The Role of Politics and Economics in Explaining Variation in Litigation Rates in the U.S. States

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ABSTRACT

This article develops and empirically tests two theories of the causes of variation in levels of litigation in the United States: that litigation rates are affected by political structure and by economic strength. Fragmented political power results in less detailed legislation and a more powerful judiciary, which increases the demand for judicial action. Economic strength is positively associated with high rates of litigation, rather than being stymied by it. This article tests these claims using state-level civil filings data over 25 years and finds both political and economic factors to be highly determinative of litigation rates.

1. INTRODUCTION

Whether critiquing America's "exceptional litigiousness" or the "litigation explosion," it is commonly assumed in discussions of causes litigation that litigation is a drain on the economy (for example, Olson 1991; Burke 2004). Typically, responses focus on amending litigation-inducing legal rules, for example, through tort reform or procedural reform (for example, Pace 1997). This article proposes and tests an alternative view: that litigation rates are positively related to the strength of the economy.

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Compared to legislation, litigation may in fact be an efficient means of resolving social conflicts. This article also tests the extent to which governmental division, which creates legislative gridlock, increases litigation. A well-developed positive political theory (PPT) literature explains variation in judicial power as conditional on executive and legislative division. Fragmentation in legislative power both limits the effectiveness of nonjudicial forms of conflict regulation and creates a demand for judicial provision of regulatory detail not provided by gridlocked legislatures. An implication of this work that has not previously been empirically explored is that the same fragmentation of legislative power that empowers the judiciary also encourages litigation. This article tests that theory.

Litigation is also a mechanism of doing business: whether suing former comrades, battling rivals in new markets, or defending lawsuits brought by the public, as the value of the relevant economic activity increases, the volume of litigation can be expected to similarly increase. A stronger and more complex economy can be expected to produce more litigation overall, both as a means of resolving disputes and as a conduit for economic activity. This view challenges the claim that litigation is a burden on the U.S. economy that prevents its efficient operation. This article tests the nature of the relationship between the economy and litigation, with implications arising for the so-called litigation explosion literature.

The results show not only that political and economic causes are both highly significant in explaining variation in litigation rates among the states and over time but that the two effects are interactive. The impact of political division on litigation is significant but conditional on the strength of the economy. This is important for understanding causes of litigation and suggests that political-judicial models may need to more explicitly incorporate economic factors in their analysis.

Section 2 examines the implications for litigation arising out of the PPT literature on the effects of political division on judicial power. Section 3 presents the theory and impressionistic evidence that economic strength is closely associated with litigation rates in the U.S. states. Section 4 presents the empirical evidence, showing that economic and political factors are highly determinative of litigation rates. Section 5 concludes by considering the implications and potential extensions of this analysis.

2. THE ROLE OF POLITICAL STRUCTURE IN LITIGATION RATES

The two standard explanations of what determines levels of litigation are historical and legal accounts. The customary historical account emphasizes a path dependence stemming from the conditions that shaped America's early settlement and nascent civil society: its lack of a prefabricated class structure and a limited state led to reliance on small-town lawyers and courts (Toqueville [1848] 1998; Kagan 2001; McIntosh 1990). The typical legal account stresses how differences among legal rules—contingency fees, facilitation of forum shopping, costs assignment, and joining rules—create variously litigation-generating effects (Kritzer 2002; Danzon 1986).

One limitation to these approaches is that neither is able to account for the significant variation that exists in litigation rates among the states and over time. Variation has occurred in litigation levels in America over time: for example, there are five times as many lawsuits today as in 1962 (Liptak 2003, p. N1), and the federal court workload has increased 146 percent between 1970 and 2001 (Samborn 2002). Variation in litigation levels also occurs between states: the median number of annual state court filings between 1975 and 2000 was approximately 98,000, the mean was almost 170,000, and the standard deviation was over 200,000 (see Table 1). An explanation of litigation rates focusing on societal formation or legal structure cannot explain this contemporary variation.

A second limitation to a rule-focused account of litigation rates is that it may have the causation reversed: flexible legal rules may be needed when litigation is more extensive. England and Wales, for example, began introducing U.S.-style simplification of practice and procedure rules explicitly to remove barriers to litigation, because of the increasing extent and cost of litigation in the United Kingdom (Woolf Report 1996). As Lawrence Friedman (1980, p. 671) puts it, "The real architect of judicial review is American society, the world outside the courtroom door. The courts are only tools, levers, instruments—used to advance social change, or retard it." The question then becomes, why do some jurisdictions adopt litigation-inducing legal rules, while others do not?

Rules governing the litigation process are developed by courts and legislatures and so are not an exogenous cause of litigation: both the rules and the level of litigation are affected by the broader political institutional structure and economic environment. As such, it makes sense to look to political and economic explanations of causes of litigation rates. This section uses PPT models to consider the effect on

Table 1. Summary Statistics for Dependent and Main Independent Variables

Variable	Mean	Median	SD
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
Gross state product (per million)	112,274	60,484	151,814

Source. Data are compiled from the Court Statistics Project (2000), the National Conference of State Legislatures (data available from the author), and the Bureau of Economic Analysis, Regional Economic Accounts: Gross Domestic Product (http://www.bea.gov/regional/gsp/default.cfm).

judicial power of the ideological position of the judiciary relative to the legislative and executive branches.

