of is denoted by $r_t \equiv D_t \setminus a_t$. The payoff received by the Court in period t is

$$U_t(a_t; D_t) = - \left[k|a_t| + \sum_{d \in r_t} c(d) \right]$$

The next docket—the set of cases available for resolution in period $t + 1$ —consists of those cases that were available for resolution, but not resolved, in period t : $D_{t+1} = r_t$, and all cases provoked by those resolved in period t (except those that would have been provoked but were resolved in period t —we assume these do not immediately reappear.)¹⁹ Thus, the probability that dispute j is in D_{t+1} , given D_t and a_t , is denoted and defined by

$$P(j; D_t, a_t) \equiv \begin{cases} 0 & \text{if } j \in a_t, \\ 1 & \text{if } j \in r_t, \\ 1 - \prod_{d \in a_t} (1 - L_{dj}) & \text{otherwise.} \end{cases}$$

Thus, given D_t and a_t , the probability that the next period's docket will equal D is

$$P(D; D_t, a_t) \equiv \prod_{d \in D} P(d; D_t, a_t) \prod_{j \notin D} (1 - P(j; D_t, a_t)),$$

¹⁸Obviously, one could generalize the framework by allowing the cost of adjudicating a given dispute to depend on the dispute (or more complicated structures that allow the cost to depend on the exact set of disputes is adjudicates). Allowing for this heterogeneity will easily generate the possibility of seemingly counterintuitive optimal adjudication strategies. However, we demonstrate that such counterintuitive results emerge in a smaller, more restricted environment anyway, thereby rendering such additional complications superfluous for our purposes. This is because the actual, equilibrium, cost of optimally resolving different disputes is already heterogeneous in this framework due to the fact that disputes will generally differ with respect to the identities and characteristics of their successors. In a nutshell, optimally resolving a dispute requires accounting for the number of, and costs of not resolving, the disputes that would be initiated by resolving the dispute in question.

¹⁹The final step (subtracting the disputes resolved in period t) may seem a bit counterintuitive at first, but merely accounts for the fact that, if one resolve multiple disputes at once, one or more of the resolved disputes might “initiate” one or more of the other disputes. We presume that this initiation is immediately and costlessly resolved in such a situation.

or, given our restriction of attention to deterministic linkage matrices, the next period's docket is with certainty given by the following:

$$D_{t+1}(D_t, a_t) = r_t \cup (\cup_{d \in a_t} S_L(d)) \setminus a_t.$$

Then, for any T -period sequence of dockets, $\mathbf{D} = (D_1, \dots, D_T)$, and adjudications, $\mathbf{a} = (a_1, \dots, a_T)$, the Court's overall payoff is simply

$$U(\mathbf{a}; \mathbf{D}) = \sum_{t=1}^T \delta^{t-1} U_t(a_t; D_t), \quad (4)$$

where $\delta \in (0, 1]$ is an exogenous discount factor. Finally, a *setting*, $\sigma = (\mathcal{D}, c, k, L)$, is a combination of a set of $n \geq 1$ potential disputes, \mathcal{D} ; a vector of costs of delay, $c \in \mathbf{R}_{++}^n$; a cost of adjudication, $k \geq 0$; and a $n \times n$ matrix of linkages, L . The set of all potential settings is denoted by Σ .

Adjudication Strategies. A T -period adjudication strategy is a complete description of which disputes will be resolved and when they will be resolved. Specifically, for any setting σ and number of time periods T , an adjudication strategy is a mapping, denoted by $\alpha : 2^{\mathcal{D}} \times \{1, \dots, T\} \rightarrow 2^{\mathcal{D}}$, that maps each docket $D \subseteq \mathcal{D}$ and the time period, $t \in \{1, \dots, T\}$, into a set of disputes to resolve, denoted by $\alpha(D, t)$.²⁰ The set of all adjudication strategies, given a setting σ and a number of time periods T , is denoted by $\mathcal{A}(\sigma, T)$. For any setting σ , number of time periods T , and initial docket $D_1 \subseteq \mathcal{D}$, an adjudication strategy $\alpha \in \mathcal{A}(\sigma, T)$ induces, for each time period $t \in \{1, \dots, T\}$, a distribution of dockets and adjudication decisions.

Given a setting σ , a time horizon T , a discount factor δ , and an initial docket $D_1 \subseteq \mathcal{D}$, we denote the Court's total payoff from an adjudication strategy $\alpha \in \mathcal{A}(\sigma, T)$ by $EU(\alpha; \sigma, T, \delta, D_1)$.²¹ With this in hand, an adjudication strategy $\alpha^* \in \mathcal{A}(\sigma, T)$ is *optimal* for any setting σ , number of time periods T , and discount factor δ , if it maximizes $EU(\cdot; \sigma, T, \delta, D_1)$ for each possible initial docket

²⁰We could restrict adjudication strategies to adjudicating only disputes currently in the docket ($\alpha(D, t) \subseteq D$ for all (D, t)), but this is unnecessary given our focus on optimal adjudications.

²¹This function encompasses how α will generate dockets in periods $2, \dots, T$, given L . This is what distinguishes it from its primitive function, $U(\cdot)$, defined in Equation (4).

$D_1 \subseteq \mathcal{D}$:

$$\forall D_1 \subseteq \mathcal{D}, \quad \alpha^* \in \operatorname{argmax}_{\alpha \in \mathcal{A}(\sigma, T)} EU(\alpha; \sigma, T, \delta, D_1). \quad (5)$$

We denote the set of all optimal adjudications for a setting-time length pair (σ, T) by $\mathcal{A}^*(\sigma, T, \delta)$. When the setting σ is clear, we denote the set of all t -period optimal adjudications in period $t \leq T$ for any docket $D \subseteq \mathcal{D}$ by $A_t^*(D)$. We show in the appendix that the set of optimal adjudication strategies is nonempty and generically unique (Proposition 4).

While our existence result applies to any finite time horizon, much of our discussion in the article focuses on the two-period setting ($T = 2$). It is important to note that this simplification is merely for presentational purposes. The two-period setting is sufficient to highlight the Court’s incentives in a dynamic adjudication setting, and our findings extend to any finite horizon setting with more than two periods.²² In the following subsections, we consider (1) the characteristics of optimal behavior in a two-period setting, (2) the effect of foresight on optimal behavior, (3) the effect of costs (of adjudication and delay) on optimal behavior, and (4) the effect of the linkages among cases on optimal behavior.

