Which Issues Should We Decide? Coalitions and Agenda Setting*

Tom Clark†   John Patty‡

Abstract

The study of politics involves not just how the government decides questions but when it decides to act and on what subjects. We propose a model of collegial agenda-setting in which issues can be packaged together for resolution. We situate the model in the context of the US Supreme Court to investigate how collective choice and discretionary review interact to shape what problems get resolved and when. Our model uncovers novel dynamics about strategic delay. Those dynamics affect which cases are selected for review and the timing in when open questions are resolved.

1   Introduction

When does the government decide to act on which issues? This is a question central to the understanding of democratic performance. In the context of the law, the question is particularly acute, because most notions of democracy involve a commitment to adjudication as a means of dispute resolution. Frequently, disputes reveal open legal questions that need resolution, and in common law systems courts serve as the institution to provide both dispute resolution and as a means and answers to open legal questions. To advance our understanding of when the governments acts on what issues, we propose of model of which issues come to the courts and when.

In studying apex courts, such as the US Supreme Court, a great deal of research has examined how litigants and lower courts can shape the set of cases and issues that flow up the judicial hierarchy. Other research notably focuses on how judges with control over their own docket use their discretion to pick and choose what questions will be resolved. Through nearly all of this work, the courts are seen as passive—they simply select cases individually from among the the set presented to them, rather than actively deciding what combination of issues and questions should shape their docket (for a notable exception, see Baird, 2007).

However, consider an example to the contrary. In March 2009, the US Supreme Court heard oral argument in a case called *Citizens United v. FEC*. At issue was whether the Bipartisan Campaign Reform Act violated the First Amendment in its limitations of corporations' campaign expenditures. Shortly after hearing argument, a bare majority of the Court ordered the litigants to come back to the Court and present argument about whether two other cases, *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*. What was most striking about that decision was that no one—neither the litigants nor a lower court—had asked the Court to consider the question. In his dissenting opinion in the case, Justice John Paul Stevens sharply criticized the Court for injecting new issues into the case, of its own volition. He wrote, "Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to

change the law."

Strategic incentives for issue bundling do not always result in expediting the resolution of issues, as in *Citizens United*. Sometimes, those incentives create delay. Consider the history of litigation about same-sex marriage in the US. The Defense of Marriage Act was a federal law that precluded recognition of same-sex marriage, and while the Supreme Court ultimately declared it unconstitutional in 2013, it did so only after declining to decide the issue in myriad cases over many years. Some of those cases had unusual procedural problems, though others presented straight-forward challenges to DOMA.[1] Notably, when the Supreme Court did decide to rule on the constitutionality of DOMA, in *Windsor v. United States*, the justices also decided to hear a challenge to California's Proposition 8, which overturned a previous court decision allowing same-sex marriage in the state. The justices heard oral argument in both cases on the same day and issued decisions and opinions in both cases simultaneously. This example raises the possibility that the presence of two related but distinct issues on the Court's docket affected the justices' incentives to rule on the issues.

Our analysis focuses directly on how the combination of claims presented for potential resolution interact to shape the set of issues the a court decides. How might issues interact with each other to determine what issues make it onto the agenda? How does a collegial court—or, more generally a collegial group of any sort—come together to select cases for resolution when those cases simultaneously involve multiple issue dimensions? The literature informing these questions is characterized by a particular conceptual bifurcation. Whereas most of our theories of agenda-setting at the courts focuses on individual case selection, most of our theories of law-making and doctrine focus on legal issues and questions. Those two concepts are distinct. Our model advances the literature by helping to bridge that theoretical divide. As we show, though, our model's insights go beyond a judicial setting and speak to a more general strategy of bundling issues together in a group setting.

However, in the context of judicial decision-making, the model yields specific insights

---

[1] e.g., *Gill v. OPM*, *Mass. v. DHS*, *Smelt v. United States*, *McQuigg v. Bostic*, *In re Levinson*, and *Wilson v. Ake*, among others

that engage a variety of core problems in the literature. For example, scholars have long sought to understand how we can make inferences about the content of the law from the cases that, for example, the Supreme Court hears (e.g., Frank, 1973; Kastellec and Lax, 2008; Lax and Rader, 2010; Callander and Clark, 2017). Our model provides a framework for evaluating how a collection of judges' decisions relates to the underlying set of issues and problems available for the courts to resolve. A related literature is concerned with how litigants trying to change the law can build cases to achieve their goals (e.g., Motley, 1999; Epp, 1998; Rosenberg, 1991), Our model also engages this literature by illustrating how the cases can be more or less likely to achieve their goals as the issues bundled together within the case vary,

2 Discretionary Review, Jurisprudence, and Collegial Politics

As we noted, the literature on case selection is bifurcated. On one hand, there is empirical work that typically focuses on the facts of a case, error correction, and power through the judicial hierarchy, and on the other hand, there is theoretical work that typically focuses non doctrine, rule-making, and jurisprudence (e.g., Boucher Jr and Segal, 1995; Caldeira, Wright and Zorn, 1999; Hansford and Spriggs II, 2006; Clark, 2009; Haire, Lindquist and Songer, 2003; Kornhauser, 1992; Beim, Clark and Patty, 2017; Callander and Clark, 2017). There are exceptions to this general pattern, of course (e.g., Cameron, Segal and Songer, 2000; Baird, 2007; Carrubba and Clark, 2012). The most notable of this work is arguably Perry's study of discretionary review at the Supreme Court (Perry (1991)). Perry outlines the process by which Supreme Court justices collectively set their agenda from cases that potentially involve complex issues or combinations of issues that complicate their ability to resolve legal questions and change the law. Not only does Perry's analysis pull back the curtain on the opaque process of case selection at the US, it highlights the ways in which

cases (comprised of collections of facts and legal disputes) interact with collegial politics to shape which questions are resolved and when.

2.1 Vehicles and Good Cases

One of the foremost concepts at the heart of Perry's work, which is typically missing from political science studies of agenda-setting at the Court is the notion of a "vehicle." The core idea underlying a vehicle is that cases contain legal issues, presented in the context of a particular dispute. Lawyers and judges have a sense that some cases represent better vehicles than do others, though precisely what constitutes a "bad" vehicle is typically a murky concept. At the core, though, a feature that is central to a case's value as a vehicle is the extent to which the case presents an issue cleanly and clearly. Because judicial decisions constitute precedents for future application by analogy (Levi, 1949), the that a future case might be distinguished from the precedent, the less effective the precedent is at settling the issues that have already been decided.

That judges care about the nature of the vehicles in which they decide issues creates incentives for litigants, especially impact litigants—those people trying to use cases to shape the law intentionally. The history of major impact litigation, for example, shows documents concerted efforts to bring together legal issues in ways that would advance the law in particular ways (e.g., Motley, 1999). Sometimes, this involves bundling related legal issues together, whereas other times it involves separating legal issues over time. Further, these features of cases and legal development implicate not just the doctrinal space itself—what dimensions of the law are touched in in any given case—but also the facts of the particular case—some litigants present more sympathetic situations than others. While the legal issues at hand in a case and the facts that gave rise to the dispute itself are inextricably linked, we focus on the relationship among potential legal issues at hand in a case, because this is the area that is least systematically studied in the literature but that most clearly implicates the relationship between collegial politics and agenda-setting.

An implication of variation in how good or bad a vehicle a case might be is that some issues will not be resolved not because they do not present pressing or important or interesting legal questions. Rather, some cases will not be resolved because they are not good opportunities for resolving a question. Maybe the facts are too complex or unrepresentative of future applications of the law. Maybe the case intertwines multiple issues that the group does not want to resolve. In the model we develop, we explicitly capture the idea that cases might be more or less attractive because of the collection of issues at hand. Our analysis, in this way, also engages the incentives created by "judicial minimalism," which is the view that judges ought to resolve as few questions as necessary to decide a given case (e.g., Sunstein, 2001).

2.2 The relationship between issues and cases

That issues come to the courts in the form of cases creates the opportunity for complicated conceptual scenarios. Most notably, cases can potentially pose more than one core issue for the Court. For example, there might be two related constitutional rights at hand, implicating separate legal frameworks. In the context of a single case, this can lead to situations where each litigant wins some portion of their claims, or where different groups of justices vote together across legal issues. Essentially, this corresponds to a case representing multiple legal questions or disputes, combined into one case. An unusual, but illuminating, example is *Regents of the University of California v. Bakke*. That case addressed two questions—first, whether the government has a compelling interest in promoting diversity in the classroom; second, whether an affirmative action program that includes racial quotas violates the Equal Protection Clause. The justices concluded there is a compelling state interest in promoting diversity and therefore that some affirmative action programs are permissible but also that systems with quotas were not permissible under the Constitution. This case famously resulted in six separate opinions, with only Justice Powell in the majority on each of the issues. In some settings, the Court creates such situations by in fact consolidating multiple similar cases into one large case. Perhaps the most salient historical example is *Brown v.*

Board of Education, which was in fact a consolidated set of cases from multiples states, and the District of Columbia. However, the practice in general is more widespread, both in the US and abroad (e.g., Epp, 1998; Gash, 2015).

The model we develop builds from the observation that multiple legal issues interact to determine the consequences of accepting any given case for review. In that way, our model helps illuminate the way in which legal evolution and doctrinal development are a function of the particular vehicles that arise to create opportunities for courts to step in. We leverage one particular feature of judicial decision-making—the courts typically are passive and must wait for cases to come to them for resolution. This is a feature that distinguishes courts from, for example, legislatures that can simply decide to select a given issue for resolution. However, at the same time, the model focuses analytic attention on the ways in which complicated connections among substantive issues can explain why some topics are addressed while others are left unresolved.

