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An Informational Model of Constitutional Jurisdiction

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In shaping constitutional courts' jurisdictions, societies must contend with the informational challenges associated with rule making and the distributive politics of granting courts jurisdiction over administrative lawmaking. Curiously, judges are often granted jurisdiction that seems to create a tension between their ability to acquire information about appropriate rules and to clearly articulate them. In particular, many courts handle the onerous burden of resolving thousands of routine, low-stakes cases of law application. We develop an informational model of judicial docket style that isolates a tension between information acquisition and quality rule writing and examine how that tension manifests in the incentives concerning jurisdiction style. Dockets that include a mix of law application and rule construction promote more informed judicial rule construction at the cost of lower-quality rules and a greater role of the judiciary in the day-to-day activity of the state. We develop implications for constitutional design in a liberal democracy.

In asking judiciaries to monitor and ultimately construct rules on the nature of limits on the state, liberal democracies charge constitutional judges with a series of informational challenges. How should the constitutionality of a public act be understood in light of existing doctrine (Cameron 1993; Knight 2009; Kornhauser 1992; Lax 2011)? If doctrine needs to be changed, what are the likely consequences of the change for political and economic activity, and how precisely should legal rules be drafted in light of plausible consequences (Fox and Vanberg 2013; Lax 2012)? In large, complex societies, answers to such important constitutional questions are seldom obvious. They depend on a variety of facts, background assumptions, and models of human behavior. In addition, working through these informational changes is not costless (e.g., Beim, Hirsch, and Kastlelec 2014; Cameron, Segal, and Songer 2000; Carrubba and Clark 2012; Spriggs and Wahlbeck 1997). And even once a court reaches an understanding of the law in principle, translating that po-

sition into an interpretable rule written in natural language is no small task.

For peak courts, solving these informational challenges is part of a process of developing stable, clear rules that are well matched to society's needs and promote political stability and economic development (Carrubba 2009; Gibler and Randazzo 2011; Reenock, Staton, and Radean 2013; Weingast 1997). For these reasons, constitutional courts are often designed to focus primarily, often exclusively, on *rule construction*—developing principles of law concerning political, social, and economic behavior in the context of salient questions of constitutional law emerging out of major political controversies. Yet many peak courts with constitutional jurisdiction also spend considerable time on *law application*, by which we mean the resolution of an enormous series of factually similar cases, in which the core task is not the development of new rules but only the application of preexisting rules to the facts at hand.¹ In the civil law tradi-

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1. Clearly, appellate courts often create rules and apply them in particular cases. We do not mean "law application" in that sense. The distinction we adopt is admittedly artificial, but we adopt it in order to place analytical focus on the trade-offs across tasks. And of course, many cases are really much more about the rule than the application, and some cases really do not involve new rule writing at all.

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tion, this activity is typified by the Latin American *amparo* (Brewer-Carias 2009; Navia and Ríos-Figueroa 2005). In the common law tradition, it manifests in the form of India's public interest litigation (Shankar and Mehta 2009) or more generally in what scholars often refer to as simple error correction (Cameron 1993; Knight 2009; Kornhauser 1992; Lax 2011).

We develop an account of constitutional review and jurisdictional choice that has implications for fundamental problems concerning the informational challenges inherent in rule construction, politicians' ability to control the courts' access to information, and the optimal design of judicial jurisdiction. Our model departs from past studies of jurisdiction, which focus on one of two kinds of distributional concerns. In one approach, political actors manipulate jurisdiction to protect themselves from other institutions or to manage agency loss associated with the administration of the law (e.g., Farhang 2010; McNollgast 1990; Shipan 2000). In another approach, political actors manipulate jurisdiction to manage the costs associated with litigation and resolving disputes through a judicial process (e.g., Chutkan 2008). While not calling into question the claims underlying those studies, we focus analytic attention instead on how leaders influence the information to which peak courts are exposed. This has significant consequences for courts' ability to construct optimal rules. In isolating the informational component of jurisdiction, we show that when distributional concerns are set aside, there nevertheless exist incentives for political actors to broaden the judiciary's formal authority to review the day-to-day activities of the bureaucracy. We claim that law application conducted repetitively in a large number of nonsalient cases can provide useful information for solving a court's inferential challenge over the appropriateness of particular rules; however, the increase in information provided by law application can also complicate solutions to a court's legal writing challenges by reducing the time judges have to devote to the development of persuasive, clear opinions. Thus, there is a trade-off between what we will call "informative" rule construction and "high-quality" opinion writing about those rules.

We construct an informational model of docket choice in which first judges and then politicians are charged with the task of choosing a docket style in light of the trade-off between informative rules and quality opinions. In our model, endowing the government with control over the court's jurisdiction always reveals information to the court useful for rule construction. Under some conditions, rule construction can be more informative when governments select dockets than when courts do, because many types of leaders have strong incentives to expose the judiciary to detailed infor-

mation about their bureaucratic practices. This is true even though there are many other types of leaders who would like to minimize the judiciary's exposure to the bureaucracy. The consequence is that under some conditions, a government that otherwise does not want a judiciary to interfere with its administrative decision making will still give the courts jurisdiction over such cases in order to provide the courts with information useful for appropriate rule making. Critically, the informational advantage of granting the government control over the court's jurisdiction grows as courts become better resourced and increasingly deferential to the government.

RULE CONSTRUCTION AND LAW APPLICATION ON PEAK COURTS

The focus on quality rule construction is sometimes characterized as a special concern for legal systems in the common law tradition, because common law judges aim to be guided by precedent cases. Yet, past decisions have always featured as a practical matter in the civil law tradition (e.g., Merryman and Pérez-Perdomo 2007, chap. 7), and for that reason, getting the rules right is a general concern. This similarity between the two traditions became even stronger as a result of the massive increase in constitutional review powers granted to civil law judges following the end of the Second World War, frequently via the design of Kelsenian constitutional courts. The increase largely tracked the second and third waves of democratization and has meant that both civil law and common law judges on peak courts exercising constitutional review authority are confronted with similar challenges of rule construction (Ginsburg 2003, 2008). The US Supreme Court and the Constitutional Court of Colombia both interpret public policy with respect to their constitutions and attempt to lay out general rules of law. Often this is done via the resolution of cases of relatively high political salience, where the constitutional questions presented are significant and the primary legal challenge involves crafting quality legal rules, which will guide future political and economic behavior. For example, in *National Federation of Independent Business v. Sebelius*, 567 U.S. (2012), the critical issue was whether (and if so why) the US Congress possessed the authority to enact the individual mandate provision of the Patient Protection and Affordable Care Act under either the tax and spend or commerce clauses of Article I. Similarly, in the Colombian Constitutional Court's 2005 landmark decision on presidential reelection, the critical matter was whether (and if not why not) Congress's amendment to the Constitution amounted to a fundamental substitution of the founding document rather than a simple amendment (C1040/2005).

Both decisions involved salient partisan battles but also had consequences for a general class of potential future cases.

The judicialization of politics on a global scale has meant that judges are increasingly asked to resolve salient questions of public policy (Tate and Vallinder 1997). Yet at the same time, as the judicialization process came to deal with social and economic rights, judges in both civil law states (e.g., Colombia) and common law states (e.g., India) are commonly placed in the position of reviewing routine bureaucratic decisions across a wide range of topics; that is, the potential burden of what we refer to here as law application has increased in many places (e.g., Rodríguez Garavito 2010–11; Shankar and Mehta 2009; Wilson and Rodríguez Cordero 2006). Of course, systems have dealt with these pressures in different ways, and these differences are reflected in docket styles. Some peak courts focus on a smaller number of cases that largely involve rule construction, whereas others hear a mix of cases that invite rule construction but also sometimes simply involve law application.

THE PUZZLE OF LARGE DOCKET SYSTEMS

The variation in docket styles is startling. The Supreme Courts of the United Kingdom and United States and the Chilean Constitutional Court manage just hundreds of cases per year. In contrast, the Constitutional Chamber of the Costa Rican Supreme Court now resolves roughly 20,000 cases annually; the Colombian Constitutional Court disposes of nearly 400,000 in one area of its jurisdiction alone. Many countries around the world have constitutional courts that engage in amparo-style adjudication—essentially routine law application. Critically, when they do, these cases almost always constitute the vast majority of the courts' dockets. Figure 1 shows the recent docket size for a selection of constitutional courts. We show the number of cases filed per judge on the state's peak court.² We distinguish between countries with common law traditions and countries with civil law traditions: gray dots indicate civil law and black dots indicate common law. The crucial observation is that there exists considerable heterogeneity in docket size, even within legal traditions. Common law countries such as the United States, Canada, and Ireland, as well as civil law countries such as Chile and Italy, have very small docket sizes. By contrast, common law countries such as India and Israel, as well as civil law countries such as

2. If the state has multiple peak courts, one of which is a constitutional court, we focus on that court. We focus on cases per judge recognizing that some high courts hear cases in panels and are composed of many judges.

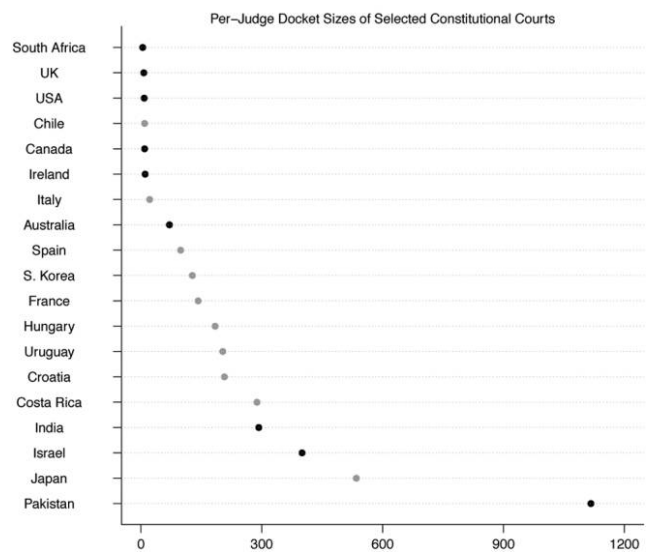


Figure 1. Constitutional court dockets in select countries. Gray dots indicate courts in civil law states. Black dots indicate courts in common law states.