A.1 Analysis

In the two-period setting, the Court’s motivations are based solely on the relative costs of delay and on what “new issues” will emerge as a result of adjudication. We can solve for the optimal first-period adjudication decision, a_1^* , given an initial docket D_1 , by backward induction. In particular, given any second period docket, D_2 , deriving the optimal adjudication strategy is straightforward. The optimal second period adjudication decision, given D_2 , is any adjudication decision satisfying

$$a_2^*(D_2) \in \operatorname{argmax}_{a_2 \subseteq D_2} U_2(a_2; D_2) = \operatorname{argmin}_{a_2 \subseteq D_2} \left[\sum_{d \in r_t} c(d) + k|a_2| \right]. \quad (6)$$

The additive separability across disputes of both the costs of resolution and the costs of delay implies that the Court should resolve only those disputes that are costlier to allow to linger than to

²²By focusing on the two-period case, we can set aside ancillary questions such as whether a resolved dispute can arise again. Our results specifically hold when disputes, once resolved, never arise again.

resolve and should always resolve those that are strictly so. If, as in the final period, the Court is faced with simply considering whether to leave a dispute unresolved or not, without concern about any further future implications of the resolution of the dispute (*i.e.*, if the linkage matrix L is not part of the Court’s calculus), then the Court should resolve a dispute d only if $c(d) \geq k$.

Moving back from the second period to the first, the question becomes, which cases should be left unresolved in the first period? The Court should resolve a dispute d in the first period *only* if $(1 + \delta)c(d) \geq k$. This motivates the next assumption, which simplifies the presentation of our results and requires only setting aside very low cost (*i.e.*, “minor”) disputes.²³ In the static setting, the assumption implies that any dispute that has no successors would be resolved by an optimal adjudication strategy if the dispute arises in any period before the final period, but does allow for the possibility that a dispute might not be resolved in the final period.

Assumption 2 *Given the discount factor, δ , each dispute $d \in \mathcal{D}$ satisfies the following:*

$$c(d) > \frac{k}{1 + \delta}.$$

Assumption 2 establishes a useful baseline: any dispute in the initial docket that is left unresolved by an optimal strategy is left unresolved precisely because of the *dynamic implications* of its resolution. That is, given Assumption 2, an optimal adjudication strategy would resolve all disputes in the first period in a “static” setting, where the linkage matrix, L , contains only zeroes.

Analysis of our model gives rise to a host of rich results and implications across a variety of features of the dynamic resolution framework. Here, we focus attention on three sets of findings: (i) the ways in which the dynamic links among cases create an efficiency in delay, (ii) the static consequences of those dynamics, and (iii) the endogenous emergence of economies of scale in dynamic dispute resolution.

²³We assume that the inequality is strict so as to set aside uninteresting knife-edge indifference on the part of the Court.

A.1.1 Efficient procrastination

Judicial decisions and interpretations are relevant to the Court at least partially because the Court will have to revisit them in the future. Accordingly, the Court's expectations about what it will (or will not) have to adjudicate in the future will affect its willingness to let even a seemingly pressing issue percolate. Our first result illustrates why the Court may sometimes rationally demur from resolving a seemingly easy or seemingly pressing issue—because the expected consequences of resolution are too costly.

We begin illustration of this result with a simple example.

Calculations for Example 1. Suppose that there are four potential disputes, $\mathcal{D} = \{1, 2, 3, 4\}$. The cost of delay from each dispute $d \in \mathcal{D}$ is given by $c(d) = d$. That is, Dispute 1's cost of delay is 1, the cost of delay for Dispute 2 is 2, the cost of delay for Dispute 3 is 3, and the cost of delay for Dispute 4 is 4. The cost of adjudication is $k < 1$ for each dispute. Furthermore, suppose the set of initially available disputes is $D_1 = \{1, 2\}$ and that the linkages between the disputes are as follows:

$$L = \begin{bmatrix} 0 & 0 & 1 & 1 \\ 0 & 0 & 1 & 0 \\ 0 & 0 & 0 & 1 \\ 0 & 0 & 0 & 0 \end{bmatrix},$$

so that the linkages are as displayed in Figure 7, where an arrow from one dispute i to another, j indicates that resolving the dispute i in the first period will result in dispute j arising in the second period. Note that dispute 2 is logically connected and ancillary to dispute 1.

There are four potential adjudication decisions for the Court in the first period ($a_1 \in \{\emptyset, \{1\}, \{2\}, \{1, 2\}\}$) and the docket that the Court will face in the second period as a function of the first period adjudication is given by the following:

$$\begin{aligned} D_2(\emptyset) &= \{1, 2\}, \\ D_2(\{1\}) &= \{2, 3, 4\}, \\ D_2(\{2\}) &= \{1, 3\}, \text{ and} \\ D_2(\{1, 2\}) &= \{3, 4\}. \end{aligned}$$

The Court's optimal adjudication depends on the cost of adjudication, k . Assumption 2 implies that $k < 2$. (For the purposes of this example, it suffices to assume that $k < 1$.) This assumption implies that the optimal second-period adjudication strategy for any docket D_2 is simply D_2 : all pending disputes should be resolved in the final period. Accordingly, the Court's total payoff from each of the

