THE JUDICIARY'S STRATEGIC INTERACTIONS WITH THE ELECTED BRANCHES IN THE AMERICAN POLITICAL SYSTEM

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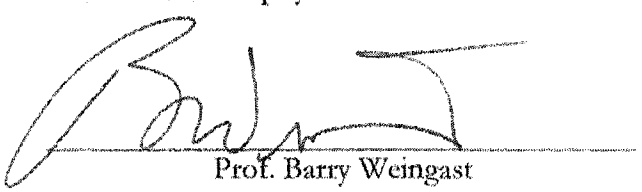

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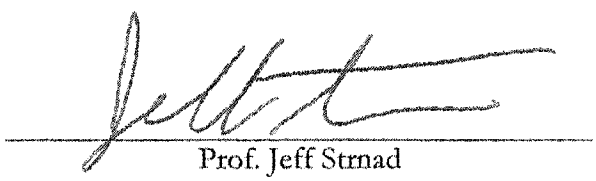

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CHAPTER 1

INTRODUCTION

The Judiciary is a legal institution, but it is also a political one, operating within the larger American political system. That political system is governed by the separation of powers, an interplay of constraints that allows each branch to limit and shape the power of the others. Traditional legal analysis tells us the shape, nature and direction of the law, but to comprehend and predict the choices judges and other key judicial actors make demands accounting for the political context legal rules are created within. This inquiry also mandates knowledge of how extra-legal actors, such as the President, senators and activists, affect the bounds of judicial action. These requirements imply the need for a cross-institutional approach.

This dissertation addresses a series of puzzles about the operation of the Judiciary: how senatorial courtesy shapes judicial selection, how judges shape their agendas by signaling their case preferences, and how the political system encourages judicial solutions to social conflict. The exploration and solution of these puzzles provides new insights into the core processes of judicial selection, judicial decision-making and the causes of litigiousness. Additionally, the exploration of each of these theses both originates from, and contributes to, an overall conception of the Judiciary as a political institution.

There are two primary ways of analyzing the courts in a political context. The first is to determine the most fundamental institutional elements that shape the Judiciary on a given topic, and predict behavior by modeling the interaction of relevant actors within the political system's institutional constraints. The second is to focus on the behavior of court actors, and explain that behavior by theorizing causation on the basis of similarities and differences with

past legal actions. Examples of the former method include the law and economics school (see e.g. Newman), and the strategic judiciary school (e.g. Epstein & Knight); examples of the latter include the attitudinalist model (e.g. Segal & Spaeth).[1] The approach primarily utilized herein is the former, generally called Positive Political Theory (PPT) or strategic modeling.[2]

This dissertation uses economic and other social science modeling techniques to analyze and predict the behavior of actors in relation to the Judiciary. In particular, game theoretic and structurally introduced equilibrium models are used. The benefits of these modeling techniques include: facilitating informed predictions about judicial behavior; providing rigorous mechanisms of assessing the impact of actions and responses to those actions; providing frameworks for assessing the consequences of implicit or explicit assumptions made regarding judicial behavior; and helping us are explain why some behavior is regularly observed, and other behavior is exceptional.

The three chapters that follow address three central issues of judicial politics: how judges are selected, how judicial agendas are shaped, and how the political system creates both the demand and opportunity for judicial action.

Chapter Two: The Senatorial Courtesy Game: Explaining the Norm of Informal Vetoes in 'Advice and Consent' Nominations

This chapter explains the continued existence of the norm of senatorial courtesy, and its effects on the nomination and confirmation of judicial officers and other positions subject to

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[1] Although some suggest that these two approaches are mutually exclusive (e.g. Segal), there is no reason why judges cannot behave, and be analyzed, in both strategic and policy-driven ways.

[2] Generally, see e.g. Krehbiel; Weingast and Moran; Diermeier and Fedderson. For applications to the Judiciary, see e.g. Eskridge and Ferejohn; Ferejohn and Shipan; McNollgast.

the advice and consent of the Senate. Senatorial courtesy is an unwritten rule enabling either senator from a nominee's home state to effectively veto that nominee. The general importance of federal nominations, combined with the counter-majoritarian nature of senatorial courtesy, creates a puzzle as to why senators would routinely subjugate their own preferences in deference to their parochial colleagues.

The answer this chapter proposes is that nominees from a senator's own state have greater salience to that senator, and so the senator is willing to trade a percentage influence over the fate of all nominees for almost total influence over the senator's own state's nominees. This heightened salience is due to two factors: the jurisdictional relevance of a state's nominees, and the advantage to senators of controlling federal benefits that flow to their state. This intuition is formalized in a game theoretic model, allowing elucidation of when the conditions exist for senatorial courtesy to be followed, and when they do not.

Chapter one also answers a related question: if senatorial courtesy is followed, which governmental actors does it advantage or disadvantage? A spatial model is used to generate comparative statics of which candidates are produced in nomination systems with and without senatorial courtesy. The most interesting result is that, although senatorial courtesy imposes an additional check on the President's nomination power, in aggregate the President is not disadvantaged by senatorial courtesy. In fact, when the President has discretion over which state to draw a nominee from, the President is actually advantaged by senatorial courtesy, simply by choosing a nominee from a state whose senators are ideologically closer to the President than the median senator is. This result suggests another reason why senatorial courtesy has been preserved, and also introduces a significant factor in predicting the ideological composition of advice and consent nominees.

Chapter Three: The Judicial Signaling Game: How Judges Strategically Shape Their Dockets

Chapter two describes how judges shape their agendas, by signaling their interest in hearing particular cases. Judges are institutionally constrained from initiating cases; traditionally judges have been viewed as passive by nature. Combined, these two factors led to the conclusion that judges have no control over their agendas. More recent literature has considered that judges can be strategic in achieving their policy goals, particularly by manipulating certiorari. However, little attention has been given to the possibility that judges can influence their agendas prior to certiorari.

This chapter proposes that judges partake in signaling, by taking advantage of the private information they possess by virtue of their profession: their knowledge of the probable outcome of cases. The notion of judicial signaling is formalized through a signaling model; the equilibria produced by this model provide predictions of when judges will signal, and how reliable those signals will be.

The first implication of modeling judicial signaling is that it provides a new means of interpreting judicial statements. Secondly, it explains a phenomenon of anomalous cases, including the publication of highly critical dissents, indications of potential switches, speeches on future cases, and other emphatic judicial statements. The third implication of the judicial signaling model is to show that, because case information is available to judges and unavailable to litigants or their advocates, in some cases judges have an incentive to send misleading signals. These results provide a framework for assessing the effect of judicial signaling, and a novel conception of judicial behavior.

Chapter Four: Explaining American Litigiousness: A Product of Politics, Not Just Law

There have been a number of attempts to explain the causes of America's exceptional litigiousness. Typically, historical accounts describe connections without showing systematic causes, and legal accounts ignore the endogeneity of legal rules. This chapter posits an institutional explanation: America's extraordinary litigiousness is a product not only of its legal rules, but of its political structure, that encourages extensive judicial activity. In the American separation of powers system, power is highly fragmented: between levels of government, between branches of government, and even within those branches. This has the effect of both stymieing legislative power to comprehensively regulate, and limiting the spheres in which legislatures and executives can check the Judiciary. These two effects create both the need and opportunity for expansive judicial activity. Consequently, the separation of powers system encourages use of the courts to resolve conflict.

This chapter uses spatial models for institutional comparisons of the effects of elements of the separation of powers and other systems of government. These models show why the litigiousness-generating effect of the separation of powers is systematic, and so illustrates why this institutional explanation of American litigiousness is superior to existing historical or legal explanations.

Testable implications arise from these models: divided government and internal legislative division should increase litigiousness. This chapter tests these predictions by examining state-level judicial and political activity between 1975 and 2000. The results show that divided government, bicameral partisan division and the size of majority control in each chamber are all highly significant in determining the level of general jurisdiction state civil

filings. This supports the conclusion that a relationship exists between political fragmentation and litigiousness.

Methodology: Positive Political Theory Assumptions

The three substantive chapters of this dissertation provide solutions to three puzzles central to judicial politics scholarship: the causes and effects of senatorial courtesy, judicial means of signaling case preferences, and the systemic causes of America's litigiousness. Together, this chapter also constitutes a distinctive approach to judicial politics scholarship, that explains and predicts judicial outcomes based on the effect of many actors' strategic behavior. Given that America's political system empowers multiple players to shape the authority of the Judiciary, such an approach is essential to understanding judicial behavior and outcomes.

The three chapters exploit a variety of PPT methodologies: game theory, spatial models, and signaling models. Using PPT models require certain assumptions. The first assumption is that actors behave rationally, that is, that they pursue the most efficient means of achieving their goals, whatever those goals are. Studies have shown that individual decision-making displays elements of irrationality, such as optimistic overconfidence or loss aversion (e.g. Kahneman: 3, 19). Although expecting rational behavior of any individual in a single instance may be questionable, rationality is the best available predictor of aggregate behavior.

The second assumption is that actors behave strategically, that is, they pursue their goals with an eye to the future, taking into consideration expected responses of other actors. Although a random selection of individuals may not be rational or strategic, most actors involved in judicial games – such as judges, members of Congress and advocacy groups – are sophisticated, well-informed and well-resourced. Consequently, it is reasonable to model

these actors as capable of looking multiple steps ahead in any process (Epstein and Knight). This does not mean that judicial players do not make mistakes or are not subject to neuroses that limit their rationality, but rather in aggregate, modeling these actors as capable of strategic analysis is the most likely to reflect the sort of considerations presidents, senators and other court actors make.

The third assumption strategic models require relates to mechanisms of decision-making and choice aggregation. Sometimes these mechanisms are specified in rules, such as majority rule or the rule of four. In other cases, mechanisms must be assumed to apply as if a rule existed, and at times these rules are clearly artificial – for example that actions occur simultaneously, or that information is entirely complete. Although some artificiality is unavoidable, as models require simplification, the damage of these contrivances can be mitigated by making the model's assumptions explicit, choosing a rule that most accurately reflects reality, and establishing how the results of the model would change under different assumptions (e.g. Baron and Ferejohn).

PPT models typically rest on theories of actor preferences, and consequently these models justify, but then assume, players' utility functions. However, beyond this, an assumption does not need to be made regarding the nature, substance or basis of actors' preferences. When senators are modeled, for example, values can be given to different outcomes: for instance, a successful policy is assigned a positive value and an unsuccessful policy given a negative value. However this does not assume that senators only value the substance of that policy, without regard to public opinion, or that senators only value their chances of reelection, and lack genuine policy goals. It is possible to develop models that account for these and other senatorial motivations.

When it comes to modeling judges, refraining from making assumptions about the makeup of judicial goals is particularly important. It may be acceptable, even though not universally supported, to assume that members of Congress are primarily driven by the desire for reelection, or will sacrifice one policy in order to promote another. In contrast, assuming that judges are self-interested policymakers with their own subjective preferences, or are concerned primarily with self-promotion, is far more controversial. It is equally arguable that judges are motivated by procedural properness and fairness, interested in policy outcomes only to the extent of enhancing the efficacy of the law in a democratic system. Most PPT models assume players are individual utility maximizers; it is common but not necessary to assume judges are policy-driven. How judicial utility is constituted does not need to be assumed. Judicial utility can consist of the value a judge receives from the law being properly followed or developed, regardless of the outcome; equally judicial utility can be gained from a case being correctly decided, in the judge's view. As such, unless otherwise specified, strategic models only need to assume that judges are sophisticated decision-makers, not that their decisions have a particular substance or motivation.

Different strategic modeling techniques are used in each chapter of this dissertation. Each model rests on the assumptions outlined above, makes as few further assumptions as possible, and makes any additional assumptions and their impact explicit.

POSITIVE POLITICAL THEORY AND THE JUDICIARY: AN APPROACH

Despite the minimalism of the assumptions PPT models require, they can offer considerable insight into the interplay between the law and politics. PPT models have been used to explain patterns of judicial behavior (e.g. Segal, Cameron and Cover); they have also been used to explain exceptions to those patterns, and to analyze whether those exceptions

represent turning points or mere anomalies (e.g. McNollgast). Additionally, PPT models can have predictive power; this provides policy-making benefits, allowing, for example, comparative assessments of the benefits of legal and other governmental responses (e.g. Sanchirico and Mahoney).

In fact, the advantages PPT offers for judicial analysis are yet to be fully exploited. Most PPT judicial analyses take one of three forms. First, strategic models have begun to include the Judiciary as a stage in 'structure of government' games, that predict the effect of court actions on the elected branches of government, and vice versa. This includes models of judicial interactions with agencies (e.g. Ferejohn and Shipan), Congress (e.g. Ferejohn and Weingast) and the President (e.g. Segal, Cameron and Cover). Second, strategic models have been used to study the courts in isolation from the other branches, examining the effect of internal judicial rules (e.g. Krol and Brenner). Third, and similar to the second, strategic models assess the effect of unwritten rules, or norms (e.g. Picker).

Instead of using PPT to only address either the Judiciary's relationship with the other branches, or its internal mechanisms, the approach begun in this dissertation uses PPT to illustrate the relevance of politics to every aspect of judicial functioning. This recognizes that judicial puzzles, and their solutions, are not confined to the above three parameters of PPT scholarship. Rather, some puzzles are a result of the interaction between interbranch exchanges and legal internal rules, and so require models that meld these two previously distinct types of PPT judicial models. Additionally, many phenomena are the result not of top-down legal rules, but of bottom-up effects, for example societal demands for legal solutions; consequently, analyses must account for both directions of causation. Finally, constraints on the elected branches, and interactions between or within them, shape judicial

conduct; as such, understanding many judicial issues requires modeling the elected branches' constraints, not just the judiciary's.

The driving force behind this dissertation's approach is the recognition that the relevance of the judiciary to the political system transcends its role in the legislative-production sequence. The Judiciary is an integral part of the political process, and is itself inherently shaped by the political system it exists within. The nature and operation of the elected branches shape the Judiciary, not only when they exercise the constitutional checks available to them, but also when they go about their basic legislative and executive functions; and judicial decisions, rules, conduct and inactions constantly contribute to the political environment. Thus a profound understanding of the Judiciary depends on a comprehensive account of the political system that constrains, empowers and defines it.

CHAPTER 2

THE SENATORIAL COURTESY GAME: EXPLAINING THE NORM OF INFORMAL VETOES IN 'ADVICE AND CONSENT' NOMINATIONS

ABSTRACT

Despite the contentiousness of advice and consent nominations, the Senate usually rejects a candidate a home senator objects to. Using game theory, this article explains the persistence of senatorial courtesy and maps its effects on which candidates succeed. The greater salience of a home nomination allows retaliation and reciprocity in a repeated game to elicit support for a veto, even under adverse conditions. Comparative statics indicate the range of the President's feasible nominees and show which players gain and lose from the practice. Most notably, the President can benefit from an exercise of senatorial courtesy.

INTRODUCTION

Presidential nominations subject to the advice and consent of the Senate, including federal judgeships, raise some of the most controversial issues representatives face. Nominations are often the subject of intense and bitter political battles, both within the Senate, and between the Senate and the Executive. Yet even when supporters of a nominee control a majority of votes, those majorities routinely allow one senator to thwart the nomination, under the informal norm of senatorial courtesy. Senatorial courtesy is an unwritten rule followed in both the United States Senate and the New Jersey Senate: when a nominee for a state or district position is opposed by the senator representing that constituency, the Senate will vote down the nomination, or will never address it, allowing it to lapse. Senators relinquishing their power to support a nominee in this way are not aberrations: senatorial courtesy has persisted since Washington's presidency.

Senatorial courtesy is controversial for many reasons,[3] but two institutional effects are particularly significant. Firstly, senatorial courtesy is a counter-majoritarian force within the Senate, made exceptional because it is not enforced by any written rule. This raises the question of why majorities of senators continue to follow a norm that seemingly disadvantages them.[4] The first half of this article answers this question: in a repeated game, each senator expects to be in the majority more often than to be the lone individual asserting their right of veto; but if senators care significantly more about nominations that directly affect their own state than other states, they will support the dissenting voice out of an expectation of future reciprocity.

The second institutional effect of senatorial courtesy is that it imposes an additional check on the President's nomination power: nominations are subject not just to the advice and consent of the Senate, but to the whim of one or two individuals who share the nominee's home state. This raises the question of whether senatorial courtesy systematically disadvantages the President; the second half of this article uses spatial models to assess the comparative statics of the nomination process, with and without senatorial courtesy exercised. It shows that overall the President is in fact advantaged by senatorial courtesy. In

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[3] Martin summarizes the common complaints: "First, the practice threatens the independence of appointees. Second, the practice discourages qualified people from seeking or accepting nominations. Third, the custom lessens public confidence in the legislature, appointees and... government generally. Finally, the practice is an unreasonable and unfair method of determining the nominees fitness for appointment" (2000: 7). Numerous efforts to prohibit and reform the norm in New Jersey, through revision of Senate rules, constitutional amendments, and legal challenges, have all failed. There have been three cases in which senatorial courtesy has been legally challenged, all of which have been unsuccessful: Kligerman v. Lynch 92 N. J. Super 373 (1966), Passaic County Bar Association v. Hughes 260 A.2d 261 (1969), and De Vesa v. Dorsey 634 A.2d 493 (1993).

certain circumstances, the President can control which senator has the power to exercise senatorial courtesy, and so can actually increase his[5] influence on confirmation, as compared to when the fate of the nomination is determined by the median senator.

Other spatial models of appointments[6] construct the appointment process as a product of the interaction between President and the median of the Senate.[7] This model's results indicate that purely presidential-median senator models are incomplete because they do not account for the role of the home state senator in the nomination process. Also, the results herein show that senatorial courtesy does not harm the interests of the President. This suggests that the interests of the President and any potential veto point as are not a zero-sum game, and any rigorous nomination model needs to account for this complexity. Before beginning the game, some clarification of key terms is necessary.

I. EXPLAINING SENATORIAL COURTESY

Senatorial courtesy seems to present a paradox because it involves senators voluntarily refraining from exercising their constitutional prerogative to advise on the nominations of judges, U.S. attorneys, U.S. marshals and other office holders. The seeming paradox can be explained by the persuasive effect of reciprocity and retaliation. Senators support vetoes by

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[4] Most exercises of senatorial courtesy are backroom negotiations that never result in formal action, and so are difficult to quantify. Consequently, most studies have relied on anecdotal evidence (e.g. Cole 1937; Harris 1952; Goldman, 1997). No prior formal conceptual framework of senatorial courtesy exists.

[5] For the sake of clarity, without a better alternative, senators are gendered female and the President is gendered male throughout this article.

[6] Such as Segal, Cameron and Cover, 1992: 102; Moraski and Shipan, 1999: 1071; Snyder and Weingast, 2000: 275.

[7] Some models also include a filibuster pivot. For simplicity, in this model, the filibuster pivot is excluded, as the effect of that mechanism is well understood – see Krehbiel, 1998.

home state senators because they expect to one day be in a like position, and they hope that their past support of senatorial courtesy will be reciprocated.

If a senator thinks it is likely that in the future she may have a strong preference over a nominee from her home state, she may be willing to forego acting on a weak preference over a nominee from a different state, in expectation that other senators will likewise forego asserting their rights over nominees from her state. Similarly, if there is an expectation that senators will pay each other this courtesy, a senator who declines to do so is likely to face retaliation when she attempts to assert senatorial courtesy herself.

This all depends on senators having a greater interest in the nominations affecting their own state than any other nominations; scholars of both Congress and the Judiciary agree this is generally the case (see Smith, 1999: 318; Chase, 1977: 7). If senators are pure re-election seekers, nominations affecting their own constituency are likely to be more salient to the community, and so more valuable to the senators (Segal, Cameron & Cover, 1992: 110). Even if senators have substantive policy preferences, policy outcomes that affect the senators' state are still likely to be more salient.

There are three ambiguities in the border of the norm of senatorial courtesy that require clarification. Firstly, senatorial courtesy can extend beyond the ability of senators to veto a nominee from their home state of whom they do not approve, to placing a positive expectation on the President to consult with the home state senators prior to making any nomination. The expectation may be even greater, requiring the President to choose between nominees the home state senators jointly recommend.

This additional requirement is just a logical extension. The consultation requirement "operates prospectively to determine the character of the nomination on the basis of the anticipated reaction of the confirming body... The President is only accommodating himself

beforehand to the same criterion that will be applied formally when his selection is submitted." (Cole 1934: 876) On this reasoning, if the President expects an exercise of senatorial courtesy, and if there is a cost for the President in failing to have a nominee accepted,[8] a rational President will consult with home state senators prior to making a nomination, or even choose from among their proposed nominees. As such, consultation is not a separate norm, but a natural corollary of the practice of senatorial courtesy.

Secondly, senatorial courtesy can apply to national and regional offices, including executive positions and Federal Courts of Appeals, with the Senator from the state from where the nominee harks considered the home state senator. Recent examples of senatorial courtesy's application to Courts of Appeals judges include President Clinton's nominations of Barbara Durham to a seat on the Ninth Circuit at the behest of Senator Slade Gorton of Washington,[9] and of H. Lee Sarokin to satisfy Senator Bill Bradley of New Jersey. The latter nominee was confirmed with the help of 14 Republicans, because Senator Bradley had supported Reagan nominees, despite Sarokin being seen as soft on crime and far outside the mainstream on law enforcement (Washington Times, 1994: pA23). Both Michigan senators have been using senatorial courtesy to block four nominees from that State to the Sixth Circuit for more than a year.[10] President Carter's effort to institute a merit selection for Federal judges failed, as even amongst Democrats the majority of senators continue to rely on senatorial courtesy.

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[8] See Moraski and Shipan 1999, 1072, for a good discussion as to why this is likely.

[9] Durham eventually had to withdraw for health reasons.

[10] Chair of the Senate Judiciary Committee, Senator Hatch, at the urging of White House counsel Alberto Gonzales, has stated he intends to proceed with hearings nevertheless. However Michigan's Republican House members have expressed concern that instead the President will choose nominees from other states to fill the slots (The Hill, 2003).

Many non-judicial officers are also subject to senatorial courtesy, such as heads of departments and offices, including the Justice Department,[11] centers such as the National Humanity Center[12] and the National Endowment for the Humanities,[13] as well as executive advisory positions, such as the General Advisory Committee of the Arms Control Disarmament Agency.[14] Thus there are two categories of senatorial courtesy, one that applies to state-based federal offices, the other to regional or national federal offices. The operation of the norm for nominations to the two types of offices differs somewhat, a difference accounted for in the game, but the essential concept is the same.

The third aspect of the operation of senatorial courtesy relates to the extent to senatorial courtesy is respected to opposition and majority party in senators. Early accounts of senatorial courtesy suggested the norm was only respected within party limits. More recent accounts indicate that senatorial courtesy is respected across party lines (e.g. Chase, 1977: 9-10). Because the operation of senatorial courtesy is often informal and not recorded, the details of its operation cannot be known with certainty, but examples are known, such as the

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[11] For example Walter Dellinger was blocked by Senators Helms and Faircloth as nominee to head the Justice Department's Office of Legal Counsel (Washington Post, 1993: p25A) .

[12] For example, Senator East of North Carolina is reported to have blocked President Reagan's nomination of William Bennett to the Presidency of the National Humanity Centre, but he later announced he was satisfied with the nomination (New York Times, 1981: p60).

[13] For example, Senator Pell of Rhode Island long delayed, but ultimately allowed, President Ford's reappointment of Dr Ronald Berman for Chairman of the National Endowment for the Humanities (Wall Street Journal, 1976: p26).

[14] For example, Senators Warner and Byrd successfully prevented President Reagan's nominee of Admiral Zumwalt to the Arms Control Advisory Board, even though the nomination had been unanimously approved both in committee and on the floor. The senators objected to not having been notified of the nomination, and demanded that the nomination be sent back to the Senate, to allow them to successfully invoke senatorial courtesy (Washington Post, 1982: pA14).

Michigan case above, where senatorial courtesy was respected across partisan division both within the Senate and between the White House and the home state senators.[15]

Binder, one of the few contemporary scholars to write in detail on senatorial courtesy, initially suggested that, unlike blue slips, senatorial courtesy applies only to members of the President's party (2003); but Binder's more recent work with Maltzman (forthcoming) found senatorial courtesy to be statistically significant across party lines, at least within the first few weeks of the nomination process. The reason for this inconsistency may be that both of these articles assume that the Senate rules governing the blue slip process determine the nature of the norm of senatorial courtesy; instead, senatorial courtesy predates any rule, and the rule appears to exist as a formalization of the norm. This article shows that the practice of senatorial courtesy creates self-enforcing equilibria; self-enforcing equilibria can be broader than the requirement of formal rules, including application across party lines.