Costa Rica and Japan, have extremely large docket sizes.³ Crucially, in each of these systems, the constitutional courts hear a small number of cases in which they create constitutional rules; the distinction is in whether the constitutional court also hears a large number of relatively routine law application cases.

This source of variation in how courts spend their time is on its face perplexing, given that the law application cases seem to be resource demanding, provide little policy-making opportunity, and are presumably distracting from rule construction, which judges commonly describe as more engaging work. Both politicians and judges lament the size of those dockets. Judges complain about massive law application caseloads, which take up time that could be more profitably devoted to salient rule construction (Clark and Strauss 2010; Dakolias 1995–96; Ganz 2012). Indeed, in the early 2000s, the Sala IV lobbied for a constitutional reform that would have created special courts for resolving amparos, leaving the Sala IV to its smaller but admittedly more salient docket. Politicians do not seem to care for them either. A 2013 reform in Ireland, which created a new Court of Appeals to hear, essentially, routine law application cases, demonstrates the incentive both judges and politicians have to focus high courts on constitutional rule making. In the US

3. Our estimate for India's caseload is considerably lower than what we find in another source. In particular, Shankar and Mehta (2009, 149) suggest that the Indian Supreme Court had a per-judge caseload of 3,846 in 2006. That figure only makes the point more starkly. Figure 1 uses the lower number reflecting that reported by Robinson (2013), who distinguishes cases that are resolved administratively rather than through a full judicial process.

context, litigating these cases, which often involve review of administrative decisions, is time-consuming and costly. It also transfers a degree of control over bureaucratic outcomes from the executive to the judiciary (Chutkow 2008), although there may also exist incentives to endow courts with jurisdiction for precisely that reason (Farhang 2010; Shipan 2000). The Latin American *amparo* especially places judges in the position to tightly monitor a government's agents, frequently inviting them to substitute their technical judgment for that of the bureaucracy, an institutional decision that can promote policy-making errors derived from a mismatch between the problem at hand and judicial expertise (Uprimny 2007, 62).

Politicians certainly exert influence over judicial caseloads, yet it is important to keep in mind that judges do as well (e.g., Elkins, Ginsburg, and Melton 2009; Fontana 2010; Rubio, Magaloni, and Jaime 1994). Aggressive use of doctrines governing threshold questions can even result in a kind of *de facto* discretionary jurisdiction (Rubio et al. 1994). Moreover, courts often take active steps to lobby for and secure reductions in their dockets, such as the radical expansion of the writ of *certiorari* in the United States (e.g., Crowe 2007) or when the chief justice of the Israeli Supreme Court sponsored legislation to reduce that court's docket. Further, not only do courts use jurisprudence to reduce their dockets; sometimes they expand their dockets, as when the Italian Constitutional Court invalidated an arbitration law specifically designed to reduce the courts' caseloads or when the Colombian Supreme Court altered its *actio popularis* jurisdiction to allow individuals to challenge constitutional amendments and international treaties. And if judges are somehow incapable of reducing their law application docket or unwilling to do so, politicians are often in the position to reduce the docket on their own, even in systems in which jurisdictional structures are entrenched (Elkins et al. 2009).⁴ In either event, it is important to note that there are often opportunities for courts to control their own docket. Thus, it is instructive to understand how a court will balance potentially competing incentives when shaping its dockets. Below, we develop a decision-theoretic model to help understand what a court would do with such discretion; we then introduce a game-theoretic version in which the government controls the court's docket.

4. This is most obviously true in the context of amending a constitution or writing a new one; constitutions commonly grant considerable discretion in establishing jurisdiction for the kinds of cases that are resolved by peak courts via the law application task.

INFORMATIONAL IMPLICATIONS OF LARGE DOCKETS

The alleged problem with large law application dockets, from the judiciary's perspective at least, is that they take judges away from the more challenging and intellectually stimulating task of rule construction. There are at least two potential ways in which the law application docket erodes judges' ability to effectively construct rules. First, rule construction requires the resolution of a "means-ends" problem common to public policy making: developing context-dependent knowledge to develop rules that optimally interact with features of the world about which judges are often uncertain (Kornhauser 1992; Lax 2012; Staton and Vanberg 2008). Second, judges must articulate their rules in written opinions, for others to read and apply. Communicating those rules precisely is time-consuming and challenging (e.g., Jordan, n.d.).

To know whether and how a large law application docket might undermine rule construction requires understanding how law application influences rule construction's informational challenges. Our argument departs from a simple assumption. Law application can affect a judge's ability to solve these informational problems, but rather than unambiguously undermining rule construction, engaging in significant law application generates two competing effects on successful rule construction. Rule construction can benefit from the information derived from experience managing vast quantities of nonsalient cases. Many of the Colombian Constitutional Court's most fundamental rights decisions have come in the context of "structural" rulings declaring a general "unconstitutional state of affairs" in policy areas as diverse as internally displaced persons, social security, prison overcrowding, and the protection of human rights defenders (Rodríguez Garavito 2010–11). The rationale for these declarations, the precise rules defined, and the remedies proposed were aided by a massive stream of individual *tutela* claims that indicated and clarified the nature of the political problem across the country.⁵

A notable challenge facing judges on constitutional courts is the breadth of jurisdictional responsibilities they face. As Fontana (2010, 635) notes,

5. It seems possible, as well, that large caseloads that provide information on the functioning of the state's bureaucracy might also provide information about appropriate levels of judicial scrutiny in unrelated areas. For example, observing how a president's security sector respects fundamental human rights may provide important information about the general degree of discretion such a person (or the office) should be granted. This information may be particularly useful in developing rules about seemingly unrelated, general questions, like whether the constitution permits a president to run for a consecutive term.

After their appointments, constitutional review courts are not entirely unaware of the political situation surrounding the constitutional issues presented to their courts. Constitutional review courts are facing thousands upon thousands of petitions every year. The Supreme Court of the United States received about 7000 petitions per year. In Argentina, the Supreme Court receives 26,000 petitions per year. The Supreme Federal Court in Brazil in 2001 had 110,771 petitions filed before it. These petitions—the stories they present, the lower court decisions they embody—serve as information to the constitutional review court about how different constitutional issues are faring in the general public, and in the political system. Constitutional review does not just generate outcomes, it provides information to constitutional review courts.

The point is that constitutional judges must make decisions on a wide body of constitutional law and do not necessarily have the expertise to do so. Exposure to routine law application cases provides an opportunity to learn about myriad areas of the law, rule making, and the practical consequences of doctrine, and adjudication more generally.

That said, as judges gain information about appropriate legal rules by engaging in law application, they take time away from the process of writing opinions; that is, they devote less time to the communicative task of relating rules to the government, other judges, and the general public. If clarity in writing depends on writing and rewriting, on trying out phrases and incorporating feedback, the time judges spend on multiple tasks is likely to undermine the clarity and (perhaps) the persuasiveness with which they write (Fontana 2010). Indeed, it is commonly assumed that large judicial caseloads are a bad thing, presumably because of their deleterious effects on the judicial craft. Moreover, in many instances of judicial docket design, we observe informational concerns playing a role in policy makers' decision calculus.

This trade-off between the information that can be obtained via law application and the quality in writing that can be achieved via a focus on rule construction should be addressed in the choice over docket style. Insofar as judges and leaders may have diverging preferences over both legal rules and the way in which the law application cases are resolved, they likely will evaluate this trade-off differently. And for that reason, they will likely make different docket choices. Further, we know that jurisdictional choice does not turn on information alone. As we described above, a key governmental rationale for limiting the kinds of law application activities courts engage in is administrative: it

reduces the state's administrative burden in litigating these cases. It also transfers less control over the government to another branch, thus providing weaker checks on government. But just as governments might prefer to maintain control over the final outcomes to bureaucratic decisions, judges are frequently concerned with ensuring that there is a meaningful check on the state's obligations to protect individual rights (Cepeda-Espinosa 2004). Effective judicial checks commonly come in the form of the kinds of cases we refer to as involving mere law application. For this reason, concerns over justice and effective checks in a separation of powers system complicate jurisdictional choices and have important implications for informed constitutional review.

A MODEL OF JUDICIAL CONTROL OF THE DOCKET

We begin our analysis by considering the kinds of jurisdictional choices a court would make were it solely empowered to do so. This first requires considering the court's jurisprudential challenges, which in our case will involve challenges of law application and rule construction with respect to public acts taken by the sitting government. The court's docket choices will follow from the jurisprudential challenges it sees.

The court in our model has a docket that may comprise law application and rule construction cases. In either case, we assume that the court's primary motivation is to "get the law right." What this means in practice depends on the jurisdiction. The first jurisdiction asks the court to resolve a large number of cases, deriving from individual constitutional complaints, each of which is tightly linked to a particular government effort to enforce the law. The plaintiff's claim in each case is that the government has acted in a way violating its constitutional obligations. Resolving each of these cases requires the application of existing law to unique factual situations. The court must engage in factual inquiries that are easily resolved once the facts are learned. The key problem is that there are many of these cases. The second jurisdiction asks the court to engage in constitutional rule construction, typically aimed at characterizing general limits on the powers of the government. The goal of the court in its second jurisdiction is to construct a rule that is appropriately constraining given its beliefs about the nature of the government it reviews. Some governments are deserving of considerable deference or flexibility whereas others are deserving of a high degree of constraint. We alternatively refer to this rule as a "constitutional posture." There are very few of these rule construction cases, but their proper resolution and clear communication depend on considerable attention to good writing and good infor-

mation about the likely consequences of granting more or less discretion to the government. We refer to the first kind of case as a “law application” case and the second kind as a “rule construction” case.