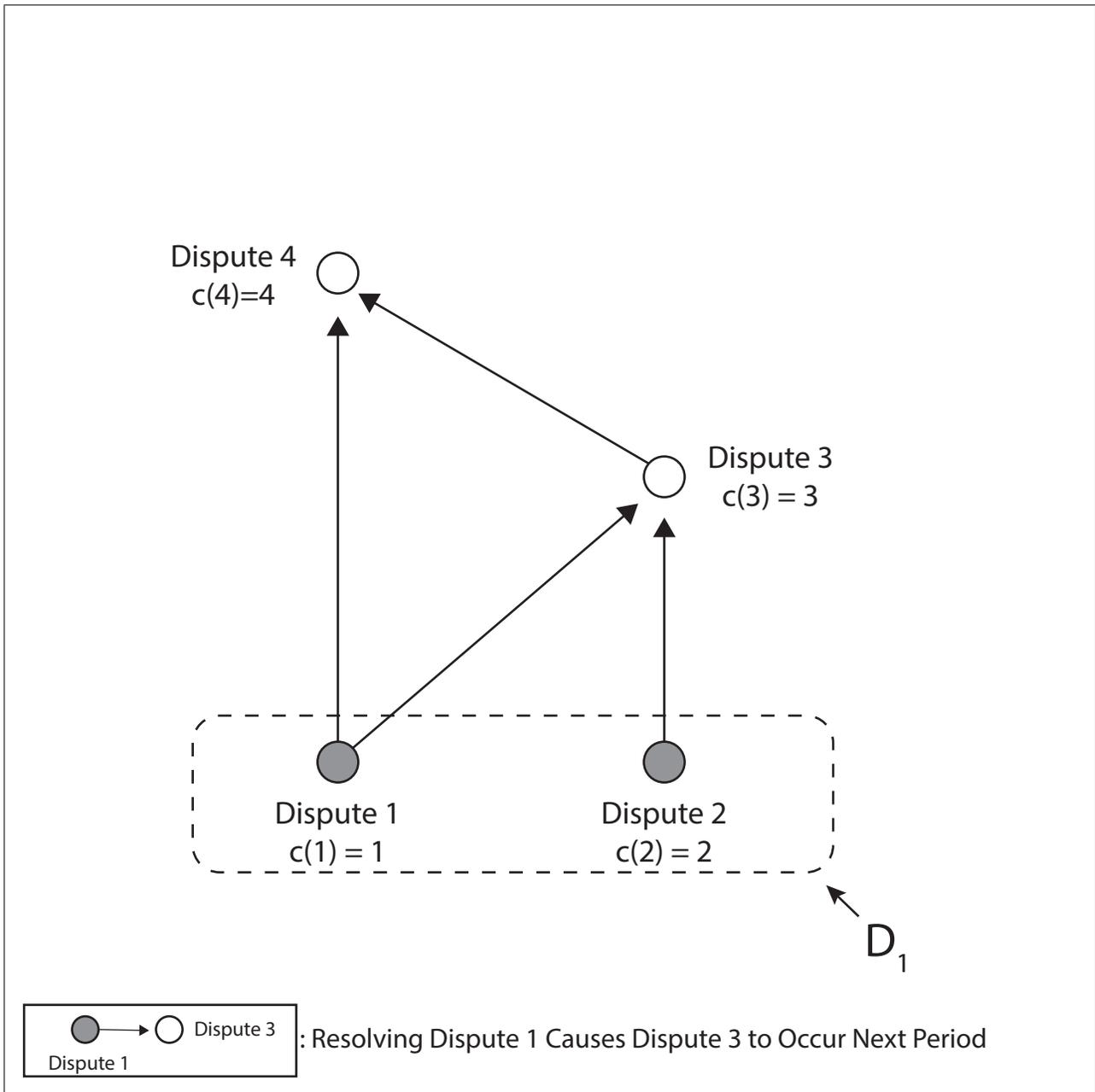


Figure 6: Endogenous Ripeness

four possible first-period adjudications, given that the Court is sequentially rational (*i.e.*, it uses an optimal adjudication strategy in the second period and resolves all pending disputes) are as follows:

$$\begin{aligned} V^*(\emptyset) &= -(3 + 2k), \\ V^*({1}) &= -(2 + 4k), \\ V^*({2}) &= -(1 + 3k), \text{ and} \\ V^*({1, 2}) &= -4k. \end{aligned}$$

Note first that, for any $k < 1$, resolving only dispute 1 is dominated by resolving both disputes 1 and 2: $V^*({1}) < V^*({1, 2})$. This is consistent with Proposition 3: because dispute 2 is ancillary to dispute 1: it provokes dispute 3, while dispute 1 provokes both disputes 3 and 4. Thus, if $k < 1$, the Court's optimal solution is

$$\mathbf{a}^* = ({1, 2}, {3, 4}).$$

it should resolve every dispute as it arises.

In order to capture the notion of when a case is ready to be resolved, consider first the situation when the docket contains only dispute 1: $D_1 = {1}$. In this case, the Court's total payoff from each of the two possible first-period adjudication strategies, given that the Court is sequentially rational (*i.e.*, it uses an optimal adjudication strategy in the second period) are as follows:

$$\begin{aligned} V^*(\emptyset) &= -(1 + k), \\ V^*({1}) &= -3k. \end{aligned}$$

Accordingly, the Court should resolve the first dispute in the first period only if $k \leq 1/2$. If $k \in (1/2, 1]$, the Court will dispose of the first dispute in the first period *only if* if the second dispute is also pending.

Considering the complementary case of the initial docket containing only dispute 2, $D_1 = {2}$, the Court's total payoff from each of the two possible first-period adjudications, given that the Court is sequentially rational (*i.e.*, it uses an optimal adjudication strategy in the second period) are as follows:

$$\begin{aligned} V^*(\emptyset) &= -(2 + k), \\ V^*({2}) &= -2k. \end{aligned}$$

Accordingly, the Court should resolve dispute 2 in the first period if $k < 2$, as we have assumed. Thus, the Court should dispose of dispute 2 regardless of whether dispute 1 is on the docket, but it should dispose of dispute 1 only if either the cost of adjudication is sufficiently small ($k \leq 1/2$) or if dispute 2 is also on the docket.

A.2 Dynamically-Induced Dispute Interdependence

Our model demonstrates that the dynamic relationships among cases create interdependence among cases being considered by the Court at the same time. This result, as we show below, has direct implications for theoretical and empirical models of case selection and agenda-setting.

We begin by defining connectedness among cases. One such notion is similar to covering or domination (Fishburn, 1977; Miller, 1980; McKelvey, 1986) and emerges when one dispute initiates a strict superset of the disputes initiated by another dispute to which it is logically connected. In this case, resolution of the first dispute renders mute the dynamic implications of resolving the second dispute. Formally, when one dispute's successors are contained within those of another dispute with which it is logically connected, the first dispute is said to *ancillary* to the second.