In summary, senatorial courtesy can extend to minority party members, multi-state offices and include presidential consultation with home state senators. Before continuing, it is worth noting what senatorial courtesy is not: senatorial courtesy should not be confused with other related norms. It is not simply courtesy among senators. Nor is it the practice of not opposing the nomination of members of Congress to offices requiring confirmation. And nor is it the practice of holds, which are suspensions that can be put on any matter, including a nomination, by any Senator. Holds are sometimes used to delay a nomination so as to force or prevent some separate action, and lifted once that action is taken (e.g. Congressional Quarterly: 1988, 376). The current Republican leadership in the Senate has indicated its intention not to continue to respect holds, but has not made such a statement in

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[15] Most accounts necessarily underestimate the extent that senatorial courtesy is invoked, as exercises of

relation to senatorial courtesy.[16] What remains is to determine when upholding senatorial courtesy is a stable equilibrium.

II. THE SENATORIAL COURTESY GAME

The game models both negotiations among small groups of senators and the exercise of senatorial courtesy within the full Senate. The starting premise is of differentiated intensity among the players. The home state senator, who chooses whether to invoke senatorial courtesy or not, has the greatest intensity of preferences, and thus the most extreme negative and positive payoffs, depending on the outcome.[17] The intensity condition required for equilibria sustaining senatorial courtesy is initially assumed, but later the extent of this requirement is identified.

Uncertainty as to tenure is captured by the discount factor, δ, that renders later rounds less important than earlier rounds of play. [18] This discounting captures the extent that present benefits are valued more than the promise of later rewards. For example, a Senator who

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senatorial courtesy only become known when they draw conflict

[16] In fact the White House is reported to have attempted to postpone the battle over nominees by focusing on nominees likely to have their senators' support (see CNN, 2001). The Senate also changed the blue slip process to require both home state senators to object the nominee. This article shows that home state senators may still be successful in exercising senatorial courtesy, even with a more restrictive rule.

[17] This analysis assumes senators are responsive to the constituencies they represent, but electoral, strategic and substantive considerations can all be captured by the payoffs without upsetting the relative intensity of the home state senators' preferences.

[18] The possibility of any individual senator failing to gain re-election is relevant to their own payoffs, which is captured in the δ term. But the possibility of any other senator failing to gain re-election does not affect the outcome, except where the equilibrium depends on a similarity of views among senators, discussed below. Once an equilibrium exists, new senators will have the same expected values as previous senators: the Home State Senator in any round does not need to know the payoffs of any individual senator, only the distribution from which senatorial preferences are drawn. As such, every stage of the game is the same, regardless of changes in personnel.

fears failure to gain reelection would have a greater discount factor that a Senator with a safe seat. Additionally, the discount factor can account for different senators' expectations over when a vacancy in their state is likely to arise – consequently, senators from California may discount less than senators from New Hampshire, as they expect to be the home state senator sooner due to the sheer number of nominees from California.

The players are a Home State Senator (HSS)[19] and non-home state senators, labeled "voting senators" ($V_1, V_2 \ldots V_{99}$). At this stage, the President is not a player. An equal and independent probability of being HSS in any given round is initially assumed. That is, each state is treated equally by the President, without favor, and is equally likely to receive a nominee.[20] Although presidential favor is a strategic consideration reflected in the payoffs of the senators, the game is initially a game against nature. Once senatorial courtesy is exercised, HSS needs majority support to succeed in the exercise. If senatorial courtesy fails, the nominee is appointed. Communication is possible, and complete information, common knowledge and perfect anticipation are assumed.

The game begins when HSS has exercised senatorial courtesy. The voting senators play simultaneously. Each voting senator has the strategic set containing the strategies: support senatorial courtesy (SC) and oppose courtesy (OC), that is, voting against or in favor of the President's nominee respectively.

Payoffs are immediately realized at the end of each round. The game is only interesting in cases when the voting senators must choose between pursuing their own preferences and supporting senatorial courtesy. That is, when HSS opposes the candidate but it is not in the

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[19] There are always two home state senators, but to rigorously test the limits of senatorial courtesy, this game assumes only one home State Senator opposes the nominee.

[20] $pr(S_1 = HSS) = 1/n$, $pr(S_1 = V_i) = (n-1)/n$.

voting senators' short-term interests – represented in the stationary game – to support senatorial courtesy. The payoffs for the voting senators for cooperating and defecting are normalized at 0 and 1 respectively.

If a Senator genuinely supports the nominee, she has a strictly dominant strategy of defecting from senatorial courtesy in the stationary game.[21] Constructed in this way, the game creates a worst-case scenario for the norm of senatorial courtesy, to test its resilience and to avoid the trivial outcome where voting senators have a short-term interest in opposing the nominee.

Figure 2.1 shows the payoffs in the stationary game with three players, once HSS has chosen to exercise senatorial courtesy. The payoff for HSS in the stationary game is $\alpha > 1$, if she gains majority support, $\beta < 0$, if she fails. The key question is what do α and β need to be for senators to have an incentive to respect each other's exercises of senatorial courtesy, in anticipation of future support of their own exercises.

Figure 2.1: Payoff Matrix when HSS Exercises Senatorial Courtesy

		V2: SC	V2: OC
V1	SC	0, 0, α	0, 1, α
	OC	1, 0, α	1, 1, β

Where HSS has exercised senatorial courtesy; $\alpha > 1$; $\beta < 0$; payoffs are (V1, V2, HSS)

[21] The stationary game is not a prisoner's dilemma, because once the home state senator has chosen to exercise senatorial courtesy, mutual defection by the two voting senators is the best outcome for both players in the given round. This constitutes a more stringent test than a prisoner's dilemma would.

II.A RESULTS

The possibility that any voting senator will become HSS in a future round enables the current HSS to use punishment strategies to elicit co-operation from a voting senator in the current round. Here, two classic game theory punishment strategies are considered: a grim trigger strategy – cooperate if cooperate, defect forever otherwise – and uses tit-for-tat – cooperate if co-operate, defect for one round if defect, then cooperate again if cooperate.

In a group of three senators, an equilibrium outcome of supporting senatorial courtesy is induced by a grim trigger strategy if the discount factor $\delta \geq 3/(\alpha - \beta + 1)$, [22] and by tit-for-tat if $\delta \geq 3/(\alpha - \beta - 2)$.[23] So the requisite patience to sustain an equilibrium supporting senatorial courtesy decreases as α and β increase; greater intensity supports a broader range of equilibria.

When the game is expanded from 3 senators to 100, equilibria become harder to sustain. This is because the probability of being HSS drops from 1/3 to 1/50, drastically decreasing the expected value of being HSS in the future. Equilibria supporting senatorial courtesy

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[22] Derivation: under a grim trigger strategy, the voting senators will then have an incentive to cooperate if the value of cooperating in the first round plus the value of cooperating in future rounds, discounted perpetually, is greater than the value of defecting in the first round plus the value of defecting under perpetual punishments, discounted perpetually. That is:

$\alpha.\delta/(1-\delta).1/n \geq 1 + \delta/(1-\delta).(n-1)/n + \beta.\delta/(1-\delta).1/n$

[23] Derivation: under a tit-for-tat strategy, the voting senators will want to cooperate if the value of cooperating in the first round plus the value of cooperating in the second round, discounted for one round, is greater than the value of defecting in the first round, plus the value of cooperating in the second round while being punished, discounted for one round. That is:

$\alpha.\delta/n \geq 1 + \delta.(n-1)/n + \beta.\delta/n$

HSS will always want to cooperate, because it is always true that the value of perpetual cooperation is greater than the value of defecting in the first round and being punished for one round:

$\alpha.\delta/n \geq \delta.(n-1)/n + \beta.\delta/n$

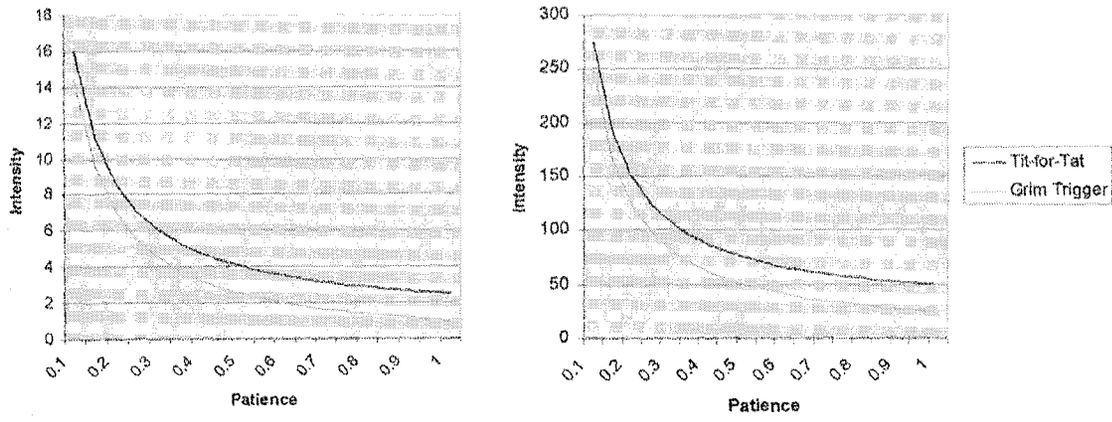
And the home state senator will always want to punish a defection as: $\delta.(n-1)/n \geq 0$

requires $\delta \geq 50/(\alpha - \beta + 1)$ for the grim trigger strategy, and $\delta \geq 50(\alpha - \beta - 49)$ if tit-for-tat is played.

An intensity factor can capture the relationship between α and β that can then be mapped against the requisite patience to sustain equilibria where senatorial courtesy is respected. The ranges of all possible equilibria for these two punishment strategies when $\alpha = -\beta$,[24] varying across all possible discount factors, are represented in Figure 2.2.

Figure 2.2: An Intensity-Patience Relationship, by Strategy

Figure 2.2A: A Three Player Negotiation **Figure 2.2B: The Full Senate**



The minimum intensity required to sustain an equilibrium exists when legislators are infinitely patient: $\delta = 1$. As can be seen in Figure 2.2A, in a small group negotiation, if legislators are infinitely patient, α and $-\beta$ only need to each be greater than or equal to one, that is each value needs only equal the difference in value for voting senators between defecting and cooperating. This positive result does not depend upon infinite patience: equilibria for both strategies require an intensity factor up to 4 whenever $\delta \geq \frac{1}{2}$. So for any reasonable level of discounting, senators need only value influencing their own state's next

[24] This could be constructed for any intensity factor and is not dependent on α equaling $-\beta$.

nomination as much as four other nominations for senatorial courtesy to be followed. This first result is a positive beginning for explaining the senatorial courtesy norm, as for small groups the intensity condition may require only equal value being given to one's own state.

As Figure 2.2B illustrates, when senators try to convince the full Senate to respect and exercises Senatorial courtesy, the conditions for success on become more stringent. Using the incumbency advantage as a proxy for likely senatorial discounting of the value of future nominations, when $\delta = .9$, the value to HSS of a successful exercise and the cost of failure each have to be almost one quarter of the sum total of the difference in utility for all the voting senators between defecting and cooperating when a grim trigger strategy is played, or almost half the sum total when tit-for-tat is played.

While it is possible to have equilibria that support the norm of senatorial courtesy in the full Senate in the worst-case scenario, where 99/100 senators support the nominee, the equilibria require stringent intensity conditions. Support for the norm under these circumstances may seem unlikely: if 99 senators support a nominee, will respect for HSS's view, or fear of HSS's retaliation, be great enough to overcome such popularity? So while equilibria can be found to support senatorial courtesy even under these adverse conditions, the limits of the norm have been identified: the senatorial courtesy fails when the intensity condition is not met.

In practice, such stringent conditions do not normally apply, as the above analysis is the worst-case scenario of 99 senators supporting the nominee. It is possible to capture a more realistic characterization of the conditions and exercises senatorial courtesy would have to meet in practice by using party as a proxy for ideological division over nominees. While support for senatorial courtesy is not strictly tied to party, party can be used to represent

ideological division. This allows for an approximation of how difficult it is for a home state senator in an ideological minority to successfully invoke senatorial courtesy.

Since World War II, party division in the Senate has ranged from a 50-50 to a 36-64 split; the average margin was 12.4. As can be seen in Table 2.1, on facing an average ideological divide, senators only need to care up to twice as much about their own state's nominations as other state's nominations. Even on the strongest partisan division the Senate has had in the modern era, a margin of 32, senators need to care less than three times as much about their own state's nominations. Even with intense discounting, the intensity requirement remains below four. While party is not a perfect proxy for ideological position, these figures illustrate that senatorial courtesy can be expected to be quite robust even under strong partisan division.

Table 2.1: Requisite Intensity Factor, Using Party as a Proxy for Nominee Support

	Average partisan division (12)		**Maximum margin (32)**	
	Grim trigger strategy[25]	Tit-for-tat[26]	Grim trigger strategy[27]	Tit-for-tat[28]
Minimum intensity factor ($\delta = 1$)	0.64	1.77	0.97	2.44
Intensity factor with incumbency advantage ($\delta = .9$)	0.76	1.90	1.04	2.49
Intensity factor if $\delta = ½$	1.77	2.91	2.44	3.91

[25] From footnote 21: $\delta \geq (25/11)/(\alpha - \beta + 1)$.

[26] From footnote 22: $\delta \geq 25/(11\alpha - 11\beta - 14)$

[27] $\delta \geq (25/9)/(\alpha - \beta + 1)$

[28] $\delta \geq 25/(9\alpha - 9\beta - 17)$

This is not to suggest that senatorial courtesy determines the fate of all nominees: some nominees are exceptionally salient to many senators, as the public battle and filibuster of Miguel Estrada recently illustrates.[29] Binder & Maltzman's (forthcoming) findings suggest senatorial courtesy is very effective in the weeks following a vacancy, but lengthy nominations come to be dominated by other dynamics of the selection process. This makes sense: nomination periods are likely to be lengthy when numerous senators have strong feelings about the nominee, and the senatorial courtesy intensity condition will not be met. Nevertheless, in the majority of nominations senatorial courtesy is determinative, and these low intensity factors explain why. If most senators are moderately patient and care more about having a veto over nominees from their own state than the outcome of between one and four other nominees not from their state, then there exist equilibria where senators respect the norm of senatorial courtesy.

It is unlikely that is a minimum winning coalition will form that will undermine these results. Although a strategy of cooperating only within a coalition of 51 senators strictly dominates the strategy of cooperating with all senators, literature on coalitions suggests that senators favor universalist coalitions (e.g. Weingast 1979). When senatorial courtesy is placed in the broader context of other senatorial interactions, a minimum winning coalition becomes hard to sustain because senatorial preferences may be heterogeneous over different issues. If there is a perfect correlation between senators' views on nominations and other issues, a minimum winning coalition would leave itself highly vulnerable to turnover changes. If correlation between issue preferences is low, senators expect to need to form

[29] See Binder (2003) for examples of failure of senatorial courtesy.

different coalitions on other topics, and so gain from universalism. Either way, a minimal winning coalition respecting senatorial courtesy would not be effective in the long run.

The difference in the equilibria achieved in the three player game and the full Senate game illustrates that as the size of the chamber increases, sustaining an equilibrium where senatorial courtesy is respected requires the absolute value of the payoffs to HSS increasing dramatically relative to the payoffs of the voting senators. Consequently, all other things being equal, senatorial courtesy and other like norms become harder to sustain in a large chamber than a small chamber. We could predict, then, that norms are likely to be more influential in the Senate than the House. Many accounts have made empirical claims that this is the case in the U.S. Congress (see e.g. Matthews 1959); this model shows that these differences are likely to be systematic.

Additionally, these results indicate an effect of the incumbency advantage: the higher senators' expectation of reelection, the lower senators' requisite intensity of preferences needs to be in order for senators to be willing to engage in logrolling behavior.

More broadly, these results have implications as to when legal regulation of norms is appropriate. There may be more need to regulate the effect of norms on small groups than on large groups, as smaller groups are more conducive to the development of collusive norms, such as anti-trust activity.

The conditions for equilibria supporting senatorial courtesy have been established. The next section examines the effect of the existence of senatorial courtesy on which candidates are nominated and confirmed, and in doing so reveals who is advantaged and who is disadvantaged by its operation.

III. THE COMPLICATION OF THE STRATEGIC PRESIDENT

The President has three means of influencing the Senate in advice and consent nominations. Firstly, he has gate-keeping power: he has the choice to nominate or not nominate a candidate, and if he chooses not to nominate anyone, no other actor can do so. As such, he is the agenda setter, and enjoys all the advantages that position entails (see Baron and Ferejohn, 1989).

Secondly, the President has the ability to choose a nominee who reflects his own ideological position, but this power is subject to the need to gain confirmation. The President will choose the candidate closest to his ideal point who will garner the support required for confirmation. In the absence of senatorial courtesy, the pivot point for successful confirmation is the median senator; but with senatorial courtesy, if the norm operates prospectively as discussed, every candidate not endorsed by HSS will be vetoed, and the President will ultimately be forced to nominate HSS's favored choice. If the intensity factor is satisfied, HSS can expect senatorial support vetoing any nominee up to the point H, her ideal point. So H replaces M as the relevant pivot once the intensity factor is satisfied.[30] So the President's nomination power is subject to the limits of the pivotal vote, whether that is the Senate median or HSS. This changes the equilibrium, i.e. the President's feasible choice of nominees who will receive confirmation.[31]

Thirdly, under some circumstances, the President has power to determine who is HSS in a given round. As discussed in section I, there are two types of nominations subject to

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[30] For more on the theory behind how a veto allows a pivotal vote to realize his or her ideal point, see Krehbiel (1998); for evidence that senatorial courtesy operates this way in practice, see e.g. Corwin (1939): 25; Goldman (1997).

[31] Note that this is necessarily a simplified model, and other players may be influential, such as committee chairs (see Binder & Maltzman, forthcoming), and the filibuster pivot (see Krehbiel, 1998) .

senatorial courtesy: those for multi-state federal offices and those for single state federal offices. For national and regional offices, the President can sometimes choose which state to draw a nominee from. In these cases, the President makes two choices in the one action: as well as choosing an actual candidate, who can represent any point on or beyond the ideological spectrum of senatorial preferences, he effectively chooses which two of the hundred senators are the home state senators in any round.

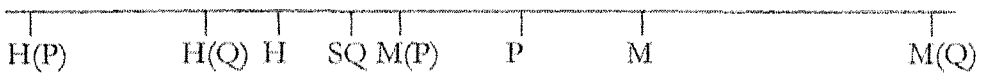
The following section represents how the equilibrium candidate varies with different distributions of preferences between the President, the median senator and the home state senator, and different status quos in the absence of a nominee.

III.A. Comparative Statics of a Full Senate and a President

To assess how a successful exercise of senatorial courtesy affects the type of candidate nominated by the President and confirmed by the Senate, this model is tailored for a multi-judge panel, although variations may be possible for other positions. The multi-judge forum is used because it provides a meaningful status quo: without a nomination, the ideological make-up of the bench will be that of the status quo in the absence of a new nominee. Again, full information and anticipation of other players' moves is assumed for all players.

The method used in this model follows that initiated by Weingast and Moran (1983), further developed for open-rule chambers by Ferejohn and Shipan (1990) and generalized by Krehbiel (1998). The home state senator, the median senator and the President are represented in a one-dimensional Euclidean policy space. Preferences are assumed to be monotonic within that space. Figure 2.3 illustrates one distribution of preferences, for an example position of the status quo.

Figure 2.3: Preferences of Players



H is the position of the home state senator, M is the position of the median senator, P is the position of the President. The status quo (SQ) is the average ideological position of the relevant bench in the absence of a new nominee. All players are indifferent between a nominee at the point SQ and no nomination being made.[32] All players are assumed to care only about the ideological position of the nominee and to be unconcerned with the practicalities of the operation of the judiciary, for example whether the judiciary is understaffed.[33]

M(Q) is the point to the right of M when the status quo is on the median senator's left (and vice versa) that the median senator regards as indifferent to the point SQ; likewise M(P) is the point of indifference for M on the opposing side of P. Similarly, H(Q) is the point of indifference to SQ for H, and H(P) is the point of indifference to P for H. Note that symmetry does not need to be assumed.

The significance of the indifference points is to determine the boundaries of the President's power of nomination. Player i prefers anything in the range i(Q) to SQ; for example in Figure 2.3, faced with a dichotomous choice, M will tolerate any point as far right as M(Q) in favor of SQ.

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[32] This model does not include expectations of changes in the administration, which could undermine senatorial indifference between the status quo and no nominee being confirmed.

The policy space represents a continuum relevant to the players, for example liberal-conservative. Three cases are considered, varying which player lies between the other two players on the ideological continuum, where H<M<P, H<P<M and P<H<M. The opposite ideological distributions are merely inversions; consequently, the three cases examined represent all possible permutations of positioning between the three players.

For each case, the equilibrium outcome is considered under both a system with and without an exercise of senatorial courtesy; this makes an assessment of the effect of senatorial courtesy possible. For each case, the continuous functions of the equilibria mapped on the range of possible status quo are summarized.

Case 1: H < M < P:

In the absence of senatorial courtesy, when the status quo is to the right of the President, the median senator prefers the President's nominee. But the President can also have his ideal nominee supported when the status quo is to the extreme left, as long as P < M(Q). However between M(P) and P, the President, anticipating the median senator's indifference function, will nominate a candidate at M(Q), such that median senator is always indifferent between the candidate and status quo. So without senatorial courtesy, the equilibrium outcome is M(Q)[34] if P > M(Q), and P otherwise. Inversely, but by the same logic, in the range M < Q < P, the equilibrium outcome is SQ. The President only has to alter his choice of candidate to satisfy the median senator when the status quo is close to the point M.

With senatorial courtesy, the results are identical when the SQ ≥ M; but when SQ < M the results are radically different. When the status quo lies between H and M, the home state

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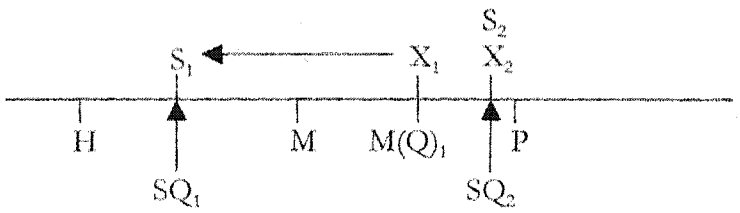
[33] Recent years have seen extended judicial vacancies, suggesting this is a reasonable assumption for courts other than the Supreme Court.

senator will veto any nominee to the right of SQ, as she prefers no nominee to a nominee in line with the President's preferences. So as SQ moves to the left of M, the equilibrium outcome moves away from the President, rather than toward his preferences, as it did in the absence of senatorial courtesy. To the left of H, as the distance between H and H(Q) increases, the equilibrium outcome once again approaches P, giving the President greater latitude in nomination.

Figure 2.4: The Effect of Two Contrasting Status Quo in Case 1



Two examples are illustrated in Figure 2.4. While at SQ_2, between M and P, the outcome is unchanged, at SQ_1, between H and M, the equilibrium outcome moves from $X_1 = M(Q)_1$ to $S_1 = SQ_1$. The results for the continuum of possible status quo case 1 distributions are summarized in Figure 2.5.

Figure 2.5 summarizes the results for the continuum of possible status quo case distributions. The x-axis represents one possible position for each player, and the y-axis indicates the equilibrium outcomes (a player's movement left or right of within the parameters of the case changes the angle of the equilibrium lines, but not their general nature). The figure maps the equilibrium outcome for each possible status quo. In the absence of senatorial courtesy, every point to the left of H results in an equilibrium outcome

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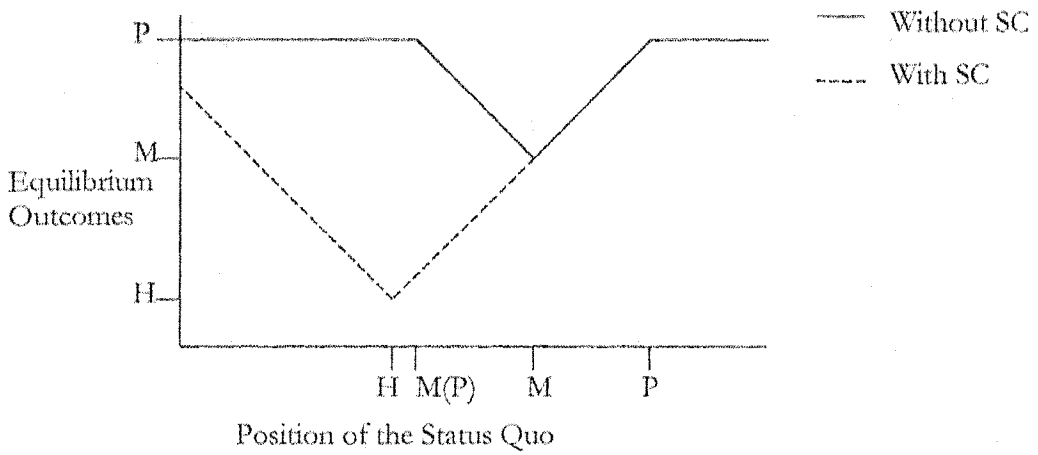
[34] Which will equal 2M – SQ if M's preferences are symmetrical.

of P's ideal preference, but with senatorial courtesy the equilibrium outcome ranges between P and H, approaching H as the status quo approaches H. If the President did not need the advice and consent of the Senate at all, all equilibrium outcomes in each case would be a horizontal line at point P.