Prior PPT work (for example, Eskridge and Ferejohn 1992; Moraski and Shipan 1999) has shown that fragmentation of political power, whether between branches of government—through constitutional checks and balances—and within branches of government—for example, through bicameralism—expands judicial power by limiting the extent that the legislative players can constrain the judiciary (Weingast 2002; see Langer [2002] for empirical confirmation). Scholars have also noted that fragmented legislative power constrains legislative players by encouraging a tendency to gridlock, which limits both the comprehensiveness of legislation (Atiyah and Summers 1987; Steinmo 1993) and the capacity of the legislative players to exercise the institutional and constitutional checks on the courts, such as limiting federal jurisdiction (Tate 1995, p. 32; Randazzo, Waterman, and Fine 2006, p. 1009). It follows that both of these tendencies increase litigation: the former by creating demand for solutions to social conflict that are not being provided by the legislature (Eskridge, Frickey, and Garrett 2000, p. 76), the latter by creating potential supply, in that an unconstrained judiciary can provide those solutions (Burke 2004, p. 171). A few studies have considered the substitutive effect of the ideological distance between the executive and legislative branches on litigation rates (Kagan 2001; Grossman and Sarat 1975; Barton 1974–75), and one study has shown that the likelihood of an individual case being docketed for judicial

review is higher in states with divided government (Langer 2002),[1] but the claim that litigation rates increase with governmental fragmentation has not previously been empirically tested.

Litigation is not the only potential substitute for legislation: legislative gridlock also increases reliance on administrative conflict resolution. The substitution of administrative agencies for comprehensive legislation has been explored elsewhere[2] and is not the focus of this study, but the logic is similar.

Political fragmentation constrains governmental functioning by limiting the regulatory capacity of the legislative branches. The PPT literature on veto points has shown that bicameral division and division between the executive and the legislature creates a range of legislative gridlock in which legislation cannot be passed. When the status quo lies in the gridlock region, any proposal that makes one player better off will be vetoed by at least one other player (Krehbiel 1991). Although structural power fragmentation does not necessarily increase the distance between any two players, the gridlock region will be the maximum distance between the players, and the more veto points there are, the greater the potential gridlock area. The breadth of the gridlock region will vary with whether there is partisan bicameral division and divided government—that is, partisan division between the executive and the legislature. Prior empirical work has shown at both the federal[3] and state[4] levels that divided government makes passage of legislation more difficult.

By checking the policy-making capacity of the legislative branches, it follows that bicameral division and divided government should also create the demand for litigation as a substitute for legislation. If litigation can substitute for legislation, then in the absence of comprehensive leg-

1. Although Langer's results held only in some policy areas. More generally, scholars have shown that political participation, competitiveness, and responsiveness affect litigation rates—see McIntosh (1990) and Harrington and Ward (1995).

2. The development of the administrative state is in large part a response to Congress's incapacity to overcome institutional limits in its policy making. Administrative avenues constitute a significant alternative to litigation stemming from dissatisfaction with the legislative process, and so the substitutive effect between legislation and litigation is unlikely to be a one-to-one ratio. See, for example, Epstein and O'Halloran (1999) and McCubbins, Noll, and Weingast (1987).

3. Under divided government, the president opposes significant legislation more often, more legislation fails to pass, and the likelihood of any given statute failing to pass is 45 percent higher (Edwards, Barrett, and Peake 1997; Coleman 1999).

4. Divided government between governors and legislatures makes legislation passage less likely, but the effect for bicameralism is less clear (Bowling and Ferguson 2001).

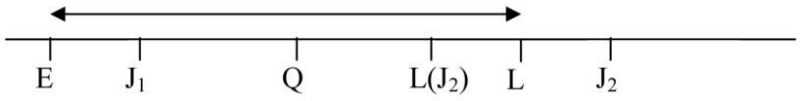

Figure 1. Judicial discretion as a product of the relationship between the branches of government.

islative solutions to social conflicts, litigation should be in high demand when gridlock increases, that is, when divided government and bicameral division exist.

The other recognized effect of divided government and bicameral division is that the judiciary has room to act without fear of override or some other check when the legislative players are gridlocked (Iaryczower, Spiller, and Tommasi 2002). The natural implication of this insight is that gridlock will create more litigation, not simply by checking the legislative players but by creating greater opportunity for the judiciary to act to resolve social conflicts. However, that conclusion is contrary to a popular view that suggests that because the judiciary often protects minorities and disadvantaged groups, the narrower the gridlock region, the more judicial activity will occur. "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" (*Economist* 2003, pp. 58–59). If there is any cost to courts in having their statutory interpretation amended by legislation, policy agreement among the legislative branches leaves less room for courts to make rulings that the legislative branches will not be able to agree to alter. Judicial activity thus can be expected to decrease when governments have stronger majorities; conversely, the broader the gridlock region, the greater the courts' capacity to act (Bill-Chavez, Ferejohn, and Weingast 2003).

The PPT view is summarized in Figure 1, which accounts for the executive (E), a legislature (L), the status quo (Q), and two possible positions of the Judiciary (J_1 and J_2). Point $L(J_2)$ is the point to the left of L at which L is indifferent between it and J_2 on its right.

When J lies between E and L, for example at J_1, and rules at its ideal point, any change that would benefit one legislative player will make the other worse off, and so the court's policy will stand without legis-

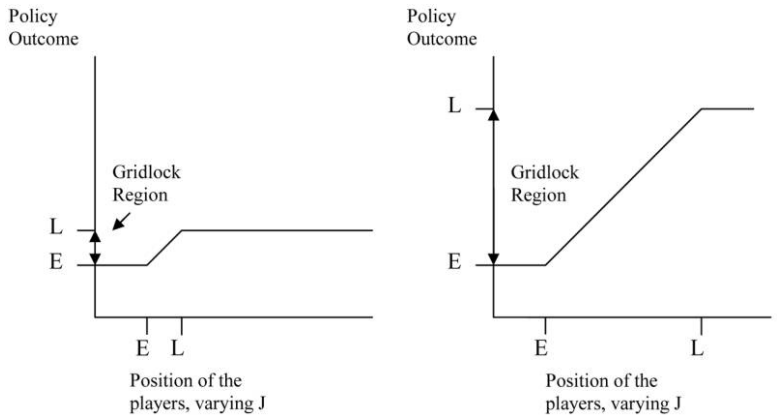

Figure 2. Judicial discretion by the position of the executive and legislature

lative override. When J lies outside the E–L gridlock range, for example at J_2, if the court attempts to implement its ideal ruling, both E and L prefer anything in the range $L(J_2)$–L over J_2 and will override. Consequently, J will choose point L if J is to the right of both players (and the point E if J is to the left of both players). So the extent of judicial discretion depends on 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 2, which accounts for continuous variation in the position of the judiciary relative to the legislative players for two different gridlock ranges.