Definition 1 *Given a setting $\sigma = (\mathcal{D}, c, k, L)$, and any pair of disputes $d_1, d_2 \in \mathcal{D}$ that share a common successor, d_1 is ancillary to d_2 if $S_L(d_1) \subseteq S_L(d_2)$.*

The relationship is referred to as ancillary because, if d_1 is ancillary to d_2 , then resolving dispute d_2 initiates *every* dispute that resolution of d_1 would initiate. Note that two disputes can be ancillary to each other: this occurs when the two disputes have identical successors.²⁴

With our definition of ancillary disputes, our next result provides further insight into the static interdependence created by disputes' dynamic relationships. In particular, Proposition 3 states that if it is optimal to resolve a dispute d in any given initial docket, then it is also optimal to simultaneously resolve any disputes ancillary to d . This is a dominance argument, but it also establishes a specific monotonicity result: when one adds an ancillary dispute, it remains optimal to resolve the original dispute *and* it is optimal to resolve the ancillary dispute as well.

Proposition 3 *For any setting $\sigma = (\mathcal{D}, c, k, L) \in \Sigma$, any positive integer T , any discount factor δ , and any T -period optimal adjudication $a^* \in \mathcal{A}^*(\sigma, T, \delta)$, if $d \in \mathcal{D}$ is ancillary to $d' \in \mathcal{D}$, then for any $D \subseteq \mathcal{D}$ with $\{d, d'\} \subseteq D$, $d' \in a^*(D, 1)$ implies $d \in a^*(D, 1)$.*

It is straightforward to see that the converse of Proposition 3 does not hold: if resolving a dispute is optimal in a docket and one adds a dispute to which that dispute is ancillary, it is not necessarily the

²⁴We might also define a weaker notion of connectedness, logical interdependence, as when two disputes share at least one common successor—i.e., when $S_L(d_1) \cap S_L(d_2) \neq \emptyset$.

case that resolving the newly added dispute is optimal, too—the newly added dispute might initiate an arbitrarily large number of disputes above and beyond those that the original dispute initiates.

The monotonicity established in Proposition 3 reveals a crucial source of static interdependence that arises from dynamic linkages. Two disputes that seem unrelated today may be connected by shared offspring. As a result, the decisions to resolve seemingly independent disputes may not be independent. In particular, judicial decisions and interpretations are relevant to the Court at least partially because the Court will have to revisit them in the future. Accordingly, the Court’s consideration of what future cases will or will not arise can affect its willingness to let even a seemingly pressing issue percolate. Put more directly, our analysis illustrates the interdependence (or, “joint dependence”) of the Court’s optimal adjudication strategy on the combination of various disputes eligible for resolution.

Result 4 *A strategic adjudicator will resolve (weakly) more disputes as the number of pending disputes increases.*

A.2.1 Downstream Consequences and Endogenous Economies of Scale

As we saw above in our discussion of Proposition 1, whether a case is ready to be resolved is a function of how much overlap there is in the downstream consequences of logically related disputes. Proposition 3 demonstrates a strong result, that if a dispute’s downstream consequences are totally subsumed by another dispute—i.e., if a dispute is ancillary to another pending dispute—then it is optimal to resolve that ancillary dispute whenever it is optimal to resolve the dispute to which it is ancillary.

These results reflect a form of “endogenous economy of scale” with respect to optimal dispute resolution. Even though we assume constant and linear costs to adjudicating disputes, economies of scale arise endogenously in the dynamic resolution framework. This may produce episodic- or burst-style adjudication, in which the Court decides related cases in clusters. These economies arise because of the common downstream consequences that follow from resolving any given collection of disputes. To see this, consider another illustrative example.

Example 4 Let $\{d, e, f\}$ be three distinct disputes satisfying the following: d is logically connected

to e through f and only through f : $(S_L(d) \cap S_L(e) = \{f\})$. Suppose that $c(d) \leq c(e) < k$ and $k \leq c(f)$. Then it is simple to show that, if f is not active in the first period, the optimal adjudication strategy will not resolve either d or e in the first period unless *both* d and e are active in the first period.²⁵ With these presumptions in hand, the optimal adjudication for $D_1 = \{d, e\}$ is described by the following:

$$a^*(\{d, e\}) = \begin{cases} (\{d, e\}, \{f\}) & \text{if } c(d) + c(e) > \frac{3k}{2}, \\ (\emptyset, \emptyset) & \text{otherwise.} \end{cases}$$

Thus, holding $c(d)$ fixed at (say) $\frac{3}{4}k$, the d will be resolved only if $c(e) \geq c(d)$. That is, the resolution of d is dependent upon the cost of a different dispute to which d is logically connected. \triangle

Example 4 highlights the potential importance not only of what disputes are logically connected to each other—a point that follows from the discussion of downstream consequences—but also the costliness of allowing each of the logically connected disputes to remain unresolved. In the end, if a given dispute is logically connected to urgent or pressing disputes, that dispute will be resolved more quickly (or may be more likely to resolved) than if it is logically connected to less important disputes. Herein lies a crucial source of endogenous economies of scale. There may exist two disputes that, independently, are not worth resolving. However, because one dispute's downstream consequences are completely subsumed by another's, there are no costs to resolving the ancillary dispute as long as the other is resolved, and in effect the two disputes' costs of delay are combined. This results in an apparent economy of scale that arises endogenously as a consequence of the logical connections among disputes.

It is straightforward to show that, holding fixed the number of disputes that a given dispute d would initiate, resolution of that dispute d becomes more likely as the set of disputes to which it is logically connected grows. Indeed, a fundamental feature of readiness in our theory is that *enlarging the number of logical connections of a given dispute will increase the Court's incentive to resolve that dispute.*

²⁵Suppose that d is active in the first period but e is not. Then resolving d will initiate f in the second period, which will then cost k to resolve in the second period, so that the payoff would be $-2k$, whereas not resolving d at all will yield a payoff of $-2c(d) > -2k$.