Figure 2.5: Continuum of Equilibria for Case 1 for all Status Quo Positions

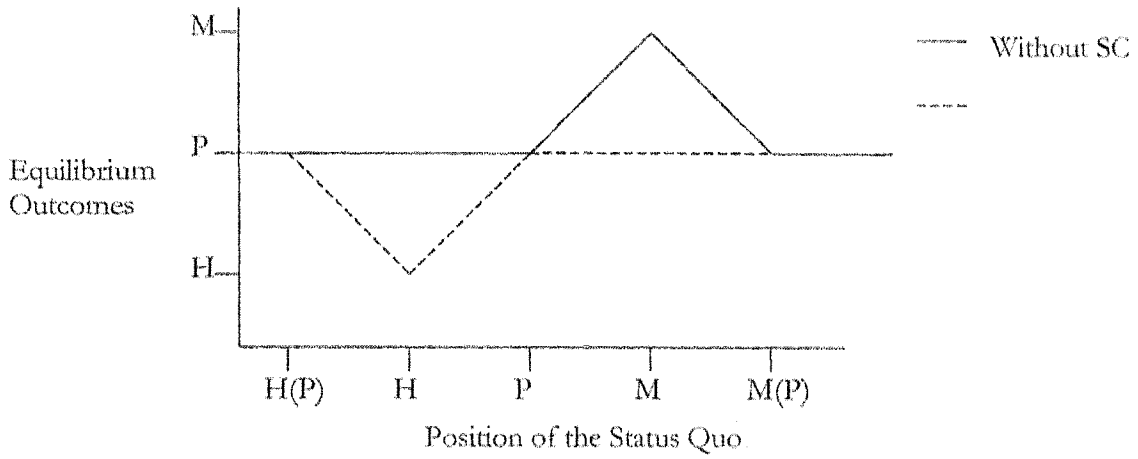


Case 2: H < P < M:

In this situation, without senatorial courtesy, at any point SQ < P the median senator prefers P to SQ, so P is the equilibrium. When P < SQ < M, these preferences are reversed and the equilibrium outcome is SQ. However when M < SQ, the median senator is indifferent between M(Q) and SQ, so the President will nominate M(Q) if P < M(Q) and P otherwise. With senatorial courtesy, the results are inverted. H(P) < SQ < P results in equilibria tracking H(Q);[35] but when SQ > P, the home state senator prefers P. The results for the two continua of equilibria of possible status quo are summarized in Figure 2.6.

[35] H(Q) = 2H – SQ under symmetry.

Figure 2.6: Continuum of Equilibria for Case 2 for all Status Quo Positions

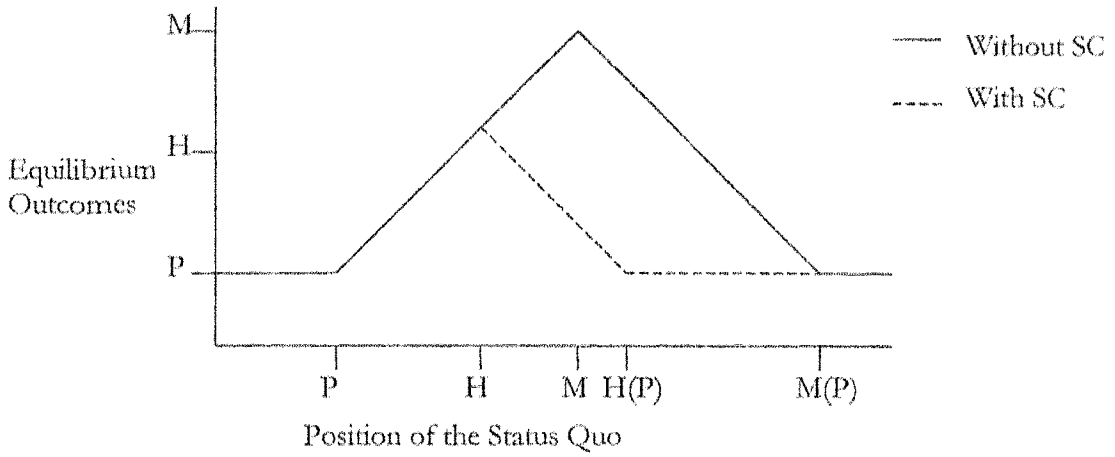


Case 3: P < H < M:

When SQ < H, the equilibria achieved are identical with and without senatorial courtesy. However when H < SQ < M, without senatorial courtesy, the median senator prefers the status quo to the President's nominee, and so the equilibria is SQ. However in the same region, the home state senator prefers any point to the left of H(Q). As such, the equilibrium outcome with senatorial courtesy is H(Q) if H(Q) < H(P), and P otherwise. When H(P) < SQ < M(P), the equilibrium outcome is M(Q) without senatorial courtesy, and P with senatorial courtesy. The results for the continua of equilibria are summarized in Figure 2.7.

The variation in the continua of equilibria found under the two conditions shows that senatorial courtesy can dramatically influence the type of candidate nominated by the President. Consequently, the refinement this model provides of the median voter model should render more accurate predictions of presidential candidates in advice and consent nominations.

Figure 2.7: Continuum of Equilibria for Case 3 for all Status Quo Positions



This analysis also indicates which players are advantaged and disadvantaged by the existence of the norm of senatorial courtesy. For distributions equivalent to case 1, the existence of senatorial courtesy harms the interests of the President. The current battle over judicial nominations is analogous to case one scenarios: a rightwing President faces a moderate median;[36] the President's choice of nominees is being blocked by a more liberal veto point, in this case a filibuster of 45 senators. As can be seen in Figure 2.5A, the range of equilibria under senatorial courtesy in this type of case is equal to or further away from the President's preferences than the range of equilibria without senatorial courtesy.

In case 2, the President's fortunes depend on the distribution of status quos and the relative space between the players. If the status quos were distributed symmetrically around the ideal point of the President, case 2 would overall be neutral in effect for the President: when the President is closer to the median senator, he prefers not to have senatorial

courtesy, but if he is closer to the home state senator he is in fact advantaged by the norm. But symmetry is an unreasonable assumption here. As such, the effect of senatorial courtesy in case 2 distributions is neutral on expectation but is variable in application.

In case 3, in contrast, the President is consistently advantaged by the existence of senatorial courtesy for any point between P and M(Q), and neutral beyond those points. All equilibrium candidates between H and M(P) are further from the median senator's preferences than in the case without senatorial courtesy. Returning to the example of the contemporary administration, as characterized above, to take advantage of the effect of senatorial courtesy when the President has a choice of nominees among more than one state, the current President has to choose nominees from States whose senators are more right-wing than the median senator. Assuming party accurately reflects ideology, the existence of senatorial courtesy means that the President can draw the equilibrium nominee closer to his ideal point by nominating a candidate from a dual-Republican state.

Overall, the median senator's preferences are less represented under a system of senatorial courtesy than without the norm. This is an expected result, and explains the need for threats of retaliation or promises of reciprocity modeled in the initial game. It is easy to conclude that on expectation of an equal probability of the three distributions, the President is overall neither advantaged nor disadvantaged by senatorial courtesy. This alone is contrary to the intuitive conclusion that an extra veto mechanism on the President's nominations would harm the President's interests. But in fact, the results are stronger than a conclusion

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[36] This was clearly true for the last Congress, as illustrated by the change of power caused by Jim Jeffords' switch; now the median will be either Jeffords or the most moderate of the 51 Republicans, depending on who the home state senator is.

of neutral effect: when it comes to filling multi-state federal offices, the President can actually be advantaged by the norm of senatorial courtesy.

If the President has the flexibility to nominate candidates who inspire preferences like those illustrated in cases 3, or a mixture of cases 2 and 3, he will achieve the confirmation of candidates closer to his preferences than he would in the absence is senatorial courtesy. To be advantaged by senatorial courtesy, the President only needs to choose candidates from states that are closer to his preferences than the median senator is.

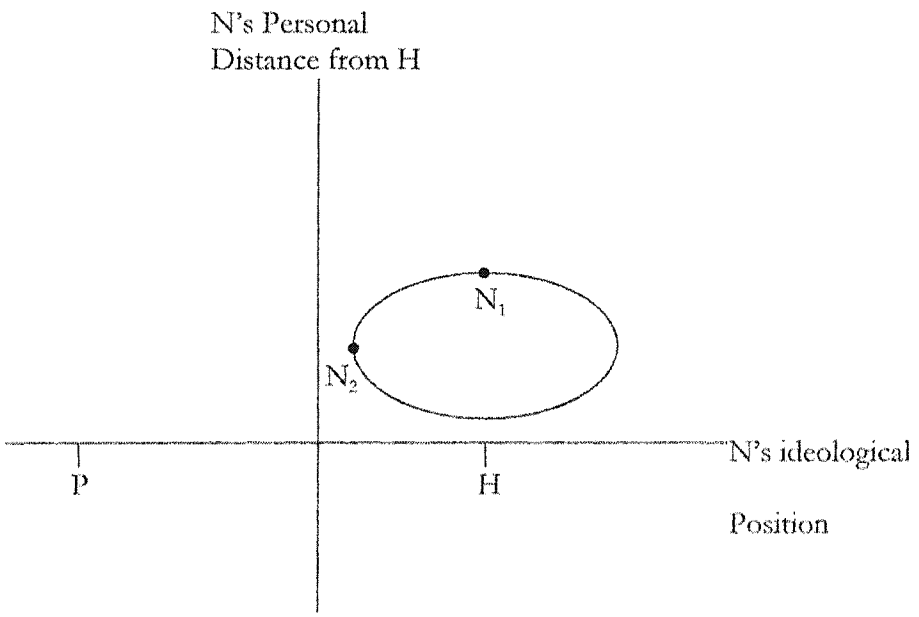
The President's strategic power in relation to circuit courts nominations is somewhat limited due to another norm that seats in any circuit are traditionally reserved for specific states. The power of this norm is uncertain: on occasion, both senators and presidents have overcome this constraint. In the case of the blocked Michigan nominees mentioned above, Senators Levin and Stabenow threatened to extend their blockade to all six vacancies for the Sixth Circuit, not just those typically reserved for Michigan. When North Carolina's Senator Helms continued to block all of President Clinton's African-American candidates to the Fourth Circuit, Clinton eventually nominated Roger Gregory from Virginia during recess. This breach of the reserved seat norm did not receive strong senatorial backlash; in fact, when the Democrats took over the Senate, President Bush was pressured to nominate Gregory permanently. These cases suggest that presidents may have some leeway in mixing up appointments among states within circuit courts, and so senatorial courtesy could render the President advantaged, not just neutral, for Court of appeals seats also.

If the President cannot overcome the expectation of circuit court vacancies being filled by nominees from particular states, then the President will be unable to take advantage of this strategic mechanism. Then for circuit courts, like district courts, the President will be neither advantaged nor disadvantaged; on expectation, the effect of senatorial courtesy is

neutral from the President's perspective. Additionally, for other multi-state seats, such as executive positions, the President may still be able to take advantage of the existence of senatorial courtesy by favoring case 3 nominees.

In fact, this analysis understates the President's ability to manipulate senatorial courtesy to his advantage. So far, this analysis has modeled a single continuum, salient to all players. As mentioned, exercises of senatorial courtesy can be entirely idiosyncratic; consequently, senators may invoke senatorial courtesy due to a personal dislike of a nominee. Senatorial courtesy's history stems from patronage, and senators may have an interest in it controlling nominations within their states, to reward their supporters and check their opponents. These idiosyncratic and personal concerns can be considered a second axis, with greater distance from the senator's ideal point representing the extent of the senator's personal animosity to the nominee. This is illustrated in Figure 2.8.

Figure 2.8: Senatorial Preferences in Two Dimensions



The oval in Figure 2.8 represents H's indifference range in two dimensions. Even if H can gain support for a nominee at her ideological ideal point (N_1), H still prefers any nominee within the oval to N_1, and is indifferent between N_1 and N_2.

In most cases, the President and the median senator are is likely to be indifferent along the y-axis, as this axis is personal to HSS. Consequently, the President can use the y-axis as leverage against the senator, to pull the equilibrium outcome toward his own ideal point. As such, the President has an additional strategic advantage when senatorial courtesy is driving the nomination process than without it. This analysis applies for any status quo, and consequently buttresses the results above.

This analysis has revealed mechanisms the President can exploit senatorial courtesy to systematically bias the process in his favor. Consequently, not only does the repeated game of senatorial courtesy overcome the disadvantage for voting senators in supporting the norm, converting their opposition to support, overall the President is also advantaged.

CONCLUSION

Given the institutional importance and the political contentiousness of advice and consent nominations, any factor that has a striking effect on the outcome of such nominations deserves close scrutiny. Senatorial courtesy has been shown in this article to potentially have such a dramatic effect, yet it is an under-analyzed mechanism of influence. Until now, a thorough explanation of why senatorial courtesy is supported systematic exploration of the conditions under which it operates, and a means of predicting its effects has been lacking.

The expectation of future reciprocity or retaliation in a repeated game explains why senatorial courtesy persists. As long as there is an adequate difference in the intensity of preferences between when a senator is the home state senator compared to when she is not, equilibria supporting the norm can be sustained even under quite adverse conditions. Those

challenging conditions include all senators possessing a dominant strategy of defecting from the norm, a low probability of being home state senator in any round, and coalitions of senators with shared preferences who could benefit from partial defection from senatorial courtesy.

None of these factors prevent the persistence of the norm, however the level of opposition to a nominee, the size of the chamber, the probability of being home state senator and the consistency of ideology of any coalition can vary the point of equilibria. Consequently, these factors can influence the formation and persistence of senatorial courtesy and other like norms. So the results indicate what factors can be manipulated by constitutional crafters or institutional reformers wishing to encourage or limit the formation of similar informal rules.

Senatorial courtesy alters the range of feasible nominees the President will nominate and the Senate will confirm. The consistent direction of this change is away from the preferences of the median senator. This result was to be expected, and the mechanism of reciprocity and retaliation in the game accounts for how this bias does not undermine senatorial support for the norm. The more surprising result is that even though it provides another veto point on presidential nominations, overall the President is not disadvantaged by senatorial courtesy, and is advantaged if he chooses nominees from states whose home state senators are closer to his preferences than the median senator is.

To be complete, spatial models of the nomination process need to factor in the possibility of an exercise of senatorial courtesy, and so should include the home state senator as a potential veto point. Failure to do so cannot be defended by equating or replacing the median senator with the home state senator. By definition, the position of the median senator lies in a moderate position within the Senate. In contrast, the home state senator can

lie anywhere on the spectrum of senatorial ideology, including extreme outliers. Thus a complete model of the nomination process should include the home state senator as a veto point. While senatorial courtesy can be excluded from models of the nomination process for the sake of parsimony, its operation must be recognized as an important element of the nomination process.

Throughout this game, all players have been assumed to have full information and perfectly anticipate the future course of play. Consequently, because senatorial courtesy has been shown to be robust, it follows that the President will anticipate such support for any exercise of senatorial courtesy, and so will nominate a candidate within the feasible range of nominees dictated by the home state senators' preferences. On this logic, senatorial courtesy should never be exercised in the first place. This may explain why open conflict over the exercise of senatorial courtesy is seen only rarely, as compared to the number of advice and consent nominations made, and compared to other forms of controversy in relation to those nominations. Of course the fact that some conflicts do arise means that mistakes are made, players lack full information or players fail to anticipate in every case. The assumptions made herein, and consequently the results found, are unlikely to exactly mirror reality; no doubt complications could be added to improve the accuracy of this representation, however this article provides at least the beginnings of a systematic model of the important influence of the norm of senatorial courtesy on highly salient political nominations.

CHAPTER 3

THE JUDICIAL SIGNALING GAME: HOW JUDGES SHAPE THEIR DOCKETS

ABSTRACT

In contrast to the traditional wisdom, judges are not passive receivers of their agendas. Instead, many judges attempt to shape their dockets by encouraging potential litigants to bring particular cases. This encouragement takes the form of judges signaling their own positions on an issue as well as their colleagues' expected support. This process is modeled as a signaling game, with both separating and pooling equilibria resulting. The existence of pooling equilibria is of particular interest, as it indicates some judges misrepresent the chances of success of a case in order to induce desired legislation.

INTRODUCTION

Unlike the elected branches of government, the Judiciary is institutionally constrained from initiating policy. This does not mean that judges have no control over their own dockets. While judges depend on litigants to initiate litigation, judges encourage potential litigants to bring particular cases. Judges have private information of the expected outcomes of future cases as they know their own position and have inside information on their colleagues' positions; consequently judges can credibly signal the prospects of success of a given case. Signaling includes a judge volunteering comments in a speech that an as yet to be appealed decision of lower court is constitutionally unsound, or a majority opinion including obiter dicta suggesting that the author would provide the swing vote to the dissenters under different circumstances. This information constitutes signals which may convince a litigant to bring a case, and so allow the judge to shape the law on that topic.

The notion that judges signal the outcome of future cases in order to actively shape their dockets stands in sharp contrast to the traditional view of judges as passive disinterested

recipients of cases brought before them by independent parties (e.g. Provine, 1980: 7). Once cases are brought, certiorari and other powers not to hear provide some discretion,[37] but the traditional view holds that judges have no other mechanism to seek a case on an issue on which they wish to shape the law.[38] Most contemporary court scholars recognize that judges have an incentive to shape their agendas, but fail to seriously consider how judges use signals to induce the cases they seek.

This paper provides a systematic account of how judges shape which cases are brought before them, by transferring their private information regarding the cases' potential for victory. It uses game theory and economic equilibrium concepts to establish what equilibrium outcomes occur under judicial signaling. As well as showing how and when signaling occurs, this analysis reveals an important result: that under certain conditions, judges have an incentive to misrepresent the chances of success of some cases.

The degree of directness of judicial signals is constrained by mores of judicial circumspection, which limit judicial communication to the public. This particularly applies to communication regarding the prospects of potential litigation, because the Rule of Law requires that cases not be prejudged. Judicial indications of support for a position, therefore, can only occur in a limited number of forums and generally must be implicit or abstract, and thus without guarantee. How, then, can litigants distinguish between genuine signals and cheap talk – that is, potentially false signals? In this paper, I show that two primary factors determine the reliability of judicial signals: first, the level of alignment between judicial and litigant interests, and second, the cost of signaling.

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[37] More than half of State courts of last resort have certiorari-like exclusion powers — see Baum (1977).

[38] This debate is normatively significant, as an incapacity to shape their agenda limits judges' ability to push their own political interests, and so justifies the lack of judicial accountability in a democratic system.

Signaling occurs in two classes of cases. In the first, judges want to hear cases only if the position they support is ultimately successful. Then, the interests of the judge and the litigant arguing that position are fully aligned. Consequently, there is a full transfer of information, as any judicial signal is reliable. In the second class of cases, judges also want to hear cases even if they cannot gain majority support for their position. This is because judges sometimes seek vehicles to shape the law, either through their own persuasiveness, or by giving prominence to the issue in the hope of raising public awareness and pressuring other decision-makers. While the class of the public who support the same position may benefit from such action, the individual litigants' benefit from this publicity is likely to be outweighed by the enormous cost of an unsuccessful litigation. Consequently, in the second class of cases, there is only partial alignment of interest between judges and litigants who support the same position. In this second class of cases, judicial representations are sometimes reliable and other times not.

Judges have to decide whether to signal, and whether to signal honestly or falsely, and how overtly to signal. The results of the game show the optimal strategy for these three decisions, for two types of judge: those facing winning and those facing losing cases. With low credible signaling costs, pooling equilibria occur, in which both types of judge signal a winning case and litigants cannot distinguish between them. With credibility only satisfied by greater signaling costs, separating equilibria exist in which each type of judge signals truthfully and the litigant can differentiate between the two types.

To explore what signaling consists of in the judicial context, section 1 presents some instances of signaling. Section 2 introduces more formal signaling concepts and spells out the assumptions in the signaling model. Section 2 also uses the existing agenda setting literature to assess the empirical merit of the game's signaling assumptions. Section 3

presents the game and its implications. The game models judicial choice over a continuum of endogenously determined signaling options.

1. JUDICIAL SIGNALING THEORIES AND EXAMPLES

This paper proposes that judicial expressions constitute signals of what litigants can expect from potential future cases. This section highlights some examples of signaling from the Supreme Court's 2002-2003 year. Signaling could be illustrated by drawing from cases from other courts and other years;[39] the number of cases discussed here within the limits of one year and one court suggest that the practice is significant.

Dissents are, among other things, an obvious form of signaling. Alternative theories are unable to fully explain the phenomenon of the dissent. A published dissent is not an attempt to convince the majority of their error — this could explain circulated dissents, but by the time of publication, such an effort has been lost. Alternatively, dissents have been explained as unsuccessful threats: judges circulate dissents in an attempt to coerce the majority away from their position (Epstein and Knight, 1998). Under this theory, publication is necessary, or else future threats would not be credible. But the damage which underlies the threat is presumably harm to judicial legitimacy, which applies equally to the dissenter as to members of the majority, thus rendering the threat non-credible. And since every judge has an interest in the legitimacy of the Judiciary, dissents are difficult to explain as criticism for their own sake. Yet judges occasionally harshly emphasize their displeasure when it is clearly too late to influence the decision, for example by reading their dissents aloud from the bench, or extravagantly damning their colleagues. For example, Justice Scalia recently awarded "the

[39] Though signaling will be more influential when practiced by higher courts than courts of first instance, as signaling and primarily delineates the boundaries of law and policy questions.

Prize for the Court's Most Feeble Effort to fabricate" evidence of the majority's argument in one case (Atkins v. Virginia (2002): 347).

All of these elements are explicable if dissents are interpreted not as off-equilibrium gamesmanship or poor-losership, but instead as strategic attempts to establish a feasible alternative future majority. The purpose of providing this alternative is to suggest that future decisions need not necessarily arrive at the same conclusion. This theory explains the existence of highly critical attacks on majority opinions, such as the emphatic example above, despite the value placed on judicial circumspection. For if dissents are signals, these signaling efforts are bolstered by assertions of the weakness of the precedent being forged. Establishing the weakness of the majority's case supports any claim of a possible future contrary outcome, and thus encourages litigants to bring the cases individual judges seek.

Other forms of judicial expressions can also be signals to litigants of anticipated outcomes, including majority opinions. One example is the June 2003 case of Federal Election Commission v. Beaumont, in which a corporate contributor unsuccessfully challenged a longstanding ban on corporate electoral contributions. This decision constituted a rich opportunity for justices to signal the type of argument that would be most persuasive in the pending September 2003 challenge to McCain-Feingold campaign Act. As one commentator noted, McCain-Feingold law supporters "were quick to derive encouragement" from Beaumont, as Justice Souter's majority opinion repeatedly emphasized the need for "deference to legislative choice" in campaign finance (New York Times, 2003: p20).

Concurrences can also constitute signals. In the same case, Justice Kennedy stated in concurrence that corporate contributions can be regulated more closely than corporate expenditures. But he stated: "were we presented with a case in which the distinction between

contributions and expenditures under the whole scheme of campaign finance regulation were under review, I might join Justice Thomas' [dissenting] opinion" (Beaumont, 2003: 1-2). This is a common judicial strategy.[40] It is a means of signaling potential future grounds for differentiation, with the purpose of encouraging current losers to continue to pursue this field of litigation.

Judicial signaling is not limited to published opinions. Other forms of judicial expression, such as bench opinions, speeches, articles or books can perform a similar function. In March 2002, the Federal Appeals Court in the Ninth Circuit ruled that requiring students to recite the Pledge of Allegiance was unconstitutional as long as it contained the phrase "one nation under God" (Newdow v. U.S. Congress). The following January, while the case was on hold pending further review by the same court, Justice Scalia gave a speech in which he discussed the case as an example of a misinterpretation of the Constitution by lower courts. Justice Scalia went on to provide arguments to support his position (CNN.com, 2003). Six months after Scalia's speech, an appeal was filed to the Supreme Court in the case.

The main implication of this discussion is that judges use signals to encourage particular cases. They do this by indicating both their own receptivity to hear a particular case and the likely future prospects of any case. Having established that judges use signals, the next important issue is whether these signals are reliable, or whether judges could falsely signal.

It may seem antithetical to all accepted notions of the judicial role that judges would mislead the public in order to promote their own agendas. Yet even unusually stark judicial signals have been followed by incongruous results. The Supreme Court's 2002-2003 series of

[40] For another recent example, see State Farm v. Campbell 123 S. Ct. 1513 (2003) in which Justice Kennedy, writing for the Court, repeatedly emphasized that in this case, which introduced a new limit on punitive damages, there was only economic harm and not physical harm, implying that a different result may arise in physical damages cases (at 1524-1525).

death penalty cases provides a notable example in which cases brought following unusually direct encouragement were nevertheless unsuccessful.