Elements of the model

Notation. The model permits two docket styles, one that is varied and one that is concentrated on rule construction. A docket style is denoted $d \in \{0, 1\}$, where $d = 0$ contains only rule construction cases and $d = 1$ contains a mix of law application and rule construction cases. The law application portion of the docket involves N law application cases. Let the set of law application cases be characterized by a vector \mathbf{x} of length N , where $x_i \in \mathbb{R}$ for all i . The value of x_i in each case indicates to the court the degree to which the government has intruded on an individual right or otherwise exceeded a constitutional limit as it attempts to enforce the law. The law application cases are themselves created by N actions taken by the government in an effort to enforce the law. Let the set of those actions be given by a vector of length N , denoted \mathbf{a} , where $a_i \in \mathbb{R}$ for all i . Finally, each of these law application cases results in a ruling regarding the plaintiff—either in favor of or against the plaintiff. Let the set of rulings be given by a vector, \mathbf{v} , of length N , where $v_i \in \{0, 1\}$ and $v_i = 0$ is a ruling against the plaintiff and $v_i = 1$ is a ruling for the plaintiff. We assume that $v_i = 0$ for all i if $d = 0$. The court has a threshold $C \in \mathbb{R}$ such that it prefers $v_i = 1$ if $x_i \geq C$ and $v_i = 0$ if $x_i < C$. Denote the number of bad law application classifications by k (e.g., $v_i = 0$ when $x_i > C$), and let $\gamma_c > 0$ represent the cost of making an incorrect classification in each case.

We denote the government’s type by $\omega \in \mathbb{R}$, which reflects the level of legal constraint that is appropriate for the government from the court’s perspective. In the rule construction jurisdiction, the court drafts a legal opinion. Judicial opinions are written in natural language. For this reason, what the court intends by the rule may not be the outcome of the rule in practice. We distinguish between the rule that the court writes in its opinion, denoted $r \in \mathbb{R}$, and the outcome of the rule, denoted r° , also a real number. We assume that the variance in realized constitutional rules around the rule written in the opinion is a function of the court’s workload. Formally, we assume that $r^\circ \sim \mathcal{N}(r, \sigma_r^2)$ if $d = 0$ and $r^\circ \sim \mathcal{N}(r, N\sigma_r^2)$ if $d = 1$. Finally, a decision profile for the court is a list of $N + 2$ decisions $\rho = \langle d, v_1, \dots, v_N, r \rangle$.

Timing. The baseline model begins with nature choosing a type for the government, after which N instances of law application outcomes are realized. These outcomes are re-

alizations of random variables defined by N government actions. Formally, we assume that $x_i \sim \mathcal{N}(a_i, \sigma_{x,i}^2)$ for all i . The randomness of the case outcomes captures the fact that the legal system (litigants themselves, lower courts, etc.) is unlikely to perfectly communicate to the court exactly what happened in a particular enforcement action. The same government action can result in more or less abusive outcomes in individual cases. Similarly, we assume that the government actions are themselves realizations of random variables defined by the government’s type, such that $a_i \sim \mathcal{N}(\omega, \sigma_a^2)$ for all i . The randomness of government actions around the government’s type captures the fact that no government has perfect control over all actions taken, owing to bureaucratic agency loss, indeterminacy in the law, and so forth. The court then chooses a docket style, $d \in \{0, 1\}$. If the court chooses $d = 1$, then it observes \mathbf{x} and chooses a vector of resolutions of the law application cases, \mathbf{v} . Otherwise, the court does not observe \mathbf{x} , and $v_i = 0$ for all i . Independent of its choice of d , the court then selects a constitutional posture, r . A realization of the court’s constitutional outcome, r° is then realized. Finally, payoffs accrue.

Utility. As we note above, the court’s primary challenge is to get the law right. The utility function we assume captures the court’s objective simply. We assume that the court experiences quadratic losses in the distance between ω and the constitutional outcome r° , as well as linear losses in the cost of a poor law application allocation, scaled by the number of such allocations. The court’s utility function is given by

$$u(k, r; \omega, \gamma) = -(\omega - r^\circ)^2 - \gamma_c k. \quad (1)$$

Information. The court has a prior belief about the government’s type given by $\omega \sim \mathcal{N}(0, \sigma_\omega^2)$. Let $\phi_0(\omega)$ represent the probability distribution function (pdf) for the court’s prior belief. In the event the court chooses $d = 1$, the court directly observes cases but not the government enforcement actions that generated them, reflecting the idea that cases imperfectly reveal information about government enforcement actions via the litigation process. Each case corresponds to a unique set of case facts, substantive questions at hand, procedural histories, attorney qualities, deliberative outcomes, and so forth. That said, cases are signals of the government’s actions, which are themselves signals of the government’s type. As we discuss above, each case is conceived of as a draw from a normal distribution centered on the government’s action in that case, and each enforcement action is a draw from a normal distribution centered on the government’s type. For simplicity we further assume that the case-specific variance in outcomes around government

actions is the same, so that $\sigma_{x_i}^2 = \sigma_x^2$ for all i . Upon observing N signals about ω , the court's posterior belief about ω is given by

$$\omega \sim \mathcal{N}\left(\frac{N\nu^2\bar{x}}{\sigma_\omega^2 + N\nu^2}, \frac{\sigma_\omega^2\nu^2}{\sigma_\omega^2 + N\nu^2}\right),$$

where \bar{x} is the average value of x_i observed and $\nu^2 = \sigma_a^2 + \sigma_x^2$ (DeGroot and Schervish 2012, 398–99). Let $\phi_0(\omega)$ represent the pdf of the court's prior belief about ω and $\phi_1(\omega)$ represent the pdf of the court's posterior belief after choosing $d = 1$ and observing \mathbf{x} .

Analysis

We begin by characterizing the optimal constitutional posture, r . Intuitively, the optimal rule to pick is equal to the court's expected value of ω , because utility losses from random realizations of the rule, r^o , are symmetric around the target rule, r . While this result is not surprising, it proves important in the subsequent analyses to come, because it creates incentives regarding information seeking and revelation by the court and the government, when we extend the model to allow the government to control the court's docket.

Lemma 1. The optimal constitutional rule to write is given by $r^* = \mathbb{E}[\omega]$.

By construction, the court faces no strategic incentives in the choice of \mathbf{v} . Therefore, the court will rule sincerely on each of those cases, picking $v_i = 1$ if $x_i \geq C$ and $v_i = 0$ otherwise. The implication is that as the court becomes increasingly permissive, it will grant plaintiffs' claims in fewer cases.

Finally, consider the court's docket choice. To do so, it is helpful to express the court's expected utility at the beginning of the game. The court's expected utility function is given by

$$EU(d) = - \underbrace{(\mathbb{E}[\omega|\phi_1(\omega)] - r_{d=1}^*)^2}_{\text{policy mismatch}} - \underbrace{N\sigma_r^2}_{\text{drafting error}} - \underbrace{\frac{\sigma_\omega^2\nu^2}{\sigma_\omega^2 + N\nu^2}}_{\text{knowledge error}}$$

if $d = 1$,

$$EU(d) = - \underbrace{(\bar{w} - r_{d=0}^*)^2}_{\text{policy mismatch}} - \underbrace{\sigma_r^2}_{\text{drafting error}} - \underbrace{\sigma_\omega^2}_{\text{knowledge error}}$$

$$- \underbrace{\sum_{i=1}^n \gamma \Pr(x_i > C)}_{\text{bad allocations}} \quad \text{if } d = 0.$$

Yet as lemma 1 notes, regardless of the docket style, the court will set the rule equal to the expected state. For this

reason, the expected utility of each docket turns on the variance in the court's belief about the state, the court's opinion-writing ability, and the expected number of misclassifications it will induce in the law application docket, weighted by the cost of doing so, if it leaves the resolution of those cases to the lower courts. The court will select the large docket whenever the following inequality holds:

$$-\frac{\sigma_\omega^2\nu^2}{\sigma_\omega^2 + N\nu^2} - N\sigma_r^2 \geq -\sigma_\omega^2 - \sigma_r^2 - \sum_{i=1}^N \gamma \Pr(x_i > C). \quad (2)$$

And because the court knows the action and case distributions, as well as its own threshold, $\Pr(x_i > C)$ is constant for all cases i , and we can rewrite this inequality as

$$\frac{\sigma_\omega^2\nu^2}{\sigma_\omega^2 + N\nu^2} + N\sigma_r^2 \leq \sigma_\omega^2 + \sigma_r^2 + N\gamma \int_C^\infty f(x)dx, \quad (3)$$

where $f(x)$ is the pdf of the normal distribution with mean zero and variance $\sigma_\omega^2 + \sigma_a^2 + \sigma_x^2$. Using condition (3), we can identify a necessary and sufficient condition for the court to choose $d = 1$. Specifically, it must be that the variance in constitutional outcomes—the precision with which the court writes opinions—is sufficiently low that the adverse consequences of choosing to hear law application cases justify the increased information and case correction benefits.

Lemma 2. The court will choose $d = 1$ if and only if

$$\sigma_r^2 \leq \left[\sigma_\omega^2 - \frac{\sigma_\omega^2\nu^2}{\sigma_\omega^2 + N\nu^2} + N^2\gamma_c \int_C^\infty f(x)dx \right] (N - 1)^{-1}.$$

While the intuition behind lemma 2 is straightforward, the finding gives rise to a series of important results that illustrate the consequences of the tension we study. In particular, there are a number of parameters that monotonically increase the court's incentive to hear the law application cases.