B Technical Results and Proofs

Derivations for Example 1 Suppose that there are four potential disputes, $\mathcal{D} = \{1, 2, 3, 4\}$. The cost of delay from each dispute $d \in \mathcal{D}$ is given by $c(d) = d$. That is, Dispute 1's cost of delay is 1, the cost of delay for Dispute 2 is 2, the cost of delay for Dispute 3 is 3, and the cost of delay for Dispute 4 is 4. The cost of adjudication is $k < 1$ for each dispute. Furthermore, suppose the set of initially available disputes is $D_1 = \{1, 2\}$ and that the linkages between the disputes are as follows:

$$L = \begin{bmatrix} 0 & 0 & 1 & 1 \\ 0 & 0 & 1 & 0 \\ 0 & 0 & 0 & 1 \\ 0 & 0 & 0 & 0 \end{bmatrix},$$

so that the linkages are as displayed in Figure 7, where an arrow from one dispute i to another, j indicates that resolving the dispute i in the first period will result in dispute j arising in the second period.

There are four potential adjudication decisions for the Court in the first period ($a_1 \in \{\emptyset, \{1\}, \{2\}, \{1, 2\}\}$) and the docket that the Court will face in the second period as a function of the first period adjudication is given by the following:

$$\begin{aligned} D_2(\emptyset) &= \{1, 2\}, \\ D_2(\{1\}) &= \{2, 3, 4\}, \\ D_2(\{2\}) &= \{1, 3\}, \text{ and} \\ D_2(\{1, 2\}) &= \{3, 4\}. \end{aligned}$$

The Court's optimal adjudication depends on the cost of adjudication, k . Assumption 1 implies that $k < 2$. (For the purposes of this example, it suffices to assume that $k < 1$.) This assumption implies that the optimal second-period adjudication strategy for any docket D_2 is simply D_2 : all pending disputes should be resolved in the final period. Accordingly, the Court's total payoff from each of the

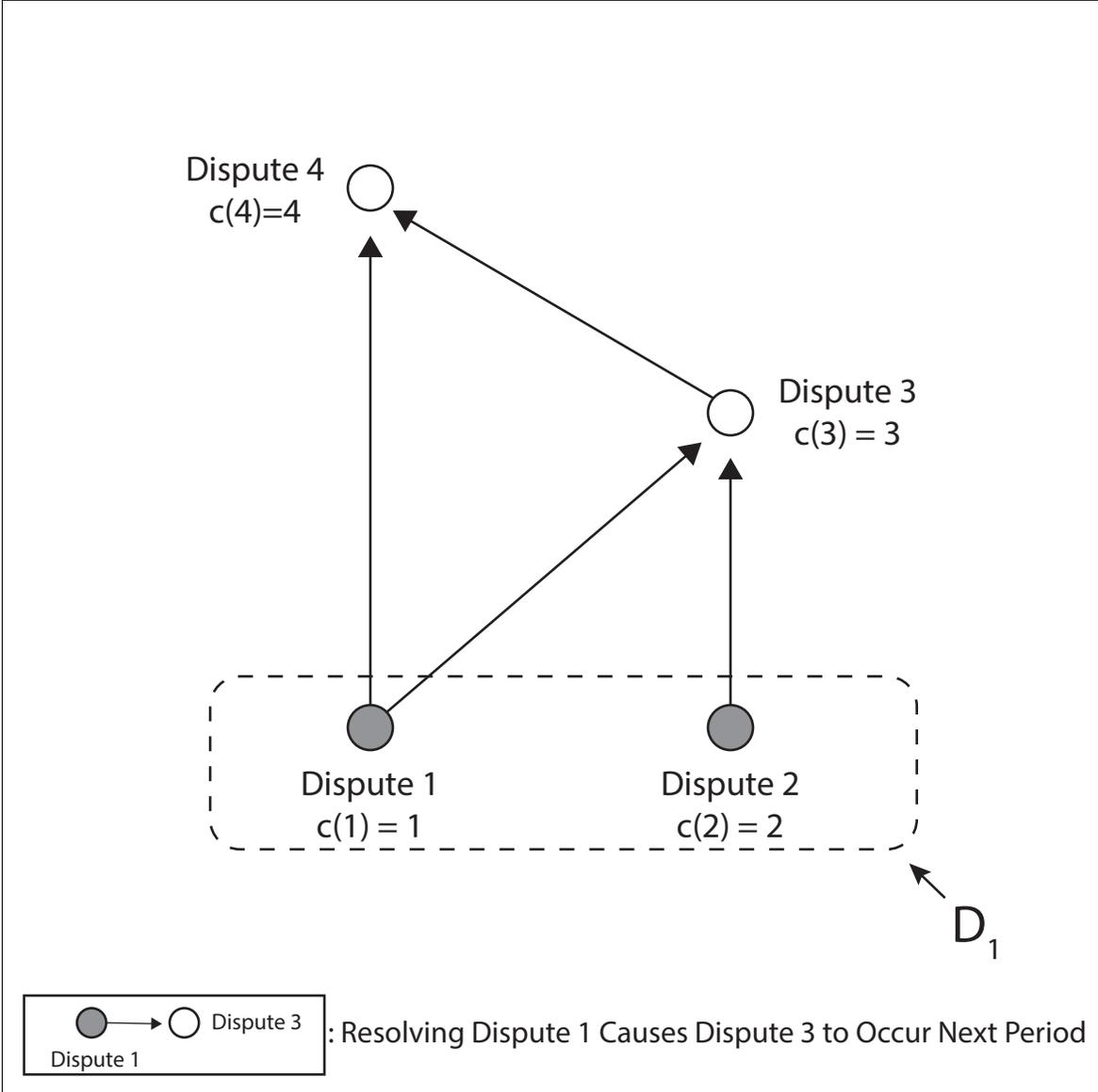


Figure 7: Endogenous Ripeness

four possible first-period adjudications, given that the Court is sequentially rational (*i.e.*, it uses an optimal adjudication strategy in the second period and resolves all pending disputes) are as follows:

$$\begin{aligned} V^*(\emptyset) &= -(3 + 2k), \\ V^*({1}) &= -(2 + 4k), \\ V^*({2}) &= -(1 + 3k), \text{ and} \\ V^*({1, 2}) &= -4k. \end{aligned}$$

Note first that, for any $k < 1$, resolving only dispute 1 is dominated by resolving both disputes 1 and 2: $V^*({1}) < V^*({1, 2})$. This is consistent with Proposition 3: because dispute 2 is ancillary to dispute 1: it provokes dispute 3, while dispute 1 provokes both disputes 3 and 4. Thus, if $k < 1$, the Court's optimal solution is

$$\mathbf{a}^* = ({1, 2}, {3, 4}).$$

it should resolve every dispute as it arises.