As before, the horizontal axes in Figure 2 represent the position of the players E, L, and J but over the range of possible positions of J; the *y*-axes are the equilibrium policy outcomes. When J lies between E and L, 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 by both legislative players, and similar analysis applies if J is to the right of L, resulting in policy at L. Thus, the judiciary's capacity to shape policy is limited to the range between E and L. Consequently, the farther the distance between players whose approval is needed for legislation, the greater the range of judicial discretion.

The greater ability of the judiciary to provide solutions to social conflicts when the gridlock region is broad does not prove that judges will exploit the full extent of their latitude in supplying such remedies,

but it does mean they are freer to do so. Also, the more capable judges are of providing forms of redress, the more effective are threats to litigate, which in turn increases the extent that litigation can be used as a strategy, even when it is not ultimately pursued. These conclusions raise the testable hypotheses that divided government generates litigation and similarly that bicameral division should also be associated with higher rates of litigation. Another way of testing a similar effect is that the strength of political control by a given party should be inversely related to litigation rates, so the size of a partisan majority should be inversely related to higher litigation rates.[5] The PPT model of litigation, then, raises three hypotheses that are tested in Section 4:

Hypothesis 1. Judicial activity increases with divided government.

Hypothesis 2. Judicial activity increases with bicameral partisan division.

Hypothesis 3. Judicial activity increases with smaller House and Senate partisan majorities.

This theory concerns the effect of legislative gridlock broadly, not simply government action directed toward the civil litigation system: it suggests that legislation affects the likelihood of litigation simply by its level of specificity. Issues need not be highly publicized or controversial; rather, it is governmental inaction on the nuts and bolts of ordinary regulation that creates the need for courts to fill in regulatory details. For example, 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 (Sag 2005). In disputes between landlords and tenants, specific provisions, such as statutory notice requirements, will minimize uncertainty and the likelihood of litigation. As such, the empirical tests in Section 4 involve all civil litigation, not just "litigious policies" (Burke 2004).

However, this does raise a counterargument to the PPT: others have argued that some legislation creates litigation. Richard Posner (1996, p. 98), for example, argues that legislation that enlarges rights "shift[s] the demand curve for federal judicial services outward." He points to acts

5. However, in the United States, fractured political power has also given rise to weak political parties, traditionally lacking policy cohesion and unable to enforce voting blocs (Diermeier and Fedderson 1998). As such, this may somewhat mitigate the effect of partisan division.

that create both legislative and judicial rights and remedies, such as Title VII and the Age Discrimination in Employment Act (ADEA). There seems little doubt that acts of the sort that Posner refers to will create litigation—for example, Donahue and Siegelman (1991) found that the ADEA increased the population of workers protected by civil rights legislation, accounting for an estimated 829 additional cases. But whether these highly salient, unusually sweeping federal statutes that explicitly create rights are representative is questionable. Donahue and Siegelman found, for instance, that in contrast to the ADEA, Title VII had minimal effect on litigation rates. Ordinary legislation may well create litigation that tests its boundaries or loopholes, and thus can be expected to cause short-term increases in litigation, but unless it is unhelpfully vague (see Moe 1989), PPT suggests that most legislation answers questions and should ultimately reduce the burden that would otherwise fall to the courts, the default mediators in the absence of such codification.

There have been some prior studies on specific areas of litigation before and after legislation was passed. Some found the effect that PPT predicts: legislation reduces litigation (Kline, Stephan, and Holbrook 2004). Others found that legislation can have contrary effects, depending on its topic and character: some legislation increases litigation; some legislation initially causes greater litigation, but then subsides when the law is clarified; some legislation has little or no effect on litigation rates (Helms, Helms, and Biggs 1995). Some legislation specifically aimed at decreasing litigation had the intended effect (Ross 1994); other attempts failed, with some reforms even increasing litigation (Overby 2005). The topic-by-topic approach has not presented a clear answer to this question. Section 4 provides the first broad-based empirical test of this question, looking at civil filings in all courts of general jurisdiction over 25 years in the 49 states that have bicameralism. It tests whether the overall effect of governmental division, and the associated reduced capacity to comprehensively regulate, increases legislation. But first some other factors are considered.

3. TIME AND MONEY: THE ROLE OF ECONOMICS IN LITIGATION RATES AND THE ALLEGED LITIGATION EXPLOSION

In Section 2, it was theorized that the extent to which judges will rule contrary to the preferences of the legislative players will depend not on

how great the need of the public may be but on the size of the costs of doing so. Even though minorities may be more in danger from majority tyranny when government is united, judges are predicted to be more active when government is divided, because activism is less costly. Similarly, I hypothesize in this section that litigation, which is costly, will be pursued more when wealth is more abundant than when it is scarce. Even though the common orthodoxy is that litigation stifles economic growth, litigation can be expected to increase with economic wealth, because litigation can be more easily afforded then, and the potential benefits are greater.[6]

There is a large literature on economic analyses of the causes of litigation, including but not limited to the role of uncertainty about trial outcomes in generating litigation (for example, Simon 1981), the effect on litigation levels of varying the scope of liability (for example, Danzon 1984), the economic costs and effects of various procedural rules (for example, Reinganum and Wilde 1986; Priest 1982), and the individual calculation involved in the decision to litigate and how those incentives are shaped (for example, Shavell 1982).[7] That literature typically seeks to break down the effect of different economic elements by subject, jurisdiction, or party affected. The aim of this section, in contrast, is to take a macro look at the extent to which the state of the economy affects litigation rates[8] and potentially interacts with political factors analyzed.