In Atkins v. Virginia (2002) the Supreme Court held in a 5:4 opinion written by Justice Stevens that executing mentally retarded criminals was cruel and unusual punishment prohibited by the Eighth Amendment. Justice Stevens stated that a comparison to execution of juvenile offenders was telling (footnote 18 at 315). Two months later, when the Supreme Court rejected an application for a stay of execution by a juvenile defendant, Justice Stevens issued what was considered an unusually forthright public statement (see e.g. New York Times, 2002). Referring to Atkins, Justice Stevens wrote that "since that opinion was written, the issue has been the subject of further debate... Given the apparent consensus that exists... I think it would be appropriate for the court to revisit the issue at the earliest opportunity" (Paterson v. Texas, 2002). Justice Ginsburg, with whom Justice Breyer joined, made a similar statement and joined Justice Stevens. Two months later, the court denied a writ of habeas corpus for a juvenile offender facing the death penalty (In Re Stanford, 2002). This failure was unsurprising, given that Stanford arose from original jurisdiction, under which cases seldom succeed. Despite the failure of the second attempt, this case was encouraging to death penalty opponents because Justice Souter also joined Justice Stevens' dissent, which explicitly called for an end to that "shameful practice". Yet two months later, the court rejected without comment an appeal for review from a juvenile offender (Hain v. Mullin, 2003).

There are at least two possible alternative explanations for the outcome of this series of cases other than that the judges were falsely signaling: the judges may simply have been mistaken as to their chances of success, or gambling that the public nature of their statements may have put pressure on a judge to switch sides. It is impossible to prove

judicial intent in any given case, but the rest of this paper argues firstly, that judges generally know their colleagues likely positions, secondly, that judges have an incentive to lie in certain circumstances, and thirdly, that the variation in the extent and cost of judicial signals can be systematically explained.

II. AGENDA-SETTING AND SIGNALING

There is a growing literature on the agenda-setting power of the Supreme Court. Examination of the Supreme Court's discretionary power over the grant of certiorari has led to recognition that the Court has the power to shape its own agenda, and in doing so, to influence the political focus of the nation. This literature is highly valuable, illustrating the strategic processes Supreme Court judges undertake in making decisions as to which cases to decide, but there is a dearth of analysis of judicial signaling actions.

One exception is Peter Linzer's analysis of certiorari (1979). Linzer assessed what can be inferred from justices 'going public,' as well as from judicial silence, and a number of other potential signals (1979: 1304). The other notable exception to the literature's lack of contemplation of the possibility of judicial signaling is testimony from judges that Perry collected, suggesting that judges send out signals to "invite cases." One Justice states that if a judge wants to hear a case in a certain area, "[h]e says something [in an opinion] that might indicate that the court would be willing to hear a case which brought up certain issues. We say this is something that we are not deciding here, but that it is something that the Court might want to resolve... I think generally that people are sometimes aware of what a justice might be interested in" (Perry, 1994: 213). Another judge concurs, suggesting that the notion that the Supreme Court is a reactive institution which has to wait for cases to come to it "may exist more in theory than in practice" (Perry, 1994: 212).

Despite this direct evidence, even the literature which explicitly contemplates strategic judicial behavior seldom considers judicial signaling. Consequently, this strategic literature struggles to provide an explanation as to why judges ever vote to grant certiorari for a case when the side they support is expected to lose. While some authors simply assume this never occurs (e.g. Epstein, Segal and Victor, 2002: 404), a majority of judges studied by Boucher and Segal sometimes grant certiorari to cases they then vote to affirm (2002: 832). This result is only irregular if it is assumed that judges' strategic analysis is limited to the short term. While many authors have recognized that judges act strategically, their focus has largely been on short-term strategy: how judges ensure their favored outcome in any given case. For most studies, an assumption of judicial focus being short-term is implicit (e.g. Baum, 1977: 16), for others it is explicit (e.g. Epstein and Knight, 1998: 18).

There is no reason to assume that judges have such a myopic focus, particularly for judges with lifetime tenure. Judges may seek to have the capacity to set the law of the land (or state or region), and be willing to sacrifice their interest in a given case to find a vehicle to direct the development of the law. While Boucher and Segal begin their article: "it is now common... to view Supreme Court justices as policy-minded decision makers," they, and other scholars who have studied strategic judicial action, nevertheless have failed to consider the possibility that judges may look beyond the immediate facts of any given case to long-term strategic goals. This game models one such possible strategy.

While the agenda-setting literature is not on point, the empirical studies that literature contains are useful for assessing the reliability of the assumptions required to be made in a judicial signaling game. Section 2.2 is by no means a comprehensive literature review, but rather the section draws out elements relevant to this topic and useful in devising a model of

judicial signaling. Before analyzing the agenda-setting literature, it is worthwhile introducing the essential concepts behind signaling models.

II.A Signaling Analysis

Economics has been used in analyses of a range of legal issues; an entire 'law and economics' literature has developed (see e.g. Newman). However this literature has largely limited itself to applying full information market theory.[41] There is a powerful realm of economic analysis devoted to predicting behavior under conditions of incomplete information, or uncertainty.

The question of how judges can induce parties to bring particular litigation judges seek is one of incomplete information. Judges are privy to 'inside information' not available to litigants, both as to their own and their colleagues' likely positions on an issue. While interested spheres of the public analyze patterns of judicial behavior to predict judicial outcomes, such conclusions are inferential and unreliable, compared with judges' own expectations of how their colleagues will vote. As Caldera, Wright and Zorn succinctly put it: "judges deal with the same issues and a small number of individuals year after year, so knowledge about preferences is both easier to obtain and more likely to be accurate." (1999: 551)

Under conditions of incomplete information, there can be a market advantage for some informed parties to disseminate information to uninformed parties. That information is only valuable to the uninformed parties if the information is reliable, and so effective

[41] There are notable exceptions, such as analysis of divergences of information in parties' search for, and presentation of, evidence for trial – see Daughety and Reinganum (2000); and analysis of information available to parties but not available to, or verifiable by, a court – see Baird, Gertner & Picker (1994). Typically, even such studies which do consider uncertainty, however, model the asymmetry of information between parties, or else when they consider judges, the judges are the less informed, rather than the more informed, player.

dissemination often requires authentication.[42] This dissemination and authentication process is best modeled as a signaling game.

In the judicial signaling game, judges are like sellers, and litigants are like buyers. Litigants have to decide whether to expend the resources on the good, litigation, in order to gain the utility of a winning case. A judge who wishes to hear a particular case is selling the prospect of success. Of the judges who wish to hear a case, any judge may be one of two types: those with a high-quality good, i.e. a winning coalition, and those with a low quality good, i.e. no support or only minority support. There are also two classes of cases: cases where a judge only wants to hear the case is the side he or she supports will win, and those the judge may wish to hear even if the side they support will lose. The second category could apply when the judge seeks a vehicle to express views or agitate for change. Any judge seeking to hear a case even if the side they support will lose has a motivation to claim the goods are high-quality even if they are not. The suggestion that judges have an incentive to lie is a highly contentious statement,[43] which is ultimately be proven in the model; but for the meantime, let us assume it is possible.

If judges can be long-term strategists, as argued above, they may sometimes be willing to sacrifice the outcome of a given case in favor of shaping the future direction of the law, for example by having a vehicle in which to write a strong dissent. Essentially, the two types of cases reflect two different orderings of judicial preferences. In the first class of cases, judicial preferences are:

1. Hear the case in which the supported side wins
2. Do not hear the case
3. Hear the case in which the supported side loses

[42] Information can be made credible through costly signaling, reputation costs, competing groups making the same message, the other party independently checking, and threats of verification.

[43] One of the few articles to consider the possibility of judicial guile is Ulmer (1978: 903).

The utility of judges supporting position A is confluent with the utility of litigants arguing position A. As such, each judge wants to reveal as much of their private information as they can within the limits of judicial circumspection, but does not have an incentive to send false signals to either type of potential litigant. Signaling still takes place and leads automatically to full revelation.[44]

In contrast, in the second class of cases, judicial preferences reverse the second and third ordering. While the utility of judges supporting position A is correlated with the interests of litigants arguing position A, there is a divergence of interests between these two players when position A is a losing one. This is essentially because, unlike the litigant, the judge has two aims: to see the position he or she favors supported by a majority, and to find appropriate vehicles for statements he or she wishes to make. The judge may be willing to promote the second aim at the expense of the first. The litigant, in contrast, is only concerned with the first. The difference in preferences explains the full alignment of interests between the judge and the litigant supporting a particular side in the first case, and only a partial alignment of interest in the second class of case.

In order to encourage litigation of cases they wish to hear, judges can send signals to potential litigants indicating they have a winning coalition. Because litigation is the sort of good that consumers cannot determine the value (i.e. the outcome) of prior to expending the costs of the litigation process, signaling is a particularly apt form of inducement to litigate (see Nelson, 1974: 752). Both types of judges can signal a winning coalition, but the costs of providing such a signal differs for judges with a coalition and those without.

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[44] Full alignment of interests has been modeled by Gilligan and Krehbiel (1987); the unrestricted amendment model would be equivalent to a full alignment of interests between judges of litigants. The uninformed party gets their ideal preference. See also Potters and Van Winden (1992).

High quality sellers generally have a lower marginal cost in signaling than do low quality sellers. If sellers and buyers repeatedly interact,[45] high-quality sellers develop a reputation of high quality, and so the marginal cost of signaling activity is lower (Hirshleifer & Riley, 1979: 1406).

The negative correlation between quality and cost means that high-quality sellers can afford to send signals which low-quality sellers cannot afford. If litigants only believe that a judge has a winning coalition if they observe very costly signals, judges with a winning coalition may be able to use such signals to distinguish themselves from their low-quality mimics. The conditions under which the outcome may occur are explored in the game.

II.B The Agenda-Setting Literature and the Judicial Signaling Game Assumptions

Applying signaling analysis to judicial agenda setting requires making a number of assumptions. Firstly, judges act strategically; secondly, judges draw utility from the outcome of cases; thirdly, judges have knowledge of the likely outcome of future cases;[46] and fourthly, litigants consider signals justices send when deciding whether to litigate. Although the agenda setting literature seldom addresses judicial signaling, it does encompass a different aspect of strategic judicial behavior, and so is helpful assessing the reasonableness of these four signaling assumptions.

Judges acts strategically when they make forward-looking decisions which "maximize their payoffs given their beliefs about the outcomes of subsequent decision nodes" (Caldera,

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[45] With repeated dealings comes value in reputation, but signaling can be effective even in non-repetitive markets -- see Spence (1973: 355).

[46] In this game, judges are modeled as having perfect knowledge of their colleagues' future behavior, but uncertainty could be added without substantially changing the results — see Austen-Smith and Wright (1992). Thus an assumption of perfect knowledge does not need to be defended, only an assumption of some private knowledge of other judges' probable behavior.

Wright and Zorn, 1999: 554). To do so requires anticipating the expected actions of other players, and devising responses in accordance with those expectations. This may involve, for example, taking an action contrary to the judge's immediate preferences, to achieve a long-term goal or to prevent the judge's least preferred policy outcome occurring (see e.g. Epstein, Segal and Victor, 2002: 404; Epstein and Knight, 1998: 13).

There is disagreement in the literature over the extent of strategic judicial behavior,[47] yet numerous studies have found substantial theoretical and empirical evidence of some level of strategic behavior by judges in agenda setting (see for example Schubert, 1962, and Epstein, Segal and Victor, 2002, respectively). This strategic behavior can take a number of different forms, such as bargaining or threats to publish dissents (Epstein and Knight, 1998: 58). Additionally, studies have found strategic judicial behavior in non-agenda setting situations (see e.g. Eskridge, 1991). So there is considerable evidence to support the first assumption of strategic judicial action.

Judges having an interest in, and gaining value from, the outcome of cases is fundamental to the logic of strategic agenda setting. Judges sometimes feel strongly about the outcome of issues before them, as is apparent from judicial interviews, some judicial opinions, speeches and other sources.[48] Judges also sometimes care strongly about which cases come before them, as is clear from dissents from cert.[49] In his extensive interviews

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[47] See e.g. Boucher and Segal, who argue the extent of strategic behavior varies by individual justice. (1995: 836). Also compare Caldera, Wright and Zorn who argue that judicial agenda setting is particularly "fertile soil for strategic manipulation" (1999: 550) with Perry (1994), who argues that judges deciding every case strategically would be institutionally overwhelming to the Judiciary, and so outcome-focused behavior is the exception rather than the rule.

[48] For example in the recent Supreme Court case Lawrence v. Texas (2003), Justice Scalia read his dissent aloud from the bench, emphasizing his displeasure.

[49] Discussing how this practice has become more common, Justice Stevens wrote: "One characteristic of all opinions dissenting from the denial of certiorari is manifest. They are totally unnecessary. They are examples of the

with judges and their colleagues, Perry (1994) found that while judges most commonly exercise jurisprudential thinking, there are some cases that judges care strongly about. In those cases, judges exercise an outcome-focused mode of judicial analysis, asking whether the side the judge supports will win on the merits, whether the case is a good vehicle to achieve the outcome they desire, or whether a better case is in the pipeline (Perry, 1994: 278).

In addition to judicial statements, judicial interest in the outcome of cases can also be inferred from judicial behavior. Epstein and Knight found evidence that judges decide whether to grant certiorari on the basis of whether a case will be decided in accord with their policy preferences. Strategic judicial actions to ensure such accord can take the form of defensive denials – refusing to take a case the judge may wish to hear, out of an expectation of being unable to garner majority support – and aggressive grants – taking a case that may not warrant review because the judge calculates it may be good for developing a doctrine (1998: 80).

Judges have the benefit of conference discussion and less formal conversations, as well as a day-to-day interaction with their colleagues, to develop private knowledge of their colleagues' proclivities. A number of studies have provided evidence that judges have foreknowledge of their colleagues' future outcomes, but this evidence is necessarily indirect.[50] For instance, studies have found that judicial decisions depend on the level of

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purest form of dicta, since they have even less legal significance than the orders of the entire Court which, as Mr. Justice Frankfurter reiterated again and again, have no precedential significance at all" (Singleton v. C.I.R. (1978): at 944-945). The lack of legal significance of the practice supports the argument of its informational effect.

[50] This is a fairly standard assumption in imperfect information models (see e.g. Rothschild and Stiglitz, 1976: 632). It is also an assumption made by scholars studying the courts (see e.g. Epstein, Segal and Victor, 2002: 420); however some assume the opposite (e.g. Baum, 1997: 17). One of the few studies to challenge this notion is Krol and Brenner, but arguably their results actually support the hypothesis that judges consider their colleagues' likely actions. Of the three hypotheses relating to this topic that they test, two are supported

support judges expect from other members of the court (e.g. Boucher and Segal, 1995: 832), implying some level of foreknowledge. Brenner found "clear and unambiguous" support for his hypothesis that when there are four votes for certiorari, affirm votes are associated with higher success rates than denial votes (1979: 651). These findings show both that judges can accurately anticipate their colleagues' likely actions, and so their own chances of success, and that judges' own actions vary with their likelihood of casting the pivotal vote. That is, the study provides evidence to support each of the first three signaling assumptions.

The final assumption is that litigants consider judicial signals when weighing the decision of whether to bring litigation. Even if judges did not know their colleagues' pending positions, judges definitely possess some private information: their own vote. Pursuing litigation is a gamble, with high costs and uncertain payoffs. Any information a litigant receives from a judge as to his or her chances of success are factored into the litigant's decision whether to litigate or not.[51] To take an example, in death penalty cases, the litigant has little to lose in pursuing every right of appeal, and so judicial signals have minimal effect on a defendant's decision to pursue litigation. But advocacy groups may need to be more discriminating. A signal that the Supreme Court is amenable to arguments that the death penalty should not apply to a particular class, such as juveniles or the mentally retarded, is likely to result in a number of such cases being presented by advocacy groups opposed to

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by the evidence, and the one which is not in fact relates to predicting the behavior of uncertain judges only (1990: 338).

[51] Justice Scalia noted the effect of the expectation that the Supreme Court was likely to rule in the Atkins case that the death penalty was cruel and unusual when applied to retarded defendants. He stated that "the mere pendency of the present cases has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded" (Atkins (2003): 353-354).

the death penalty. This conclusion has been supported by empirical studies (see McGuire and Caldeira, 1993: 718; Baird, forthcoming).[52]

Given this, in an era of litigant groups, such as the NAACP, who in aggregate are ready and willing to bring cases on almost any contentious view, judges can significantly influence their own agendas by utilizing methods of sharing their private information. The following game examines whether a judge with a partial alignment of preferences with a potential litigant has an incentive to mislead the litigant, and how that incentive shapes the actions of judges in such a scenario.

III. THE JUDICIAL SIGNALING GAME

Players: This game models two interlinked actions: the decision of a Judge (J) on a multi-judge panel as to what sort of signal to send to potential litigants; and the choice of a potential Party (P) as to whether to pursue a legal action or not, given such signals. We are considering a Judge and a Party who each support the same position.

A simplified representation of the game, with only one judge and one litigant, is represented in Figure 3.1, however the model accounts for multiple players.

Play: The outcome of a given case can be represented as being determined by nature, reflecting the fact that litigants do not know the outcome of cases before they decide to pursue litigation. Even though the Judge votes on the outcome of the case, the draw by nature can be seen as occurring after the Judge has formed a definite opinion on the issue.

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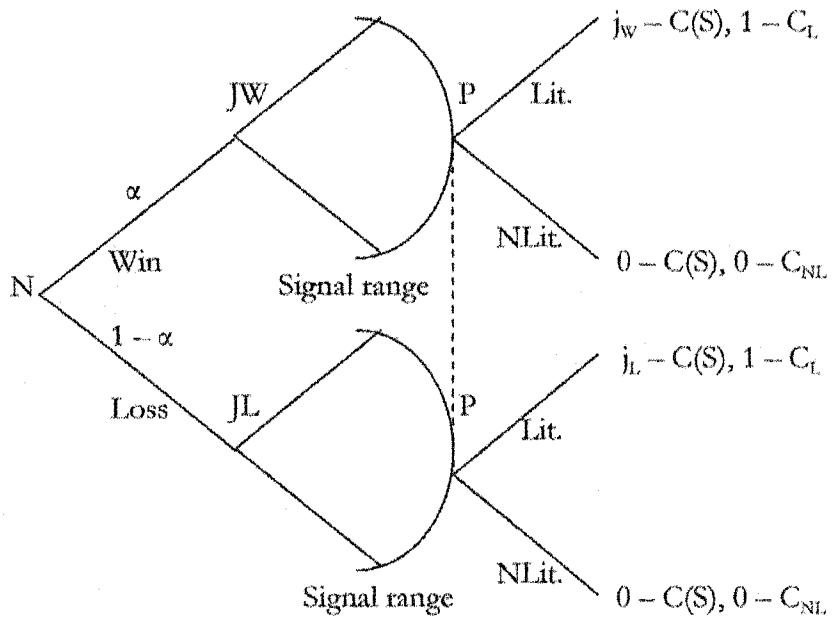
[52] A counter-argument is that litigants may not be able to interpret such signals, however Nelson showed that consumers of signaling information do not need to assess the information intelligently for the model to work (1974: 751). At any rate, advocates are experts who can be expected to interpret judicial signals on litigants' behalves.

Figure 3.1: The Judicial Signaling Game



The game is modeled with the signaling Judge as one of two types: a winning type (JW), who faces a case in which the side they and the litigant support will win, or a losing type (JL), whose prefers side will lose. JW gains utility from the case being heard and won by the side he or she supports (j_W); JL gains utility from the case being heard and lost (j_L). The Judge faces a signaling choice on anticipation of how his or her colleagues will vote, based on the private information each judge has by virtue of his or her position.[53]

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[53] For courts with random distribution of judges, the models still applies but the signals will be discounted in proportion to the probability that the signaling judge will appear on the relevant bench.

For inferior courts, a major issue regarding agendas is the potential for forum shopping. While this model may apply to forum shopping, particularly if courts are in competition with one another over certain issues, forum shopping is not the focus of this paper.

In the Federal courts, parties have an automatic right of appeal. This need not undermine the signaling process. A party may be uncertain whether to expend the resources in pursuing their appeal, and thus rely on signals from judges as to their amenability to the party's case. Also, advocates may use judicial signals to determine whether they are best off expending their resources in judicial or other forms of issue development, to choose the best timing for a case, or to determine the best vehicle for advocating their chosen issue.

A potential litigating Party (P) does not know whether their case will win or lose, but has an ex ante belief of the underlying probability of the case succeeding: α = the independent probability of a Win; $1 - \alpha$ = the independent probability of a Loss. The Party can update its expectation of success based on the signal it receives from the Judge. Thus the Party is a Bayesian updater.

While the Judge may know the distribution of all the potential parties' ex ante probabilities of litigating, it is unrealistic to assume that the Judge knows every individual Party's ex ante probability of litigating. The orthodox assumption in signaling games is that the more informed party, the Judge, has perfect knowledge of the Party's ex ante probability of litigating, even when there are multiple potential parties. Consequently, the Judge can perfectly anticipate how the Party will act in each game. The perfect knowledge assumption drastically curtails the possible outcomes; unique equilibria result, but this outcome is based on artificially restrictive parameters. To combat this limitation, this paper's model relaxes one assumption of common knowledge: while the judge is also a Bayesian updater, his or her information is updated probabilistically. This has the dual advantages of making the game more realistic and the assumptions less restrictive.

An example illustrates the order of the play of the game: in the death penalty series of cases, while writing the majority opinion in the retarded defendant case (Atkins), Justice Stevens sent a signal encouraging litigants to bring a juvenile defendant death penalty case. Subsequently, such litigation was brought (Patterson and Hain) but failed despite the encouraging signal from the majority.

Payoffs:

Party: The last move is made by the Party. The Party has the choice of litigating (lit) or not litigating (NL). If the Party litigates, a win has positive utility, the value of which is

normalized at utility = 1, a loss at utility = 0; either way, this is reduced by the cost of litigating (C_L), which represents attorney charges, court fees etc. If the Party chooses not to litigate, there are no legal costs, but the Party bears the cost of not pursuing their legal case (C_{NL}); for example this could be the Party's cost of bearing its own damages.

Thus the Party's payoffs are:

$U_P = \{1 - C_L$ if litigate and win

$\{0 - C_L$ if litigate and lose

$\{0 - C_{NL}$ if not litigate

(where $1 - C_L > 0 > -C_{NL} > -C_L$)

Judge: After Nature moves, the Judge observes the inevitable outcome of the case. The Judge gains positive utility from both a winning case being litigated (j_W) and losing case being litigated (j_L), although more from a winning case ($j_W > j_L$). The Judge gains nothing if the case is not litigated. The Judge incurs a cost of signaling (C_S), the extent of which is determined by the level of directness of signal and whether the Judge sends a true or false signal (discussed below).

Thus the Judge's payoffs are:

$U_J = \{j_W - C_S(.)$ if litigated and wins

$\{j_L - C_S(.)$ if litigated and loses

$\{0 - C_S(.)$ if not litigated

(where $j_W > j_L > 0$[54])

Signaling Costs: The Judge has a continuum of signaling options, including sending no signal. Knowing whether the case is a winner or a loser, the Judge makes two decisions within the

[54] Both j_W and j_L are positive, as we are looking at the cases where the judge wants to hear the case regardless of its outcome. As such, by the definition of the game, both values are exogenous and provide positive utility to the judge.

one action: the judge decides whether to send a true or false signal; and the judge decides how direct to make the signal. Both choices affect cost as both are tied to judicial reputation.[55] Firstly, the signaling Judge bears the cost of signaling, increasing with the level of directness of signaling activity: this cost encompasses such factors as the forum in which the signal is given, including the size and type of the audience; and how overt the signal is. This cost is due to judicial reputation resting on lack of prejudgment: any signals of intent regarding future cases are costly to this aspect of reputation. Secondly, the Judge bears an additional cost for signaling falsely. In the judicial arena, even though signaling is costly for both types of judges, judges who repeatedly signal falsely will develop a reputation of unreliability, or worse, dishonesty; consequently, while a judge with a losing case can signal a winning case, the cost of doing so is higher than for a judge who actually has a winning case. Judges choose whether to send a false or true signal, and how direct to make the signal; consequently costs are endogenous.

Choice of Actions:

Party: given the signal observed, the expected utilities to the Party of litigating and not litigating are:

$$EU_P(Lit|S_W) = Pr(W|S_W) - C_L$$
$$EU_P(Lit|S_L) = Pr(W|S_L) - C_L$$
$$EU_P(NL) = - C_{NL}$$

Judge: given the Judge's Bayesian expectations of whether the Party will litigate, the expected utilities of the Judge of signaling at some level $S=S^*$ in each state of nature are:

$$EU_J(S^*, JW) = j_W.Pr(Lit.|S^*) - C(S^*)$$
$$EU_J(S^*, JL) = j_L.Pr(Lit.|S^*) - C(S^*)$$

[55] Signaling costs can arise through other mechanisms, such as checking and fining by the uninformed party – see Austen-Smith and Wright (1992).