2.3   Issues and collegial politics

Agenda-setting is complicated not only by the interaction of substantive issues within individual cases; it is also affected by the dynamics of collegial politics. Judges deciding whether to accept a case for resolution must contend with their colleagues preferences for resolving particular issues along with expectations about *how* their colleagues will resolve those issues. Perry (1991) describes the incentives created by collegial politics in part by reference to two kinds of choices a justice might make—defensive denials and aggressive grants.

A defensive denial is a vote against hearing a case for fear of how the group will decide it. A justice might want to hear a case for jurisprudential reasons but anticipate that her colleagues will make a bad decision. In this case, it is better to resist hearing the case than enshrine a bad decision in the law. An aggressive grant, by contrast, is a vote to hear a case for the purpose of upholding a lower court's decision. Here, the incentive is to take a decision that is perceived to be correct and enshrine it as a precedent.

These tactics represent an important way in which the particular cases that arise before the Supreme Court interact with the collegial politics that underlying case selection. Moreover, the empirical research finds considerable support for the expectation that the justices strategically vote as predicted by the logic of aggressive grants and defensive denials. That is, the justices' decisions seem to reflect (in part) their expectations about other justices' votes on the case (e.g., Caldeira and Wright, 1988; Caldeira, Wright and Zorn, 1999; Caldeira and Wright, 1990).

However, they only tell part of the story. One of the other lessons that comes from Perry is the notion that cases are to some degree fungible. That legal questions and issues arise repeatedly across different cases over time gives rise to the possibility that collegial politics might create incentives for delay or log-rolling. While there is not much evidence of log-rolling at the Supreme Court, considerable evidence documents strategic delay, both theoretically and empirically (e.g., Lindquist and Klein, 2006; Clark and Kastellec, 2013; Beim, Clark and Patty, 2017; Beim and Rader, 2019).

We model a judicial environment in which constellations of legal questions exist as possible issues for resolution. Cases are characterized by bundles of particular issues presented to the Court in tandem for resolution. In this way, out model also reveals a tension in common tropes about agenda-setting at the courts. On one hand, it is often said that at the appellate level–especially at the apex court level—"case are fungible," in the sense that particular cases are less of a concern than the issues that give rise to the cases themselves. At the same time, concern with a case's properties as a vehicle for resolving those issues reveals important ways in which they are not fungible—the unique characteristics of individual cases shape the extent to to which they are attractive vehicles. Our model integrates this tension by asking how the characteristics of a case's legal underpinnings interact to affect who wants to resolve what questions. In this way, our model integrates jurisprudential concerns about finding "good vehicles" with the collegial politics of agenda-setting.

3   The Model

At the heart of our model is a collegial **court**, composed of $n > 2$ **judges**, the set of whom are denoted by $N = \{1, \ldots, n\}$. The (exogenous) set of **issues** is finite and denoted by $M \equiv \{1, \ldots, m\}$, where $m \geq 2$ represents the number of legally relevant questions for which the court is potentially responsible.

Cases.   In the baseline model, the court is faced with a single **case**, x. The case is represented by a finite list of at least one, and no more than M **issue-location pairs**.[2] For example, if a case would set policy on issue 2 equal to 0.4, then this case would be written as

$$x = (2, 0.4).$$

On the other hand, if the case x' would set policy on issues 1 and 3 at location 1.2 and -2.3, respectively, this would be written as

$$x' = ((1, 1.2), (3, -2.4)).$$

Adjudication and Policy Outcomes.   The case will ultimately be compared with a prevailing **status quo**, $q \in \mathbf{R}^m$, which is commonly known by all players. A case, if it is adjudicated, moves policy to the respective positions on each of its issues. Policy outcomes on all of the other (omitted) issues remain at the locations of the status quo.

Majoritarian Collegial Bargaining.   Collegial bargaining in our model is cased on the following stylized majoritarian process.

1. The court observes x (and this is common knowledge),

2. Each judge $j \in N$ votes simultaneously whether to **support adjudication** of the case

---

[2]Formally, the space of cases is $C \equiv 2^M \times \mathbf{R}^M$, subject to an appropriate requirement that the number of policy locations in the case is equal to the number of issues in the case.

$(\sigma_j(x) = 1)$ or not $(\sigma_j(x) = 0)$. [3]

3. If a majority of judges support adjudication $(\sum_j \sigma_j(x) \geq \frac{n+1}{2})$, then x is **adjudicated**. Otherwise, x is **not adjudicated**.[4]

4. If the case is adjudicated, then the policy outcome equals x on all issues contained in x, and remains at the status quo q on all other dimensions. Otherwise, the policy outcome remains at the status quo q.

5. The judges receive their payoffs and the process concludes.

Payoffs. The payoff received by any judge $j \in N$ if x is *not* adjudicated is normalized to equal zero. If case x *is* adjudicated, each judge j receives a payoff equal to:

$$u_j(x) = \pi(x, q \mid t_j). \tag{1}$$

We refer to $t_j^i \in \mathbf{R}$ as judge j's **ideal point** on issue i. Accordingly, we refer to $\pi(x, q | t_j)$ as judge j's **policy payoff** from adjudicating x, given the status quo, q, and judge j's ideal point, t_j. We are somewhat agnostic about the form of this function, but we do impose the following two assumptions for tractability and interpretability:

$$\pi(q, q \mid t_j) = 0 \text{ for all } q \in \mathbf{R}^2 \text{ and } t_j \in \mathbf{R}^m, \tag{2}$$

$$\pi(x, q \mid t_j) \text{ is strictly quasi-concave.} \tag{3}$$

Condition (2) is simply a normalization, and Condition (3) ensures that the judges have **single-peaked preferences** over each issue.

---

[3] The x argument in this notation is superfluous at this point in the analysis, but will be useful when we allow the court to consider multiple cases, below.

[4] We do not need the court to use majority rule, but it makes the analysis simpler to describe.

Policy Preferences. We assume throughout that the policy payoff function in (1) is additively separable across the issues in any case with respect to the some function λ:

$$\pi(x, q \mid t_j) = \sum_{i \in x} \lambda(x^i \mid t_j^i) - \lambda(q^i \mid t_j^i),$$

where λ is assumed to satisfy Conditions (2) and (3).

Information. We assume that each judge j's ideal point, $t_j = (t_j^1, \ldots, t_j^M) \in \mathbf{R}^M$, is common knowledge to all players.

Equilibrium Analysis. This is a simple game, but as a voting game, it will generally have multiple subgame perfect Nash equilibria (SPNE). Accordingly, as is standard in these settings, we restrict attention to equilibria in which judges use what we refer to as **weakly undominated support strategies**. In this static model, this is essentially the same as assuming that judges *vote sincerely* on any case x (this will not necessarily be the case in the dynamic version of the model, below):

$$u_j(x) > 0 \Rightarrow \sigma_j^*(x) = 1, \quad \text{and}$$
$$u_j(x) < 0 \Rightarrow \sigma_j^*(x) = 0. \tag{4}$$

The case of how a judge treats a case about which he or she is indifferent between adjudication and not is not important in this static model of a single case, so we leave this unspecified for now.

We will refer to any SPNE in which judges' support strategies satisfy (4) as a **weakly undominated equilibrium**. The following simple proposition clarifies that adjudication in any such equilibrium will be majoritarian *with respect to the judges' payoffs*.

Proposition 1 *In any weakly undominated equilibrium of the single-case baseline model, a case x is adjudicated if*

$$\left| \left\{ j \in N : u_j(x) > 0 \right\} \right| > \frac{n+1}{2},$$

10

and x is not adjudicated if

$$\left| \left\{ j \in N : u_j(x) < 0 \right\} \right| > \frac{n+1}{2}.$$

Proposition 1 establishes that equilibrium adjudication in the baseline model is majoritarian. With this brief tour through the baseline static model in hand, we now turn to the dynamic version.

3.1 Cases as Vehicles

An adjudicated case is a **vehicle** for its constitutive issues. The principal focus of our theory is characterizing cases as vehicles, and understanding their occurrence in a strategic collegial court. We identify three types of vehicles, based on the court's collective preferences over the issues contained in the case in question. The first type we consider, **convenient vehicles**, is both the least controversial and easiest to understand.

Convenient Vehicles

A case is a convenient vehicle if each issue addressed by the case would be adjudicated on its own. We refer to this as a convenient vehicle because the court's ultimate adjudication would be no different if each of the issues in the convenient vehicle were presented to the court as separate cases—the fact that they are presented together in a single case is accordingly convenient for the court in terms of the processing of its business.

Definition 1 *Given the preferences of the judges, $u \equiv \{u_j\}_{j \in N}$, a case x is a **convenient vehicle** if every issue contained in x would be adjudicated by the court if it were contained in a separate case.*

From a strategic standpoint, convenient vehicles are not particularly interesting after the court's docket has been set.[5] However, we shall see that the notion of a convenient vehicle is useful for understanding the incentives of litigants and lower courts when attempting to

---

[5]Furthermore, any single issue case that is adjudicated is by definition a convenient vehicle for that issue.

shape the court's agenda and decision-making.

We now turn to the second type of vehicle, which we refer to as **bridging vehicles**.