The broad effect theorized here is twofold: that economic growth has a strong positive relationship with litigation rates and that economic growth and political structure have an interactive effect on litigation rates. The first theory is that as the economy grows and becomes more complex, reliance on litigation will increase, both to resolve social conflict and more simply as a mechanism of economic interaction. The second theory is that the extent to which economic agencies can turn to the courts for solutions, when legislative solutions are not forthcoming, will be conditional on wealth, since litigation is costly.

The United States is commonly characterized as exceptionally liti-

6. However, see Harrington and Ward (1990, p. 223), who find that lower per capita income is associated with higher civil litigation rates in private federal civil appeals.

7. On using law as the independent variable and economic growth as the dependent variable, see Cross (2002), which summarizes the literature.

8. Specifically in the context of employment discrimination, see Donahue and Siegelman (1991), who find that there is a strong link between macroeconomic performance and the rate of employment discrimination filings and that the single most important factor in the growth of this caseload was the unemployment rate.

gious (for example, Samuelson 1986; Cross 2003) and described as having a "blaming and claiming culture" (Kritzer 2002). Although some deny that the United States is particularly litigious (Galanter 1983, 1986; Miller 2003), few challenge the implicit criticism in this characterization (but see Galanter 1983). It is popular to portray litigation as a burden on the economy—President George W. Bush, for example, said, "America [ought to] be the best place in the entire world for people to do business. . . . That means we gotta do something about these lawsuits that are making it awfully hard for employers to expand" (Ludden 2004).

The view of litigation as an impediment to business is at least partly misconceived. While it may be true that the United States has exceptionally high levels of "policy making, policy implementation, and dispute resolution by means of lawyer-dominated litigation" (Kagan 2001, p. 3), it is also exceptionally wealthy by international standards. The suggestion here is that the United States is not wealthy despite its reliance on litigation but that litigation may be an efficient way of resolving disputes. If historical accounts are correct that developing a litigation-based system reduced the need for a heavily bureaucratized system, that trade-off may have been a key part of the U.S.'s free-market-based wealth.

Litigation is one of the costs of doing business. Litigation is a transaction cost, but in the same way that most services are transaction costs; Wallis and North (1988) estimated that by 1970, transaction costs accounted for over 45 percent of the gross national product in the United States. That study classified lawyers and judges as occupations deemed to be 100 percent transactional, but so were police, military, and postal services, as well as sales, clerical, transportation, and managerial work. On this basis, Wallis and North challenged the common view that sees transaction services as waste without corollary benefits.

Nevertheless, the litigation-as-waste view persists and drives much of the concern about the so-called litigation explosion. The litigation explosion literature claims that the massive increase in filings since the 1970s impedes the free flow of commerce, clogs the courts, and dampens the economy (Olson 1991; Rosenberg 1972; Birke 1995; Walpin 1996–97). One response to the litigation explosion literature has been to stress that most litigation occurs in state courts, and so results showing an explosion of federal claims do not establish an explosion (see Galanter

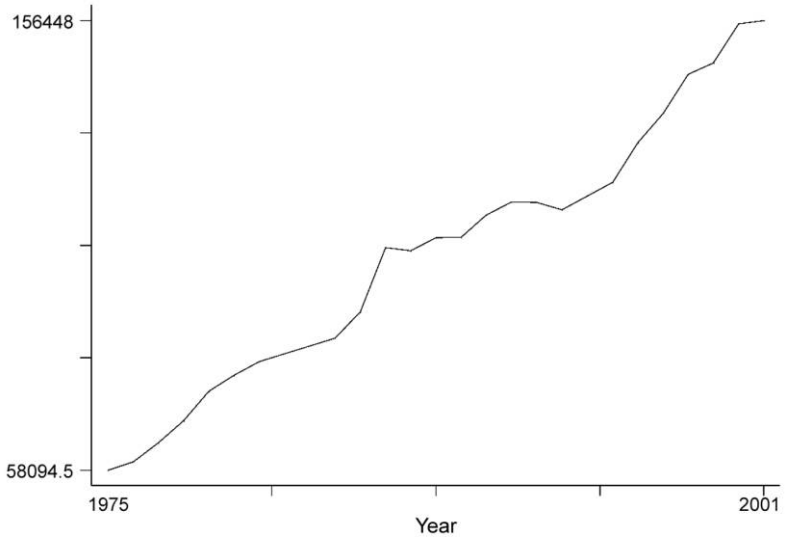

Figure 3. Median general jurisdiction total filings by state over time

1986).[9] But a superficial look at state court data also suggests an explosion, as seen in Figure 3.[10]

Figure 3 maps the increase in median general jurisdiction filings in state courts over a 25-year period, from 1975 to 2000. In 25 years, general jurisdiction filings in state courts increased dramatically, from approximately 58,000 in 1975 to over 150,000 by 2000.

The claim that the United States is becoming massively more litigious has been strongly disputed for both its factual accuracy and the alleged causes of that litigiousness.[11] Nevertheless, the claim of litigation explosion has persisted (see for example, Shapiro 1995, p. 56) and forms

9. Others question whether there was an explosion in litigation in the federal courts—see, for example, Sorenson (1995, p. 703), who notes that "civil case filings actually decreased slightly in federal courts six of the seven fiscal years between 1986 and 1993."