That is, each type of judge's expected utility is the sum of the expected utility from the case being litigated and the expected utility when the case is not litigated. The former component equates to the utility of hearing the case minus the cost of the signal, multiplied by the Party's probability of litigating, which is contingent on the signal. For the latter component, there is no positive utility gained, only the cost of the signal multiplied by the Party's probability of not litigating, contingent on the signal.

Equilibrium Concept: As this is a signaling game, the equilibrium concept used is Perfect Bayesian Equilibrium (PBE). This requires that players' actions are best responses, beliefs are consistent with actions and vice versa, and that players Bayesian update where possible.

The relationship between expected judicial utility and a continuum of signaling options is represented in Figure 3.2.

Figure 3.2: Probability of Litigation, Judicial Preferences and Perfect Bayesian Equilibria as a Product of Signaling Cost

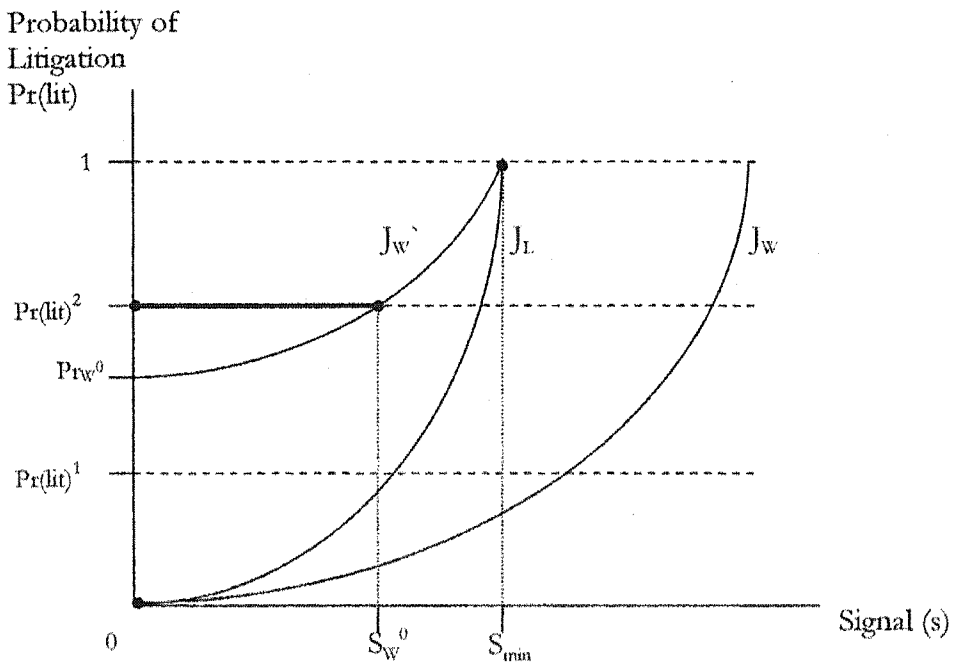

Figure 3.2 represents the Party's probability of litigation (Pr(lit)) as a product of the Judge's signaling level (S) for each type of judge. Thus the x-axis represents the Judge's strategic choice and the y-axis represents the Judge's expectation of the Party's strategic choice. This enables the possible equilibria to be graphed; the separating equilibrium is represented by two single dots; the pooling equilibria are represented by the solid black line bounded by two dots (discussed in detail below).

Figure 3.2 also represents the preferences of each type of judge. These preferences are represented by indifference curves, in which points above and to the left are favored to points below and to the right. Each judge is indifferent to all points along each of their own indifference curves, labeled J_W, J_W` and $J_L$. $J_W$` is concentric to J_W, representing higher utility. J_L is JL's indifference curve that runs through the origin; it reaches Pr(lit) = 1 at signaling level S_{min}. This point S_{min} is significant, as it will be shown that this is the maximum level of signaling that will be seen.

Both types of judges' indifference curves are monotonic: the expected probability of litigation is always increasing with greater signaling. Thus the Judge's indifference curves are convex: more explicit signaling is less likely to be cheap talk.[56] JW has a less steep indifference curve than JL, which captures the difference in their marginal benefits ($j_L < j_W$): for the same increase in the probability of litigation, JW can afford more costly signals that JL can. The single crossing property holds.

Judicial utility is a product of the probability of litigation and the benefits to the Judge, conditional on the outcome of the case, minus the cost of signaling. With no signaling, each

[56] In Figure 2, the relationship is graphed as convex, but it could be rescaled as linear; the important element is monotonicity.

type of Judge's utility is the respective utility each would receive if the case is litigated, multiplied by Pr(lit)*, the ex ante probability of litigation.

Pr(lit)* is the ex ante probability that the Party will litigate with no meaningful information as to the type of the Judge. This is exogenous and so can be any level, but the level determines which equilibria exist. Consequently, Figure 3.2 graphs two possible Pr(lit)*s, $Pr(lit)^1$ and $Pr(lit)^2$. $Pr(lit)^1$ lies below the point Pr_W^0, $Pr(lit)^2$ lies above. Pr_W^0 is the requisite ex ante probability of litigation the Party must possess for the winning type of judge to be indifferent between signaling at level S_{min} and not signaling. It is proved below that the relationship between Pr(lit)* and Pr_W^0 determines whether some of the equilibria exists.

Below, three hypotheses are made and proved, which together fully describe all of the possible Perfect Bayesian Equilibria (PBE). Hypothesis 1 is that a separating equilibrium exists with the losing type signaling at (0,0) and the winning type signaling at $(S_{min},1)$; this is not contingent on the position of Pr(lit)*. This result means that there is always an equilibrium outcome where litigants can differentiate between judges with the winning cases and judges facing losing cases. Hypothesis 2 is that the position of Pr(lit)* relative to Pr_W^0 determines whether pooling equilibria exists: if $Pr(lit)^* < Pr_W^0$, no pooling equilibria exist. Practically, this means that the prior probability that the Party will litigate in the absence of any signal determines whether signals reveal whether the case is a winner or a loser. Hypothesis 3 is that if $Pr(lit)^* \geq Pr_W^0$, a range of pooling equilibria exist between $(0, Pr(lit)^2)$ and $(S_W^0, Pr(lit)^2)$, where S_W^0 is the winning maximum level of signaling the winning type of judge will tolerate if the probability of litigating remains at $Pr(lit)^2$. That is, if the ex ante probability of litigating is adequately high, a range of equilibria exist in which it is impossible to tell honest judges from dishonest judges.

Together, these three hypotheses describe all the possible equilibria. In summary, there can exist both pooling and separating equilibria. With pooling levels of signaling, as signaling increases the probability of litigation stays constant at Pr(lit)*, but the expected judicial utility decreases because of the increasing cost of the signal. The highest level of signaling that will be seen is S_{min}. This is because even when Pr(lit) = 1, if $S=S_{min}$, $EU(J_L) = J_L - C(S_{min}) = 0$; i.e. the costs of signaling outweigh the benefits JL gains from the litigation being heard. At S_{min}, JW's utility jumps to $j_W - C(S_{min})$, because Pr(lit) = 1; the Party litigates because it knows that only the winning judge can afford to signal, and so the signal proves the case will win. Since $EU_j(S=0, L) = EU_j(S=S_{min}, L) = 0$, it is assumed that JL will choose S=0 over $S=S_{min}$.

As Figure 3.2 shows, $EU(S_{min}, W) > 0$; it is still worthwhile for the winning judge to signal at this level.

The litigant is unwilling to litigate at all if the he or she believes the judge is a losing type. As such, if a separating equilibrium exists, the requisite signaling level at which the party can be certain of distinguishing between the types must be S_{min}, because this is the point at which it is no longer profitable for the losing type of judge to signal so as to be inseparable from the winning type. This leads to the first hypotheses: a separating equilibrium exists with the losing type of judge (JL) signaling at point (0, 0) and the winning type of judge (JW) signaling at (S_{min}, 1).

Hypothesis 1: A separating PBE exists with JL signaling at (0,0) and JW signaling at (S_{min}, 1), for any Pr(lit)*.

Proof:

Let S^* be some S: $0 < S^* < S_{min}$

If P believes $Pr(L| S<S_{min}) = 1$

and $Pr(W| S \geq S_{min}) = 1$

Then:

$EU_J(S=0, L) = 0$

$EU_J(S=S^*, L) = 0.J_L - C(S^*) < 0$

$EU_J(S=S_{min}, L) = 1.J_L - C(S_{min}) < 0$

then $pr(S=0, L) = 1$

And:

$EU_J(S=0, W) = 0$

$EU_J(S=S^*, W) = 0.J_W - C(S^*) < 0$

$EU_J(S=S_{min}, W) = 1.J_W - C(S_{min}) > 0.$

then $Pr(S= S_{min}, W) = 1$

Then:

$Pr(S=S_{min}, W) = 1$

So $Pr(W|S_{min}) = 1$

and $Pr(lit|S_{min}) = 1$

In words, this proof shows that if the Party believes that any signal below S_{min} indicates a losing case, then JL's utility is maximized by not signaling, and JW's utility is maximized by signaling at S_{min}. This confirms the Party's beliefs, and so JL not signaling and JW signaling at S_{min} is a Perfect Bayesian Equilibrium.

Hypothesis 2: If $Pr(lit)^* \leq Pr_W^0$, no other PBE exists.

Lemma 1: If $Pr(lit)^* \leq Pr_W^0$, no Pooling PBE exist between the range (0, Pr(lit)) to (S_{min}, Pr(lit)*).*

Proof:

Let S^* be some S: $0 < S^* < S_{min}$

If P believes $Pr(W|S>0) = \alpha$

and $Pr(W|S=0) = 0$

Then:

$EU_J(S=0, L) = 0$

$EU_J(S^*>0, L) = J_L.Pr(lit)^* - C(S^*) > 0$

Then $pr(S=0, L) = 0$

And:

$EU_J(S^*>0, W) = J_W.Pr(lit)^* - C(S^*)$

which can be seen from Figure 3.2 is less than $EU_J(S_{min}, W) = 1.J_W - C(S_{min})$

So $pr(S=S_{min}, W) = 1$

And $pr(Lit.|S<S_{min}) = 0$

This proof shows that if the Party believes that not signaling reveals the judge as having a losing case, JL will signal at some level S* greater than zero but less than S_{min}. But in this case JW can maximize from his or her utility by signaling at S_{min}. Then the party will not believe any signal less than S_{min} comes from a judge with a winning case, and so will not litigate unless it sees a signal of at least this level. Consequently, no Perfect Bayesian pooling equilibrium exists in this range when $Pr(lit)^1 \leq Pr_W^0$.

Lemma 2: If $Pr(lit)^* \leq Pr_W^0$, no separating PBE exist between the range(0, Pr(lit)) to (S_{min}, Pr(lit)*).*

Proof:

Let S^* be some S: $0 < S^* < S_{min}$

If P believes $Pr(W|S \geq S^*) = 1$

and $Pr(W|S<S^*) = 0$

Then $EU_J(S^*, L) = J_L.1 - C(S^*) > 0$

Then $Pr(S=S^*, L) = 1$

And so $Pr(W|S \geq S^*) \neq 1$

This establishes that if the Party has alternative beliefs to those in the lemma 1, believing instead that any signal equal to or greater than S* guarantees a winning case, then the losing judge has the incentive and capacity to deviate from the equilibrium and signal at level S*. This undermines the Party's beliefs and so no separating PBE exists between the range (0, Pr(lit)*) to (S_{min}, Pr(lit)*).

Combining hypothesis 1, lemma 1 and lemma 2, when $Pr(lit)^* \leq Pr_W^0$, the only PBE which exists is a separating equilibrium with JL signaling at (0,0) and JW signaling at (S_{min}, 1).

Hypothesis 3: If $Pr(lit)^* > Pr_W^0$, pooling PBE exist between $(0,0):(S_W^0), Pr(lit)^*)$ only.

Note: S_W^0 is the maximum level of signaling at which JW is willing to pool with JL, such that the Party litigates with probability $Pr(lit)^2$. At $S_W^0+\varepsilon$, JW prefers to signal at S_{min} and be differentiated from the losing type. S_W^0 is the point which the J_W` indifference curve running through S_{min} insects with the $Pr(lit)^2$ line.

Lemma 3: If $Pr(lit)^* > Pr_W^0$, (0,0) is a pooling PBE.

Proof:

Let S^* be some S: $0 < S^* < S_{min}$

If P believes $Pr(W|S<S_{min}) = \alpha$

$Pr(W| S \geq S_{min}) = 1$

Then:

$EU_J(S=0, L) = J_L.Pr(lit)^*$

$EU_J(S=S^*, L) = J_L.Pr(lit)^* - C(S^*)$

$EU_J(S=S_{min}, L) = J_L.1 - C(S_{min}) < 0$

So $pr(S=0, L) = 1$

And:

$EU_J(S=0, W) = J_W.Pr(lit)^*$

$EU_J(S=S^*, W) = J_W.Pr(lit)^* - C(S^*)$

$EU_J(S=S_{min}, W) = J_W.1 - C(S_{min}) < J_W.Pr(lit)^* - C(S^*)$

because $Pr(lit)^* > J_W^0$

So $Pr(S=0, W) = 1$

Then $pr(lit|.) = Pr(lit)^*$

If the Party believes that signaling at S_{min} guarantees a winning case, but signaling below this level could emanate from either type of judge, then both JL and JW maximize their utility by not signaling, because the Party will still litigate with the ex ante probability $Pr(lit)^*$. Then the Party's ex ante beliefs are rational and the Party's probability of litigating will not vary from $Pr(lit)^*$. So when $Pr(lit)^* > Pr_W^0$, (0,0) is a perfect Bayesian pooling equilibria.

The next step shows that this analysis holds for anything in the range (0,0) to (S_W^0, Pr(lit)*).

Lemma 4: (S, Pr(lit)*) is a pooling PBE.*

Proof:

Let S` and S˜ be some S's: $0 < S˜ < S^* < S` < S_{min}$

If P believes $Pr(L|S<S^*) = 1$

$Pr(W|S \geq S^*) = \alpha$

Then:

$EU_J(S=S˜) = 0.J_L - C(S˜)$

$EU_J(S=S^*) = Pr(lit)^*.J_L - C(S^*)$

$EU_J(S=S`) = Pr(lit)^*.J_L - C(S`) < Pr(lit).J_L - C(S^*)$

So $pr(S=S^*, L) = 1$

The same analysis holds true for a Judge facing a winning case, once again because Pr(lit)* > Pr_W^0, from which it follows that:

$EU_J(S_{min}, W) = J_W.1 - C(S_{min}) < J_W.Pr(lit)^* - C(S^*) = EU_J(S^*, W)$

Then for P:

$Pr(W|S^*) = \alpha$

And $Pr(Lit.|S^*) = Pr(lit)^*$

If the Party believes that signaling less than some level S* reveals a judge as a losing type, but that signaling above this level does not guarantee the judge is a winning type, then both JW and JL will maximize their utility by signaling at exactly level S*. This is consistent with the Party's initial beliefs, so signaling in the range (0,0) to (S_W^0, Pr(lit)*) is a range of Perfect Bayesian Pooling Equilibria. This means that, subject to their ex ante beliefs, litigants are unable to differentiate between judges signaling in this range.

All that remains to be proved is that signaling in the range (S_W^0, Pr(lit)*) to (S_{min},1) does not support any PBE.

Lemma 5: (S_W^0, Pr(lit)) to (S_{min},1) is not a separating PBE.*

Proof:

Let S˜ and S` be some S's: $0 < S^{\sim} < S_W^0 < S` < S_{min}$

If P believes Pr(W|S=S`) = 1

and Pr(W|S=S˜) = α

then pr(Lit.| S=S`) = 1

Then:

$EU_J(S=S`, L) = 1.J_L - C(S`)$

$EU_J(S=S^{\sim}, L) = Pr(lit)^*.J_L - C(S^{\sim})$

Figure 3.2 shows that $1.J_L - C(S`) > Pr(lit)^*.J_L - C(S^{\sim})$

So pr(S=S`, L) = 1

If the party believes some signal between S_W^0 and S_{min} guarantees a winning case, then JL's utility is maximized by signaling at that level. Then the Party will not believe that the signal guarantees a winning case, and so the equilibrium fails.

Lemma 6 shows this result is true for other initial Party beliefs.

Lemma 6: (S_W^0, Pr(lit)) to (S_{min},1) is not a pooling PBE:*

Proof:

Let S` be some S: $S_W^0 < S` < S_{min}$

If P believes Pr(W| S`) = α

and $Pr(W|S_{min}) = 1$

Then:

$EU_J(S=S`), W) = Pr(lit)^*.J_W - C(S`)$

$EU_J(S=S_{min}, W) = 1.J_W - C(S_{min})$

From Figure 3.2, $Pr(S=S_{min}) = 1$

So Pr(W| S=S`) = 0

If the Party believes any signal above S_{min} guarantees a winner at any signal below S_W^0 is non-determinative, JW's maximum utility is achieved by signaling at S_{min}. This is inconsistent with the Party's beliefs and so the equilibrium fails.

Lemma 5 and lemma 6 together show that no Perfect Bayesian Equilibrium exists between the signaling range (S_W^0) to (S_{min}). Combined with lemma 3 and lemma 4, hypothesis 3 is proved, and consequently a range of pooling equilibria can exist, providing the ex ante probability of litigation is adequate.

Implications:

The first result of note is that the model indicates what the upper bound on the level of signaling is. Signaling will not occur beyond S_{min}. S_{min} is the threshold beyond which it is not worthwhile for the losing type to signal; consequently, litigants' beliefs do not rest on an expectation of signaling beyond this point, and so winning types also have no incentive to signal beyond S_{min}.

The position of S_{min} is determined by the losing type's indifference curve: S_{min} is the point at which the J_L indifference curve running through the origin intersects with the Pr(lit) = 1 line. This yields the first comparative static: the steeper the J_L slope, the lower S_{min} is. This result is intuitive: the more costly it is to lie, the easier it is to differentiate between winning and losing judges.

The second result is that when $Pr_W^0 > Pr(lit)^*$, no pooling equilibria exist. This has considerable normative implications: if the ex ante probability of litigation is adequately low, losing judges do not have the ability to mislead potential litigants as to their chances of success.

The third result, however, is that when $Pr_W^0 \leq Pr(lit)^*$, a range of pooling equilibria exist, and so the problem of losing judges being able to mislead litigants reappears, with multiple equilibria supported by a range of signaling options.

The relationship that determines whether pooling equilibria exist depends firstly on the ex ante probability of litigation. This factor is entirely exogenous, and depends on such factors as the resources the potential litigant possesses, and their perceived chances of winning, prior to any signaling.[57] The second factor is the point Pr_W^0, which is determined by the combination of the position of S_{min} and J_W`, the winning type's indifference curve that runs through S_{min}. The conclusion that the existence of pooling equilibria depend on the ex ante probability of litigation and the point of indifference for the winning type of judge yields two more comparative statics: firstly, the lower S_{min} is, the higher Pr_W^0 is. This in turn makes it less likely that pooling equilibria exist. Combining the first two comparative statics, the more costly false signaling is, the less likely any pooling equilibria can exist at all.

The third comparative static is that the steeper the winning type's indifference curve is, the lower Pr_W^0 is, and so the more likely pooling equilibria exist. Thus the greater the difference between the winning and losing types' indifference curves, the less able losing types are to pool with winning types. The difference between the two curves is dependent on the costs and benefits of hearing a winning and losing case, which is exogenous.

The fourth result is that the range of pooling equilibria is bounded by the point S_W^0, which is determined by the intersection between Pr(lit)* and J_W` (assuming Pr(lit)* $\geq Pr_W^0$). This yields the final two comparative statics: the lower the ex ante probability of litigation, the narrower the range of pooling equilibria; and the steeper the winning type's indifference curve, the broader the range of possible pooling equilibria. These two results are variations on the previous results.

[57] Ironically, high litigation costs, which will lower the ex ante probability of litigation, will therefore protect the litigant from misleading signals.

The combination of these results has implications for recent cases regarding penalties imposed for judicial communications, such as extensive judicial campaigns (see Republican Party of Minnesota v. White (2002)). This case struck down ethical restrictions on judicial campaigning conduct as contrary to the First Amendment. The game's results show that, by making honest signaling more easily achievable without fear of sanction, this ruling could enable honest judges to more easily differentiate themselves and create separating equilibria. However by lowering the costs of potentially false signals, such a ruling could instead make pooling more achievable. Which equilibria will occur will depend on how much the costs of signaling are lowered, but by enabling greater judicial signaling, this game shows that decisions such as White also promote the cheap talk of false signals.

III.A Proof that Judges Have an Incentive to Mislead Litigants

A final implication of the game warrants further scrutiny. The existence of pooling equilibria indicates that, in some circumstances, litigants are unable to differentiate between judges who face a winning and the losing case. This means that judges can misrepresent the cases before them but; of particular importance is the possibility that judges can signal that cases will win when in fact they will lose. The game so far has proved that judges could misrepresent losing cases as winners; if the Judge's strategic choice is simplified to choosing between honest and false signaling, it is possible to prove that judges have the incentive to misrepresent cases.

If the costs to the Judge are simply the cost of signaling truthfully, C_T, and the cost of signaling falsely, C_F, and $C_T < C_F$, then the following hypothesis follows.

Hypothesis 4: JL have an incentive to lie if $j_L > C_F - C_T$

Proof by Contradiction:

If P believes $Pr(W|S_W) = 1$

and $Pr(W|S_L) = 0$

Then by Bayes' Rule: $EU_P(Lit.|S_W) = [Pr(S_W|W).\ Pr(W)]/Pr(S_W) = (1.\alpha)/\alpha = 1$

And $EU_P(Lit.|S_L) = 0$

Then:

$EU_J(S_W, W) = j_W - C_T$

$EU_J(S_L, W) = -C_T$

And:

$EU_J(S_W, L) = j_L - C_F$

$EU_J(S_L, L) = -C_T$

So if $j_L > C_T - C_F$,

then $Pr(S_W|L) = 1$

And $Pr(W|S_W) \neq 1$

If P believes J always tells the truth, then a winning signal implies a winning case with probability = 1, and a losing signal guarantees a losing case. As such, the Party's expected utility from litigating when observing a signal of a winner and a signal of a loser is 1 and 0 respectively. The Party will litigate if and only if it sees a winning signal. As such, when the Judge observes a winning case, he or she will always signal a winner. But as long as $j_L > C_F - C_T$, that is, as long as the benefits to JL of lying outweigh the difference in costs between telling the truth and lying, JL has an incentive to lie, and signal a winner. The Party's initial beliefs are unsustainable, and so when $j_L > C_F - C_T$, no PBE can exist where judges always truthfully signal.

A table of results of the comprehensive model of the game in which the Judge only chooses between signaling honestly and signaling falsely can be found in the appendix. Separating, semi-separating and mixing pooling equilibria exist. A similar model with three strategy choices by the Judge, signaling truthfully, signaling falsely and not signaling, yields

similar results.[58] Hypothesis 4, however, contains the most important result, which is that judges have an incentive to misrepresent a losing case as a winning case as long as the benefits of hearing the case cover the reputational costs of issuing such false signals.

Implications:

When judges face cases in which their favored side will lose, they can only be relied upon to consistently signal the truth when the payoffs from hearing the case are sufficiently low. For litigants, this means that foreknowledge that a judge cares strongly about an issue, and not just an outcome, should lead to skepticism of any judicial signal. Litigants will want to look to cues such as the importance of the doctrine in the area, prior indications of strong feelings of judges on like matters etc, to determine the likelihood of misrepresentation-inducing strength of judicial feeling. This is unfortunate for any judge wishing to shape the court's agenda, as the issues judges consider to be most important will, due to Bayesian updating, also be those which they have least influence over.

CONCLUSION

This game explains seemingly incongruous results, such as the 2003 death penalty series of cases: judges signal the future outcome of cases, but sometimes those judges have incentives to exaggerate the chances of success of the position. This conceptual explanation is supported by a rigorous model of judicial signaling behavior and the effect it has on litigants' responses. The results of the game provide a framework for understanding and predicting how signaling of judges' private information to potential litigants takes place, and what its effects are.

[58] Proofs for either of these games can be obtained from the author.

This behavior has been shown to be systematically explicable, as a number of equilibria have been proved to exist. The comparative statics outlined above explained how and when different signaling behavior manifests itself, in accordance with the beliefs and actions of each player. The existence of a separating equilibrium is a positive normative result, as it suggests that in some circumstances litigants are able to differentiate between cases that will and will not succeed. However the equilibrium only occurs if judges facing winning cases can afford to signal at the level S_{min}. This condition is by no means guaranteed: institutional limits, be they legal restraints, such as impeachment, or conventional constraints, such as an expectation of judicial circumspection, may render judges unable to signal as overtly as the separating equilibrium condition requires. Consequently, the pooling equilibria may be the only achievable equilibria.

The existence of pooling equilibria indicates that, in some circumstances, litigants are unable to differentiate between judges who face a winning and a losing case. This means that judges can misrepresent the cases before them; in particular, judges signal that a case will succeed when in fact it will fail. The final hypothesis showed that when judges gain a benefit from a case even when it loses, they have an incentive to misrepresent the prospects of those cases.