Bridging Vehicles

We refer to a case as a bridging vehicle if it can not be adjudicated if it is "narrowed" at all, in the sense that the court can adjudicate the bridging vehicle if and only if none of its issues are removed. An adjudicated case is a bridging vehicle if it contains more than one issue and, if any issue were removed from the case, the resulting, "narrower" case would *not* be adjudicated.

In order to define the notion of a bridging vehicle precisely, we refer to any case y as a **subset** of another case x if $(i, z) \in x \Rightarrow (i, z) \in y$. This is denoted by $x \subseteq y$.[6] In words, if x is a subset of y, then

- x would change policy on no issue that y does not change policy on, and

- on any issue x would change policy, it would move policy to the same position as y.

In judicial terms, $x \subset y$ implies that x represents a "narrower ruling" than y. A case y is a bridging vehicle if y can be adjudicated, but can not be adjudicated if it is narrowed at all. With this notion in hand, a bridging vehicle is defined formally as follows.

Definition 2 *Given the preferences of the judges, $u \equiv \{u_j\}_{j \in N}$, a case x is a **bridging vehicle** if x would be adjudicated by the court, but any subset of x would not be adjudicated.*

Bridging vehicles can be complicated to assess from a normative standpoint: the court does not possess majority agreement to adjudicate *any* of the included issues in a bridging vehicle, but there is majority support for adjudicating the case as it stands. We refer to these as *bridging* vehicles because they represent a classic case of "strange bedfellows" coalitions: a bridging vehicle is adjudicated by a "coalition of coalitions" that can not successfully

---

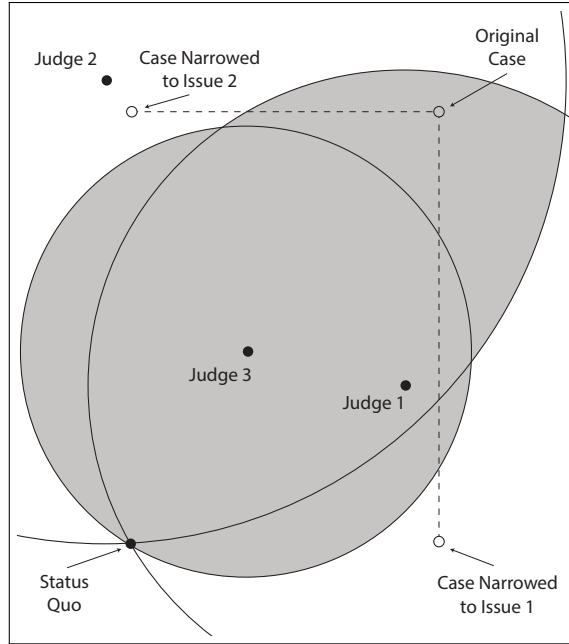[6]Following convention, we write $x \subset y$ if $x \subseteq y$ and $y \nsubseteq x$.

Figure 1: An Example of a Bridging Vehicle

adjudicate any narrowing of the case that represents the "vehicle." An example of a bridging vehicle is pictured in Figure 1.

The original case (in the upper right of Figure 1) is located in the majority rule *winset* of the status quo (in the lower left of Figure 1), meaning that it would be successfully adjudicated (in this case, with votes from Judges 1 & 3, but over the opposition of Judge 2). This is the first requirement of a bridging vehicle—satisfaction of the second requirement (that no narrowing of the case would be adjudicated) is demonstrated by the fact that the other two hollow circles are each *not* located in the majority winset of the status quo.[7]

Figure 1 provides some graphical understanding of the preference environment in which we are working in this article. The straight dotted lines in the figure represent the three judges' indifference curves with respect to the status quo. These are straight because we are assuming (for presentation purposes) that the judges' preferences are additively separable across the issues (*i.e.*, dimensions).

As the figure illustrates, the hypothetical situation in this case can be represented as an

---

[7]These "narrowings" are located in the lower right (narrowing to issue 1) and upper left (narrowing to issue 2) of Figure 1.

"ends against the middle" coalition: the case's adjudication is supported by judges 1 and 2, and opposed by judge 3, but judge 3's ideal point is the **dimension-by-dimension median** of the judges' ideal points. In other words, on either issue, judge 3's ideal point is the median of the court's ideal points on that dimension.[8]

Clown Cars

Our final type of vehicle is referred to as a **clown car**. A clown car is a case that is adjudicated in spite of the fact that one or more of the issues contained therein are not supported by a majority of the judges, and a case containing the remaining issues *would* still be adjudicated if they were removed from the case (thereby distinguishing it from a bridging vehicle).

Definition 3 *Given the preferences of the judges, $u \equiv \{u_j\}_{j \in N}$, a case x is a **clown car** if x would be adjudicated by the court, but some subset of x is majority preferred to x.*

Figure 2 displays two related examples of a clown car. The two cases, x and y, share a common position on the second issue, but differ with respect to their positions on first issue. Each case, x or y, is in the majority rule winset of the status quo, implying that the case would be successfully adjudicated if it is not narrowed. However, in both cases, the position on the first issue is farther from the status quo on the first issue dimension from *each judges' ideal point* than is the first issue of the status quo. This implies that, if the judges narrowed either x or y to the first issue, the resulting narrowed case in each situation would fail to be adjudicated. In contrast to a bridging vehicle, however, each of the two cases would be adjudicated (with unanimous support) if narrowed to the second issue. (We picture two cases in Figure 2 instead of just one to make clear that clown cars might, but need not, be adjudicated with *unanimous* support: left unnarrowed, case x would secure unanimous

---

[8]Note that when individuals preferences are additively separable linear loss preferences, the indifference curves of the individuals are "diamonds," and the dimension-by-dimension median of the groups' ideal points is in the majority rule core. (Indeed, if the majority rule core is nonempty with convex spatial preferences, it must contain the dimension-by-dimension median of the judges' ideal points, which may or may not correspond to one of the judges' ideal points (see also Laver and Shepsle (1990)). We illustrate a similar example to that portrayed in Figure 1 in such a setting in Appendix A.

support, whereas case y would attract the support only of Judges 1 and 3.

Figure 2 illustrates why adjudication of either x or y is problematic from a normative perspective: narrowing either x or y to issue 2 in this situation would represent a majority-preferred outcome relative to adjudication of the case in question without narrowing. The "clown in the car" in each of the two cases is the movement of policy on issue 1. The movement on issue 2 is preferred by a majority of judges and, for both judges 1 and 3, in each case, outweighs the dis-utility of the movement on issue 1.
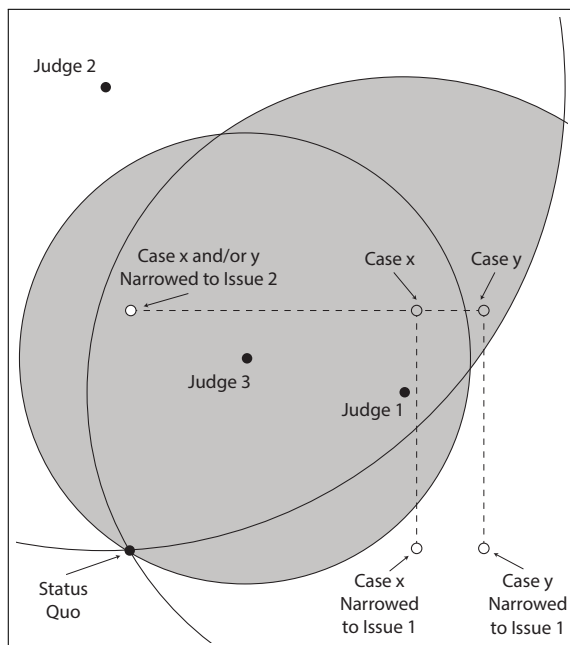

Figure 2: An Example of a Clown Car

4   Aggressive Grants, Passive Aggressive Denials

In this section we consider the dynamic implications of our categorizations of vehicles. Our findings in this section speak to a large literature on strategic judicial behavior. As Bachrach and Baratz (1962) famously pointed out, the power to *not* decide[9] is sometimes even more potent than the power to decide. We do not develop a full-blown, detailed model of the

---

[9]Or, perhaps, the "power to decide whether to decide, and about what."

dynamic case selection process.[10] Instead, we focus on a few vignettes in which the court has some information about what cases it might confront prior to deciding which cases, if any, to adjudicate.

This is easiest to see if one considers a hypothetical pair of cases, x and y, such that x is *one issue narrower* than y.[11] If x is one issue narrower than y, x is a bridging vehicle, and y is a clown car, then x will be the *sophisticated voting outcome* (e.g., Farquharson, 1969; Shepsle and Weingast, 1984; Banks, 1985) if the court is choosing whether to adjudicating only x and/or y. Specifically, a majority of judges must prefer adjudicating x to y and, more subtly, the adjudication of x prior to y would lead to a failure to adjudicate y subsequently. If the judges are choosing to adjudicate x and/or y, then the sophisticated voting outcome will be x. This is stated formally in the following proposition.

Proposition 2 *If the court is choosing between x and y with*

- *x being one issue narrower than y ($x \subset y$ and $|y \smallsetminus x| = 1$),*

- *x being a bridging vehicle, and*

- *y being a clown car,*

then x is the sophisticated voting outcome from the set $C = \{x, y\}$.