10. The data in Figure 3 are compiled from the Court Statistics Project (2000).

11. In addition to scholars who challenge the claim that America is exceptionally litigious, others claim that although America is different than other countries, those differences are commonly overstated (Kritzer 1991). Still others argue that this disagreement is due to ambiguity in the measures used; for example, studies have shown that in the last 30 years, the number of case filings in civil, criminal, federal, and state cases has consistently increased, while the number of trials has declined (Judicial Council of California 2002; Liptak 2003, p. N1).

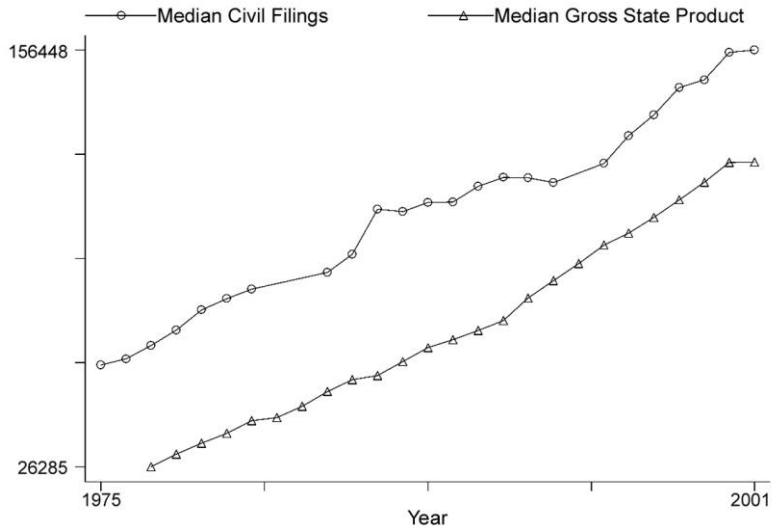

Figure 4. Median general jurisdiction total filings and median gross state product, by state and year.

much of the basis for numerous tort reform proposals enacted in many states. However, the result in Figure 3 looks considerably less dramatic when filings are graphed alongside a measure of economic growth. Figure 4 uses gross state product (GSP)—sometimes called gross domestic product by state—as a measure of economic strength.[12] This is a state-level price-adjusted index of value-added production by labor and property, similar to gross domestic product. All values are in 2000 dollars.

Although even such law and economics scholars as Posner (1997, p. 477) have assumed that growth in litigation "cannot possibly be explained by growth in population or economic activity," when economic growth is accounted for, the claim of a litigation explosion looks far less persuasive than Figure 3 implies. The economy has expanded in lockstep with the expansion of civil filings,[13] which suggests that increasing litigation rates may simply be a product of economic growth.

12. The data in Figure 4 are compiled from the Court Statistics Project (2000) and the Bureau of Economic Analysis, Regional Economic Accounts: Gross Domestic Product (http://www.bea.gov/regional/gsp/default.cfm).

13. This is consistent with Donahue and Siegelman's (1991, p. 987) findings in the context of employment discrimination litigation.

Figure 4 is only suggestive of the relationship between the economy and filings, and more formal testing needs to be conducted to determine, for example, whether both are simply changing over time or whether the correlation tracks variation among states. (This is done in Section 4.) If there is a strong positive relationship between civil filings and the state of the economy, this would constitute an interesting challenge both to the litigation explosion proponents and to the claim that litigation is a drag on the economy.

The theory in this section raises a fourth hypothesis: that litigation rates will be positively associated with economic growth. An associated effect suggested by an impressionistic look at the data is that when economic growth is accounted for, there will not be a significant increase in filings over time. Section 4 considers the potential interaction between economic growth and political structure.

4. THE INTERACTION OF ECONOMIC GROWTH AND POLITICAL STRUCTURE

Figure 4 suggests the possibility of a strong relationship between the economy and filings, but the economy may also be relevant for my analysis in terms of its interaction with the political variables. The interaction between political and economic factors has been explored in many areas—such as the political business cycle literature (for example, Alesina and Sachs 1988), political budget cycles (for example, Rogoff 1990), and the effect of incumbency on economic outcomes (for example, Whiteley 1988). There is reason to think that general political and economic variables will be interactive in the litigation context, and a few studies have analyzed the two in conjunction. For example, Grossman and Sarat (1975) assessed the impact of economic and political conditions on rates of litigation, examining the extent to which societies characterized by low levels of economic development and interdependent social relationships rely less on formal legal institutions.

There is also good theoretical reason to expect a relationship between economic growth and the specific political variable examined here—structural political division—in their effects on litigation. This study is concerned with the ability of economic agents to turn to the courts for new rules and solutions to social conflict; the economy may factor into this capacity in a number of ways. On the one hand, the state of the economy may condition the extent of the effect of political division: prosperity may make it easier to overcome political legislative division,

as wealth facilitates cross-partisan pork-barrel bribes and logrolling, thus enabling legislative responses to social conflicts. Whereas even under conditions of political consensus, passing comprehensive legislation may be difficult without economic strength. This would suggest a negative interaction between economic and political factors.

On the other hand, if economic growth is positively related to litigation, as Figure 4 suggests, the extent to which the courts can be exploited may also depend on economic strength. The level of wealth will affect whether marginal litigation is pursued. As such, the extent to which courts can substitute for legislative action may be hampered by economic weakness, which suggests a positive interaction between economic and political factors.

Ultimately, there is good reason to expect both litigation and legislation to be positively associated with economic strength. Since arguably litigation and legislation substitute for one another, the interaction between economic and political factors may pull in both directions. As such, the interaction could be positive or negative; whether it will be significant will depend on whether one of these two effects dominates. The important point is to attempt to capture the extent to which there is an interactive effect, as well as an effect of both economic and political variables on the level of litigation.

5. EMPIRICAL EVIDENCE OF THE EFFECT OF GOVERNMENTAL DIVISION AND ECONOMIC GROWTH ON LITIGATION RATES

The theory raised testable implications that litigation increases with the extent of governmental division, the distance between veto players, and economic growth. This section tests the following hypotheses:

Hypothesis 1. Judicial activity increases with divided government.