This does not necessarily mean that signaling harms the litigant. Signaling literature suggests that even if more informed players have an incentive to misrepresent, as long as the uninformed party is a Bayesian updater, even misleading signals can still convey some information (Austen-Smith and Wright, 1992; and Potters and Van Winden, 1992).[59]

[59] Gilligan and Krehbiel (1987) even show the information receiver may grant the signaler power to encourage such signaling, even with an incentive to misrepresent, such as restrictive rules on committees.

Nevertheless, the result that judges send misleading signals to potential litigants fundamentally challenges accepted notions of how judges do and should behave.

CHAPTER 4

EXPLAINING AMERICAN LITIGIOUSNESS: A PRODUCT OF POLITICS, NOT JUST LAW

ABSTRACT

The claim that America is far more litigious than other common law countries is often asserted, but seldom explained. This chapter argues that America's exceptional litigiousness is a product not only of its legal system, but also of its unique political structure. America has an institutional configuration of fragmented power; this explains the comparative lack of detail in America's legislation, as well as the activism of America's judiciary. Both factors in turn contribute to the litigiousness of American society. The separation of powers constrains the elected branches; this in turn contributes to both the 'supply and demand' of litigiousness. First, checks and balances limit the elected branches' ability to restrain activism by the courts in satisfying demand for judicial remedies. Second, these checks limit the elected branches' ability to meet the policy demands of the public, which increases the demand for judicial action. This theory is theoretically modeled, then established empirically with evidence that governmental division has a highly significant effect on the number of civil cases filed each year.

INTRODUCTION

America is commonly characterized as exceptionally litigious, however both the meaning of this claim and the causes of litigiousness are ambiguous. Litigiousness is most commonly associated with the quantity of tort litigation, and the alleged excessiveness of the corollary awards. However, tort litigation is only one manifestation of a more general litigiousness: the American propensity to litigate has been found in many other areas.[60] Generally, litigiousness

[60] See e.g. Friedman's discussion of the growing social expectations of "total justice," which includes workers compensation, a welfare-regulatory state, providing a social minimum and controlling the economy. Litigiousness also extends to other areas of law, such as criminal law -- see Samborn. See also Shapiro's discussion of the "litigation explosion" and its application to corporate law and the relative increase in the amount of judicial responses to statutes, rather than to common law generated action (55 and 56 respectively).

can be defined as the proclivity of individuals and groups to use judicial means of conflict resolution over other means. The choice to litigate is not simply a legal action, but must be understood in terms of the path not taken; litigiousness means favoring the pursuit of legal remedies over those provided through political and other means.

Understanding litigiousness as a preference for judicial solutions over political ones reveals the limitations of explaining litigiousness through analyzing the legal system alone. America has many litigation-generating legal principles, such as inclusive class-action rules, opportunities for forum shopping, and risk-limitation through minimal cost awards. Nevertheless, legal rules do not completely explain the causes of litigiousness, because they are only one half of the cost-benefit equation represented in the choice to litigate.

The existence of flexible legal rules is not an exogenous cause of litigiousness, as these rules are created by legislatures and the courts; America's flexible legal rules, and the bodies that created them, are both part of a broader political system that is structured toward the courts providing a primary means of conflict resolution. As litigiousness reflects a legal choice in preference to a political choice, a systematic account of the causes of litigiousness must consider the capacity and limitations of all three branches of government.

The American political system is characterized by fragmentation in governmental power, as designed by the separation of powers doctrine. Power is fragmented between branches of government – through constitutional checks and balances – between levels of government – through federalism – and even within branches of government – for example through bicameralism. This fragmentation shapes the elected branches as well as the courts in ways that generates litigation.

Previous positive political theory and the law literature has examined the effect on judicial power of the positions and powers of the elected branches (e.g. Ferejohn and

Shipan; McNollgast; Eskridge and Ferejohn; and Epstein, Segal and Victor); however this literature has not recognized the link between the relations between the executive and legislative branches and litigiousness.

Political fragmentation encourages litigation in two ways. First, although the American Judiciary is subject to the usual constitutional checks that most liberal democracies adopt, the ability of the elected branches to exercise such checks is impaired by the separation of powers. Compared to Westminster systems, for example, the separation of the Executive from the Legislature, and the division of power within the legislative branch, allows the American Judiciary unusual latitude. This enables the courts to supply more extensive judicial solutions than they could otherwise. This breadth of capacity contributes to the extraordinary power of the judicial branch in the US system, which further drives expectations and demand for judicial provision of remedies to conflicts. Second, the legislative functioning of Congress is encumbered with multiple veto points, making US legislation less detailed than the legislation of other Western democracies (Atiyah and Summers). This both limits the effectiveness of non-judicial forms of conflict regulation, and creates a demand for judicial provision of that detail. In this way, separation of powers contributes to litigiousness on both sides of the equation of legal versus political provision of solutions.

Taken together, these effects of America's fragmented power system encourage both the supply and demand of judicial remedies, while weakening the provision of legislative solutions to social conflicts. This chapter provides a comparative institutional analysis of the litigiousness-generating effects of America's fragmented political system. It uses spatial models to illustrate the effects of each element of this power fragmentation, and contrasts it to the relative consolidation of power in Western democracies with parliamentary systems, a

common alternative to the US-style presidential system. It then tests the effect of divided government on litigiousness, and finds that divided government is associated with a dramatic increase in litigation.

This approach disentangles historical quirks from systemic explanations of the causes of litigiousness. The combination of institutional factors in the US may be particularly encouraging of litigiousness; however, by isolating the institutional, and thus replicable, factors that promote litigiousness, this analysis suggests why other nations may become similarly litigious. Internationally, there has been an increase both in nations adopting separation of powers-like systems, and of regions of nations ratifying extra-governmental systems, such as the European Union, which add veto mechanisms to those nations' political systems. Both of these trends involve power fragmentation, suggesting that litigiousness may increase in other nations also.

Section I describes some non-institutional explanations of litigiousness, which are typically either historical or legal in nature. It argues that both approaches offer only partial explanations. Then, section II begins to develop an institutional explanation of litigiousness, by systematically describing the American political system's fragmentation of power. Section III shows how the fragmentation of political power enables the supply of judicial means of conflict resolution, by empowering the Judiciary to provide such means. Section IV shows how political fragmentation contributes to the demand for judicial remedies, by limiting the supply of political means of conflict resolution. Section V uses court filings and political data to test the implications arising from this analysis: that divided government increases litigiousness. The findings show that divided government has a large and highly significant effect on litigation levels.

I. Testing and Explaining Litigiousness: Historic and Legal Accounts

America's tendency toward litigiousness was noted by commentators as early as Tocqueville (e.g. 109). Much debate has ensued since on whether American litigiousness is increasing to the point of constituting a "litigation explosion,"[61] or whether America's uniqueness in this regard is declining due to American-style "judicialization" – the extensive use and power of the courts – spreading to other countries (see Tate and Vallinder; Ferejohn).[62] Although some deny that the US is particularly litigious (e.g. Galanter; Samuelson), there is strong evidence to that effect. The American Tort Reform Association reports that "[t]he U.S. tort system is the most expensive in the industrialized world. U.S. tort costs are 2.2% of Gross Domestic Product (GDP), substantially higher than that of other developed countries studied and two and a half times the average of those studied."[63] This understates America's exceptional litigiousness, as the US's GDP is extremely high by international standards. Additionally, section V of this paper shows that greater governmental division is associated with higher levels of civil litigation; given the US has an extremely highly divided political system, this finding supports the case of America's strong litigiousness. Most accounts agree that the US is exceptionally litigious, but their explanations typically fail to withstand close scrutiny.

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[61] See e.g. Olson for support of this argument and Galanter and Miller for rebuttal. One cause of the disagreement on this topic may be due to ambiguity in the measures used. For example, studies have shown that in the last 30 years, in civil, criminal, federal and state cases, case filings have consistently risen, while trials have declined (Samborn: 26; New York Times; Judicial Council of California: 12).

[62] This is discussed further in the conclusion, however these authors claim this is a result of the mounting influence of American jurisprudence, whereas this chapter argues that the increasing spread of American-style institutions, not simply American jurisprudence, is at the heart of this change.

[63] Tillinghaust-Towers Perrin. Tort Costs Trends: An International Perspective, (New York, New York, 1995), quoted by the American Court Reform Association, http://www.atrafoundation.org/tort_facts.html

Historical accounts of American litigiousness emphasize a variety of conditions that shaped America's early settlement and nascent civil society. In contrast to feudalism, wherein social structure was predetermined by class, America's lack of a prefabricated class structure meant early US society required other regulation; but with a limited state, this led to reliance on small town lawyers and the courts (Tocqueville: 109). The early influence of the legal profession was buttressed by the English, who allowed small groups of immigrants to govern themselves, with their own magistrates. Even in this early period, the law entered "into a thousand various details to anticipate and satisfy a crowd of social wants" (Tocqueville: 19).

Lawyers continued to play a major part in developing American society: The primacy of litigation in resolving conflict was mutually reinforcing with the focus on individual rights in American culture. The American Revolution, for example, was legalistic in nature, expressed as a reassertion of constitutional rights, not an attack on the existing legal system (Shapiro: 43). After the revolution, the legal profession was seen as a means of safeguarding individual rights against the excesses of democracy (Tocqueville: 109). In contrast to other Western countries, the elucidation of individual rights, as well as democracy generally, came to America before industrialization; the reliance on individual rights-based protections stymied the growth of the labor movement, reinforcing the dominance of litigation over syndicalism. Even when the 20th century brought pressure for extensive governmental protection, the entrenchment of legal over bureaucratic remedies led to a further elaboration of adversarial mechanisms of protection, such as rights to free legal defense (Kagan, 2001; Friedman).

Although these historical accounts tell a compelling story, their usefulness for deeper analysis is limited for two reasons. First, historical explanations of litigiousness emphasize path dependence, and consequently they cannot account for variation. For instance, studies

have shown that there are five times as many lawsuits today as in 1962 (New York Times), and the Federal Court workload has increased 146% between 1970 and 2001 (Samborn). An explanation of American litigiousness that focuses on societal formation cannot explain contemporary variation. Second, historical explanations emphasize American idiosyncrasies, and so do not provide systemic explanations that allow for replication and prediction.

America's historical path led to the establishment of political institutions that entrench and perpetuate litigiousness, and so historical accounts inform understandings of how and why these institutions were so formed. But once litigiousness became institutionalized, historical narratives are only of secondary value in explaining later litigiousness. An examination of the effect of litigiousness-generating institutions allows for the development of comparative statics, that can account for variation in levels of litigation, and the development of theories of systematic causes, that can then be employed in other contexts. It is more useful to analyze litigiousness institutionally.

One mechanism by which litigiousness was entrenched in American institutions was through the development of litigiousness-encouraging legal rules. Many analyses of litigiousness either explicitly or implicitly ascribe its causes to America's unusually liberal procedural rules.[64] America has a number of legal rules that facilitate entry into the litigation system, and thus make litigation more likely, including: contingency fees, facilitation of

[64] See e.g. Walpin, who states that "civil practice abroad... differs from American civil practice in a number of ways... those differences act as checks on both litigation and costs of litigation such that these countries have not experienced the effect of the ongoing litigation explosion that plagues the American system" (994). See also Olson, who claims that the Federal Rules of Civil Procedure and other procedural changes in the early 20th century removed restraints that previously limited litigation. See also Quam, who claims that the sheer number of lawyers, as well as procedural rules, provide greater access to the courts and increases malpractice litigation.

forum shopping, the presumption that each party will bear its own legal costs, and flexible joining rules, including class actions and non-joining coalitions of like interests.

Costs rules provide an example of the effect of different legal rules on litigation levels. The American rule is that generally each party bears its own costs. The rule in most Commonwealth countries is that the losing party usually bears both parties' costs. With costs unrecoverable under the American rule, for litigation to be undertaken, it would have to produce an expected outcome that would more than compensate for such unavoidable costs. However, there is no additional risk for a plaintiff in pursuing litigation; combined with a contingency fee system, there is little cost restriction on a plaintiff considering bringing suit. In contrast, under the English 'fee shifting' rule, although a successful plaintiff's award will not be reduced by the cost of their own fees, a plaintiff risks walking away with a debt, rather than nothing, in the face of failure. The fee shifting rule drastically increases the variance of the expected outcome of any legal endeavor. Thus litigation will be discouraged by the fee shifting system when compared to the American system if there is any level of risk aversion in the plaintive class, which is likely among one-shot players. Evidence shows for that large award cases, the US rule is associated with greater litigation than Commonwealth rule is (Kritzer: 1980).[65]

This evidence does not, however, prove causation. Litigation-inducing rules may be another manifestation of America's litigiousness, rather than the cause of it. These explanations may in fact have the causation reversed: flexible legal rules may be needed because litigation is so extensive. England and Wales, for example, are introducing American-style simplification of practice and procedure rules to remove barriers to litigation,

[65] There is evidence that the American rule has a small effect of discouraging more small damage cases from being litigated than the Commonwealth rule does – Kritzer: 1950.

because of the increasing extent and cost of litigation in the UK (Woolf Final Report). The question then becomes: why does America have litigation-inducing legal rules when other common law countries do not? Rules governing the litigation process are developed by courts and legislatures, and as such these rules are not exogenous to the process being analyzed. Legal rules may be an intervening variable contributing to American litigiousness, but both the rules and the level of litigiousness are affected by the broader political institutional structure.

Legal rules are a proximate and entrenched factor encouraging litigiousness,[66] but they are the wrong institutional level at which to analyze the causes of litigiousness. Although they may superficially appear to be an entirely legal construction, liberal litigation rules are generated by other institutions that promote litigation as a solution to conflict, and so are not an exogenous variable. Liberal procedural rules are a manifestation of a political system geared towards courts providing solutions to social problems, rather than a cause of that phenomenon. Litigiousness is better understood by examining broader institutional effects. The remaining sections show that the fragmentation of power in the US political system drives America's high propensity to litigate.

II. Fragmentation of Power in the American Political System

The separation of powers system in the US divides government power, creating multiple veto points for governmental action. This constrains governmental functioning; in particular, it limits the regulatory capacity of the elected branches, causing greater demand for judicial means of social regulation. Simultaneously, it limits the capacity of the elected branches to

[66] Danzon provides evidence that court reforms of the 1970s increased the frequency and severity of malpractice claims; states which enacted shorter statute limitations and limited discovery had less such growth.

restrict the courts in providing such regulation. This section outlines the US political system's institutional mechanisms of power fragmentation, and the effect each has on restricting the reach of the elected branches. The separation of powers encompasses formal mechanisms of fragmentation, including checks and balances, bicameralism and federalism, as well as the consequential effects of those formal divisions which themselves have become institutionalized factors, including divided government, weak party discipline and a strong individual rights-based constitutionalism.

The fragmentation of political power resulting from these institutional factors has two key effects. Political fragmentation limits the capacity of the elected branches to check judicial activity and simultaneously impedes the ability of the elected branches to comprehensively regulate. Together, these two effects create both an opportunity for the Judiciary to provide expansive solutions to those conflicts and a demand for judicial resolution of conflicts not codified by elected representatives. Judicial activity perpetuates the demand for further judicial provision of remedies; and so the American system institutionalizes judicial action. Sections III and IV examine the effect of the fragmented political power on the supply and demand for judicial activity respectively; this section details the fragmented effects of the mechanisms of political fragmentation, described above.

The central element of the separation of powers is the checks and balances that exist between the two elected branches of government. In parliamentary systems, the Executive is drawn from the Legislature, and the governmental leader is the head of the party with majority control. As such, the Prime Minister will be ideologically aligned with the Lower House, and so the Executive will not constitute an additional veto point on legislation.[67] In

[67] For a detailed discussion of veto points, see Krehbiel.

contrast, the American President is not only separate from Congress,[68] but elected in an entirely different manner and with a distinct constituency. As such, the President is not only an additional check on the legislative process, and thus represents another level of power fragmentation, but is designed to be significantly ideologically distant from the two chambers of Congress.

Additionally, the US legislative branch is divided internally, through bicameralism. The division of the legislature into separate chambers has the obvious effect of dividing power. In America, bicameralism has been substantive, and not simply formal, as seen in Britain. The British House of Lords has the power to examine and amend most bills, but lacks the power to reject legislation. Its weakness and undemocratic character undermined its popular legitimacy, rendering it currently subject to drastic reform proposals. In contrast, the American Congress, and most US state legislatures, have two chambers with substantial, albeit different, functions and powers. Both the Senate and the House are democratically elected, and most importantly, the passing of legislation requires the approval of both chambers. As such, there are two genuine sources of power in the American Congress, compared with the UK's one. So, bicameralism operates as a second layer of potential veto points, encumbering the passage of legislation.

The fragmenting effect of these two aspects of separation of powers is illustrated in the comparison of Figure 4.1A and Figure 4.1B. Figure 4.1 provides a basic spatial model of the ideological distance between governmental actors; this simple representation will be built upon throughout this paper. It represents two comparative institutional models: a parliamentary system and a presidential system. H is the position of the House of

[68] For ease of terminology, the section refers to federal actors, but the analysis applies to the states, and section V analyses the relationship between litigation and governmental structure at the state level.

Representatives/Lower House, S is the position of the Senate/Upper House, and P is the position of the President/Prime Minister.

Figure 4.1: Potential Gridlock Regions in Parliamentary and Presidential Systems

Figure 4.1A: a Parliamentary system **Figure 4.1B: a Presidential System**

The ranges covered by the arrows in Figure 4.1 indicate the potential gridlock regions in each system. Legislation cannot be passed when the status quo lies in the gridlock region, because any proposal that makes one player better off will be vetoed by at least one other player (Marks; Weingast). Gridlock may be overcome in this region through logrolling, but any issue considered in isolation cannot pass if the status quo lies in the gridlock region. Britain could be modeled as consisting of just the points H and P, positioned at the same point, with no resulting gridlock region. Most other parliamentary systems look more like Figure 4.1A, with potential gridlock existing between the two Houses of Parliament.

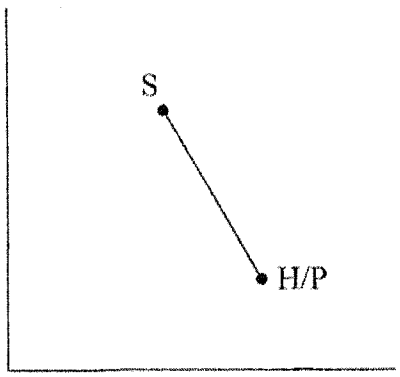
Although the distance between any two players need necessarily not be further apart in the presidential system, the gridlock region in the US will be the maximum distance between three players instead of two, thus increasing the potential gridlock area. In parliamentary systems, the gridlock region (GR) = $\{ |H - S| \}$, the absolute value of the ideological distance between the two chambers; whereas in a presidential system, GR = $\max\{ |H - S|, |H - P|, |S - P| \}$.

In fact, Figure 4.1 and the above calculation of the gridlock region understates the presidential system's multiple veto players expansion of potential gridlock. When the policy

space exists in more than one dimension, the expansion of the gridlock region by additional veto players is exponential, not linear. Figure 4.2 illustrates the effect of multiple veto players in two dimensions.

Figure 4.2: The Effect of Multiple Vetoes on the Existence of a Core

4.2A: A 2 Player System



4.2C: 3 Players With a Unanimity Rule: A Non-empty Core

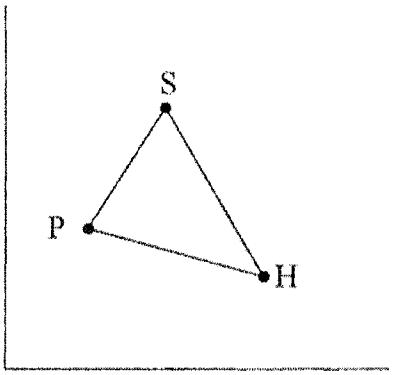


Figure 4.2 contrasts a parliamentary system, with two players (Figure 4.2A) with a presidential system, with three veto players (Figure 4.2B). In Figure 4.2A, the gridlock region is the line between S and H (with H = P): if the status quo lies anywhere along this point, the players will not be able to agree on any change. Thus any point on the line S-P is a stable equilibrium. This contrasts to Figure 4.2B which, with three players, has a non-empty core = ΔPSH. That entire core is a gridlock region, in which the players will not be able to agree on any change, as a movement from any point within the core harms at least one player.

For simplicity, the remainder of this paper reverts to examining the effect of power fragmentation on the gridlock region in one dimension, but it should be kept in mind that this effect is exacerbated when the policy space exists in more than one dimension.[69]

[69] Schofield's theorem proves that a unanimity requirement always results in a non-empty core in any number of dimensions (see Austen-Smith and Banks: 130).

Three further fragmenting effects flow from these two formal elements of the separation of powers: divided government, weak political parties and rights-embracing constitutionalism. Divided government stems from the different modes of election of the President and Congress, and tends to further expand the gridlock region. Just as the framers utilized a bicameral system with two differently constituted chambers, to render them "by different modes of election and different principles of action, as little connected with each other as the nature of the common functions and a common dependence on the society will admit" (Hamilton, Madison and Jay: Federalist 51, 266-267), the framers designed different electoral techniques for each office, to make the distance between the President, the House and the Senate as great as possible. This makes divided government likely, and expands the potential gridlock region.

The effect of divided government in Figure 4.1 is to alter the position of P relative to H and S. When P lies between H and S, the gridlock region will be the same in parliamentary and presidential systems. When P lies to the left or right of both H and S, the gridlock region will be greater in the presidential system. Thus the gridlock region in a presidential system is always equal or greater to the gridlock in a parliamentary system. Divided government makes it more likely that P will be distant from H and S, and thus increases the potential gridlock region.

This conclusion has been supported by empirical evidence: the President opposes significant legislation more often under divided government, more legislation fails to pass under divided government, and the likelihood of any piece of legislation failing to pass is 45% higher under divided government (Edwards, Barrett and Peake: 555-561).[70] The

[70] This is contrary to earlier influential analysis by Mayhew (1993), but as Edwards, Barrett and Peake point out, Mayhew considered only the number of pieces of legislation passed, and not how many failed (547). Also,

different constituencies of the President, the House, and the Senate, result in divided government, which in turn fragments power and checks the policy-making capacity of the elected branches.

A second fragmenting effect of the separation of powers is the weakness of America's political parties. Unlike Westminster systems, in which voting counter to the party line, or "crossing the floor," will see a representative struck from the party, American political parties have traditionally lacked policy cohesion and have been unable to enforce voting blocs.[71] Diermeier and Fedderson argue that party weakness results from the absence of a vote of confidence procedure in the American system. With a vote of confidence procedure, in any given period, a policy sponsor has to offer less to ruling coalition members to gain their support – they are cheaper and so are included in the policy coalition. However, the absence of a confidence motion is itself endogenous to the broader political system. Fundamentally, both the lack of a confidence motion and the underlying cause of America's weak political parties stem from the same effect: the separation of powers.

In the US, because the Executive is not drawn from the legislature, the ongoing legitimacy and effectiveness of an administration does not depend on the support of Congress. As such, there has never been an adequate need to create incentives for party cohesion, resulting in a lack of discipline in the political parties. There are, however, incentives to disburse power over policy within America's political parties: the single member, simple plurality (SMSP) system means parties can maximize the electoral returns of

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Mayhew used newspaper editorials on legislation as his data source, but this fails to account for the possibility that newspaper editorials will be fixed in number, regardless of the relative significance of legislation passed in any year. So Mayhew's dependent variable may have been exogenously generated.

[71] "What the Constitution separates our political parties do not combine. The parties are themselves composed of separated organizations sharing public authority... Our national parties are confederations of state and party local institutions" (Neustadt, 1990: 29)

their members if each representative can be as responsive as possible to his or her own constituency, which will result in a heterogeneity of policy positions by members.[72] Although the SMSP system is characteristic of most former British colonies, which are typically parliamentary, the unity of the Executive and Legislature creates incentives toward policy centralization, which counters SMSP's decentralizing momentum. In the American presidential system, because the executive is not drawn from the legislature, no such countervailing incentive exists, and so party discipline remains relatively weak.

There are other idiosyncratic institutional causes of the weakness of America's political parties; particularly, they lack control over their own membership, representation and money. But these effects are themselves a result of the overarching institutional fact that executives are functionally independent from legislatures: parties do not need to be as strong for the President to maintain power and influence in the American system. As with policy decentralization, although there are incentives to disburse power over money and membership, there are no opposing incentives in a presidential system toward centralization.

The effect of weak parties is to further fragment power within Congress. Instead of between two and a handful of cohesive policy coalitions, Congress consists of 535 individuals who can raise their own money and vote their own preferences. They owe little allegiance to parties that cannot even guarantee them the party's candidacy.

Figure 4.3 illustrates one effect of weak political parties: an additional veto mechanism of the filibuster pivot – the 60th vote needed to end debate, and force a vote on a proposal. SM is the Senate median, and SF is the filibuster pivot.

[72] There is disagreement in the literature regarding the extent of responsiveness to local pressures compared to national party platforms: compare Fiorina with Ansolabehere, Snyder and Stewart.