First, regarding the court's uncertainty about the government's type, lemma 2 shows that increasing uncertainty about the government's type (σ_ω^2) always increases the incentive to hear the law application docket (i.e., choose $d = 1$). To see why this is the case, note that as the court is increasingly uncertain about the government's type, the value of information from the law application cases becomes increasingly valuable. Moreover, as the court becomes increasingly uncertain about the government's type, there is an increasing chance that outcomes (x_i) will exceed the court's threshold, C , creating another incentive to hear the law application cases. At the same time, the court's uncertainty about the government's type does not implicate the quality of

the information the court receives from the law application cases, as that is driven by the government's control over the bureaucracy (σ_a^2) and the variability of case outcomes around government actions (σ_x^2).

Second, as the court becomes more effective in its opinion writing, as σ_r^2 decreases, the court becomes more likely to hear the law application cases. The reason is straightforward: more effective courts stand to lose less in terms of clarity and efficiency from their additional workload.

Third, as the court becomes more concerned about injustice—as C decreases or as γ_c increases—the court becomes more likely to hear the law application cases. As C decreases, the chances of a case outcome, x_b , exceeding the court's threshold for reversal increase, and so the court risks more injustices that go uncorrected. As γ_c increases, the disutility the court receives from injustices increases, and so the court cares more and more about unresolved injustices in the law application cases.

Result 1. The court's uncertainty about the government's type, its skill in opinion writing, and its tolerance for injustice all have monotonic effects on the incentive to hear law application cases. The more uncertain the court about ω , the greater its skill in opinion writing; and the more it cares about injustice, the greater the incentive to hear law application cases.

A great variety of features of the world might reflect the parameters of the model. For example, insofar as common law judges are more likely to have varied legal experiences prior to appointment, they may feel less uncertain about writing rules in varied contexts than a judge in a civil law system. On the other hand, civil law judges appointed to Kelsenian courts are intended to bring with them considerable political experience, and that experience might also manifest in the uncertainty these judges perceive about appropriate rules. Thus we might anticipate that common law judges would have stronger incentives to reduce error correction relative to civil law judges, but especially so if we are considering civil law judges that are on Supreme Courts with constitutional jurisdiction rather than Constitutional Court judges. Relatedly, judges in systems that value innovation in legal rules might be willing to accept the burden of larger dockets in order to learn as much as possible about the task at hand. As we note above, key innovations in Latin American constitutional law have flowed from the resolution of many routine cases, which helped shape judges' understanding of the facts on the ground and what kind of legal rule might best advance the purposes of particular constitutional texts. Finally, an institutional differ-

ence like the degree to which constitutional review is diffused in a judicial system could be particularly important as well. A system with fully centralized review places judges considering doing less law application in the position of largely deferring to the judgment of the bureaucracy, whereas judges in systems of diffuse review might anticipate that lower-court judges will be handling these cases. Insofar as preferences are more similar within the judiciary than across the judiciary and the bureaucracy, judges in diffuse systems of constitutional review would be more likely to reduce law application activities than a judge in a centralized system.

In contrast to the court's characteristics, the size of the law application docket has a more ambiguous effect (see fig. 2). Initial increases in the size of the law application docket decrease the incentive to hear the law application cases because the informational benefit of those cases is decreasing in the margin. At the same time, the consequence for the court's efficiency is increasing linearly. Therefore, once the court has a certain amount of information, the additional work associated with the marginal case is not worth the informational benefit. However, for sufficiently large values of γ_c —the disutility the court suffers from not correcting injustices—the effect becomes nonmonotonic. If the court places enough value on enforcing individual rights, then at a certain point that disutility outweighs the workload consequences of taking the law application docket. In this instance, it is only for more moderate sizes of N that the efficiency cost is large enough that it is not offset by relatively moderate informational and error-correction benefits. As a consequence, the incentive to hear the law application docket is strongest when the law application is very small or very large.

Result 2. For sufficiently large values of γ_c , increasing N has a nonmonotonic effect on the court's willingness

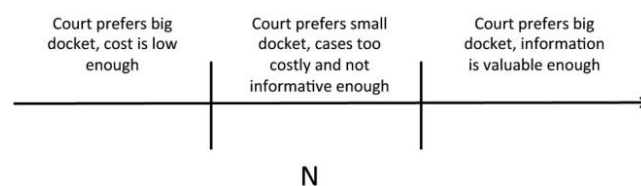


Figure 2. Nonmonotonic effect of small docket size on judicial incentives to hear law application cases, given sufficiently large γ_c . When the size of the law application docket is small, the incentive to hear those cases for their informational and justice values outweighs the relatively small cost of hearing the cases. When the size of the law application docket is large, the incentive to hear the cases for their informational value, as well as correcting errors, also justifies the cost of hearing the cases. For middling-sized dockets, there is not enough information or opportunities for error correction in the cases to justify the cost of diluting the court's rule construction quality.

to choose $d = 1$. At low levels of N , increases in N make it increasingly likely the court will prefer $d = 1$. At high levels of N , increases in N make it increasingly likely the court will prefer $d = 0$. For smaller values of γ_c , the effect of increasing N is to monotonically decrease the incentive to hear law application cases.

Finally, we note that these results highlight the nature of an important trade-off in the model. There exists for the court a trade-off between information and efficiency. As result 2 shows, the trade-off between information—gained by hearing law application cases—and efficiency—gained by focusing solely on constitutional rule writing—is not straightforward. Instead, the court's concern for injustice, its underlying efficiency, and its uncertainty about the government's type complicate that trade-off.

Corollary 1. The court faces a trade-off between collecting information about the government's type and resolving injustice and working efficiently. Under some conditions, concerns about injustice justify a loss in efficiency. Under other conditions, the desire for information justifies a loss in efficiency. Under yet other conditions, the court is willing to accept injustice and a lack of information for the benefit of judicial efficiency.

A MODEL OF GOVERNMENT CONTROL OF THE DOCKET

The decision-theoretic model provides insight into how a court with complete control over its docket might trade off tensions among information acquisition, workload, and the desire to correct errors made in the provision of justice. However, control over judicial jurisdiction is often not just in the hands of the judiciary but also (or instead) in the hands of the very government the court oversees. We develop a game-theoretic model in which we assume that control over the court's docket style rests with the government. We consider a series of incentives and trade-offs facing the government, including its interest in controlling law application, ensuring judicial efficiency, and securing a judicial-constitutional posture favorable to the government. By studying the incentives and trade-offs the government faces, we are in a position, in the next section, to return to our primary motivation of what considerations are at play in the constitutional design of judicial-governmental control over judicial jurisdiction. To preview, we find that the government can never use its control over the docket to completely block the court from learning about the government's type. As a consequence, it faces a potentially complicated trade-off

between revealing information to the court about its underlying type and its incentives concerning judicial efficiency and oversight of the bureaucracy.

Elements of the model

Timing. The model proceeds identically to the baseline. The only difference is that the government chooses d in advance of the court's decisions. If $d = 1$, then the court observes N cases and turns to its rule construction task. If $d = 0$, the court engages only in rule construction.

Utilities. The court's utility is as defined above. We assume that the government derives utility from three sources. First, the government prefers more permissive constitutional postures to less permissive postures and so receives $-r^o$ from the realization of the court's constitutional posture, r . Second, the government prefers clearer constitutional posture to vaguer constitutional posture and so receives utility $-N\sigma_r^2$ if $d = 1$ and $-\sigma_r^2$ if $d = 0$. Finally, the government derives utility from the disposition of law application cases. In particular, we assume that the government prefers $v_i = 0$ for all i . The government's expected utility is therefore given by

$$EU_g(d) = -r - N\sigma_r^2 - \gamma_g \sum v_i. \quad (4)$$

We are assuming that the government perceives no plaintiff's claim to be valid.⁶

Analysis

We seek to characterize the perfect Bayesian equilibria (PBE) of this game. A PBE is an assessment $\langle \beta, \mu \rangle$, a pair of behavioral strategies and belief systems for the players. The government's strategy is a mapping $s_G: \omega \rightarrow d$, whereas the court's strategy is a list of law application and rule construction decisions $s_C = \langle v_1, \dots, v_N, r \rangle$. Beliefs are defined via Bayes's rule consistently with β whenever possible. Throughout, we assume that beliefs at histories that are not reached in equilibrium are constructed via passive conjectures. Our analysis proceeds in three stages. First, we describe the nature of the court's belief structure about ω and describe the various ways in which the court updates its beliefs after the government makes a docket decision and the court observes case outcomes. Second, we characterize the unique PBE in the game and consider a series of comparative statics results.

6. This is not to say that the government never finds any basic claim for social services to be valid. The assumption is that once this kind of claim has been rejected and the individual chooses to litigate, the government prefers to win.

Finally, we revisit a set of trade-offs and tensions that motivate discussion of the choice facing a constitutional designer.