Hypothesis 2. Judicial activity increases with bicameral partisan division.

Hypothesis 3. Judicial activity increases with smaller House and Senate partisan majorities.

Hypothesis 4. Judicial activity increases with greater GSP.

The data used to test these hypotheses pool 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). The dependent variable is the number of civil cases filed in each state in each year in courts of general jurisdiction. Filings are preferable to trials as a measure of litigation rates because trials are essentially aberrations that do not reflect levels of litigation activities. The number of civil filings in courts of general jurisdiction is a broadly inclusive measure, including most civil filings in a state, with generally minor exceptions: for example, Indiana excludes probate matters, Colorado excludes water disputes, and Hawaii excludes nonjury trial district courts (Court Statistics Project 2000).[14]

Three points are worth noting about these data. First, as discussed, most if not all areas of civil litigation should be affected by the extent of political power fragmentation and economic growth; consequently, civil filings are calculated using all courts of general jurisdiction. To the extent that the theory can be expected to apply less to certain areas of the law that have been more effectively codified, such as contract, this will constitute noise. Consequently, the reported coefficients should underestimate the effect of the relationship. Second, using state court data is preferable to using federal court data; since approximately 98 percent of cases are brought through state courts (Galanter 1983), federal court studies are likely to be skewed.[15] Third, there will be relevant variation among the states; these differences are controlled for through the use of fixed effects.

To test the economic hypothesis, the measure of economic wealth used is GSP, as discussed in Section 3. Divided government is defined as nonunited government, that is, when the state House, Senate, and governor are not all of the same party (model 1: $\neq H = S = G$). Other formulations of interbranch governmental division are also tested: when the House and governor are of the same party, but the Senate is not (model 2: $H = G \neq S$), when the Senate and governor are of the same party, but the House is not (model 3: $H \neq S = G$), and when the House and Senate are of the same party, but the governor is not (model 4: $H = S \neq G$). For the two hypotheses concerning intralegislative division, bicameral division is simply defined as when the Senate and House are

14. One exception to the minor nature of the exclusions from the courts of general jurisdiction is New York, whose jury trial district courts and the Civil Court of the City of New York are neither heard nor appealed through the courts of general jurisdiction. Excluding New York from the analysis has no effect.

15. See Grossman and Sarat (1975, p. 344), who admit that their own federal court data are inferior to state court data, since state courts "are much more numerous, geographically proximate, and more accessible."

controlled by opposing parties (model 5). Senate and House margins are percentages of majority control (models 6 and 7, respectively). An interaction term between the political and economic measures is included.

Litigation levels will also be affected by the size of the state and other idiosyncratic traits of individual states, such as the level of urbanization—which will affect access to justice—and the extent of endemic conflicts liable to be addressed in court, such as racial division or inequality. These effects are controlled for, first, by using a population variable—with tests undertaken both controlling for and normalizing by population—and, second, by including state fixed effects to account for state time-invariant idiosyncrasies. Fixed effects will also control for minor variations in state definitions of courts of general jurisdiction.

To account for potential time changes, time fixed effects variables are also included. In the Appendix, a linear time trend variable equal to the current year minus 1975 is used instead to test for a consistent trend in filings over time. Whether this variable is significant will be informative as to whether there really has been a litigation explosion.

Table 1 provides summary statistics for the primary variables, using the definition of divided government as nonunited government. 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 state-level fixed effects, to test for the extent to which court filings are accounted for purely by individual state factors, resulted in an R^2-value of approximately zero. So the differences between states in levels of litigation are not simply a product of entirely idiosyncratic differences among states.

Table 2 presents the results for the test of hypotheses 1 and 4; Table 3 has results for the tests of hypotheses 2, 3, and 4. In contrast to the negligible R^2-value of a simple fixed effects regression, the results in Table 2 have an R^2-value of approximately 80–90 percent. This suggests that much of the variation in civil filings is attributable to political and economic factors.

The correlation between GSP and filings is very high: .76. As predicted, the GSP coefficient is positive and highly statistically significant. Although the interaction variable is negative, the overall impact of GSP on litigation rates is still strongly positive in either political condition. In the absence of divided government, a $10,000 increase in GSP per capita (an increase of

Table 2. Interbranch Division: The Effect of State Divided Government and Gross State Product (GSP) on Court Filings per Capita

	Model 1: ≠H=S=G	Model 2: H=G≠S	Model 3: H≠S=G	Model 4: H=S≠G
Divided government	.12**	.06**	.07**	.03+
	(.00)	(.01)	(.01)	(.02)
GSP per capita	1.45**	.45**	.41**	.36**
	(.16)	(.13)	(.13)	(.14)
Divided government × GSP per capita	−.63**	−.29**	−.25**	−.15+
	(.08)	(.07)	(.08)	(.09)
Intercept	−.00	−.03**	.03**	.03**
	(.00)	(.00)	(.00)	(.00)
Adjusted R^2	.80	.89	.88	.89
N	1,047	481	481	481
	.79	.88	.88	.88

Note. The group variable is state. All regressions include state and year fixed effects. Standard errors are in parentheses.

+ $p < .10$.

** $p < .01$.

slightly more than 1 standard deviation) results in almost 15,000 additional filings in a median state. This constitutes a substantively significant effect, one that is highly statistically significant for all models. When government is divided, the effect of GSP per capita on filings is 8,000 filings for a $10,000 increase in a median state. This is still a remarkable effect. So even accounting for the effect of divided government, the state of the economy is hugely determinative of civil filings.

The results in Table 2 are reported normalizing for population, using general jurisdiction civil filings per capita as the dependent variable and controlling for GSP per capita, but to check for any potential confounding when normalizing, similar analysis was also performed controlling for population. These results are provided in Table A1; they confirm the results in Table 2.