Proof: Suppose that $x \subset y$ and x is one issue narrower than y. Denote the difference between x and y by (m, y_m) (this is without loss of generality). If x is a bridging vehicle, then a majority of judges prefer adjudicating x, given the status quo q. If y is a clown car, then the single-issue case, $z \equiv (m, y_m)$ would not be adjudicated on its own.

Accordingly, the sophisticated voting outcome from $\{q, x\}$ is x, the sophisticated voting outcome from $\{x, y\}$ is x, and the sophisticated voting outcome from $\{q, y\}$ is y. This implies that the sophisticated voting outcome from $\{q, x, y\}$ (*regardless of the voting order*) will be x, because x is the majority rule core within the set $\{q, x, y\}$ (Shepsle and Weingast, 1984; Banks, 1985). ∎

Proposition 2 is not that surprising on its own.[12] More surprising is the fact that the requirement that the broader case be exactly *one* issue broader is necessary for the full strength of the proposition's conclusion.

---

[10]For example, we do not limit the court to follow any specific dynamic selection criteria, such as consistency (the court could, for example, adjudicate two or more cases that move policy on identical issue(s).

[11]For example, $y = ((1, z_1), (2, z_2), (3, z_3))$ and $x = ((1, z_1), (3, z_3))$.

[12]Proposition 2 mirrors other well-known results in the social choice literature (e.g., Black and Newing, 1951; Kramer, 1973; Feld and Grofman, 1987).

This is due to the possibility of overlapping majorities. Proposition 2 can be generalized with the notion of *covering* (Miller, 1980; McKelvey, 1986). Letting $>$ denote the Court's majority preference relation, covering is defined in our setting as follows.

Definition 4 (Miller (1980)) *For any set of cases C and pair of cases $x, y \in C$, x **covers** y **in** C if*

$$\left[z \in C \ \text{ and } \ z > x \right] \Rightarrow z > y.$$

*Any case $z \in C$ for which there does not exist some case x such that x covers z in C is referred to as **uncovered in** C, and the set of all such cases is referred to as the **uncovered set in** C.*

The results of Shepsle and Weingast (1984) and Banks (1985) (among others) imply that the sophisticated voting outcome from any set of cases C must be uncovered in C. The limits of the generalization follow from the fact that, when the majority rule core in C is empty, the uncovered set in C contains at least three elements. Furthermore, when the uncovered set in C contains multiple elements, then the *Banks set* in C (Banks, 1985)—which characterizes all of the sophisticated voting outcomes that can be achieved under "open rule" consideration[13] does as well, which implies that the proof of Proposition 2 will not yield a unique outcome.

The fact that it is possible to construct examples of clown cars that contain multiple bridging vehicles is demonstrated in Table 1.[14] The situation illustrated in Table 1 represents

	Issue 1	Issue 2	Issue 3	$u(\{1,2,3\})$	$u(\{1,2\})$	$u(\{2,3\})$	$u(\{1,3\})$
1	10	-3	-8	-1	+7	-11	+2
2	-2	6	-1	+3	+4	+5	-3
3	-3	-2	10	+5	-5	+8	+7

Table 1: Three Bridging Vehicles Within A Clown Car

a clown car with three issues, but each of the three pairs of issues in the clown car is a bridging vehicle (implying that no narrowing of the clown car to a single issue will be adjudicated in equilibrium). This example illustrates a difficulty generalizing Proposition 2 without a

---

[13]Open rule consideration requires that any and all outcomes consistent with C are available for final adjudication.

[14]Note that, by definition, no distinct pair of bridging vehicles can be nested within each other, implying that a clown car must contain at least three issues to contain multiple bridging vehicles.

reliance on the notion of covering because, *among the set of all 8 possible adjudication profiles, the majority rule core is empty* and, more specifically, there is a majority rule cycle over the three bridging vehicles contained with the three issues reflected in Table 1. Accordingly, the sophisticated voting outcome for the three judges in Table 1 will depend on the procedure the judges use to adjudicate the case. For example, if the judges must vote on the clown car in a single "up or down vote," then the clown car will be adjudicated in equilibrium. On the other hand, if the judges consider whether to eliminate each issue in some pre-specified order, then the clown car will not be adjudicated: each issue will be removed.[15] Each of the three bridging vehicles contained in this clown car can be adjudicated in equilibrium with an appropriate procedure. The only outcomes that can not be sustained in equilibrium are adjudication of a single issue within the clown car. With this in hand, we now turn to consider what insights our framework provides for *case selection* by the court when they have information about cases that will arise in the future.

4.1   Aggressive Grants & Defensive Denials

Our framework helps clarify a conceptual ambiguity in the study of case selection. Specifically, there is no difference between aggressive grants and defensive denials without including some other factor(s) of judicial decision-making.[16] In a sense, this is obvious when one considers a court facing two cases, x and y: if there is a link between the two cases in the sense that the court can choose either to adjudicate x or y (or neither). In such a setting, if x and y are each preferred by a majority of judges to the status quo, then adjudication of (say) x instead of y is simultaneously an aggressive grant of x *and* a defensive denial of y. Thus, in any situation in which the court is choosing *between* two or more cases that would each be adjudicated in isolation, the court ultimately must engage in an aggressive grant/defensive

---

[15]This mirrors the central point of the analysis of multidimensional bargaining in Gailmard and Patty (2022).

[16]Examples of such factors include (1) fact-finding and/or error correction, (2) asymmetric responsiveness of public opinion and/or political reactions to judicial decision-making, and (3) strategic litigation, to name three.

denial.

One possible (and admittedly partial) distinction that our framework can bring to bear to separate the phenomena of "aggressive grants" from that of "defensive denials." Perry (1991, 198-212) introduces these notions from his interviews with Supreme Court justices and clerks. Roughly speaking, a defensive denial is a justice's effort to block a case that otherwise merits resolution because she anticipates disliking *how* it will be resolved. An aggressive grant refers to a justice's effort to resolve a case that otherwise does not merit review, because she believes she can secure an outcvome she will like. In the context of our model, an aggressive grant might take the form of a case that includes an extraneous dimension that one would prefer not to resolve because, for example, the collective outcome is desirable. We conceive of the fistinction with respect to the breadth of the case that the court ultimately adjudicates relative to the case it does not. One possible definition along these lines is as follows.[17]

Definition 5 *Suppose that the court is choosing between two cases, x and y, with $x \subset y$, each of which is majority preferred to the status quo, q. The court's adjudication of x instead of y is a* **defensive denial** *of y. Conversely, the court's adjudication of y is an* **aggressive grant** *of y.*

The requirement that both x and y be preferred to the status quo, q, is justified by the qualifier "defensive" denial: if y is not majority preferred to the status quo, then x will be adjudicated if and only if it is majority preferred to q. One can generalize these notions of defensive denials/aggressive grants to more than 2 cases, but this raises at least two issues. The first is analytical: with more than two cases, the majority rule core over the cases in C may be empty. In such cases, the adjudication outcome will depend on the order of the adjudication process. The second issue is empirical: with more than two cases, x might be adjudicated not because it is intended to "deny" adjudication of y, but rather

---

[17]There are several ways to generalize Definition 5. For example, Definition 5 requires that the two cases be nested in a strong sense (the narrower case, x, must yield an identical policy outcome as y on any issue that x alters), and thus does not apply to the example in Table 2. Similarly, one might think about how to consider even "less nested" pairs of cases. In any event, we do not extend our analysis in this direction due to space constraints.

intended to deny adjudication of some combination of adjudications of the available cases. Not only would the details of such combinations possibly be quite complicated to model and understand—the outcome that is being denied by the forward-looking judges would not be directly observable from the set of cases, C, meaning that detection of such defensive denials without additional information about the details of adjudication process would be difficult, if not impossible.

Using Definition 5, it is simple to construct examples in which an aggressive grant will occur and examples in which a defensive grant will occur.[18] If a defensive denial occurs in equilibrium with two cases, it follows that the denied case is a clown car. However, this is not a sufficient condition for a defensive denial.

A defensive denial describes the individual incentive to deny consideration of a case because the case, once considered, might be adjudicated over one's desire to have it not adjudicated. Our framework can speak to the incentive for an individual to cast a vote for a defensive denial in this sense, but it can not offer a complete explanation for why a *single case* would experience a defensive denial *by the court as a collective.* This is because, with a single case, each judge has a weakly dominant strategy with respect to accepting a case for adjudication: when considering any case *in isolation*, each judge should support considering any case he or she strictly prefers to the status quo, and likewise should oppose considering any case he or she find strictly worse than the status quo.

The issue becomes more interesting once we suppose that the court has multiple cases to consider. Suppose that the court will first consider a case x and then consider a case y. It is possible that $(q \cap x) \cap y$ is majority preferred to $q \cap x$, but not q itself, x is majority preferred to q, and q is majority preferred to $(q \cap x) \cap y$. In such situations, the majority of judges who prefer q to $(q \cap x) \cap y$ should vote to *not* adjudicate x, even if they prefer $q \cap x$

---

[18]This is in part because our assumptions about judges' preferences are very weak. For example, we have not even assumed that the judges have continuous preferences over the set of cases. Imposing additional structure (such as fixing the number of issues and requiring that judges' preferences be spatial with respect to the set of possible cases) would limit the scope of this claim, but spatial examples of each of the two cases can be easily constructed because of the fact that we have imposed no restrictions on the location of the status quo, q. If q is outside the Pareto set of the judges' ideal points, then it is particularly easy.

to q, because they will realize that adjudication of x will lead to $(q \cap x) \cap y$ being the final outcome.