Figure 4.3: The Effect of Weak Party Discipline on the Gridlock Region

Figure 4.3A: a Parliamentary System **Figure 4.3B: a Presidential System**

Filibustering is a result of an internal Senate rule, however it is made possible by a lack of party discipline.[73] In a parliamentary system, S represents pre-determined party policy; in the US system, presidential aides and party whips need to negotiate with individual members, and ensure they have not only majority support, but adequate support to overcome a potential filibuster. Weak party discipline splits S between SM and SF, further expanding the potential gridlock region. This expansion can be greater than that represented in Figure 4.3B; without party discipline, the gridlock region is not only be the maximum distance of P, H, SM and SF, but also of any other pivotal block of voting coalitions, such as the blue dogs.

A third consequential fragmenting effect of the separation of powers is the context it provides for the interpretation of the Bill of Rights and other constitutional rights that act as restrictions on governmental power. Even parliamentary systems with written constitutions and elucidated rights, such as Australia, tend to have minimalist protection provided by those rights. This is due to rights being narrowly interpreted in deference to the tradition of parliamentary supremacy associated with the Westminster system (Australian Capital Television, per Dawson J: 151-152, 182-183). Whereas in the US, the Bill of Rights is interpreted in the context of a political system premised on restrictions of governmental power. So the separation of powers gives greater effect to written constitutional protections,

[73] Another fragmenting effect arising partially from weak party discipline is the strength of congressional committees, the effect of which has been explored elsewhere (e.g. Marks).

which further fragments the power of the elected branches, particularly when combined with a presidential system.

Another aspect of the separation of powers is federalism, but it is easy to overstate federalism's fragmenting effect on political power because typically, federalism divides rather than fragments power: even when Federal, State and Local governments may share responsibilities in a given area, each level of government can govern, despite gridlock occurring in another level of government. However, many governmental initiatives require coordination between levels of government, achieved through model legislation or cooperation between the tiers of government, such as the Regional Homeland Security Coordinating Committee,[74] law enforcement coordinating committees,[75] and State-Federal agreements about the provision of water, transportation, and other such goods.[76] Because each level of government can usually act independently, gridlock will not necessarily result if the different governments cannot agree. Consequently, since each level of government is not a requisite signatory to governmental action, each is not a veto point for the other.

In summary, the separation of powers, through both inter- and intra-branch division, and the corollary effects of divided government, weak political parties and expansive individual rights based constitutionalism, fragments political power in the American system of government. This has the effect of constraining the governing capacity of the elected branches and systematically expanding the gridlock region beyond that which exists in other Western democracies.

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[74] see http://216.239.57.104/search?q=cache:B9b-14dGGOUJ:www.marc.org/emergency/RHSCCprinciplesandpolicies.pdf+federal+state+co-ordinating+legislation&hl=en&ie=UTF-8

[75] see e.g. http://www.usdoj.gov/usao/vaw/lecc.html

[76] see e.g. http://www.doi.gov/news/010629.html

In the US, $GR = \max\{|H - SM|, |H - P|, |SM - P|, |H - SF|, |SM - SF|, |P - SF|\}$; in contrast, in a typical Parliamentary system, $GR = \{|H - S|\}$, as $H = P$, and $SM = SF$. Any status quo within the gridlock region, considered in isolation,[77] cannot be overturned, because agreement cannot be formed among the various veto players. The following two sections describe the litigiousness-generating effects of this fragmentation of power and expansion of the gridlock region. The fragmented power of the elected branches inhibits their capacity both to comprehensively restrain the Judiciary and to provide comprehensive regulation themselves, thus creating both the opportunity and demand for expansive judicial activity.

III. Institutional Causes of Litigiousness: Supply of Judicial Action

The following two sections describe how the fragmentation of political power in the US system contributes to America's high litigiousness, by creating both the supply and demand for the judicial provision of remedies to conflicts. This section examines the effect of the systematic expansion of the gridlock region in the US system on the Judiciary's freedom to act: the limits on the elected branches' ability to restrain the Judiciary expand its capacity to provide a variety of judicial solutions to conflict, thus enabling litigiousness to flourish. The breadth of the gridlock region also limits the elected branches' ability to comprehensively regulate through legislation, which discourages the public from pursuing political mechanisms of conflict resolution, and so increases the demand for judicial means of conflict resolution; this is examined in the next section. These two effects feed back on one another, creating a cycle of litigiousness: the more capable the Judiciary is of supplying aid to

[77] However, logrolling and legislative norms aid governmental functioning; this is discussed in section V.

individuals seeking redress, the greater the demand will be for judicial action. Nevertheless, it is largely possible to examine the two effects separately.

Before expanding on this argument, it is worth noting that the litigation-generating effect of the separation of powers is not limited to public law litigation. All areas of actual or potential government civil regulation are affected by the extent of the elected branches' capacity to comprehensively regulate. In turn, as long as individuals or groups can respond to a lack of governmental regulation by pursuing their interests in the courts, every area of civil litigation will be affected by governmental power fragmentation.

The extent of tort litigation, for example, will vary with the level of precision of legislation governing it. At perhaps the opposite extreme to America, in 1974 the New Zealand Parliament introduced a no-fault system of accident compensation to replace the common law personal injuries action, vastly reducing the need for litigation to determine negligence (Todd: 405, 488). Sweeping civil litigation reform is also being undertaken throughout England and Wales, for the purpose of improving access to justice and efficiency of litigation. By removing barriers to accessible justice, the Woolf reforms are likely to lead to more litigation, albeit pursued more efficiently (Woolf Interim Report).

Government action need not be directed toward the civil litigation system in order to radically affect it: legislation affects the likelihood of litigation simply by its level of specificity. Whether the legislature updates intellectual property legislation when new technologies emerge will govern the extent to which inventors and innovators need to resort to the courts to ascertain the status of their creations. In landlord-tenant disputes, specific provisions, such as statutory notice requirements, will minimize uncertainty and the likelihood of litigation. All legislation will create litigation to test its boundaries or loopholes, but unless it is unhelpfully vague, legislation answers questions, the burden of which would

otherwise fall to the courts, the default mediators in the absence of such codification. The following two sections describe these effects more precisely.

In the separation of powers system, functions are divided between institutions, but power is shared among them (Neustadt: 29). Consequently, the strength and preferences of the elected branches will affect the role of the Judiciary. Because the Judiciary often protects minorities and disadvantaged groups, there is a common perception of judges as knights or guardians. This view suggests that the narrower the gridlock region, the more judicial activity will occur. A typical example of this view is this: "There seems to be more judicial review when governments have big majorities. That may be because judges take it upon themselves to constrain the power of an overweening executive, or because governments unconstrained by strong oppositions are more likely to pass bad laws" (The Economist).

This prediction is based on a precarious assumption about the inherent nature of judges. It assumes not only that judges are guardians, but that they act without regard to institutional constraints. Judicial behavior is constrained by constitutional powers given to the elected branches over fundamental aspects of judicial functioning, including court constitution, jurisdiction and judicial impeachment; judicial behavior is also constrained by the Judiciary's institutional weakness, which leaves it dependent on its popular legitimacy to ensure the obedience of the elected branches to its decrees. Thus the central judicial constraint, protecting judicial legitimacy, varies with the extent to which it is overruled or sanctioned by the elected branches. Judicial activity therefore can be expected to decrease when governments have stronger majorities.

The following analysis studies the constraints on the Judiciary by examining the constraints on the elected branches, as these define the extent of the court's freedom in statutory interpretation, and the extent that it is subject to legislative override. Similar

analysis applies to constitutional interpretation, and the extent it is constrained by constitutional sanctions;[78] the latter analysis is more difficult to accurately calculate, but similar principles apply.

Contrary to the judicial guardian view, a systematic examination of the effect of the size of the gridlock region in shaping judicial institutional constraints reveals that the broader the gridlock region, the greater the capacity courts have to act. This in turn means that the broader the gridlock region, the greater the expected level of litigiousness will be, as judges have greater freedom to supply remedies, and increased levels of judicial action fuel demand for further judicial action.

The first part of the above point has been explored previously in positive political theory and the law literature, but warrants a brief review. Weingast, summarizing a large part of this literature, argues that the authority and independence of the Judiciary is not inherent, but rather is determined by the relationship between the Judiciary and the other branches (675). "In a separation of powers system, the range of discretion and hence independence afforded the courts is a function of the differences between the elected branches. The narrower the range of policies between the branches, the lower the judicial discretion." (676).

Weingast provides models of the gridlock region, collectively summarized in Figure 4.4, which account for the Executive (E), Congress (C), the status quo (Q) and two examples of

[78] Many authors consider analyzing judicial behavior in relation to cross-institutional constraints is most applicable to statutory interpretation, as Congress can more easily respond to statutory interpretation by the courts, and thus overriding statutory interpretation is a more credible and salient threat against courts than constitutional override is– see e.g. Epstein and Knight: 140. However, Martin argues that judges are in fact more likely to respond strategically to the other branches in constitutional cases, because although retribution is less likely, the risk associated with it – being unable to determine policy at all in a given area – is a more significant effect when it does occur. He has some empirical evidence to support this claim: 12 and 19-20 respectively.

possible positions of the Judiciary (J1 and J2). C(J2) is the point at which C is indifferent between J2 on its right and a point to its left. As discussed, in the US system, the gridlock region will be broader than that illustrated in Figure 4.4, as Figure 4.4 does not account for the House and Senate separately, or the filibuster veto point.

Figure 4.4: Judicial Discretion as a Product of the Relationship between the Branches of Government

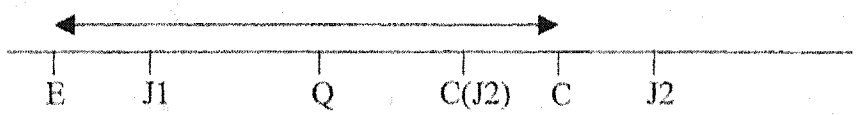


Figure 4.4 allows us to predict the extent of the Judiciary's freedom to act without fear of being overridden by the elected branches. When the Judiciary lies between E and C and rules at its ideal point, any change that would benefit one elected player will make the other worse off, and so the Court's policy will stand. For example, at J1, the Court can interpret the policy at its ideal point, without legislative override. When the Judiciary's ideal point lies to either side of both elected players, e.g. J_2, if the Court attempts to implement its ideal ruling, it will fail, as both Congress and the President can agree on an alternative they would both prefer.[79] For example, if the court ruled at the point J2, both E and C prefer anything in the range C(J2) – C over J2. Consequently, the Judiciary will choose the point C if it is to the right of both players (and the point E if J is to the left of both players).

Thus when the Judiciary's preferences lie within the gridlock region, the Judiciary is free to pursue its ideal outcomes. And even when the Judiciary's preferences lie outside the gridlock region, it can strategically choose the point within the gridlock region that it most

[79] Unless the ruling is on constitutional grounds, in which case punishment of the court is limited by numerous pivots, including State legislatures.

prefers, knowing that outcome will not be overturned, as the elected branches will not be able to agree on a preferred result.

Similar analysis of this theoretical framework, as well as empirical support, has been undertaken by others. Spiller and Tiller provide theoretical and empirical support for the more general proposition that judges will consider the relative positions, and likely reactions, of the elected branches when making policy rulings (508, 518; also Dahl: 294). Bill-Chavez, Ferejohn and Weingast provide a spatial model and case studies to show that "when the executive and legislative branches are united against the courts, the courts have few resources with which to defend an independent course. In contrast, when significant and sustained disagreements arise among elected officials – such as under divided government – judges have the ability to challenge the state and sustain an independent course, with little fear of political reaction" (1).

Thus the extent of the Judiciary's discretion depends upon the breadth of the gridlock region: the broader the gridlock region, the greater leeway the Judiciary has to provide solutions to conflicts. This analysis is generalized in Figure 4.5, which accounts for continuous variation in the position of the Judiciary relative to the elected branches, for two different sized gridlock ranges.

As before, the horizontal axis in Figure 4.5 represents the position of the players E, C and J. Unlike the previous figures, however, Figure 4.5 considers the range of possible positions of the Judiciary. Consequently, the equilibrium policy outcomes are mapped in two dimensions, corresponding to the ideal points of the players.

Figure 4.5: The Range of Judicial Discretion as a Product of the Position of the Executive and Congress

Figure 4.5A.

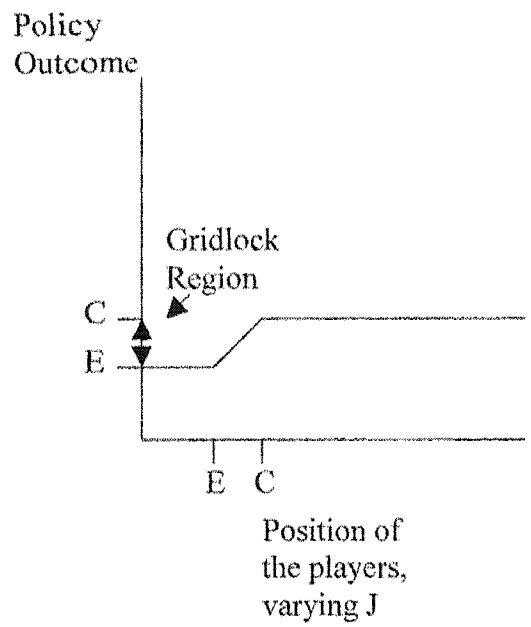
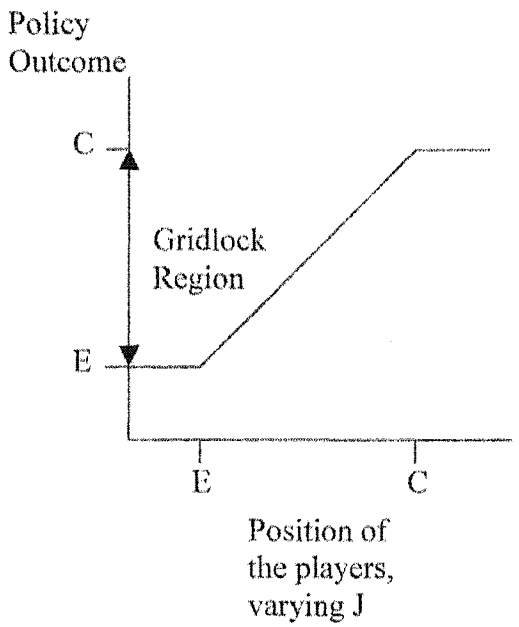


Figure 4.5B.



In both Figure 4.5A and 5B, when the Judiciary lies between E and C, the policy outcome tracks the position of the Judiciary. Otherwise the Judiciary's discretion is constrained: if J lies to the left of E, the outcome E is preferred to both elected players, and similar analysis applies if J is to the right of C, resulting in policy at C. Thus the Judiciary's capacity to shape policy is limited to the range between E and C.

Consequently, the relative positions of, and distance between, E and C determine the influence of the Judiciary. Figure 4.5 illustrates that the further the distance between two players whose approval is needed for legislation, the greater the range of judicial discretion. In Figure 4.5A, the gridlock region, and consequently to the range of judicial discretion and influence, is considerably smaller than in Figure 4.5B.

Iaryczower, Spiller and Tommasi provide empirical evidence of the endogenous nature of judicial power as represented in Figure 4.5, in a study of Argentina. This study is

particularly useful, as Argentina has variation over time, due to radical swings in the power of the executive and legislative branches. They show that the probability of the Argentinian Court voting against the preferences of the government decreased with the strength of the President's control of the Congress (709). They conclude that political fragmentation allows the Judiciary "to create a doctrine of judicial independence without fear of political reprisals," whereas a unified political environment limits the Judiciary's power (699).

Thus the US system, by fragmenting power and maximizing the potential gridlock range, increases the power and discretion of the Judiciary. The more veto players included in the analysis, the greater the gridlock region; consequently, the separation of powers, by creating veto players between and within the branches of government, increases judicial power.[80] Thus, like the gridlock region, US judicial power = max{ |H – SM| , |H – P| , |SM – P| , |H – SF| , |SM – SF| , |P – SF| }; in contrast to judicial power in a typical Parliamentary system, which = { |H – S| }. This stands in sharp contrast to authors who suggest that judges in other systems have the same theoretical power of judicial supervision as US judges;[81] these

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[80] Not all increases in judicial power can be expected to lead to greater litigation. Some authors (e.g. Ferejohn) point to the introduction of constitutional courts in many countries as another example of internationally expanding judicial power. Although this paper has emphasized the relationship between broad judicial power and litigiousness, constitutional courts may in fact have a mitigating effect on litigiousness. Because constitutional courts are typically asked to rule on legislation yet to pass, judicial influence is incorporated directly into the policymaking process, rather than through legislators anticipating likely judicial action. This would decrease the need for litigation over statutory interpretation. Also, prior legislative incorporation of judicial views involves the courts in the legislative process, but excludes non-governmental litigants from the development of doctrine. This paper has established the self-reinforcing effect of individual litigants and groups of litigants seeking judicial remedies: by preempting litigation by non-governmental actors, constitutional courts could have the opposite effect on litigiousness.

[81] See for example Shapiro, who argues that US judges have the same theoretical power of judicial supervision of government as other countries, citing examples of the similar administrative law competence between US, Britain and France (44). Although the legal framework may be the same, this ignores the differences in the

authors typically explain the higher level of judicial activity in the US as a product of inherent differences in judicial natures,[82] a precarious claim with little evidence.

The ability of the US judiciary to supply solutions to social conflicts is consequently much broader than that of courts in parliamentary systems. American courts know that they have a broad range of actions available to them that they can utilize without being overturned, because of the breadth of the US gridlock region. So the opportunity for judicial provision of conflict resolution is greater in the US than in parliamentary nations. This does not prove that US judges will choose to exploit the full extent of their latitude in supplying such remedies, but it does mean they are much freer to do so.

If US judges are more free to provide expansive forms of social regulation, when litigants seek solutions to conflicts, they know that judges are more likely to be capable of providing solutions; this in turn will drive the demand for judicial action. Judicial satisfaction of that demand will only exacerbate demand for further judicial action: the more the Judiciary initiates change from the status quo, the more litigation will be seen as an effective

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institutional frameworks of these countries. Shapiro theorizes instead that America's exceptional litigiousness is a product of the US's highly politicized judicial selection process, but offers no evidence of this.

[82] See e.g. Tate, who argues that the extension of judicial activity occurs when judges are activist and of the opposite political persuasion to the majoritarian institutions, and institutional conditions are favorable (36). While Tate's intuition is correct that the distance between the ideology of the Judiciary and the elected branches is a key determinant of the breadth of judicial action, his dependent variable is wrong. He assumes that activity is dependent on personality, rather than opportunity; but since personality is vague and of indeterminate effect, ultimately, Tate's own argument collapses down to its institutional elements: "judicial activism is to most judges an instrumental value, one that is chosen when it will help to maximize their basic policy values and avoided when it will not. If this is true, then there must be relatively few judges who, under favorable conditions, choose to exercise judicial restraint when their own policy preferences could be advanced by promoting judicialization against a regime with contrary policy values." (36) Thus, Tate's argument essentially recognizes that judicial activity hinges on favorable conditions, which are determined by institutional opportunity.

strategy, and the more litigation will be pursued in preference to other forms of conflict resolution. Additionally, the more capable judges are of providing forms of redress, the more effective threats to litigate are, which in turn increases the extent to litigation is used as a strategy, even when it is not ultimately pursued. The following section explores other elements that promote the demand for judicial action, and their role in spurring litigiousness.

IV. Institutional Causes of Litigiousness: Demand for Judicial Action

The fragmentation of power in the US system limits the capacity of the elected branches to coordinate. As we have seen, this has the effect of leaving the Judiciary unusually unconstrained, and free to supply judicial means of conflict resolution. The constraints on the elected branches also affect their capacity to provide their own means of conflict resolution, through legislative action. Thus fragmentation of political power, and the resultant legislative gridlock, drives both sides of the litigiousness equation: the appeal of judicial means of conflict resolution, and the limits of legislative conflict resolution. This section examines the second effect.

The gridlock region created by the fragmentation of political power in the US system has effects not only on the procedural action of checking the Judiciary, but also on the many substantial areas of lawmaking that Congress and the President engage in. A number of authors argue that the fragmented political system results in vague, incomplete, superficial or sparse legislative policy making (see Atiyah and Summers; Tate; Eskridge, Frickey and Garett).

Atiyah and Summers call the result "fragmented legislation." They describe the legislative results of fragmented political institutions: America relies more on case law than statute law, and when statutes are passed, they tend to be less formal than other Western

nations' laws, with less content formality, mandatory formality and interpretive formality; legislative drafting is less professional, less centralized and subject to more negotiation, and thus less formality and consistency; and legislative policy is often incomplete or vague (311; for specific applications see Melnick, 1994; and Melnick, 1995).

Apart from its substantive policy impact, fragmented legislation also has effects on the role of the Judiciary. Tate contends that this is one cause of the breadth of judicial power (32). Eskridge, Frickey and Garrett agree: the framers' intent in developing the institutional obstacles contained in the separation of powers was to reduce the amount of legislation that was possible, believing it was better to defeat some good laws than to allow bad ones (77; also Riker: 141).

But the constraining effects on legislative output arguably go beyond that intended by the framers: Atiyah and Summers argue that the resulting vague and incomplete legislation means the courts become a filtering process for legislation; courts are expected to introduce reforms that the legislature cannot or will not pass; since legislation also becomes difficult to repeal, courts have to deal with out-of-date regulations; inconsistency in drafting of legislation makes interpretation more difficult and varied; and the broad language used to state vague principles leaves broader discretion for the courts (Atiyah and Summers: 307-308, 324).

Given the limitations on legislative capacity, the delegation of power to administrative agencies as alternative sources of conflict resolution could mitigate the litigiousness-generating effect of fractured legislation. However, the frequency of judicial review of agency actions means that congressional delegation to agencies actually increases litigiousness.[83]

[83] Melnick concludes judicial review of agency decisions increases with divided government (1994: 205), which suggests that political fragmentation increases judicial activity, at least for oversight of executive agencies.

The fragmented legislation literature makes an important point, but generally fails to examine the claimed causes and effects systematically. It talks generally of the minimalist nature of US legislation, but does not rigorously assess why and when this outcome will be observed. The significance of this effect deserves closer analysis. The literature explains why the elected branches cannot comprehensively legislate, but does not explain why they choose to legislate vaguely, rather than not to legislate at all, or to legislate specifically at the point of the expected judicial ruling. Essentially, enacting fragmented legislation is like favoring a lottery – leaving the detail of policy in the hands of the gods, or judges – over the certainty of compromise. Although the literature does not discuss the question in these terms, nonetheless some attempts have been made to answer this question.[84]

The first group of explanations of why legislators would prefer a lottery over specificity is essentially a cost-benefit analysis. Many authors argue that Congress deliberately gives courts enormous discretion over certain topic areas, so that Congress can get the credit for passing legislation, while leaving the courts to take blame for the specifics (Melnick 1995; Tate: 31-32; Atiyah and Summers: 324).[85] However, this explanation only holds if the value of the process of passing legislation is greater than the value legislators gain from having policy represent their preferences.

A similar assumption underpins the second explanation, which sees legislation as a product supplied to interest groups in a political marketplace; many of the details of

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[84] One exception, outside of the immediate literature, is Fiorina's model of lotteries and legislative uncertainty. However, Fiorina equates court action with greater certainty for legislators, in comparison with administrative action (38). This assumption renders this model of limited use to the current question, which considers the uncertainty associated with legislatures leaving matters to the courts.

[85] On credit claiming and blame shifting generally, see Mayhew (1974). For discussion of a similar effect in reverse, of courts passing matters to legislatures in order to avoid blame for the specifics of unpopular policy-making, see Jacobi.

legislation are pork for interest groups, which legislators are willing to leave to a lottery (Atiyah and Summers: 311). Again, this explanation hinges on the low value of the issues left to the lottery of the courts. While this assumption may often apply, it seems likely that it would at least not hold for all issues, in which case litigiousness should vary by topic, with fragmented legislation decreasing in relation to topics of greater salience to legislators.

A third group of explanations rests on assumptions of uncertainty. Eskridge, Frickey and Garrett suggest that legislators may choose a lottery as a result of uncertainty over the meaning of legislation: "A majority vote might only have been possible because the members of the enacting coalition understood its vague or ambitious language in very different ways or because they had different expectations regarding the way courts would fill statutory gaps" (6). This is a non-answer; it requires either that legislators assume that their colleagues are less sophisticated than themselves, and so can be tricked into agreeing to a policy that has a meaning different to their understanding of it, or that the legislators all know that the meaning is actually ambiguous and so could go either way. In the second case, the expected value of compromise would be equal to the probabilistic expectation of the legislators' interpretation succeeding, which begs the original question of why legislators choose the lottery option.

A final explanation also relates to uncertainty, but in regard to miscalculations of power. The argument is that the separation of powers system itself discourages compromise: by empowering minorities, the system gives minorities an inflated expectation of the right to refuse compromise (Riker: 147). While this explanation may be useful historically (which is how Riker intended it), it has little use as a systematic explanation, as we would expect that minorities and majorities alike would learn from past action what outcome can be expected, and recalculate their power and likely benefits.