Beliefs. The information environment in which the court makes decisions in this model is very much like the information environment in the baseline model, except that the government's choice over docket type could potentially influence the court's beliefs about the government's type, ω . In particular, whereas the court's posterior belief about ω in the baseline model was given by a normal distribution updated with case signals modeled as normal draws, in this model the court's beliefs will first be updated by the government's docket choice and then by the case signals. In the event that the government's equilibrium docket choice is independent of its type (e.g., in a pooling equilibrium), the court will derive no information from the docket choice and therefore update in light of the case outcomes exactly as it does in the baseline model. In the event that the court's equilibrium docket choice does in fact depend on its type, then the court will first update its belief in light of the likelihood that each type would make that particular docket choice, putting support only on those types that play the observed docket choice in equilibrium.⁷

In describing how beliefs would be formed in an equilibrium, it is useful to focus on one kind of strategy for the government. Consider a strategy in which there is a value, ω' , such that all government types on one side of ω' choose an identical docket, say, for example, $d = 0$, and all types on the other side of ω' make the opposite choice, that is, $d = 1$. Figure 3 illustrates what the court's posterior belief would look like under a variety of scenarios. In the top-left panel, we consider the world in which the court observes $d = 0$, when $d = 0$ is chosen in equilibrium if $\omega < \omega'$; in the top-right panel, we consider the world in which the court observes $d = 0$, and $d = 0$ is chosen in equilibrium when $\omega > \omega'$. These two posteriors are just the prior belief, truncated (above or below) at ω' . The more interesting situation occurs when the court observes $d = 1$. The bottom-left panel shows the situation in which the court observes $d = 1$, and $d = 1$ is chosen in equilibrium only if $\omega < \omega'$. In such a case, having observed $d = 1$, the court will also observe N case outcomes. The bottom-right panel shows the complementary scenario, where the court observes $d = 1$, and $d = 1$ is chosen in equilibrium only if $\omega > \omega'$. Here again, having observed $d = 1$, the court then observes N case outcomes.

7. Notice that in this instance, because there are only two possible choices— $d = 1$ and $d = 0$ —all choices are observed in equilibrium, and so no government choices constitute out-of-equilibrium choices.

The most important thing to note is that, of course, the court places zero probability on types for which the strategy is out of equilibrium. Second, as the bottom row shows, the court's beliefs are more accurate when the court benefits from observing N case outcomes. The visual intuition for the court's posterior beliefs is useful for equilibrium analysis below.

Equilibrium analysis. There is a unique PBE in this game. To characterize the equilibrium and provide intuition behind the result, we first consider the possibility of a pooling equilibrium, in which the government chooses either $d = 1$ or $d = 0$, independent of type ω . Such an equilibrium cannot exist for the following reason. Suppose that there exists an equilibrium in which the government, independent of type, chooses $d = 0$. In this case, the court's posterior belief about the government, conditional on observing $d = 0$, is equal to its prior belief. By lemma 1, the court would choose $r^* = \mathbb{E}[\omega] = 0$. This would create an incentive for the government to choose $d = 1$ if ω is sufficiently below zero, where *sufficiently* is defined by its utility loss from the decrease in judicial efficiency and the utility loss from judicial intervention in the plaintiff's claims. Because ω is unbounded below, there will always be some type of government for which this trade-off is justified.⁸

On the other hand, suppose an equilibrium in which the government always chooses $d = 1$, independent of its type. In this case, the court would have a posterior belief about ω that is close to the true ω , though how close depends on the quality of the signals—measured by σ_a^2 and σ_x^2 —and the size of the docket, N . By deviating and playing $d = 0$, the government can induce a belief that is equal to the court's prior (under passive conjectures). This belief may be higher than what would have been induced by playing $d = 1$, but the government would benefit from increased judicial efficiency and from avoiding judicial intervention in the law application cases. Because ω is unbounded above, there will always be some type of government for which this trade-off is justified.

Lemma 3. There exists no equilibrium in which all types of governments pool and choose the same docket for the court.

Of course, no fully separating equilibrium is possible given the coarseness of the signal space. Thus, the only other

8. Note that under passive conjectures, the court's beliefs would not be updated by the signal, but they would be pulled in the direction of the true ω by the N signals.

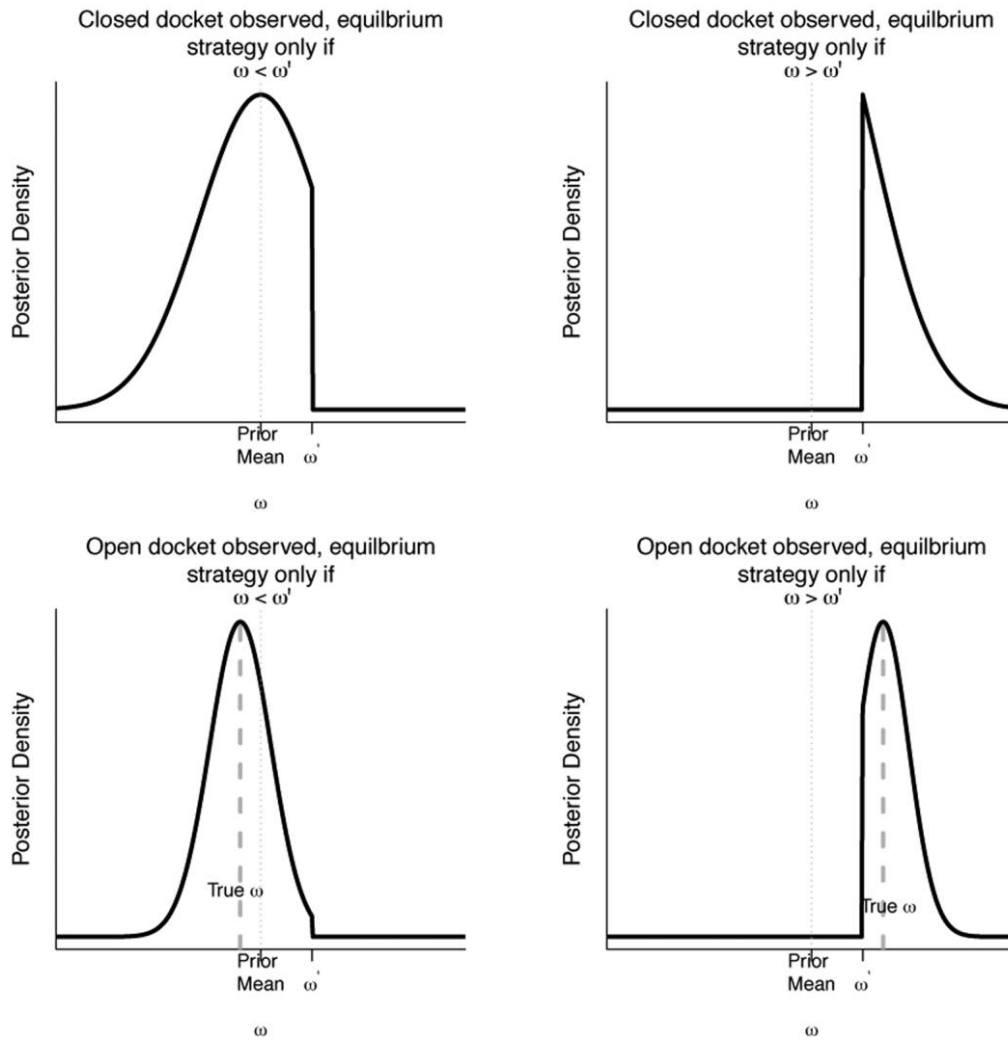


Figure 3. Belief structure under different types of actions by the government. Each panel shows a posterior belief under an alternative set of signals. The top-left panel shows the posterior belief after observing truncation above at ω' ; the top-right panel shows the posterior belief after observing truncation below at ω' . The bottom-left panel shows the posterior belief after observing truncation above at ω' , followed by N case outcomes; the bottom-right panel shows the posterior belief after observing truncation below at ω' , followed by N case outcomes.

possibility is an equilibrium in which the types of government separate partially. In practice, this means that the types would separate into classes, where within a class, docket choices are identical (e.g., all $\omega : \omega' \leq \omega \leq \omega''$ choose $d = 0$, while all $\omega < \omega'$ and all $\omega > \omega''$ choose $d = 1$). Lemma 4 and its corollary demonstrate that in fact any such equilibrium must entail a partition of the type space into no more than two sets, where all government types below the threshold choose $d = 1$ and all government types above the threshold choose $d = 0$.

Lemma 4. Any equilibrium involving semiseparation must entail a threshold such that the government chooses $d = 1$ if ω is below that threshold and $d = 0$ if ω is above that threshold.

The reasoning is as follows. Suppose that there is an equilibrium such that there is a threshold, ω' , in which all government types above ω' play $d = 1$ and all types below ω' play $d = 0$. Substantively, this is to say that all governments below a certain level of ω (governments in less need of scrutiny according to the court) would eliminate the law application docket and all governments above this level of ω (governments in need of more scrutiny) would provide for a mixed docket. In such an equilibrium, having observed $d = 1$, the court's posterior belief about ω will be supported only on that range of types and will be influenced by both the court's prior and the signals it receives. Having observed $d = 0$, the court's posterior expectation about ω will necessarily be lower for those types than for the types playing $d = 1$. The reason is that the court's posterior will place

positive probability only on the types playing $d = 0$, which is a range of types lower than those playing $d = 1$. Figure 4 illustrates this intuition visually. Any type that is supposed to play $d = 1$ that deviates to $d = 0$ will benefit from (a) a better constitutional posture (i.e., lower r), (b) a more efficient court (i.e., it will lose $-\sigma_r^2$ instead of $-N\sigma_r^2$), and (c) avoidance of judicial intervention in the law application cases. The consequence is that there cannot be an equilibrium in which types to the left of ω' play $d = 0$ while types to the right play $d = 1$.

An immediate corollary of this result is that any partition of the government type space can divide the types into at most two sets. The reason is that any partition that involves more than two sets of governments choosing distinct docket choices will involve at least two government types ω_i and ω_j such that $\omega_i > \omega_j$ for $i \neq j$, where ω_i chooses $d = 1$ when type ω_j chooses $d = 0$. This is not possible by lemma 4.

Corollary 2. A perfect Bayesian equilibrium in this game entails a partition of the government type space into at most two sets of governments.