4.2 Aggressive Grants

Table 2 displays an example in which an aggressive grant would occur in equilibrium if the streamlined vehicle is presented to the court prior to its associated clown car. We refer to this (tongue half in cheek) as an example of a "passive aggressive grant," because the judges voting to grant the streamlined, single-issue vehicle actually prefer the ideological location of the clown car on the the issue the two cases share in common *more* than the ideological location of the streamlined vehicle on the same issue.

Judge	Payoff from Issue 1	Payoff from Issue 2	Total Payoff
1	6	-2	+4
2	4	-3	+1
3	1	-3	-2
Clown Car Vehicle			

Judge	Payoff from Issue 1	Total Payoff
1	5	+5
2	4	+4
3	-1	-1
Streamlined Vehicle		

Judge	Payoff from Issue 1	Payoff from Issue 2	Total Payoff
1	5	-2	+3
2	4	-3	+1
3	-1	-3	-4
"Amended" Vehicle			

Table 2: An Example of an Aggressive Grant/Defensive Denial

Presume, for clarity, that the judges can choose between four outcomes: the clown car, the streamlined vehicle, the status quo (neither case), or an "amended" adjudication consisting of the payoffs from issue 1 in the streamlined vehicle and issue 2 in the clown car. The judges' payoffs for this amended adjudication is illustrated in Table 2.

In the example displayed in Table 2, Judge 1 prefers adjudicating the streamlined vehicle to adjudicating the clown car, each of which he or she prefers to the status quo. More surprisingly, Judge 3 will vote to adjudicate the streamlined vehicle if it sets aside consideration/adjudication of the clown car vehicle. This is *in spite of the fact that the streamlined vehicle is less preferable than the status quo to Judge 1.*[19] Judge 2 would prefer to adjudicate the clown car, but he or she will be outvoted. More generally, the streamlined vehicle is the Condorcet winner among the four possible outcomes, implying that it is the sophisticated voting outcome in this case.

4.3   Incorporating Uncertainty about Future Cases

Suppose that the court is engaged in dynamic adjudication, and the clown car vehicle in Table 2 is available for adjudication in period 1 and the probability that the streamlined vehicle will become available in the period 2 is denoted by $p \in (0, 1)$. Suppose also that the court must adjudicate the clown car vehicle in the first period or it becomes moot. The judges in this example should realize that if the clown car is adjudicated in the first period, then the streamlined vehicle will not be adjudicated in the second period.

Judge 1 will be willing to adjudicate the clown car vehicle if $p \leq 0.8$. Judge 2 will be willing to do so if $p \leq 0.25$, and Judge 3 will not be willing to do so regardless of p. Accordingly, if $p \leq 0.25$, the clown car will be adjudicated in the first period. Otherwise, the court will not adjudicate the clown car and then adjudicate the streamlined vehicle if it is available in the second period.

Strategic Delay & Judicial Minimalism.   This is an example of a more general tendency for the court to be conservative with respect to clown cars: in essence, the court should adjudicate a clown car only to the degree that it does not expect to be able to adjudicate an approximately similar (in spatial terms) and narrower (in issue terms) case in the near

---

[19]As an aside, note that it is simple to construct examples in which the aggressively granted case contains *more* issues than the clown car that prompts its acceptance.

future. This tendency is similar to that identified by Beim, Clark and Patty (2017): in their framework, the court will tend to defer resolving a pending "question" to the degree that the "answer" to that question will prompt new questions for the court to resolve. Accordingly, the court will tend to raise new questions only when this results from answering multiple and/or highly pressing current questions. In our framework in this article, this is analogous to (strategically) declining to adjudicate a clown car in favor of waiting for a narrower vehicle addressing some or all of the same issues.

Though both types of strategic dynamic behavior are consistent with the principle of judicial minimalism, the link is arguably clearer within this article's framework—the notion of a clown car identifies a type of vehicle in which the court has a clear (collective) incentive to adjudicate *fewer issues*.[20]

Allowing for Delay. If the court can delay adjudication of the clown car until the second period without cost, then Judges 1 and 2 will defer it to the second period and adjudicate it if and only if the streamlined vehicle is not available in the second period. Otherwise, the court will adjudicate the clown car in the second period.

"Overloaded Vehicles" & Clown Cars. In addition to uncertainty about the availability of a streamlined vehicle for adjudication in the near future, clown cars might be adjudicated in equilibrium in order to preclude a subsequent adjudication that is, in a sense, "even more of a clown car." For simplicity, call a clown car that can be narrowed to another clown car as an **overloaded vehicle**. Table 3 displays an example in which a defensive denial would occur in equilibrium if the overloaded vehicle is presented to the court prior to its associated clown car.

---

[20]One reason that the link between the "questions" framework developed by Beim, Clark and Patty (2017) and judicial minimialism is more opaque than that with the framework presented in this article is that Beim, *et al* partially collapse the "number of issues" into the net payoff received from answering a "question." In their framework, the main distinction between two "questions" other than the payoff from resolving them is the nature of the subsequent questions raised by answering the pending questions. A subtle, but pertinent, link between their framework and ours is the role of covering discussed following Proposition 2, above, and Beim *et al*'s notion of an *ancillary dispute* (Beim, Clark and Patty, 2017, 207).

Judge	Payoff from Issue 1	Payoff from Issue 2	Total Payoff
1	5	-3	+2
2	-4	6	+2
3	6	-2	+4
Clown Car Vehicle			

Judge	Payoff from Issue 1	Payoff from Issue 2	Payoff from Issue 3	Total Payoff
1	6	-3	-2	+1
2	-4	6	3	+5
3	7	-2	-3	+3
Overloaded Vehicle ("Defensively Denied")				

Table 3: An Example of a Defensive Denial

5   Vehicles and Coalitions

The analysis to this point has focused on the possibility of various forms of vehicles. With that in hand, now we are in a position to consider the voting patterns generated by these vehicles. The set of all vehicles for any status quo is equal to the majority rule winset of q. To distinguish between the three potential types of vehicles with two issues, define the following:

$$t_m \equiv \left(\text{Median}_{j \in N}[t_j^1], \text{Median}_{j \in N}[t_j^2]\right), \quad (\textit{Dimension-by-Dimension Median})$$

$$W(t,q) = \left\{x \in C: \left|\left\{j \in N: \pi(x,q \mid t_j) \geq 0\right\}\right| \geq \frac{n+1}{2}\right\}, \quad (\textit{Winset of Status Quo})$$

$$R_1(t,q) \equiv \left\{x \in C: x^1 \in \left[\min[q^1, 2q^1 - t_m^1], \max[q^1, 2q^1 - t_m^1]\right]\right\},$$

$$R_2(t,q) \equiv \left\{x \in C: x^2 \in \left[\min[q^2, 2q^2 - t_m^2], \max[q^2, 2q^2 - t_m^2]\right]\right\}, \text{ and}$$

$$\bar{R}(t,q) \equiv R_1(t,q) \cap R_2(t,q).$$

With these in hand, the set of all vehicles is divided into three categories as follows:

$$\text{Convenient Vehicles}(t,q) = W(t,q) \cap \bar{R}(t,q),$$

$$\text{Bridging Vehicles}(t,q) = \left[W(t,q) \cap (R_1(t,q) \cup R_2(t,q))\right] \setminus \bar{R}(t,q), \text{ and}$$

$$\text{Clown Cars}(t,q) = W(t,q) \setminus (R_1(t,q) \cup R_2(t,q)).$$

We wish to think about the probabilities of different coalitions in an abstract fashion, so as to divorce the analysis from as much dependence on the "form" of judicial preferences as possible.[21] To this end, we assume only that the judges have additively separable payoffs across the issues contained in any case, and we illustrate the examples with circular indifference curves.

Figure 3 considers the setting examined above. The qualitative features of this configuration of note are (1) one of the judges' ideal point is the dimension-by-dimension median of the judges' ideal points (judge 3) and (2) the status quo is Pareto inefficient.[22] In this case, each of the three types of vehicles might occur in equilibrium. The darkest rectangular region identifies the cases that would be convenient vehicles. The lightest gray region surrounding this rectangle contains all of the clown cars in this setting. Finally, the "medium gray" region (in the upper right of the figure) represents the cases that would be bridging vehicles.

Substantively (and slightly informally), it is interesting to note that there are "so many" clown cars in this case. This is a link between our model and the "setter model" of Romer and Rosenthal (1978): when the status quo is Pareto inefficient, the set of policies that can defeat the status quo can be quite large.[23] The situation portrayed in Figure 3 is arguably more relevant for US courts than for legislatures

Figure 4 illustrates a "fragile aspect" of bridging vehicles. In the figure, the status quo is Pareto efficient and, furthermore, on the *contract curve* between Judges 1's & 2's ideal points. This knife-edge condition implies that there are no cases that judges 1 & 2 will both support adjudicating.

Figure 5 alters Judge 3's ideal point so that it is no longer equal to the dimension-by-

---

[21]In addition to the natural appeal of "general" results, this approach is also motivated by the ongoing debate regarding the true nature of judicial preferences (*e.g.*, "attitudinal vs. doctrinal," etc.).

[22]The status quo lies outside the smallest convex set containing all judges' ideal points (which in this case is a triangle).