What follows is a systematic explanation of when fragmented legislation will occur, with the elected branches leaving issues to the courts in a type of policy lottery; it does not require the above assumptions about legislators' preferences or uncertainty. It shows that in the separation of powers system, legislation can be passed that determines broad policy shifts, but the detail of narrow policy decisions will always be left to the lottery of judicial discretion to some extent. Variation will be seen in the extent of the issues left to judicial discretion.

The term lottery suggests that the position of the judiciary is unknown, but it is unlikely that the legislative players would have no expectation of the position of J. Given the appointment process, which involves the elected branches, as well as the constant information provided by the courts in the form of precedent and opinions, the elected players should be able to estimate the position of J, even if they do not know it precisely. An estimate of J can be weighed against the status quo, Q; or, the elected players may have an understanding of the range of possible positions of J (e.g. liberal, moderate or conservative), and assess Q as against their expectation of J. Two possible causes of fragmented legislation follow.

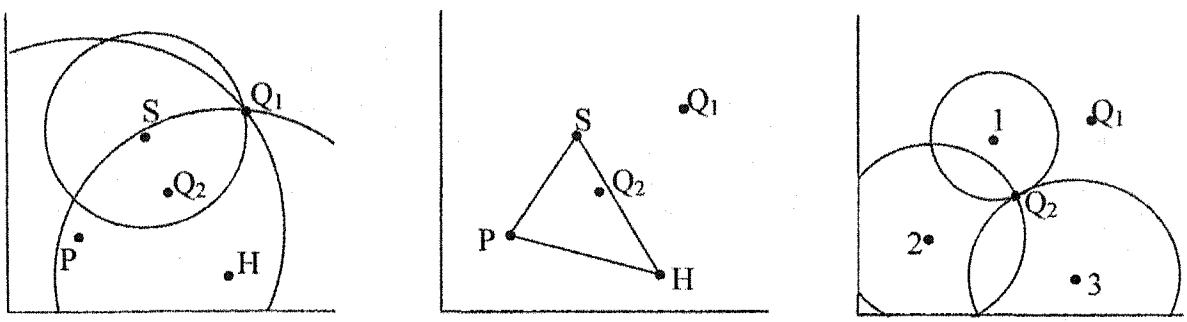
First, when the status quo lies within the gridlock region, the elected branches are incapable of coordinating to formulate legislative outcomes, and so legislation should not be able to be passed. Legislation may nevertheless pass, but can be expected to be fragmented, if legislators are risk averse. Typically lotteries are associated with risk accepting play; but for risk averse players, the expected value of a compromise exceeds the value of the probabilistic achievement of a player's preferred outcome, which would otherwise equal the value of the compromise (U(E) > E(U)). When players can predict court action to a large extent, leaving the determination of outcomes to the courts allows each player to gain the surplus of compromise, even when the compromise could not be legislated. Thus in Figure 4.3B, for

example, fragmented legislation will arise when the status quo in the absence of legislative action lies between H and SF.

Second, fragmented legislation may also arise when the status quo lies outside the gridlock region. Then, legislators may be able to agree on a broad policy shift, but when the detail of policy is separable from that broad movement, gridlock can arise over the detail of policy. Then legislative players need to leave the detail of policy to the courts in order to achieve broad policy agreement. Figure 4.6 illustrates such a scenario.

Figure 4.6: Fragmented Legislation with a Status Quo Outside the Gridlock Region

Figure 4.6A **Figure 4.6B** **Figure 4.6C**



In Figure 4.6, Q_1 lies outside the gridlock region. In Figure 4.6A, the indifference curves of S, P and H are drawn through Q_1. Any outcome internal to all three curves is preferred by all three players; Q_2 is one outcome preferred to Q_1. However, as Figure 4.6B shows, Q_2 lies inside the gridlock region, and so could be vetoed by one of the players. As Figure 4.6C shows, this problem can arise even within a majority rule institution, such as in one of the two legislative chambers – there will be majority support for any outcome lying within the

cross-over segments of any of the two players' (1, 2 and 3) indifference curves in preference to any other proposal.[86]

As we have seen, the separation of powers system maximizes the gridlock region. Unless the ideal points of all of the veto players discussed in section II are identical, mirroring Britain's winner-take-all system, there will always be a gridlock region. This does not mean, however, that legislation cannot be passed in the separation of powers system; instead, it explains the pervasiveness of fragmented legislation in the US. When the status quo lies outside the gridlock region, legislative players can agree on broad movements, such as in the direction of Q_1 to Q_2. However, since legislators cannot agree on Q_2, the legislature can successfully specify a range within the gridlock region, but believes the exact policy outcome vague and subject to the interpretation of courts.

This result does not depend on the players being risk averse; it only requires that the value gained from the broad movement in policy exceeds the expected distance of the new status quo from the player's ideal point: for player K, $(K - Q_1) > (K - E(Q_2))$. If this equation is satisfied, this also explains why fragmented legislation occurs instead of the absence of any legislation – legislators can only achieve the broad policy movement they all agree on by leaving the narrow detail to the lottery of the courts.

Taken together, this theory explains why fragmented legislation will be seen both when the status quo lies within and outside the gridlock region. Consequently, it also explains why the separation of powers consistently generates litigiousness. In limiting the ability of the legislative players to comprehensively legislate for a range of status quo both in and out of the gridlock region, the separation of powers consistently creates demand for judicial

[86] If players are not sophisticated, any point can ultimately be reached in preference to Q_2.

resolution of conflicts because the detail of policy cannot be resolved by the elected branches. The next section empirically tests this overall theory.

V. Empirical Evidence of the Effect of Governmental Division on Litigiousness

Sections III and IV have presented a systematic account of the capacity of the US courts to provide judicial solutions to policy issues, and of why legislative players, facing gridlock, will choose to enact fragmented legislation instead of not legislating, leaving the determination of many policy issues to the courts. Both the freedom of judicial action and the extent of fragmented legislation will vary with the size of the gridlock region. Although the existence of multiple veto players in a separation of powers system prevents the full detail of any piece of legislation in isolation ever being able to be agreed upon, the smaller the distance between the veto players, the more capable the elected branches are of both comprehensively regulating policy issues and effectively limiting the activity of the courts. Thus both sections III and IV raise the testable implication that litigation will increase with divided government. This gives rise to the following hypothesis:

Hypothesis 1: judicial activity increases with divided government (and decreases with united government).

Similar logic applies to the effect of division within legislatures. Separate party control of each chamber should increase litigiousness. This gives rise to hypothesis 2.

Hypothesis 2: judicial activity increases with bicameral partisan division (and decreases with House and Senate party unity).

Furthermore, this theory predicts that judicial activity should increase with increases in the size of the distance between veto players; one measure of the distance between the

elected players is the inverse of the size of the partisan majority in each legislative chamber. This gives rise to hypothesis 3.

Hypothesis 3: judicial activity increases with smaller House and Senate partisan majorities (and decreases with larger House and Senate margins).

This section tests these three hypotheses, comparing data on court filings with that of divided government, bicameral division and House and Senate partisan margins. The data pools times-series and cross-section measures of judicial activity and political division in 49 states over 25 years, between 1975 and 2000 (Nebraska is excluded, as it is unicameral). Table 4.1 provides summary statistics for the primary variables.

The key independent variables utilized are divided government, bicameral partisan division, House partisan margin and Senate margin. Divided government is defined as non-United government, that is, when the State House, Senate and Governor are not all of the same party. Other formulations of governmental division are also tested: when the House and Governor are of the same party, and the Senate of the other party; when the Senate and Governor are of the same party, and the House of the other party, and when the House and Senate are of the same party, and the Governor of the other party. The results of these three alternative formulations of governmental division are in Table 4.4 in the Appendix.

For the two hypotheses concerning intra-legislative division, bicameral division is simply defined as when the House and Senate are controlled by opposing parties. House and Senate margins are percentages of majority control.

The dependent variable is the number of cases filed in each state in each year in courts of general jurisdiction. As discussed, most if not all areas of civil litigation should be affected by the extent of political power fragmentation; consequently, civil filings are calculated using all courts of general jurisdiction.

Although the political order can is predicted to affect the extent of litigation, it will of course not be the sole determinant. Variation in litigation levels is likely to be affected by the state of the economy, the size of the state, and other idiosyncratic traits of individual states. These effects are controlled for in two ways: first, additional variables are included that account for state population and Gross State Product (GSP), a state-level price-adjusted index of value added in production by labor and property, similar to national Gross Domestic Product; second, fixed effect dummy variables are included for each state, to account for state time-invariant idiosyncrasies. The use of fixed effects will also control for variations in state definitions of courts of general jurisdiction.

A test is ale made for the effects of trends over time, using a linear time trend variable, equal to current year minus 1975, is included in the analysis. This will prevent a false positive result occurring through co-variation of civil litigation filings and divided government. However, the time trend variable proves not to be significant.

Table 4.1 provides summary statistics for the primary variables, using the exclusive definition of divided government. As can be seen from Table 4.1, governmental makeup is split almost evenly between divided and united government. All states have variation between these two conditions. All the other variables vary widely; the size of the standard deviations relative to the means in the continuous variables, particularly court filings, emphasizes the importance of accounting for fixed effects. However, a regression including only the fixed effects, to test for the extent to which court filings are accounted for purely by individual State factors, resulted in an R^2 of approximately zero.

Table 4.1: Summary Statistics for Dependent and Main Independent Variables

Variable	Mean	Median	Standard Deviation
Court Filings	168,764	98,048	201,824
Divided Government (Model 1)	51%	Divided	50%
Bicameralism	20%	United	40%
House Margin	34%	27%	26%
Senate Margin	36%	28%	27%
Population	5,034,887	3,469,166	5,396,382
GSP	112,274	60,484	151,814

Data compiled from the State Court Statistics Project, the National Conference of State Legislatures and the Bureau of Economic Analysis.

The equations for the three hypotheses, controlling for fixed state effects, are:

Equation 1: Filings = $\beta_0 + \beta_1$DivGovt + β_2GSP + β_3DivGovt*GSP + β_4Pop + β_5Time

Equation 2: Filings = $\beta_0 + \beta_1$Bicam + β_2GSP + β_3Bicam*GSP + β_4Pop

Equation 3: Filings = $\beta_0 + \beta_1$Smargin + β_2GSP + β_3Smargin*GSP + β_4Pop

Equation 4: Filings = $\beta_0 + \beta_1$Hmargin + β_2GSP + β_3Hmargin*GSP + β_4Pop

Table 4.2 presents the results for the test of hypothesis 1; Table 4.3 has results for the tests of hypotheses 2 and 3.[87]

Results:

Table 4.2 displays the results of equation 1. It shows that divided government is statistically significant at the 0.01 level. This does not depend on an exclusive definition of

[87] Equations 2, 3, and 4 were also run including the linear time trend variable; however this variable is not significant in any of the regressions, the results were largely unchanged by the inclusion of this variable, and time trend changes are less likely to affect intra-legislative changes, and so time was included only in equation 1.

divided government: all types of division among the elected veto players have a similar effect – see Table 4.4 in the Appendix. The results clearly show that divided government is a significant determinant of litigation levels.

Table 4.2: The Effect of State Divided Government and Bicameralism, GSP and Population on Court Filings, Using Fixed State Effects

	Model 1 Divided Government ≠H=S=G
Divided Government	**33,335.02** *** (5,520.65)
Gross State Product	**0.93** *** (0.58)
Divided Government*GSP	**-0.29** *** (0.03)
Population	**-0.01** * (0.00)
Linear Time Trend	441.60 (342.24)
Intercept	**103,102.10** *** (21,206.52)
R^2	0.50
DF	1042
σ	0.85
Group Variable = State	

Data compiled from the State Court Statistics Project, the National Conference of State Legislatures and the Bureau of Economic Analysis.

*signifies statistical significance at the 0.10 level; **signifies statistical significance at the 0.05 level; ***signifies statistical significance in the 0.01 level.

Similar analysis was also done by normalizing for population, instead of controlling for it; that is, by using general jurisdiction civil filings per capita as the dependent variable, and controlling for GSP per capita. The size, direction and significance of the coefficient on divided government in this regression was almost identical: 1224.14 per 100,000 population. The p-value of this coefficient was also 0.00.

In contrast to the negligible R^2 of a simple fixed effects regression, equation 1 results in an R^2 of between 50% and 62%. This suggests that much of the variation in civil filings is attributable to political and economic factors.

What this analysis does not establish is the effect of a change between divided and united government in a given electoral year; the results of this analysis are ambiguous. As discussed, litigiousness may become self-perpetuating, so a move from divided to united government cannot be expected to transform a litigious culture overnight. However, even accounting for time lags in the effect of divided government, the effect of a specific change to divided government cannot be established. Consequently, Table 4.1's positive initial results are best interpreted as indicating the effect a state's tendency toward divided versus united government; changes within the state may warrant further investigation.

Table 4.3 displays the results for the tests of hypothesis 2 and 3, the test of the effect of intra-legislative variables on civil filings. Partisan division between the House and the Senate has an effect on civil filings that is statistically significant at the 0.05 level. Increases in the size of the partisan majority in the Senate also have a statistically significant effect on civil filings. The effect in changes in House margins is a lot smaller but still significant at the 0.1 level.

All of the coefficients of the key variables are in the direction predicted by the hypotheses: divided government and bicameral division are positive, and House and Senate partisan margins are negatively correlated with civil filings. However, all of interaction terms between the governmental division variables and GSP have negative coefficients. This shows that the effects of governmental division are conditional on the wealth of the jurisdiction.

Table 4.3: The Effects of Legislative Division: State Bicameral Division, House and Senate Margins, GSP and Population on Court Filings, Using Fixed State Effects

	Model 2: Bicameralism	Model 3: Senate Margin	Model 4: House Margin
Bicameralism	**16,337.01** **		
	(7298.31)		
Senate Margin		**- 298.73** **	
		(154.76)	
House Margin			**- 45.62** *
			(185.77)
Gross State Product	**1.00** ***	**0.61** ***	**0.57** ***
	(0.06)	(0.05)	(0.06)
Bicameralism*GSP	**-0.27** ***		
	(0.04)		
Senate Margin*GSP		**0.01** ***	
		(0.00)	
House Margin*GSP			**0.01** ***
			0.00
Population	**0.02** ***	- 0.00	0.00
	(0.01)	0.01	(0.01)
Intercept	**148,741.80** ***	**101,820.60** ***	**68,642.74** **
	(20,754.62)	(2,190.83)	(23,184.51)
R^2	0.38	0.58	0.58
DF	1042	1043	1043
σ	0.87	0. 81	0. 79
Group Variable = State			

Data compiled from the State Court Statistics Project, the National Conference of State Legislatures and the Bureau of Economic Analysis.

*signifies statistical significance at the 0.10 level; **signifies statistical significance at the 0.05 level; ***signifies statistical significance in the 0.01 level.

The negative coefficient of the interaction between GSP and divided government shows that as GSP increases, the effect of divided government decreases. This covariance could be due to richer states tending to have more diverse populations, both due to migration toward wealth, and wealth being created by diversity in industrial production. These effects would result in more numerous social conflicts that prompt litigation, even under unified government.

When GSP and all other variables are at their medians, divided government increases total filings by 15,795; this translates to an increase in median court filings of 11%. However, when the data is normalized by population, the effect of divided government drops to close to zero at the median and mean. Similarly, the effect of bicameral partisan division and partisan margins are highly contingent upon GSP; when GSP increases, the effect of the intra-legislative division variables disappears. For example, when all the other variables are held at their medians, bicameral division has a zero percentage effect on civil filings. This suggests that bicameralism contributes to litigiousness, but is overwhelmed in its effect during strong economic times.

There are at least two reasons why the litigiousness-generating effect of the governmental division variables diminishes as GSP increases. The first is that, as mentioned in section II, the hamstringing effect of a status quo existing in the gridlock region can be overcome by logrolling. When the economy is in good shape, there are enough resources to go around that partisan division can be overcome. For example, minority party legislators' votes could be bought through pork for each member's constituency. But during economic difficulties, there are fewer resources to bribe minority party legislators with, and few incentives for those minority members to agree to any legislation cutting back on distributive policies. So when GSP is low, the size of partisan majorities, and the existence of bicameral partisan division, will be determinative of the fate of much legislation, and consequently affect the level of litigation in response to legislative inaction. But when GSP is high, these divisions can more easily be overcome, legislation successfully passed, and so the relationship between partisan division and civil filings diminishes.

The second possibility is that GSP could be consistently high in consistently wealthy states, with governmental division only encouraging civil filings in low GSP states. If this

was the case, the explanatory power of governmental fragmentation on litigiousness would be limited to certain types of jurisdictions. To test which explanation of the co-variation between GSP and governmental division applies, the data was broken down into five subsets, with states ordered by GSP. In each of the five regressions testing divided government on civil filings within different ranges of GSP, divided government had a similar effect as in the national compilation: the coefficient on divided government was positive, while the coefficient on the interaction term was negative. These coefficients were highly significant in the highest and two lowest categories.[88] In fact, governmental division has the highest impact in the highest GSP states, accounting for an increase of 25% for median states within this range.

Although this does not prove that the first theory is correct, it casts doubt on the second theory, and suggests that it is more likely that it is variation over time in GSP that accounts for the variation in the effect of governmental division. However, this evidence is very preliminary; in the middle GSP tier, for instance, both the divided government and interaction term coefficients are effectively zero, and all of the states in this range are Midwestern and Southern states. So the effect of governmental division may depend, for example, on the extent that political norms, such as universalism, vary by region. The variation and conditionality of the effect of governmental division of litigation warrants further analysis; nevertheless, this analysis has made the important first step of establishing the significance of the effect of political division on litigation levels.

A final point worth noting is that in both Table 4.2 and Table 4.3, GSP is also highly significant. This finding is highly relevant for the litigation explosion literature. GSP and civil

[88] The coefficients and p-values respectively for the five ranges, from lowest GSP to highest, in the per capita effect of divided government per 100,000 population were: 4,653 (0.009); 15,645 (0.000); 278 (0.932); 3,100 (0.281); 39,941 (0.000).

filings have a very high correlation of 0.76, which suggests that the 'explosions' and retractions scholars have discussed may simply have resulted from rises and falls in the economy. This suggests that high levels of litigation are not necessarily a transactional inefficiency burdening society, but an outcome of a productive economic engine.

It is possible that GSP may not be linear in its effect on civil filings. Additional tests were undertaken using a GSP-squared term in addition to controlling for GSP directly, but the results had little impact on the effect of divided government. The results were almost identical to Table 4.1: divided government had a coefficient of 34, 501, and a p-value of 0.00.

Divided government and internal legislative division have been shown to have powerful effects on litigiousness; this strongly supports the argument that governmental structure and fragmentation shape litigation levels. However, the results suggest greater complexity exists regarding the effect of the governmental division on litigiousness than the three hypotheses predict, as the effect of each variable is conditional on GSP. Governmental division dramatically increases court filings when GSP is low; but the hamstringing effect of governmental division diminishes when GSP is high. This fits with the theory, as gridlock is more difficult to overcome when resources are scarce, but, like many things, governmental division may be more easily overcome when more money is available; trade is easy when a surplus of resources exists. Overall, these results give conditional support to the findings of the theoretical model: the existence and extent of fragmented political power, and its resultant gridlock region, significantly shape America's litigiousness, but the effects of political factors may be secondary to economic factors.

Conclusion

This chapter developed a model that explains why America's political system of fractured power exacerbates its exceptional litigiousness, and tested the implications of that model with statistical evidence. The results of that analysis showed that the existence and extent of the fragmentation of governmental power affects litigation, but that effect is dependent on the economic environment. This proves that litigiousness cannot be analyzed solely in terms of legal rules governing the procedure of litigation; instead, US litigiousness is strongly affected by the separation of powers and the state of the economy.

Tests of the relationship between political structure and litigation need not be limited to the American states; litigiousness could also be measured against periods of transition in the federal political system, akin to McNollgast's analysis. Similar testable implications also arise from the variation in the levels of political fragmentation internationally. US-style separation of powers systems have been adopted in countries throughout the world, including Indonesia, Japan, Malaysia, Poland, the Republic of Armenia, Switzerland and the Ukraine. Changes in constitutional systems are typically associated with enormous social change, which would make isolating the effect of the changes in the institutional arrangements of a country difficult. Nevertheless, with so many countries having made a change to separation of powers-style systems, it should be possible to identify a generalized trend and so test the association between these changes and increased levels of litigiousness.

Such analysis would best be done historically, because even some parliamentary systems are seeing increases in litigiousness levels, for similar reasons. In recent years, many non-presidential nations introduced other types of veto players on the legislative policy-making process by subjecting themselves to meta-constitutional bodies, such as the European Union. Although these bodies are not like the US's separation of powers system, they do

constitute a means of challenging legislative policies through litigation, and thus constitute a fragmentation of political power. Most remarkably, Britain has seen increased judicial activity,[89] including the beginnings of judicial review of legislation (Schwarze), since the introduction of the European Court of Justice and the European Court of human rights (Ferejohn: 42-43). The EU's proposed charter of fundamental rights spells out both US style rights, such as freedom of religion (AII-10), as well as numerous more detailed rights, such as the right to conduct a business (AII-16) and the right to marry and found a family (AII-8), all of which would limit the capacity of governments to regulate and provide opportunities for courts to intervene. Since these bodies, like the US's separation of powers system, affect both sides of the litigiousness equation, by encumbering the capacity of the political branches to formulate policies, as well as by empowering the policymaking freedom of judicial bodies, we can expect greater litigiousness even in parliamentary systems with extra-constitutional checks. Consequently, by elucidating the important effect of the political system on litigation, this analysis explains not only the American propensity to litigate, but may explain changes currently occurring in Europe and elsewhere.

[89] English papers are rife with references to England becoming a "litigious society" (see e.g. The Guardian, 2/11/04), and having a new "compensation culture" (e.g. The Guardian, 6/3/03). The Association of British Insurers reports that the cost of insurance has increased threefold between 1996 and 2002, in part as a result of "an increasingly litigious population" (The Guardian, 9/9/03).

APPENDICES

APPENDIX A

Table 3.1: Summary of Equilibrium Conditions with Discrete Judicial Choices

Equilibrium J Action	Equilibrium Type	Equilibrium P Response	Conditions
1.a always signal honestly	Separating	$pr(Lit\|W) = 1$ $pr(Lit\|L) = 0$	$j_L \leq C_F - C_T$
1.b always signal falsely	Separating	No Equilibrium	
2.a always signal a winner	Pooling	$Pr(lit) = 0$	$\alpha < C_L - C_{NL}$
2.b always signal a loser	Pooling	$Pr(lit) = 0$	$\alpha < C_L - C_{NL}$
3.a always signal a winner if observe a winner; mix if observe a loser	Semi-Separating where S_L is fully revealing	$pr(Lit.\|S_W) = 1$ $pr(Lit.\|S_L) = 0$	$j_L = C_F - C_N$
3.b always signal a loser if observe a loser; mix if observe a winner	Semi-Separating where S_W is fully revealing	No Equilibrium	
4. mix if observe a winner and mix if observe a loser	Pooling	$pr(Lit.\|S_W) = 1$ if $pr(S_W\|L)/ pr(S_W\|W) \leq [\alpha/(1-\alpha)].(1/(C_L - C_{NL}) - 1)$; 0 otherwise	$j_W + j_L = C_T + C_F - 2C_N$ $pr(S_W\|L)/ pr(S_W\|W) = [\alpha/(1-\alpha)](1/(C_L - C_{NL}) - 1)$

APPENDIX B

Table 4.4: The Effect of State Divided Government, Using Alternative Formulations, GSP and Population on Court Filings, using Fixed State Effects

	Model 2 H=G≠S	*Model 3 H≠S=G*	*Model 4 H=S≠G*
Divided Government	**35900.58** ***	**51229.30** ***	**19848.14** *
	(6808.62)	(7023.71)	(10733.91)
Gross State Product	**0.50** ***	**0.29** ***	**0.61** ***
	(0.08)	(0.08)	(0.09)
Divided Government*GSP	**- 0.31** ***	**- 0.35** ***	**- 0.18** ***
	(0.03)	(0.03)	(0.05)
Population	**0.03** ***	**0.05** ***	**0.02** ***
	(0.01)	(0.01)	(0.01)
Linear Time Trend	31.35	426.51	- 422.66
	(418.23)	(421.49)	(460.31)
Intercept	- 23733.83	**-106125.90** ***	35078.26
	(28048.89)	(29697.66)	(30251.41)
R^2	0.74	0.73	0.73
DF	1042	1042	1042
σ	0.85	0.79	0.79
Group Variable = State			

Data compiled from the State Court Statistics Project, the National Conference of State Legislatures and the Bureau of Economic Analysis.

*signifies statistical significance at the 0.10 level; **signifies statistical significance at the 0.05 level; ***signifies statistical significance in the 0.01 level.

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