With these results in hand, we can establish the unique PBE to the model. In particular, the unique PBE is characterized by a cut point, ω' such that the government plays $d^* = 1$ if $\omega < \omega'$ and $d^* = 0$ if $\omega > \omega'$. The court's strategy is described in the previous section. Beliefs for the players are described above. All histories in this equilibrium are reached, and so the court's beliefs are fully characterized by Bayes's rule. The government's beliefs are consistent (trivially) with the strategy profile. The key intuition behind this equilibrium is that if the government's type is low enough, the incentive to reveal its type (by allowing the court access to the law application cases) outweighs the cost of burdening the court with the work (and reducing the quality of its constitutional rule making) and the cost of allowing the court oversight of its bureaucratic decisions. By con-

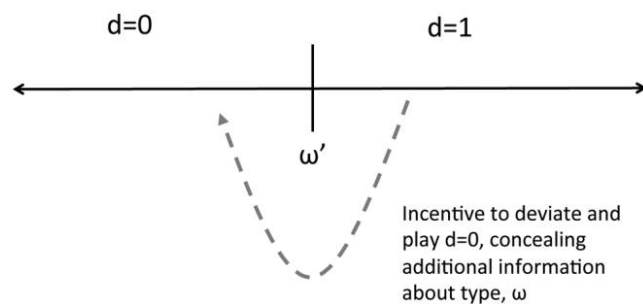


Figure 4. Incentive to deviate whenever high types choose to open the law application docket and low types choose to close the law application docket.

trast, when the government's type is high enough, the consequences of revealing too much information about its type, by allowing access to the law application docket, combine with the other adverse consequences to induce the court to shut off the law application docket.

Proposition 1. There exists a unique separating equilibrium in which the government plays $d^* = 1$ if $\omega < \omega'$ and $d = 0$ if $\omega \geq \omega'$. The court's strategy is given in the model above, and beliefs for both players are described above.

A corollary of proposition 1 is that there exists in equilibrium a single type of government that is indifferent between choosing the mixed and the closed dockets. This type of government is the one with ω that perfectly balances the informational costs of revealing its type to the court, thereby securing a more desirable constitutional rule, against the costs of allowing judicial intervention in law application and decreased judicial efficiency. Recall that if the government chooses the concentrated docket ($d = 0$), the court will have a relatively high posterior belief about ω and select a relatively high (i.e., restrictive) rule. By switching and choosing the mixed docket ($d = 1$), the court will have a posterior belief about ω that is lower than and closer to the true ω and will therefore choose a lower (i.e., less restrictive) rule that is more appealing to the government. The cost of getting that better rule, though, is judicial intervention in the administration of law and more inefficient opinion writing.

Corollary 3. In the unique perfect Bayesian equilibrium, there exists exactly one type of government indifferent over the choice of docket style. That type satisfies the equality

$$(N - 1)\sigma_r^2 + N\gamma_g \int_C^\infty f(x)dx = \bar{\omega} - \underline{\omega},$$

where $\underline{\omega}$ is the court's posterior expectation about ω upon observing $d = 1$ and the resulting cases, and $\bar{\omega}$ is the court's posterior expectation about ω upon observing $d = 0$.

A second corollary of proposition 1 concerns the nature of information revelation; specifically, in our model, the government can never completely hide its type. Even when it chooses $d = 0$ (i.e., to prohibit the court from hearing law application cases), that decision itself reveals at least some information to the court: it reveals that the government's

type is sufficiently high that it has an incentive to hide its type. Because there always exist some types of governments that want to reveal their type, choosing to not grant jurisdiction over the law application docket reveals at least that the government is not among those that want to reveal their types.

Corollary 4. The government can never completely hide its type. Even when the government chooses not to allow the court access to law application cases, that choice reveals information about the government's type.

Comparative statics and results

The equilibrium we study yields comparative statics about the conditions under which more or less information is revealed to the court. Recall that the equilibrium is one in which there exists a cut point, ω' , such that all governments with $\omega < \omega'$ choose to give the court access to the law application cases (i.e., $d^* = 1$), and all governments with $\omega > \omega'$ choose not to allow the court to hear the law application cases (i.e., $d^* = 0$). Thus, even while information about ω is revealed independent of d^* (corollary 4), there are features of the model that affect precisely where the point of indifference is between $d^* = 0$ and $d^* = 1$. Generally, these include features of the government, features of the court, and features of society. We describe each in turn.

Effect of government features on equilibrium strategy. With respect to the government, two model parameters— γ_g and σ_a^2 —measure relevant features that implicate what we observe in equilibrium. Specifically, as the government increasingly dislikes judicial intervention in law application—that is, as γ_g increases—the greater range of government types will prefer to close the law application docket. For these governments, the informational benefit associated with revealing its type to the court does not justify the costs associated with judicial right enforcement. Similarly, as the variance of government actions around its type—measured by σ_a^2 —increases, the incentive to assign the mixed docket (i.e., choose $d = 1$) decreases. The intuition is that as σ_a^2 increases, for any given type, ω , there is a greater chance of a government action associated with an outcome the court finds unacceptable and would overturn. Related, as σ_a^2 increases, the amount of information the court receives from any given law application case decreases, because the government actions are less efficient signals of the government's type. In other words, as the government has less control over its bureaucrats or the actions taken in its name, the government has less incentive to reveal its type through exposing the court to law application cases.

Result 3. The government's incentive to open the court's docket to law application cases decreases in the government's sensitivity to judicial rights enforcement and the amount of bureaucratic variance in actions around the government's type.

Effect of court features on equilibrium strategy. With respect to the court, there are two parameters of interest: the court's threshold over overturning government action, C , and the court's skill at opinion writing, σ_r^2 . With respect to the court's threshold for overturning government action, the incentive is unambiguous. More exacting courts, those with lower values of C , create a greater incentive for the government to choose $d = 0$, the docket without law application cases, because the court will intervene in more cases. With respect to the court's opinion-writing skill, measured by σ_r^2 , the incentive is again unambiguous. More skilled courts suffer less from the workload, creating an incentive for the government to choose $d = 1$, forcing the court to hear law application cases.

Result 4. As the court becomes more exacting and finds more outcomes unacceptable, a greater range of government types will prefer to focus the court's jurisdiction on rule making cases. As the court becomes increasingly skilled at opinion writing, a greater range of government types will prefer to choose a mixed docket with both rule making and law application cases.

Effect of societal features on equilibrium strategy. Finally, with respect to features of the larger society, there are two parameters of particular interest. First is the size of the law application docket, N . As N increases, the government is increasingly incentivized to choose $d = 0$, the concentrated docket. The reason is that increasing the amount of information available to the court via law application cases exhibits decreasing marginal returns: once the court sees enough cases, it becomes sufficiently informed that while additional cases yield more information, the largest impact occurs from getting to see any law application cases at all. By contrast, the marginal impact of the workload on the court's inefficiency does not change, as we have modeled it, and the loss from judicial intervention similarly increases with N . Second, we might be interested in the amount of randomness associated with outcomes in society, measured by σ_x^2 . This parameter measures the extent to which similar government actions (a_i) yield disparate outcomes (x_i). As this variance increases, so too does the incentive for the government to choose $d = 1$. In other words, as societal

variance induces greater variation in outcomes around government action, the government prefers to choose the concentrated docket. The intuition is straightforward: more variance means both that there are greater chances for the court to see something it could prefer to reverse (i.e., there is a greater chance that $x_i > C$) and that the informational benefit from the individual cases decreases.

Result 5. The incentives for the government to open the court's docket to law application cases decrease with the size of the law application docket and the variance in outcomes around government actions.

In particular, it bears noting that government control over bureaucratic actions is a measure of how informative law application cases are about the government's type. In areas of the law in which there is relatively little to be learned from routine law application (i.e., where case outcomes do not necessarily reflect the government's type), there is less incentive to hear the law application docket. However, in areas of the law in which there is little to mediate between government action and the outcomes the court observes, there will be comparatively more information to be gleaned from the law application cases.

MODELING DISTRIBUTIVE POLITICS

In the preceding two versions of the model, we have assumed that the government prefers all outcomes to remain undisturbed by the court. In other words, we have assumed maximum conflict between the government and the court over the distributive elements of adjudication. However, there certainly exist instances in which the government may see the court as a potential ally, and one might worry that the informational rationale we identify hinges on our assumptions about distributional conflict. A final version of the model that explicitly models distributive politics as an element of the jurisdiction choice shows that the government's informational goals sometimes reinforce its distributive goals and sometimes undermine those goals.

The model is identical to the preceding version, except we now assume that there exists a cut point, G , such that the government prefers $v_i = 1$ for all $x_i > G$ and that G is common knowledge. That is, whereas we previously assume that the government prefers $v_i = 0$ for all i , we now assume that there are some outcomes that the government finds unacceptable and would prefer to reverse. The government's expected utility function can therefore be written as

$$EU_g(d) = -r - N\sigma_r^2 - \gamma_g \sum I(x_i, v_i), \quad (5)$$

where

$$I(x_i, v_i) = \begin{cases} 1 & \text{if } (x_i < G \text{ and } v_i = 1) \text{ or } (x_i > G \text{ and } v_i = 0) \\ 0 & \text{otherwise.} \end{cases}$$

All other elements of the model including the timing, information, and court's utility function remain identical.

The core result we derive from this model is that there exists, in this model, a unique PBE, and the equilibrium is isomorphic to the unique equilibrium characterized in proposition 1. In particular, the unique equilibrium is one in which there exists a cut point ω' such that $d^* = 1$ if $\omega < \omega'$ and $d^* = 0$ if $\omega > \omega'$.

Proposition 2. There exists a unique separating equilibrium in which the government chooses $d^* = 1$ if and only if $\omega < \omega'$ and chooses $d^* = 0$ if and only if $\omega > \omega'$. The court chooses $v_i = 1$ for all $x_i > C$, and beliefs are as described above.