[23]This feature also characterizes the gate-keeping models of Cox and McCubbins (1993) and Krehbiel (1998), even though the two theories rest on very different assumptions about agenda setting. This is a general property of (non-unanimity) collective decision-making with spatial preferences.
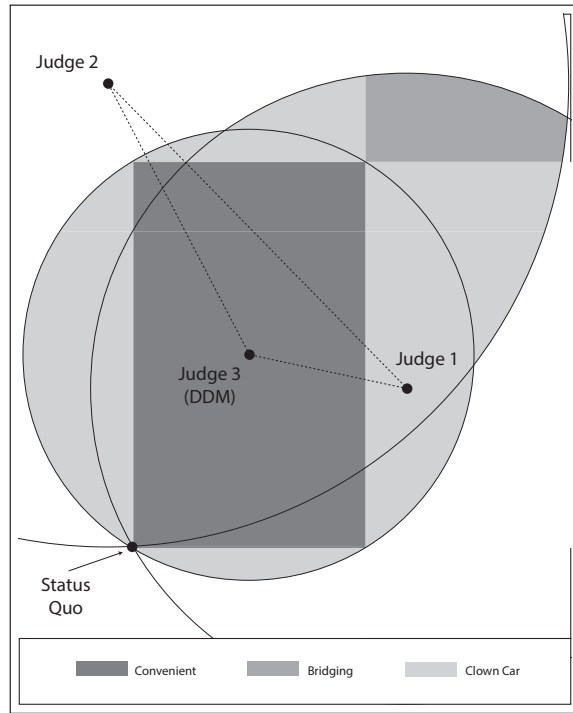
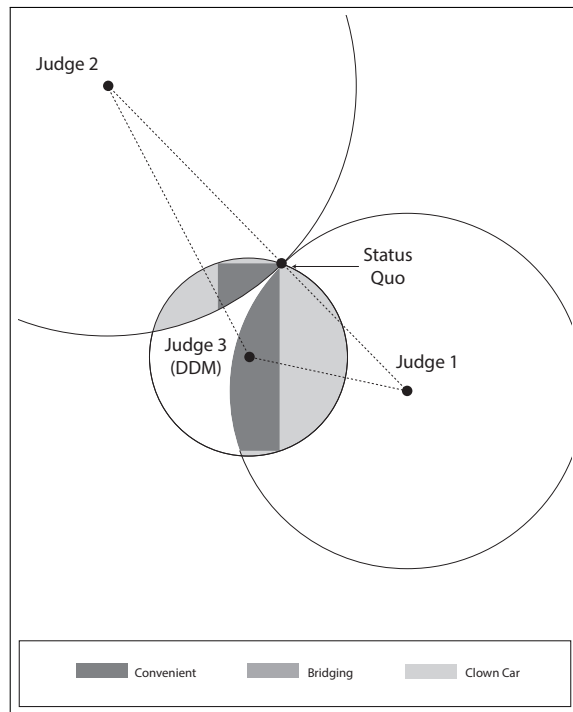Figure 3: Pareto Inefficient Status Quo: All Kinds of Vehicles

Figure 4: Pareto Efficient Status Quo with No Bridging Vehicles

dimension median of the judges' ideal points, and moves the status quo to the interior of the Pareto set. These two changes lead to to differences: the first (due to the movement of the status quo to the interior of the Pareto set) is the reemergence of a positive measure set of bridging vehicles (the "leaf" pointing up and to the right of the status quo in Figure 5). The second change is more subtle and illustrated by the dotted rectangle in Figure 5: the set of convenient vehicles is now bounded by a region that depends on two judges' ideal points (the median judge on each dimension (Judge 3 for issue 1 and Judge 1 for issue 2), specifically). Of note in this example is that *any* vehicle that attracts the support of judges 1 and 2 is a bridging vehicle (and, as with the case portrayed in Figure 3), any bridging vehicle must be supported by exactly this minimal winning coalition.
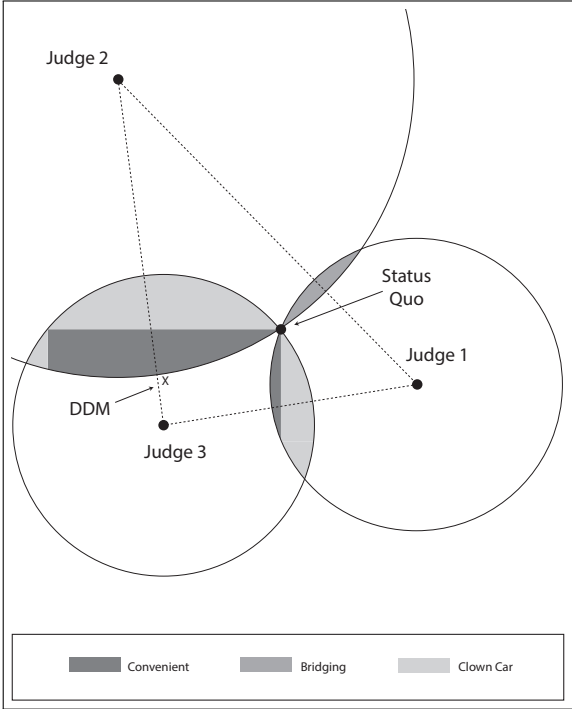

Figure 5: Pareto Efficient Status Quo With Bridging Vehicles

The next proposition partially summarizes Figures 3—5.

Proposition 3 *If π satisfies (2) and (3), then no proposal that moves policy closer to the DDM on any issue can be a bridging vehicle. Furthermore, every adjudicated vehicle that does not move policy closer to the DDM on any issue is a bridging vehicle.*

Proof: Assume that π satisfies (2) and (3), fix any profile of ideal points $t(t_1, \ldots, t_n)$, and

let $\mu = (\mu^1, \ldots, \mu^m) \in X$ denote the DDM of t. Now consider any status quo $q \in X$ and define the following set:

$$\kappa(q \mid \mu) \equiv \left\{ x \in X : \exists i \in M \text{ s.t. } |x^i - \mu^i| < |q^i - \mu^i| \right\}.$$

Now consider any proposal $x = (x^1, \ldots, x^m) \in \kappa(q \mid \mu)$ and define a refinement of x, $x_\mu(x_\mu^1, \ldots, x_\mu^m)$, as follows:

$$x_\mu^i = \begin{cases} x^i & \text{if } |x^i - \mu^i| < |q^i - \mu^i|, \\ q^i & \text{otherwise.} \end{cases}$$

Because $x \in \kappa(q \mid \mu)$, we know that $x_\mu \neq q$. Furthermore, by the assumption that π satisfies (2) and (3), $x_\mu W(t, q)$ and, by construction, x_μ is a convenient vehicle. Accordingly, if x will be adjudicated, then it must be either a clown car or convenient vehicle, implying that x can not be a bridging vehicle, as was to be shown. ∎

5.1 Implications for Social Choice and "Chaos"

Before discussing some empirical implications of the analysis, we quickly describe some theoretical implications of the analysis for social choice in general. Our typology of vehicles is context-free, and the setting is standard in political economy. Accordingly, there are links between the existence of each of the three types of vehicles and the stability of collective choice. The following two corollaries relate the conditions under which different types of vehicles exist and the presence of absence of majority rule cycles and/or the non-emptiness of the majority rule core.

The first of these corollaries states that convenient vehicles "almost always," or *generically*, exist.[24]

Corollary 1 *If π satisfies (2) and (3), then the set of convenient vehicles is empty if and only if the status quo, q is equal to the DDM of the judges' ideal points.*

A further implication following from Corollary 1 is that all vehicles (*i.e.*, cases that can be adjudicated in equilibrium) are bridging vehicles *if and only if* the status quo is located

---

[24]They exist generically with respect to the status quo, q. This means that the set of status quos for which the set of convenient vehicles is empty, for any given profile of judges' ideal points, t, possesses Lebesgue measure zero in $\mathbf{R}^m$.

at the DDM of the judges' ideal points.

Corollary 2 *If π satisfies (2) and (3), every case that can be adjudicated in equilibrium is a bridging vehicle if and only if the status quo, q is equal to the DDM of the judges' ideal points.*

Corollary 2 implies that clown cars generically exist.[25] This then implies that that the existence of clown cars in any given setting implies that the judges' ideal points, t, admits a majority rule cycle even if the majority rule core is non-empty. Corollary 2 implies that clown cars generically exist.[26] This then implies that that the existence of clown cars in any given setting implies that the judges' ideal points, t, admits a majority rule cycle even if the majority rule core is non-empty. This leads to the following general conclusion, which we set aside as a numbered "remark."

Remark 1 *The set of bridging vehicles is always nonempty unless the status quo policy is located in the majority rule core of the judges' ideal points. Because this set of policies is generically empty,[27] Corollary 2 not only implies that bridging vehicles generically exist, but it also identifies their existence as necessary for "chaos" in multidimensional spatial choice (McKelvey, 1976; Schofield, 1977; McKelvey and Schofield, 1987).*

With some of the linkages between our analysis and the more fundamental structure of collective choice in multidimensional spatial environments sketched out, we now turn to a discussion of the broader substantive implications of our analysis for judicial politics.

6   Implications and Discussion

Our analysis highlights a number of features of the agenda-setting environment at collegial courts that have implications for normative arguments about jurisprudence, empirical analyses of judicial decision-making, and theoretical models of legal evolution. We consider each in turn.

---

[25]Generic with respect to the combination of the status quo, q, and the judges' ideal points, (q, t).

[26]Generic with respect to the combination of the status quo, q, and the judges' ideal points, (q, t).