In order to capture the notion of when a case is ready to be resolved, consider first the situation when the docket contains only dispute 1: $D_1 = {1}$. In this case, the Court's total payoff from each of the two possible first-period adjudication strategies, given that the Court is sequentially rational (*i.e.*, it uses an optimal adjudication strategy in the second period) are as follows:

$$\begin{aligned} V^*(\emptyset) &= -(1 + k), \\ V^*({1}) &= -3k. \end{aligned}$$

Accordingly, the Court should resolve the first dispute in the first period only if $k \leq 1/2$. If $k \in (1/2, 1]$, the Court will dispose of the first dispute in the first period *only if* if the second dispute is also pending.

Considering the complementary case of the initial docket containing only dispute 2, $D_1 = {2}$, the Court's total payoff from each of the two possible first-period adjudications, given that the Court is sequentially rational (*i.e.*, it uses an optimal adjudication strategy in the second period) are as

follows:

$$V^*(\emptyset) = -(2 + k),$$

$$V^*({2}) = -2k.$$

Accordingly, the Court should resolve dispute 2 in the first period if $k < 2$, as we have assumed. Thus, the Court should dispose of dispute 2 regardless of whether dispute 1 is on the docket, but it should dispose of dispute 1 only if either the cost of adjudication is sufficiently small ($k \leq 1/2$) or if dispute 2 is also on the docket.

Formal Results. Two additional results are useful for presenting the proofs of the numbered results in the body of the article. The following simple proposition states that there always exists an optimal adjudication strategies and is (with respect to the costs of the disputes, $c(1), \dots, c(n)$) generically unique.

Proposition 4 *For any set of $n > 1$ disputes, \mathcal{D} , adjudication cost $k > 0$, and binary $n \times n$ linkage matrix L ,*

1. *for any $\delta \in (0, 1]$, any integer $T \geq 1$, and n -dimensional vector of costs, $c > 0$, the set of optimal adjudications for $\sigma = (\mathcal{D}, c, k, L)$, given δ and T , is nonempty: $\mathcal{A}^*(\sigma, T, \delta) \neq \emptyset$, and*
2. *the set of cost vectors $c > 0$ such that $\mathcal{A}^*(\sigma, T, \delta)$ contains more than one element possesses Lebesgue measure zero in \mathbf{R}_{++}^n .*

Proof: Fix an integer $n > 1$, a set of n disputes, \mathcal{D} , an adjudication cost $k > 0$, and a binary $n \times n$ linkage matrix L . We prove the two conclusions of the proposition in turn.

Existence of an Optimal Adjudication Strategy. Fixing a discount factor $\delta \in (0, 1]$, a positive integer $T \geq 1$, and an n -dimensional vector of costs, c , each adjudication strategy $\alpha \in \mathcal{A}(\sigma, T)$ yields a finite payoff, $EU(\alpha; \sigma, T, \delta, D_1)$, so that the set of these feasible payoffs is nonempty. Furthermore, the set of adjudication strategies, $\mathcal{A}(\sigma, T)$ is finite so that the set of feasible payoffs from these strategies is also finite. Accordingly, at least one adjudication strategy $a^* \in \mathcal{A}(\sigma, T)$ achieves the

maximum of the set of the feasible payoffs and accordingly $a^* \in \mathcal{A}^*(\sigma, T, \delta) \neq \emptyset$, as was to be shown.

Generic Uniqueness of the Optimal Adjudication Strategy. The proof proceeds by induction on T . Fixing a discount factor $\delta \in (0, 1]$ and an n -dimensional vector of costs, c . Fix the time horizon at $T = 1$. The set of adjudication strategies $\mathcal{A}(\sigma, 1)$ consists of every mapping from $2^{\mathcal{D}}$ into itself. For each docket $D \subseteq \mathcal{D}$, the Court's payoff from a strategy $a \in \mathcal{A}(\sigma, 1)$ is

$$U_1(a(D, 1), D) = -k|a(D, 1)| - \sum_{d \in r(a, D, 1)} c(d),$$

where $r(a, D, 1) \equiv D \setminus a(D, 1)$. To keep the presentation simple, note that by the assumption that $k > 0$, an adjudication strategy a can be optimal only if $a(D, 1) \subseteq D$ for every $D \subseteq \mathcal{D}$. Accordingly, we consider only such strategies in what follows.

For two strategies a and a' in $\mathcal{A}(\sigma, 1)$ with $a(D, 1) \neq a'(D, 1)$, $U_1(a(D, 1), D) = U_1(a'(D, 1), D)$ implies that

$$\begin{aligned} k|a(D, 1)| + \sum_{d \in r(a, D, 1)} c(d) &= k|a'(D, 1)| + \sum_{d \in r(a', D, 1)} c(d), \\ k(|a(D, 1)| - |a'(D, 1)|) &= \sum_{d \in r(a', D, 1)} c(d) - \sum_{d \in r(a, D, 1)} c(d), \\ k(|a(D, 1)| - |a'(D, 1)|) &= \sum_{d \in r(a', D, 1) \setminus r(a, D, 1)} c(d) - \sum_{d \in r(a, D, 1) \setminus r(a', D, 1)} c(d). \end{aligned} \quad (7)$$

Without loss of generality, suppose that $r(a', D, 1) \setminus r(a, D, 1) \neq \emptyset$.²⁶ Then let e denote a dispute in $r(a', D, 1) \setminus r(a, D, 1)$. Then we can rewrite Equation (7) as

$$c(e) = k(|a'(D, 1)| - |a(D, 1)|) + \sum_{d \in r(a', D, 1) \setminus r(a, D, 1) \setminus \{e\}} c(d) - \sum_{d \in r(a, D, 1) \setminus r(a', D, 1)} c(d). \quad (8)$$

Note that the left hand side of Equation (8) is exactly identified by the right hand side, implying that the space of n -dimensional vectors c that satisfy Equation (8), given k , possesses a dimensionality of no greater than $n - 1$. Any space of dimension strictly less than n is assigned measure zero by

²⁶This is without loss of generality because it amounts to a simple choice of labeling, because either $r(a', D, 1) \setminus r(a, D, 1)$ or $r(a, D, 1) \setminus r(a', D, 1)$ or both must be nonempty by the supposition that $a(D, 1) \subseteq D$ for every $D \subseteq \mathcal{D}$ and $a(D, 1) \neq a'(D, 1)$.

n -dimensional Lebesgue measure. This establishes the second conclusion of the proposition for $T = 1$.