Because the equilibrium is isomorphic to the one described in proposition 1, the findings described in results 3–5 hold in this model as well. However, in addition, there are two results of particular import. First, under certain conditions the government's informational and distributive concerns perfectly reinforce each other. Specifically, when $G \leq C$, then the government benefits from giving the court jurisdiction over law application cases, because the court corrects at least some instances in which the government perceives injustice. In fact, when $G = C$, the court and government agree exactly on how to resolve all cases, as G moves away from C , then there will be instances in which the court will not overturn bureaucratic actions, even though the government may perceive the outcomes to be undesirable. However, at the same time, there remains a potential tension between the government's informational goals and its distributive ones. That is, if the government wants to reveal its type, then its informational goal and distributive preferences coincide perfectly. However, for "bad-type" governments that prefer to hide their true types, the distributive benefit associated with giving the court jurisdiction cuts against that incentive.

Result 6. When $G \leq C$, the court can help the government by correcting injustices the government finds unacceptable. For governments that want to hide their types from the court—that is, sufficiently bad types—those distributive concerns cut against the incentive to hide its type.

Second, when $G > C$ —that is, when there are actions the court finds unacceptable but the government does not—then informational and distributive concerns have an alternative relationship to each other. In particular, a government that might want to use the court to help it control the bureaucracy runs the risk that there will be instances in which the court is “too aggressive” for the government’s taste—namely, when $C < x < G$. In this instance, a government’s ability to use the court to help it control agency loss is constrained by the informational implications of inviting the court into the process of bureaucratic oversight.

Result 7. When $G > C$, the court is relatively less helpful for aiding the government in controlling bureaucratic malfeasance or errors. The extent to which the court’s and the government’s preferences over law application are misaligned undermines the government’s ability to reveal its type to the court.

In summary, our model can accommodate a distributional rationale for a large law application docket; however, there is an informational rationale for such dockets whether or not there is something distributional to gain. Importantly, if there are strong distributional incentives to delegate power to judges, then delegating politicians may confront a trade-off between their efforts to constrain poorly functioning or (potentially worse) ideologically distant, unfaithful agents and their efforts to ensure that constitutional rule making is clear and not overly constraining.

CONCLUSION

Judges and politicians both commonly lament the massive caseloads of peak courts that are tasked with law application and rule construction activities. Yet many of the world’s peak courts continue to engage in considerable law application. This article develops an informational account of docket style, which analyzes a trade-off between well-informed and high-quality legal rules in the decision over how much control to grant judges over the everyday implementation of the law by the administrative state. Our findings suggest a number of implications for related questions in the literature on law and politics.

Jurisdictional expansion and stripping. Distributional approaches to understanding why politicians expand or strip jurisdiction center on one of two views of the judiciary. The first envisions the judiciary as a potential ally in a legislative effort to manage agency losses (e.g., Shipan 2000). Courts place a check on divergent agencies, which have incentives

to pull policy implementation away from the enacting coalition’s intended outcome. Under this account the political incentives for the expansion of judicial review increase as agency preferences increasingly diverge from those of the legislature, making the judiciary a more useful ally. A second approach envisions the judiciary as a generator of administrative costs (e.g., Chutkan 2008). By incentivizing litigation, active judges place administrative burdens on the state that could be avoided simply via jurisdictional stripping. Under this account, the incentives to limit a judiciary’s power increase as judges become increasingly likely to offer relief to potential litigants, especially so in contexts in which latent demand for litigation can be mobilized through an effective legal support structure.

The advantage of our approach lies in recognizing that these distributional rationales for jurisdictional expansion or stripping would still confront the core informational trade-off we evaluate. Most critically, because designers convey information about their type via their design choices, governments that strip jurisdiction in order to protect their interests or save budgets risk jurisprudential problems in other areas of the law by undermining a process by which judges might learn about appropriate constitutional postures. And by using judges to address divergent agencies, designers risk undermining opinion quality and thus legal certainty.

Entrenchment. Related, our analysis raises a constitutional design question. Ought jurisdiction to be deeply entrenched, making it difficult for the political branches to alter a peak court’s ability to engage in law application? Clearly, the answer to this question depends on what the designer values. Let us suppose that the objective is to ensure that the court is maximally informed when writing important, general constitutional rules. Our analysis reveals an interesting distinction between the situation in which courts control their docket style and the situation in which governments control the courts’ docket style. In particular, there exist conditions under which the court attains more information about the government’s type when the government has control over the court’s docket style than when the court has control. The reason is that there exist conditions under which the court would prefer to focus on rule writing, ignoring law application cases, but in which the government’s actions will always improve the court’s information about the government’s type. Any peak court that would choose to focus in this way will always receive more information if jurisdiction is controlled by the government. The reason is that no matter the government’s choice, whether to focus the court on a small, concentrated docket

or a large, mixed docket, information is communicated. Thus, for designers anticipating courts with strong incentives to focus on rule construction, information revelation is maximized by granting larger jurisdictional control to politicians.

Political judging. Finally, while our model has contemplated informational aspects of the courts' use of law application cases, there are myriad other factors that are implicated in the choice of docket style. Vast literatures have examined the consequences of judicial oversight for inter-branch conflict (e.g., Ferejohn and Shipan 1990; Vanberg 2005), a key implication being that judges can creatively avoid conflict through well-informed, carefully phrased jurisprudential strategies. Our model does not contemplate such dynamics: the court in our argument does not confront political threats. But courts that do confront political threats might be better positioned to combat those threats when they are maximally informed and enjoy the time necessary to communicate carefully their opinions. Our approach suggests that this may not be possible—that “information gathering” can undermine legal quality. Scholars have also considered how the judicial hierarchy can optimally divide components of adjudication (e.g., Kornhauser 1995) and how high courts can optimally construct auditing strategies to effectively control their subordinates (e.g., Cameron et al. 2000; Carrubba and Clark 2012). These are other factors that we have excluded from our analytic scope, though we suspect that they too interact with the incentives we have explored. The implications of our findings—that informational goals and institutional design objectives have implications for judicial docket style—suggest that studies of the consequences of judicial oversight will benefit from consideration of these broader institutional objectives.

**APPENDIX
PROOFS OF FORMAL RESULTS**

Lemma 1

The court's expected utility from r is given by

$$-\sigma_r^2 - \int_{-\infty}^{\infty} (\omega - r)^2 \phi_0(\omega) d\omega$$

if $d = 0$ and

$$-N\sigma_r^2 - \int_{-\infty}^{\infty} (\omega - r)^2 \phi_0(\omega) d\omega$$

if $d = 1$. Both of these quantities are maximized when $r = \mathbb{E}[\omega]$. QED

Lemma 2

The court prefers $d = 1$ whenever

$$(N - 1)\sigma_r^2 + \frac{\sigma_\omega^2 \nu^2}{\sigma_\omega^2 + N\nu^2} - \sigma_\omega^2 - N\gamma_c \int_C^\infty f(x) dx \leq 0,$$

where $f(x)$ is the pdf of the normal distribution with mean zero and variance $\sigma_\omega^2 + \sigma_a^2 + \sigma_x^2$. This condition, rearranged, is given by

$$\sigma_r^2 \leq \left[\sigma_\omega^2 - \frac{\sigma_\omega^2 \nu^2}{\sigma_\omega^2 + N\nu^2} + N^2 \gamma_c \int_C^\infty f(x) dx \right] (N - 1)^{-1}.$$

QED

Result 1

The court prefers to play $d = 1$ whenever

$$(N - 1)\sigma_r^2 + \frac{\sigma_\omega^2 \nu^2}{\sigma_\omega^2 + N\nu^2} - \sigma_\omega^2 - N\gamma_c \int_C^\infty f(x) dx \leq 0,$$

where $f(x)$ is the pdf of the normal distribution with mean zero and variance $\sigma_\omega^2 + \sigma_a^2 + \sigma_x^2$. The derivative of the left-hand side of this condition is

$$\frac{N\nu^4}{(\sigma_\omega^2 + N\nu^2)^2} - 1 - N\gamma_c F_{\sigma_\omega^2}(C) < 0,$$

where $F_{\sigma_\omega^2}(C)$ is the derivative of $\int_C^\infty f(x) dx$ with respect to σ_ω^2 . The derivative of the left-hand side with respect to σ_ω^2 is $N - 1 > 0$. The derivative of the left-hand side with respect to γ_c is $-N \int_C^\infty f(x) dx \leq 0$. The derivative of the left-hand side with respect to C is $-N\gamma_c F_C(C) < 0$, where $F_C(C)$ is the derivative of $\int_C^\infty f(x) dx$ with respect to C . QED

Result 2

By lemma 2 the court prefers $d = 1$ whenever

$$\sigma_r^2 \leq \left[\sigma_\omega^2 - \frac{\sigma_\omega^2 \nu^2}{\sigma_\omega^2 + N\nu^2} + N^2 \gamma_c \int_C^\infty f(x) dx \right] (N - 1)^{-1}.$$

The derivative of the right-hand side of that condition with respect to N is

$$(N - 1) \frac{N\sigma_\omega^2 \nu^4}{\sigma_\omega^2 + N\nu^2} + (N^3 + 2N^2 - 2N)\gamma_c \int_C^\infty f(x) dx - N\sigma_\omega^2.$$

That quantity is positive whenever

$$\gamma \geq \frac{\frac{(N - 1)\sigma_\omega^2 \nu^4}{\sigma_\omega^2 + N\nu^2} - N\sigma_\omega^2}{(N^3 + 2N^2 - 2N) \int_C^\infty f(x) dx},$$

which holds for N small enough and N large enough. QED

Lemma 3

Consider a pooling equilibrium in which $d^* = 1$. The government's expected utility is

$$EU_G(d = 1) = -\frac{\nu_0^2 \omega}{(\sigma_x^2/\nu_0^2) + N} - N\sigma_r^2 - N\gamma_g \int_C^{-\infty} f(x)dx.$$