[27]Generic with respect to the judges' ideal points, t.

Judicial minimalism and collegial politics There exists a long tradition of research in public law that engages normative issues about how a court ought to use its power. Much of that work if driven by the so-called counter-majoritarian difficulty, which is the tension between a democratic commitment to majoritarian politics and a liberal commitment to limitations on government power. That courts—especially courts like the US Supreme Court—have claimed power to override the will of the majority in the name of constitutional limits on power raises a host of concerns. In the wake of the Supreme Court's frustration of the New Deal legislative agenda, normative scholars in the legal academy called for the courts to exercise greater restraint. However, when the Supreme Court decided *Brown v. Board of Education*, those scholars confronted a challenge—how to identify limits on judicial power that would constrain judges from replacing the will of elected majorities with the preferences of unelected judges while also creating space for those judges to override elected majorities that use their power to oppress the minority?

Among the various ideas that emerged from that line of research is what is known as "judicial minimalism." This is the idea that judges ought change the law as incrementally as possible. For each case they resolve, they ought to resolve the fewest issues as possible to decide the case. In the context of our model, that looks like taking cases that has as few dimensions as possible and that move the status quo the least. However, as our analysis shows, judicial minimalism necessarily entails avoiding bridging vehicles. The implication, then, is that judicial minimalism is equivalent to a dictate against coalitions in which the ends vote against the middle, so to speak. While that might be desirable, it is not an obvious implication of the judicial minimalism line of thought. Moreover, it reveals that judicial minimalism endows those in the middle (not necessarily political centrists) with a veto power that ensures the substantive content of decisions reflect her preferences. Our model therefore demonstrates that normative arguments about the appropriate use of judicial power to change the law can imply non-obvious ideological consequences.

Empirical inference from judicial decisions A second set of implications that follows from our model concerns empirical inference from observed patterns of judicial voting. As we pointed out above, inferring the alignment of preferences among judges can be complicated if the distribution of cases the judges decide is not sufficiently balanced. This observation complements past work that points out inferences about preferences and the law can be undermined by agenda-setting (e.g., Kastellec and Lax, 2008). Moreover, there is reason to believe that strategic litigants pick and choose which cases to bring to the courts in anticipation of the majority's preferences (e.g., O'connor and Epstein, 1983; Priest and Klein, 1984; Perry, 1991). In order to overcome that challenge, our model suggests information about the particular issues at hand in a case can help inference. By knowing *what* judges are voting on in addition to *how* they are voting, our inferences about judges' underlying preferences can overcome confounding from what might otherwise appear to be unusual or complex voting patterns (cf, Lauderdale and Clark, 2012, 2014).

Part of what distinguishes our model's insights from that past work is in what it reveals about the implications of the underlying structure of issues for observed patterns of voting alignment among. Consider again Figure 5 and the clown car regions contained in the Pareto set of the outcome space (illustrated in each figure by the dotted triangle connecting the three judges' ideal points). In a classical social choice or bargaining context, the entirety of these triangles are all arguably fair game for collective choice. The fact that these regions are distinguished from those containing bridging or convenient vehicles reflects the fact that we have defined these regions based on whether including both *issues* is necessary for adjudication. Traditional models of social choice or bargaining treat the dimensionality of the policy/bargaining space as given—when they are multidimensional, this represents an enriching of the set of possible preferences: the dimensions themselves are not an explicit aspect of collegial choice.

Our theory, of course, treats the dimensions as *issues*—which are presumed to be a *per*

se aspect of collegial decision-making in courts, as opposed to an *ipso facto* characteristic.[28] This distinction leads to more refinement within the Pareto set, albeit not one without controversy. As a result, the judge on a court of 3 judges who desires change on both dimensions of the status quo is not going to be part of a minimal winning coalition supporting adjudication of a case that is a bridging coalition. Incorporating this feature into an empirical model of voting behavior and can directly affect one's inferences about the underlying preferences of the judges.

The path of the law   Finally, our model also provides insight into the way in which the law evolves over time. Scholars from various intellectual traditions have long been concerned with the path of the law, often considering how the particular set of cases that come to the Court determine how and when the law evolves. In our model, the law can be both path dependent and path independent.

What is more, our model reveals a link between path-dependence in the law and the logic of judicial minimalism. Incrementalism has certain normatively desirable features. Given that judges are typically not democratically accountable, democratic ideals suggest their impact on the law should be small relative to elected law-makers. to the extent judges take precedence in determining the law, they exacerbate concerns about counter-majoritarianism. However, as our model highlights, there are situations in which incrementalism and minimalism are in tension—the smallest moves in the law can be associated with the "broadest" cases, depending on which issues are combined in which cases. Put differently bridging vehicles, in our model, necessarily rule out the possibility of certain voting coalitions being able to move the status quo (Recall Figure 5). To the extent judicial minimalism counsels against allowing bridging vehicles, it also serves a counter-majoritarian function by disallowing particular majorities from pursuing their preferred outcomes. We do not make a concrete prediction about when such conditions exist but rather highlight the potential tension between these

---

[28]Of course, this notion is not foreign to scholars of legislative choice, either (e.g., germaneness rules: Shepsle, 1979; Humes, 1993).

seemingly related desiderata.

7   Conclusion

In studying how effectively democratic government works, a threshold question is understanding when policy-makers decide to act on which topics. For this reason, agenda-setting has been a subject of intense inquiry by political scientists. A significant portion of that inquiry has been concerned with identifying how political institutions exacerbate or inhibit pathologies of social choice, especially given the possibility of high-dimensional political debates. Various arguments have focused on sources of friction created by institutional rules as means of reaching stable collective behavior.

Our analysis focuses on a particular feature of agenda-setting—multidimensional policy-making in which the set of possibility outcomes is constrained. In the context of the courts—our setting—individual cases arrive at the courts potentially bundling related substantive issues for resolution. The constellation of issues present in a case can create the opportunity for "strange bedfellows" and thereby shift who wields power in a given setting. Our model isolates a series of possible situations that can arise in such an environment, illustrating how coalitions can emerge to bring onto the agenda issues that might not be able to be resolved in a lower-dimensional setting.

In future work, these results can engage work that examines the strategic incentives for impact litigants who seek to bring cases for the purpose of changing the law. They also can engage normative work about jurisprudence and the appropriate exercise of judicial power. Further, our results suggest novel institutional mechanisms for overcoming the challenges of collective preference aggregation. Those, and related topics, promise to deepen our understanding of how democratic institutions translate preferences into political outcomes.

References

Bachrach, Peter and Morton S Baratz. 1962. "Two Faces of Power." *American political science review* 56(4):947–952.

Baird, Vanessa A. 2007. *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda.* University of Virginia Press.

Banks, Jeffrey S. 1985. "Sophisticated Voting Outcomes and Agenda Control." *Social Choice and Welfare* 1(4):295–306.

Beim, Deborah and Kelly Rader. 2019. "Legal Uniformity in American Courts." *Journal of Empirical Legal Studies* 16(3):448–478.

Beim, Deborah, Tom S Clark and John W Patty. 2017. "Why Do Courts Delay?" *Journal of Law and Courts* 5(2):199–241.

Black, Duncan. 1948. "On the Rationale of Group Decision-making." *Journal of Political Economy* 56(1):23–34.

Black, Duncan and Robert Albert Newing. 1951. *Committee Decisions with Complementary Valuation.* London: William Hodge.

Boucher Jr, Robert L and Jeffrey A Segal. 1995. "Supreme Court justices as strategic decision makers: Aggressive grants and defensive denials on the Vinson court." *The Journal of Politics* 57(3):824–837.

Caldeira, Gregory A and John R Wright. 1988. "Organized interests and agenda setting in the US Supreme Court." *American Political Science Review* 82(4):1109–1127.

Caldeira, Gregory A and John R Wright. 1990. "The discuss list: Agenda building in the Supreme Court." *Law and Society Review* pp. 807–836.

Caldeira, Gregory A, John R Wright and Christopher JW Zorn. 1999. "Sophisticated voting and gate-keeping in the Supreme Court." *Journal of Law, Economics, and Organization* 15(3):549–572.

Callander, Steven and Tom S Clark. 2017. "Precedent and Doctrine in a Complicated World." *American Political Science Review* 111(1):184–203.

Cameron, Charles M., Jeffrey A. Segal and Donald Songer. 2000. "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions." *American Political Science Review* 94(1):101–116.

Carrubba, Clifford J and Tom S Clark. 2012. "Rule Creation in a Political Hierarchy." *American Political Science Review* 106(3):622–643.

Clark, Tom S. 2009. "A Principal-Agent Theory of En Banc Review." *Journal of Law, Economics, and Organization* 25(1):55–79.

Clark, Tom S and Jonathan P Kastellec. 2013. "The Supreme Court and percolation in the lower courts: an optimal stopping model." *The Journal of Politics* 75(1):150–168.

Cox, Gary W. and Mathew D. McCubbins. 1993. *Legislative Leviathan: Party Government in the House.* Berkeley, CA: University of California Press.

Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective.* University of Chicago Press.

Farquharson, Robin. 1969. *The Theory of Voting.* New Haven, CT: Yale University Press.

Feld, Scott L and Bernard Grofman. 1987. "Necessary and Sufficient Conditions for a Majority Winner in n-Dimensional Spatial Voting Games: An Intuitive Geometric Approach." *American Journal of Political Science* pp. 709–728.