Now let T be an arbitrary positive integer and presume that $\mathcal{A}^*(\sigma, T-1, \delta)$ contains a single strategy for all cost vectors c except a set assigned measure zero by possessing n -dimensional Lebesgue measure (*i.e.*, for a generic set of cost vectors c). Then, for a generic set of cost vectors c , any pair of T -optimal strategies, a and a' in $\mathcal{A}^*(\sigma, T, \delta)$, must be identical for periods 2 through T , so that to be distinct, they must differ in the first period: there must be some docket $D \in \mathcal{D}$ such that $a(D, 1) \neq a'(D, 1)$. This argument above can be readily applied to show that the equality of the total payoffs from a and a' must uniquely identify the cost of not resolving some dispute $d \in D$, implying that the equality holds on a set of cost vectors possessing dimensionality less than n , yielding the desired result. ■

The next result shows that any dispute resolved in an optimal adjudication strategy for a given docket is also resolved in an optimal adjudication strategy for a docket that is a superset of that docket.

Proposition 5 For any setting $\sigma = (\mathcal{D}, c, k, L) \in \Sigma$ and any pair of dockets, D and D' with

$$D \subset D' \subseteq \mathcal{D},$$

any 2-period optimal adjudication in D is contained within a 2-period optimal adjudication in D' , and every 2-period optimal adjudication in D' contains a 2-period optimal adjudication in D . Formally, for both $t \in \{1, 2\}$,

$$\begin{aligned} a \in A_t^*(D) &\Rightarrow \exists a'_a \in A_t^*(D') \text{ such that } a \subseteq a'_a, \text{ and} \\ a' \in A_t^*(D') &\Rightarrow \exists a_{a'} \in A_t^*(D) \text{ such that } a_{a'} \subseteq a'. \end{aligned}$$

Proof: For any docket D , any adjudication a , and any pair of disputes d, e with $\{d, e\} \subseteq D$, $d \in a$,

and $e \notin a$, the net value of resolving d in the first period when $T = 2$ is

$$W(d; D, a) = V_2(a; D) - V_2(a_{-d}; D) = c(d) - V_1(d) - k + \sum_{\delta \notin D} (P(\delta; D, a) - P(\delta; D, a_{-d})) V_1(\delta).$$

Note that, if a is an optimal 2-period adjudication, then $W(d; a) \geq 0$ for each $d \in a$. Thus, because $V_1(\delta) \leq 0$ and $P(\delta; D, a) > P(\delta; D, a_{-d})$ for any dispute δ , note that

$$c(d) - V_1(d) - k \geq 0$$

is a necessary condition for d to be part of an optimal 2-period adjudication. Now consider any D' with $D \subset D'$. Then

$$W(d; D', a) = V_2(a; D') - V_2(a_{-d}; D') = c(d) - V_1(d) - k + \sum_{\delta \notin D'} (P(\delta; D', a) - P(\delta; D', a_{-d})) V_1(\delta).$$

Note that $P(\delta; D', a) = P(\delta; D, a)$ and $P(\delta; D', a_{-d}) = P(\delta; D, a_{-d})$ for all $\delta \notin D \cup D'$. Thus, because $D \subset D'$,

$$\sum_{\delta \notin D'} (P(\delta; D', a) - P(\delta; D', a_{-d})) V_1(\delta) \geq \sum_{\delta \notin D} (P(\delta; D, a) - P(\delta; D, a_{-d})) V_1(\delta),$$

so that $W(d; D, a) \geq 0$ implies $W(d; D', a) \geq 0$. Accordingly, for any 2-period optimal adjudication $a^* \in A^*(D)$, there is a 2-period optimal adjudication $a^{**} \in A^*(D')$ such that $a^* \subseteq a^{**}$.

To show the converse (that a 2-period optimal adjudication in $D' \supset D$ must contain a 2-period optimal adjudication in D), the inequalities above can be applied to any 2-period optimal adjudication in D' , a^{**} , as follows. Beginning with $a^1 \equiv a^{**} \cap D$, eliminate any dispute $d \in$ for which $W(d; D, a^1) < 0$. If there is no such dispute, then a^1 is a 2-period optimal adjudication in D . If there is such a dispute $d^1 \in a^1$ (if there are multiple disputes that satisfy this, the choice of which dispute to eliminate is irrelevant for our purposes), then let $a^2 \equiv a^1 \setminus \{d^1\}$ and eliminate any dispute d^2 for which $W(d^2; D, a^1) < 0$ (again, choosing arbitrarily if necessary), and let $a^3 \equiv a^2 \setminus \{d^2\}$. If there is no such dispute d^2 , then a^1 is a 2-period optimal adjudication in D . Iteration of this process will

ultimately conclude, because D is finite. ■

Proposition 1 *For any setting $\sigma = (\mathcal{D}, c, k, L) \in \Sigma$, any discount factor $\delta \in (0, 1]$, a dispute $d \in \mathcal{D}$ is percolable if and only if*

$$c(d) < k \left(1 + \frac{\delta |S_L(d)|}{2} \right) - \delta \min[k, c(d)].$$

Proof: Fix a setting $\sigma = (\mathcal{D}, c, k, L) \in \Sigma$ and a discount factor $\delta \in (0, 1]$. The proof proceeds in two steps, establishing sufficiency of Equation (3) and then establishing its necessity. Note that Assumption 2 ensures that, for any T -optimal adjudication strategy (for any integer $T > 1$), $a_t^*(\mathcal{D}) = \mathcal{D}$ for all $t < T$.