This provides strong initial support for hypothesis 4. The result that litigation rates are strongly associated with economic strength poses a challenge to the orthodoxy of litigation as harming the economy: high levels of litigation are not necessarily a transactional inefficiency burdening society but may be an outcome of a productive economic engine.

The results in Table 2 were run using fixed year effects to separate as much time-driven variation as possible from the independent variables. But the results were also run using a linear time trend, which is

Table 3. Legislative Division: State Bicameral Division, House and Senate Margins, and Gross State Product (GSP) on Court Filings per Capita

	Model 5: Bicameralism	Model 6: Senate Margin	Model 7: House Margin
Bicameralism	.01**		
	(.00)		
Senate margin		.00	
		(.00)	
House margin			−.00**
			(.00)
Gross state product per capita	1.15**	.87**	.80**
	(.16)	(.15)	(.15)
Bicameralism × GSP per capita	−.37**		
	(.08)		
Senate margin × GSP per capita		.01	
		(.00)	
House margin × GSP per capita			.00
			(.01)
Intercept	.01**	.01+	.01*
	(.00)	(.01)	(.01)
Adjusted R^2	.79	.80	.81
σ	.80	.78	.79

Note. $N = 1{,}047$. The group variable is state. All regressions include state and year fixed effects. Standard errors are in parentheses.

+ $p < .10$.

* $p < .05$.

** $p < .01$.

shown in Table A1. When economic growth is accounted for, the time trend does not come close to significance; of course, it is not safe to reject the hypothesis of a litigation explosion on the basis of this negative result, but since most of that literature is driven by the claim that such a time trend exists, this result shows the weakness of that analysis. It suggests that economic factors may be driving the results that have formed the basis for the speculation of the existence of a litigation explosion.

The results for the political variables are far less clear. The point estimates on these coefficients are large, positive, and statistically significant, as predicted. But unlike the economic variables, the negative coefficients on the interaction terms between the governmental division variables and GSP overwhelm and in fact reverse much of the effect of the governmental division coefficients.

When GSP equals zero, divided government has a significant positive

effect on filings: the coefficient translates to an additional 12,388 filings per million population. The other forms of interbranch governmental division captured in models 2, 3, and 4 are similarly signed and are of the same order of magnitude but about half the size. The negative coefficient of the interaction between GSP and divided government shows that as GSP increases, the effect of divided government decreases. When controlling by population (Table A1), when GSP and all other variables are at their medians, divided government increases total filings by 15,795; this translates to a median increase in court filings of 11 percent. However, when the data are normalized by population, for a median state, divided government actually reduces filings per capita by approximately 30 percent, from 87,702 to 62,105 at the median for all variables. A similar combination of results for intrabranch division is shown in Table 3.

Bicameral partisan division has a positive and statistically significant coefficient, as PPT suggested: 5,509 filings per million population when GSP equals zero (5,000 when controlling by population). But, again, the effect of bicameral partisan division and partisan margins are highly contingent on GSP; when GSP increases, the effect of bicameral division disappears. When all the other variables are held at their medians, bicameral division reduces civil filings by 36 percent.

The coefficient for the size of the partisan majority in the House was statistically significant, but the effect is substantively insignificant, even when GSP is set at zero: an increase of 1 percent in the House margin reduces civil filings by 127 per million population. The effect of the Senate margin is effectively zero. When controlling by population (Table A2), the Senate margin regains statistical significance while the House margin loses statistical significance, but once again both are substantively meaningless. In fact, in Table 5, the Senate margin is in the direction opposite of that predicted: it results in 96.8 additional filings per percentage change in the partisan margin. Like the effect for the House margin in Table 3, this effect is also substantively trivial.

The null results for bicameralism are consistent with Bowling and Ferguson's (2001) results in testing the effect of divided government on legislative passage. They found gubernatorial-legislative division to have a significant effect on high-conflict legislation but bicameral division to have no effect, and in some cases a positive effect, on legislative passage. Thus, the lack of effect of bicameralism on litigation rates may arise because bicameralism does not have the predicted effect on legislative

passage. Given the fragility and inconsistency of the results on the Senate and House margins, hypothesis 3 cannot be sustained.

Finally, it is not possible to establish the effect of a change between divided and united government in a given electoral year, which was tested for using a range of time lags.[16] This is not very surprising: a move from divided to unified government cannot be expected to transform a litigious culture overnight. The results in Table 2 show a conditional effect of political variables, which is best interpreted as indicating the effect of a state's tendency toward divided versus united government; changes within the state warrant further investigation.

These results suggest that both divided government and bicameralism have significant effects on litigation, but the relationship is not as straightforward as the PPT model proposes. The effects of governmental division are conditional on the wealth of the jurisdiction. The point at which the effect of divided government is zero occurs when GSP is approximately $20,000 per capita—well below the state median. This means that divided government contributes to litigation only when GSP is quite low. When GSP is high, the effect of governmental division is overwhelmed by economic factors.

There are at least two reasons why the litigation-generating effect of the governmental division variables might diminish as GSP increases. Positive political theory could be correct in describing the basic relationship between political division and litigation, but the hamstringing effect of a status quo existing in the gridlock region may be overcome by logrolling. When the economy is in good shape, there are enough resources that partisan division can be overcome through pork for each member's constituency. But during economic difficulties, there are fewer resources with which to bribe opposing legislators and few incentives for members to agree to legislation cutting back on distributive policies. So when GSP is low, governmental division will be determinative of the fate of much legislation and, consequently, will affect the level of litigation in response to legislative inaction. But when GSP is high, these divisions can more easily be overcome and legislation successfully passed, and so the relationship between partisan division and civil filings diminishes.