Assuming passive conjectures, if the government deviates and plays $d = 0$, then the government's expected utility is given by $EU_G(d = 0) = -\sigma_r^2$. The government therefore prefers to deviate whenever

$$\omega > \frac{[(N - 1)\sigma_r^2 + N\gamma_g \int_C^{-\infty} f(x)dx][(\sigma_x^2/\nu_0^2) + N]}{\nu_0^2}.$$

Consider next a pooling equilibrium in which $d^* = 0$. The court prefers to deviate whenever

$$\omega < \frac{[(N - 1)\sigma_r^2 + N\gamma_g \int_C^{-\infty} f(x)dx][(\sigma_x^2/\nu_0^2) + N]}{\nu_0^2}.$$

Thus, no equilibrium can exist in which all types, $\omega \in \mathbb{R}$, pool on a docket choice. QED

Lemma 4

The proof proceeds by contradiction. Suppose an equilibrium in which there is a partition such that $d(\omega < \omega')^* = 0$ and $d(\omega > \omega')^* = 1$. Upon observing $d = 1$, the court places zero probability on $d < \omega'$, and therefore, $\mathbb{E}[\omega] = \bar{\omega} > \omega'$. Upon observing $d = 0$, the court places zero probability on $\omega > \omega'$, and therefore, $\mathbb{E}[\omega] = \underline{\omega} < \omega'$. By lemma 1, the optimal rule to write in either case is $\mathbb{E}[\omega]$. Thus, the expected utility from playing $d = 1$ is therefore

$$-\bar{\omega} - N\sigma_r^2 - N\gamma_g \int_C^{-\infty} f(x)dx,$$

where $f(\cdot)$ is the distribution of case outcomes, and the expected utility from playing $d = 0$ is $-\underline{\omega} - \sigma_r^2$. The government with type $\omega = \omega' + \epsilon$ therefore prefers to play $d = 0$, a contradiction. QED

Proposition 1

Suppose an equilibrium in which $d(\omega < \omega')^* = 1$ and $d(\omega \geq \omega')^* = 0$. Upon observing $d = 0$, the court's posterior is given by a truncated normal distribution with mean

$$\bar{\omega} = \nu_0 \left\{ \phi\left(\frac{\omega'}{\nu_0}\right) / \left[1 - \Phi\left(\frac{\omega'}{\nu_0}\right) \right] \right\}.$$

Upon observing $d = 1$, the court first updates its prior to a truncated normal distribution with mean

$$\nu_0 \left[-\phi\left(\frac{\omega'}{\nu_0}\right) / \Phi\left(\frac{\omega'}{\nu_0}\right) \right].$$

It then updates its belief after observing N signals, x_i ; let this mean of that updated distribution be given by $\underline{\omega}$. Because the court places zero density on $\omega > \omega'$ upon observing $d = 1$ and zero density on $\omega < \omega'$ upon observing $d = 0$, then it must be that $\underline{\omega} < \bar{\omega}$. If $\omega < \omega'$, the government's expected utility is given by

$$-\underline{\omega} - N\sigma_r^2 - N\gamma_g \int_C^{-\infty} f(x)dx,$$

where $f(\cdot)$ is the pdf of the normal distribution with mean ω and variance $\sigma^2 + \nu_0^2$. If $\omega > \omega'$, the government's expected utility is given by $-\bar{\omega} - \sigma_r^2$. A government with $\omega = \omega'$ is indifferent between $d = 1$ and $d = 0$ if

$$(N - 1)\sigma_r^2 + N\gamma_g \int_C^{-\infty} f(x)dx = \bar{\omega} - \underline{\omega}.$$

Notice that if a government with $\omega = \omega'$ is indifferent between $d = 0$ and $d = 1$, then a government with $\omega > \omega'$ strictly prefers $d = 0$, because the strategy $d = 1$ yields strictly lower utility in the expected rule, the variance of the opinion, and the law application terms. Next, notice that if a government with $\omega = \omega'$ is indifferent, then a government with $\omega < \omega'$ strictly prefers $d = 1$, because the improvement in the expected rule, $\bar{\omega} - \underline{\omega}$, is greater than the cost in terms of increased variance in the rule and the intervention in the bureaucratic allocation of justice. Thus, the only type that does not strictly prefer one strategy is the government with $\omega = \omega'$. We assume that this knife-edge condition results in $d^* = 0$.

To see that this equilibrium is unique, notice first that, by lemma 3, any equilibrium must entail semiseparation. Notice next that by lemma 4, no equilibrium can entail a partition such that $d(\omega > \omega')^* = 1$ while $d(\omega < \omega')^* = 0$. This implies that there can be at most one partition, because multiple partitions imply at least one $\omega'' > \omega'$ such that $d(\omega'')^* = 1$ and $d(\omega')^* = 0$. Therefore, the only possible type of equilibrium is one that entails a single partition at ω' with $d(\omega < \omega')^* = 1$ and $d(\omega > \omega')^* = 0$. QED

Result 3

A government with type ω is indifferent between $d = 1$ and $d = 0$ iff

$$(N - 1)\sigma_r^2 + N\gamma_g \int_C^{-\infty} f(x)dx = \bar{\omega} - \underline{\omega}.$$

By corollary 3, there exists exactly one such type. The left-hand side of that equality is increasing as γ_g increases (i.e., the government cares more about judicial intervention). To hold, the right-hand side therefore must be increasing also. For that difference to increase, the indifferent type must decrease. Therefore, as γ_g increases, a wider range of types will play $d^* = 0$. Similarly, the left-hand side of the condition for indifference is increasing in the variance of action outcomes, σ_a^2 . Therefore, as the amount of bureaucratic variance, σ_a^2 , increases, a greater range of types prefers $d = 0$. QED

Result 4

A government with type ω is indifferent between $d = 1$ and $d = 0$ iff

$$(N - 1)\sigma_r^2 + N\gamma_g \int_C^\infty f(x)dx = \bar{\omega} - \underline{\omega}.$$

By corollary 3, there exists exactly one such type. The left-hand side of that equality is increasing as C decreases (i.e., the court becomes more exacting). To hold, the right-hand side therefore must be increasing also. For that difference to increase, the indifferent type must decrease. Therefore, as C decreases, a wider range of types will play $d^* = 0$. Similarly, the left-hand side of the condition for indifference is increasing in the variance of rule outcomes, σ_r^2 . Therefore, as the court becomes more skilled (as σ_r^2 decreases), a greater range of types prefers $d = 1$. QED

Result 5

A government with type ω is indifferent between $d = 1$ and $d = 0$ iff

$$(N - 1)\sigma_r^2 + N\gamma_g \int_C^\infty f(x)dx = \bar{\omega} - \underline{\omega}.$$

By corollary 3, there exists exactly one such type. The left-hand side of that equality is increasing in N . To hold, the right-hand side therefore must be increasing also. For that difference to increase, the indifferent type must decrease. Therefore, as N increases, a wider range of types will play $d^* = 0$. Similarly, the left-hand side of the condition for indifference is increasing in the variance of outcomes, because the density of outcomes greater than C is increasing in σ_x^2 . QED

Proposition 2

Notice that, as in the previous two iterations of the model, the court has a dominant strategy to select $r^* = \mathbb{E}[\omega]$ and

$v_i^* = 1$ iff $x_i > C$. Now, consider the government's strategy. If the government plays $d^*(\omega) = 1$ for all ω , then

$$EU_G(d = 1) = -\frac{v_0^2 \omega}{(\sigma_x^2/v_0^2) + N} - N\sigma_r^2 - N\gamma_g \left[\int_C^G f(x)dx + \int_G^C f(x)dx \right].$$

If the government deviates and plays $d^*(\omega) = 0$, then

$$EU_G(d = 0) = \sigma_r^2 + \int_G^\infty f(x)dx.$$

Thus, the government prefers to deviate for ω sufficiently large. Now consider a pooling equilibrium in which the government plays $d^* = 0$ for all ω . By the same logic, the government prefers to deviate for ω sufficiently low. Thus, no complete pooling equilibrium can be sustained, and it remains only to be shown that there exists a unique separating equilibrium.

Consider the proof of lemma 4. The only distinction between this model and the one from which that result is derived is that the government has some positive incentive to allow the court to engage in law application to correct errors in outcomes. Thus, higher types in this model, relative to that model, will prefer to play $d = 1$, but the same logic implies that there can exist only one cut point, ω' , and that the government prefers $d = 1$ iff $\omega < \omega'$ and $d = 0$ otherwise. Thus, there can exist only a single cut point, ω' , such that $d^*(\omega \leq \omega') = 1$ and $d^*(\omega > \omega') = 0$. Finally, to see that an equilibrium exists, note that the only difference between the current model and the model analyzed in proposition 1 is that the utility from choosing $d = 1$ increases as C approaches G . QED

Result 6

Given the distribution of x_i , the government will expect the court to overturn at least one case resolved in error by its agents. For $G \leq C$, there are no cases that the court overturns that the government would not prefer to be overturned. Thus, $d = 1$ can only help the law application docket. Since there is always a government above ω' , there is always a government that is still willing to hide its type despite the court's law application assistance. QED

Result 7

For $G > C$, selecting $d = 1$ improves the government's utility for all cases above G ; however, as in the baseline model, the government loses utility for all cases above C . As $G \rightarrow \infty$, the expected loss associated with $d = 1$ converges on that in the baseline game, and thus the incentive to select $d = 1$ is reduced. QED

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