Sufficiency of Equation (3). Consider any dispute d satisfying Equation (3). Then consider the docket $D = \{d\}$. Then, by Assumption 2, the maximum payoff from resolving dispute d , $a_1 = \{d\}$, is no greater than

$$-k - \delta \frac{k}{2} |S_L(d)|,$$

which obtains only if every dispute $e \in S_L(d)$ is left unresolved at cost $c(e) = \frac{k}{2}$ (the minimal costliness ensured by Assumption 2), and the maximum payoff from not resolving the dispute, $a_1 = \{\}$, is equal to

$$U(\{\}) = -c(d) - \delta \min[k, c(d)].$$

Thus, leaving d unresolved is optimal only if

$$\begin{aligned} -c(d) - \delta \min[k, c(d)] &\geq -k - \delta \frac{k}{2} |S_L(d)|, \\ c(d) &\leq k \left(1 + \frac{\delta |S_L(d)|}{2} \right) - \delta \min[k, c(d)], \end{aligned}$$

as stated in the proposition. This demonstrates the sufficiency of Inequality 3 for a dispute d to be percolable.

Necessity of Equation (3). To see the necessity of Inequality 3, note that if not resolving d is 2-period optimal for any docket D , it is optimal to leave it unresolved for $D' = \{d\}$, by Proposition 5. Accordingly, if a dispute d is percolable, it must satisfy Inequality 3, as was to be shown. ■

Proposition 3 For any setting $\sigma = (\mathcal{D}, c, k, L) \in \Sigma$, any positive integer T , any discount factor δ , and any T -period optimal adjudication $a^* \in \mathcal{A}^*(\sigma, T, \delta)$, if $d \in \mathcal{D}$ is ancillary to $d' \in \mathcal{D}$, then for any $D \subseteq \mathcal{D}$ with $\{d, d'\} \subseteq D$, $d' \in a^*(D, 1)$ implies $d \in a^*(D, 1)$.

Proof: Fix a setting $\sigma = (\mathcal{D}, c, k, L) \in \Sigma$, a positive integer T , and a discount factor δ . Then let $a^* \in \mathcal{A}^*(\sigma, T, \delta)$ be a T -period optimal adjudication for σ and consider a docket $D \subseteq \mathcal{D}$ with a pair of disputes d and d' such that d is ancillary to d' .

For the purpose of obtaining a contradiction, suppose—contrary to the conclusion of the proposition—that $d' \in a^*(D, 1)$ but $d \notin a^*(D, 1)$. Let t_d^* denote the time period that a^* resolves d :

$$t_d^* = \begin{cases} \{t \in \{1, \dots, T\} : d \in a_t^*\} & \text{if } \exists t : d' \in a_t^* \\ T + 1 & \text{otherwise.} \end{cases}$$

(Note that t_d^* is uniquely defined if a^* is a T -period optimal adjudication.) Then let a' be a T -period adjudication identical to a^* except that $a'_1 = a_1^* \cup \{d\}$ and $a'_{t_d^*} = a_{t_d^*}^* \setminus \{d\}$. The proof proceeds in two cases: $T = 2$ and $T > 2$.

$T = 2$. In the two-period setting, if $c(d) > k$, then the 2-period optimality of a^* implies that $d \in a_2^*$, so that $t_d^* = 2$. Then the net payoff of a' relative to the 2-period optimal strategy a^* is

$$U(a'; D_1) - U(a^*; D_1) = -[k(1 - \delta) - c(d)]. \quad (9)$$

In order for a^* to be a 2-optimal adjudication strategy, it must be the case that the left hand side of Equation (9) is nonpositive, which reduces to

$$\begin{aligned} [k(1 - \delta) - c(d)] &\geq 0, \\ c(d) &\leq k(1 - \delta), \end{aligned}$$

which contradicts the supposition that $c(d) > k$. Thus, it must be the case that $c(d) \leq k(1 - \delta)$, so that the 2-period optimality of a^* implies that $d \notin a_2^*$ and $t_d^* = 3$.

$$U(a'; D_1) - U(a^*; D_1) = -[k - (1 + \delta)c(d)]. \quad (10)$$

In order for a^* to be a 2-optimal adjudication strategy, it must be the case that the left hand side of Equation (10) is nonpositive, which reduces to

$$\begin{aligned} [k - (1 + \delta)c(d)] &\geq 0, \\ c(d) &\leq \frac{k}{1 + \delta}. \end{aligned}$$

Assumption 2 implies that $c(d) > \frac{k}{1 + \delta}$. Accordingly, a^* being a 2-optimal adjudication strategy with $d \notin a_1^*$ implies that Assumption 2 is not satisfied, resulting in a contradiction. Thus, if a^* is a 2-optimal adjudication strategy, $d' \in a_1^*$ implies that $d \in a_1^*$, as was to be shown.

$T > 2$. For $T > 2$, the same two sub-cases as in the consideration of $T = 2$ above, $k < c(d)$ and $k \geq c(d)$ emerge. It is simple to show that if $k < c(d)$, then $t_d^* < T + 1$ and the logic for the 2 period case applies, because a^* is dominated by any strategy a'' that is identical to a^* except that d is resolved in period $t_d^* - 1$ instead of period t_d^* . Given the finite time horizon, this then leads by induction to an analogous contradiction as in the $T = 2$ case, so that the desired result is obtained.

Accordingly, suppose that $k \geq c(d)$ and, further, that $t_d^* = T + 1$, because otherwise the inductive argument above could be applied based on the presumption that a^* is optimally not deferring resolution of d farther into the future.

The net payoff of the modified strategy a' relative to the T -period optimal adjudication strategy a^* is then:

$$U(a'; D_1) - U(a^*; D_1) = - \left[k - \sum_{t=0}^{T-1} \delta^t c(d) \right]. \quad (11)$$

Then, a^* being T -optimal implies that

$$k - \sum_{t=0}^{T-1} \delta^t c(d) \geq 0,$$
$$c(d) \leq \frac{k}{\sum_{t=0}^{T-1} \delta^t}.$$

Note that

$$\sum_{t=0}^{T-1} \delta^t > (1 + \delta),$$

so that a^* being T -optimal implies that Assumption 2 is violated, resulting in a contradiction. Thus, if a^* is a T -optimal adjudication strategy, it must be the case that $d' \in a_1^*$ implies that $d \in a_1^*$, as was to be shown. ■