The second possibility is that litigation could be consistently high in

16. This effect would be very difficult to clearly establish, as ordinary litigation takes approximately 4 years to progress through the court system, as does much electoral change (Baird and Jacobi 2005).

wealthy states, with governmental division only encouraging civil filings in low-GSP states. The covariance between the economic and political variables could be due to richer states tending to have more diverse populations, owing to both 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. In that case, the explanatory power of governmental fragmentation would be limited to low-GSP jurisdictions.

To further probe the covariation between GSP and governmental division, the data were 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, the coefficient on divided government was consistently positive, while the coefficient on the interaction term was negative, but these coefficients were statistically and substantively significant only in the highest and two lowest categories. The coefficients (p-values) for the five ranges, from lowest GSP to highest, in the per capita effect of divided government per 100,000 population were 4,653 (.009), 15,645 (.000), 278 (.932), 3,100 (.281), and 39,941 (.000). In fact, governmental division has the highest impact in the highest GSP states, accounting for an increase of 25 percent for median states within this range.

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 in the Midwest and South. 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 on litigation warrant further analysis; nevertheless, this analysis has made the important first step of establishing the significance of the effect of political division on litigation levels, conditional on wealth.

Divided government and bicameral division have been shown to have significant effects on litigation, but the effect of the size of chamber margins could not be established. Also, the results suggest that the effect of governmental division on litigation rates is more complicated than the PPT model predicted, 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 moderate or high. This suggests that some PPT models may need to incorporate the role of economic wealth.

Certainly this is the case for any model of litigation rates: economic

wealth has been shown to be a major determinant of litigation rates. This is significant for the debate in the legal literature over the existence of a litigation explosion, particularly given the negative results on the time trend: the massive increase in litigation rates in recent decades is insignificant when the condition of each state's economy is controlled for. Economic growth in the United States has increased by an average of 3.2 percent annually since 1970; litigation has increased in lockstep. This analysis suggests that increasing litigation rates are not necessarily cause for any alarm, despite popular perceptions to the contrary.

As mentioned, there is considerable noise involved in these tests of the data; however, this noise works against the results found here, and thus the results understate the likely effect. Nevertheless, looking at all civil filings may not be the ideal test; clearer results may be gained through breaking the data down by category of law. Such data are not currently available for state litigation rates, but in a related study, Langer (2002) examined the probability of a docketed judicial review case in four areas of law: campaign and election law, workers' compensation, unemployment compensation, and welfare benefits. She found that divided government caused a statistically significant 2 percent increase in the probability of an individual case in workers' compensation and welfare benefits but no effect for unemployment compensation and, contrary to expectations, a significant but negative effect for campaign and election law. This study suggests that Langer's varied results may stem from a failure to account for economic factors, as, in some instances, the political factors are overwhelmed by their conditionality on economic strength.

The data analyzed here identify a powerful economic effect on litigation levels and a significant effect of governmental division on litigation levels, albeit affected by economic factors. The existence and extent of fragmented political power, and its resultant gridlock region, significantly shape state variation in levels of litigation, but the effects of political factors are contingent on economic factors. This supports findings, such as Donahue and Siegelman's (1991) study specifically in relation to employment discrimination, that show that economic factors are enormously significant determinants of litigation rates; the present article shows that economic factors are highly significant in overall civil filings. As such, litigation rates should not be analyzed solely in terms of legal rules governing the procedure of litigation. Instead, litigation rates in the states are strongly affected by the separation of powers and the state of the economy.

APPENDIX

Table A1. Interbranch Division: The Effect of State Divided Government, Gross State Product (GSP), Population, and Time on Court Filings

	Model 1: ≠H=S=G	Model 2: H=G≠S	Model 3: H≠S=G	Model 4: H=S≠G
Divided government	33,335.02**	35,900.58**	51,229.30**	19,848.14+
	(5,520.65)	(6,808.62)	(7,023.71)	(10733.91)
Gross state product (per million)	.93**	.50**	.29**	.61**
	(.06)	(.08)	(.08)	(.09)
Divided government × GSP	−.29**	−.31**	−.35**	−.18**
	(.03)	(.03)	(.03)	(.05)
Population	−.01+	.03**	.05**	.02*
	(.00)	(.01)	(.01)	(.01)
Time trend	441.60	31.35	426.51	−422.66
	(342.24)	(418.23)	(421.49)	(460.31)
Intercept	103,102.10**	−23,733.83	−106,125.90**	3,5078.26
	(21,206.52)	(28,048.89)	(29697.66)	(30251.41)
Adjusted R^2	.50	.74	.73	.73
N	1,047	481	481	481
σ	.85	.85	.79	.79

Note. The group variable is state. All regressions include state fixed effects. Standard errors are in parentheses.

+ $p < .10$.

* $p < .05$.

** $p < .01$.

Table A2. Legislative Division: State Bicameral Division, House and Senate Margins, Gross State Product (GSP), and Population on Court Filings

	Model 5: Bicameralism	Model 6: Senate Margin	Model 7: House Margin
Bicameralism	16,337.01*		
	(7,298.31)		
Senate margin		−298.73*	
		(154.76)	
House margin			−45.62
			(185.77)
Gross state product	1.00**	.61**	.57**
	(.06)	(.05)	(.06)
Bicameralism × GSP	−.27**		
	(.04)		
Senate margin × GSP		.01**	
		(.00)	
House margin × GSP			.01**
			.00
Population	.02**	−.00	.00
	(.01)	.01	(.01)
Intercept	148,741.80**	101,820.60**	68,642.74**
	(20,754.62)	(2,190.83)	(23,184.51)
Adjusted R^2	.38	.58	.58
σ	.87	.81	.79

Note. $N = 1{,}047$. All regressions include state fixed effects. Standard errors are in parentheses.

* $p < .05$.

** $p < .01$.

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