Frank, Jerome. 1973. *Courts on trial: Myth and reality in American justice.* Princeton University Press.

Gailmard, Sean and John W. Patty. 2022. "Agenda Setting in Multiple Dimensions." Working Paper, Emory University.

Gash, Alison L. 2015. *Below the Radar: How Silence Can Save Civil Rights.* Oxford University Press.

Haire, Susan B, Stefanie A Lindquist and Donald R Songer. 2003. "Appellate court supervision in the federal judiciary: A hierarchical perspective." *Law & Society Review* 37(1):143–168.

Hansford, Thomas G. and James F. Spriggs II. 2006. *The Politics of Precedent on the US Supreme Court.* Princeton, NJ: Princeton Univ Pr.

Humes, Brian D. 1993. "Majority Rule Outcomes and the Choice of Germaneness Rules." *Public Choice* 75(4):301–316.

Humphreys, Macartan and Michael Laver. 2006. "Spatial Models, Cognitive Metrics And Majority Voting Equilibria." Typescript, Columbia University.

Kastellec, Jonathan P and Jeffrey R Lax. 2008. "Case selection and the study of judicial politics." *Journal of Empirical Legal Studies* 5(3):407–446.

Kornhauser, Lewis A. 1992. "Modeling Collegial Courts. II. Legal Doctrine." *Journal of Law, Economics, and Organization* 8:441–470.

Kramer, Gerald H. 1973. "On a class of equilibrium conditions for majority rule." *Econometrica* 41:285–297.

Krehbiel, Keith. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking.* Chicago, IL: University of Chicago Press.

Lauderdale, Benjamin E and Tom S Clark. 2012. "The Supreme Court's many median justices." *American Political Science Review* 106(4):847–866.

Lauderdale, Benjamin E and Tom S Clark. 2014. "Scaling politically meaningful dimensions using texts and votes." *American Journal of Political Science* 58(3):754–771.

Laver, Michael and Kenneth A. Shepsle. 1990. "Coalitions and Cabinet Government." *American Political Science Review* 84(3):873–890.

Lax, Jeffrey R and Kelly T Rader. 2010. "Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?" *The Journal of Politics* 72(2):273–284.

Levi, Edward H. 1949. *An introduction to legal reasoning.* University of Chicago Press.

Lindquist, Stefanie A and David E Klein. 2006. "The influence of jurisprudential considerations on Supreme Court decisionmaking: A study of conflict cases." *Law & Society Review* 40(1):135–162.

McKelvey, Richard. 1976. "Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control." *Journal of Economic Theory* 12(3):472–484.

McKelvey, Richard D. 1986. "Covering, Dominance, and Institution-Free Properties of Social Choice." *American Journal of Political Science* 30:283–314.

McKelvey, Richard and Norman Schofield. 1987. "Generalized Symmetry Conditions at a Core Point." *Econometrica* 55(4):923–933.

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.

Motley, Constance Baker. 1999. *Equal justice under law: An autobiography.* Macmillan.

O'connor, Karen and Lee Epstein. 1983. "The rise of conservative interest group litigation." *The Journal of Politics* 45(2):479–489.

Perry, Hersel W. 1991. *Deciding to decide: agenda setting in the United States Supreme Court.* Harvard University Press.

Priest, George L and Benjamin Klein. 1984. "The selection of disputes for litigation." *The journal of legal studies* 13(1):1–55.

Romer, Thomas and Howard Rosenthal. 1978. "Political Resource Allocation, Controlled Agendas, and the Status Quo." *Public Choice* 33:27–43.

Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* University of Chicago Press.

Schofield, Norman. 1977. "Transitivity of Preferences on a Smooth Manifold." *Journal of Economic Theory* 14(1):149–172.

Shepsle, Kenneth A. 1979. "Institutional Arrangements and Equilibrium in Multidimensional Voting Models." *American Journal of Political Science* 23(1):27–59.

Shepsle, Kenneth A. and Barry R. Weingast. 1984. "Uncovered Sets and Sophisticated Voting Outcomes with Implications for Agenda Institutions." *American Journal of Political Science* 28(1):49–74.

Sunstein, Cass R. 2001. *One case at a time: judicial minimalism on the Supreme Court.* Harvard University Press.

A   Core Existence with "City-Block Preferences"

The situation portrayed in Figure 1 when the judges have additively separable linear loss (sometimes known as "city block") preferences is displayed in Figure 6.
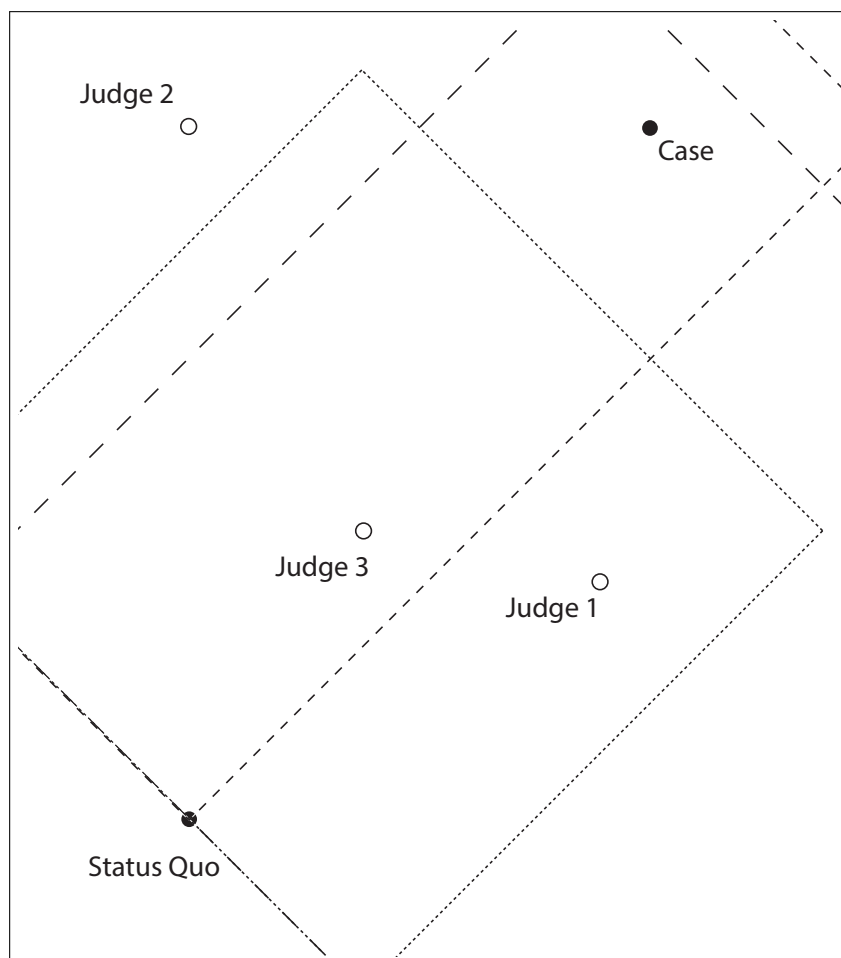

Figure 6: A Bridging Vehicle with "City Block Preferences"

Humphreys and Laver (2006) demonstrate that, with city block preferences, the majority rule core is nonempty, and contains the dimension-by-dimension median of the judges' ideal points. Thus, the situation portrayed in Figure 6 is one reason that we say bridging vehicles can be "complicated from a normative perspective." As the example in Figure 1 demonstrates, even if there is an unambiguously "median judge," he or she may be outvoted in equilibrium, meaning that the median judge on all dimensions might not be a **represen-**

tative voter.[29]

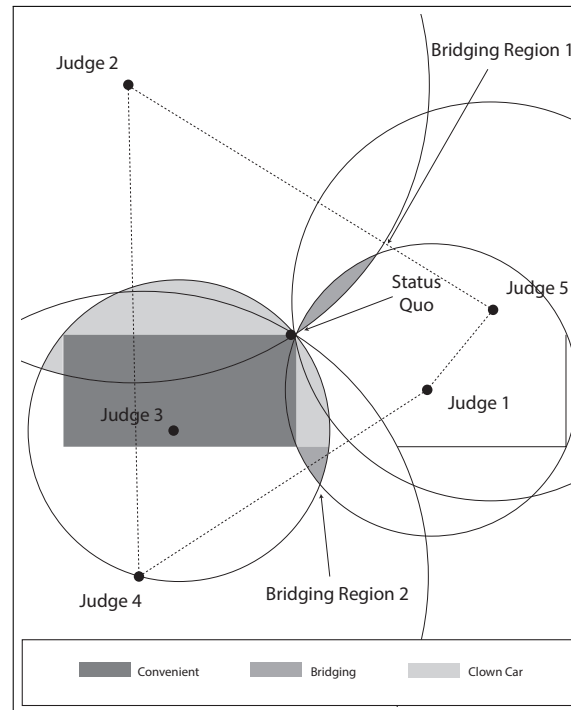## A.1 Spatial Regions of Bridging Vehicles

Figure 7: Pareto Efficient Status Quo With Bridging Vehicles

---

[29]A judge is a representative voter if his or her preference between any pair of cases is identical to the majority preference between that pair of cases. This is actually the most important implication of the celebrated median voter theorem (Black (1948)), as opposed to the more commonly (and sometimes inaccurately) cited "implications" of the result, such as the claim that policy should converge to that individual's ideal point. But, appropriately, this is dicta, rather than the main point of the article.