Research Note

THE EVOLUTION OF LITIGATION IN THE FEDERAL COURTS OF APPEALS, 1895-1975

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This article examines the business of three United States Courts of Appeals over the course of their history. The courts selected for study were the northeastern Second Circuit, the deep south Fifth Circuit, and the west coast Ninth Circuit. A random sample of 50 cases was drawn for each circuit for every fifth fiscal year beginning with 1895 and ending with 1975. The sample years were aggregated into four time periods: 1895-1910, 1915-1930, 1935-1955, and 1960-1975. The business of the three circuits was found to have changed substantially from the 1895-1910 time period to the modern period. In the earlier years the circuits had small proportions of criminal cases—with the exception of the Second Circuit—a significant portion of real property cases, substantial proportions of business cases, and significant proportions of tort cases. By the 1960-1975 period a sizable proportion of the business of all three circuits was devoted to criminal and other public-law type cases; there were negligible proportions of real property cases, relatively small proportions of business cases, and even smaller proportions of tort cases. Public disputes replaced private disputes as the major source of the courts' business, and over time there has been a convergence among the circuits in the mix of cases coming to them.

I. INTRODUCTION

The roles that courts play in the making of public policy ultimately are dependent on the composition of their business. Put simply, judges cannot decide what they do not hear. Accordingly, the pattern of demands brought by litigants helps to determine the boundaries of a court's work as a policy maker. Where a court chooses to address fully only a portion of the demands that come before it, screening decisions play an equally important part in shaping its work by modifying the impact of litigation patterns.[1] A court's business seldom

[1] The literature on litigation and case screening has become voluminous. For examples, see Sarat and Grossman (1975), Galanter (1974), Sorauf (1976), Provine (1980), and Meador (1975).

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remains static. The volume of cases that a court receives, and the subject-matter distribution of those cases, can change radically from one generation to the next. Inevitably, this evolution in business will be reflected in the kinds of outputs that a court produces.

Until recently, scholars gave little attention to the evolution of judicial business. But increasingly they have sought to trace changes in court business and evaluate their impact on judicial policy making. This concern is reflected in studies that deal with the evolution of business in trial courts (Laurent, 1959; Friedman and Percival, 1976; McIntosh, 1981) and also at the appellate level (Casper and Posner, 1974; Kagan *et al.*, 1977). The study that we report in this article was designed to describe and analyze changes in the business of the federal courts of appeals from 1895 to 1975.

Our study[2] examines changes in the business of three federal courts of appeals from 1895 to 1975. We selected three circuits—the Second, Fifth, and Ninth—to maximize diversity in the socioeconomic environments of the courts we analyzed. The business of the Second Circuit, which includes Connecticut, New York, and Vermont, has been dominated by New York City. In fiscal 1970, for example, about 80 percent of the appeals from district courts filed in the court of appeals came from the two districts whose cases come primarily from New York City (Adm. Office of the U.S. Courts, 1970: 216). The work of this court of appeals reflects rather strongly New York's status as the nation's leading commercial center.

The Fifth Circuit with which we are concerned, of course, is the large circuit that existed prior to the division approved by Congress in 1980. That circuit consisted of Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, and the Canal Zone. It contained most of the Deep South, probably the most distinctive region in the country socially and a relatively underdeveloped region economically. The circuit has been most visible in the last two decades for its civil rights business (*Yale Law Journal*, 1963); that business, however, typically has constituted only a small proportion of the circuit's workload.

The Ninth Circuit consists of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam. But over time, this has increasingly become a

[2] In its general approach and methodology, our study was modeled in part on a major study of state supreme courts by Friedman, Wheeler, Cartwright, and Kagan (see Kagan *et al.*, 1977; 1978); and we have profited a great deal from their work.

"California circuit." In our sample of cases, about half of the appeals from district courts have come from California; since 1940 the proportion has been about 60 percent. When the courts of appeals were established in 1891 much of the circuit still resembled a frontier; today it includes both highly urbanized industrial and commercial centers and areas that remain relatively unsettled and undeveloped—many of which, however, are experiencing rapid population growth.

The data for our study were taken from samples of the cases decided in published opinions. For each circuit a random sample of 50 cases was drawn for every fifth fiscal year from 1895 through 1975.[3] We obtained a total of about 850 cases for each of the courts.[4] We analyzed the composition of the courts' business in terms of a variable we call the "area of law," and which was designed to capture the field of law and factual situation involved in a case. We coded this variable on the basis of information provided in the opinions. On the whole the opinions proved to be good sources for the necessary data, although we encountered some of the difficulties involved in obtaining information from opinions described by Cartwright (1975).

To present these data, we have divided our study period into four shorter time periods: 1895-1910, 1915-1930, 1935-1955, and 1960-1975. The cases from the four or five sample years in each time period are aggregated.[5] While aggregation of sample years entails some loss of precision in pinpointing the onset of changes in patterns of litigation, especially those attributable to historical events such as wars and depressions, this procedure

[3] The Ninth Circuit sample for 1895 includes only 49 cases, because that constituted the universe of cases decided with reported decisions in that year. The Second Circuit samples for five sample years include only 49 cases because of a processing error.

[4] A sample of published opinions is not the same as a sample of all cases that the courts of appeals decide. Even in the early years of the courts of appeals some decisions were unpublished (Schick, 1970: 55). In recent years increasing proportions of decisions have been issued without published opinions. For instance, in our sample years the proportion of unpublished opinions in the Fifth Circuit first exceeded 20 percent in 1965, when it reached approximately 27 percent; that proportion fell to 19 percent in 1970, but jumped to 58 percent in 1975. For other information on publication and nonpublication, see Shafroth (1967: 271), Commission on Revision of the Federal Court Appellate System (1974: I, 451), and Dunn (1977). Furthermore, the circuits' publication guidelines ensure that certain kinds of cases are especially likely to be unpublished (Federal Judicial Center, 1973: 51-55). Our analysis of detailed data gathered by Stephen Wasby on issues raised in published and unpublished cases in the Ninth Circuit in 1973-1974 suggests that the published opinions are fairly representative of all cases but that there are some subject-matter differences between published and unpublished decisions.

[5] Strictly speaking, of course, this procedure is inappropriate, and we could not use these aggregated samples as the basis for statistical analysis of changes in court business.

yields a more easily presented and understood view of the principal secular trends.

The study is primarily an exploratory one. For that reason we did not lay out and test hypotheses about changes in the business of the courts of appeals. There are some issues of particular concern to us, including the extent of the growth in cases concerned with public policy and changes over time in differences among the three circuits. But we had no firm expectations about these issues; consequently it made most sense simply to examine the patterns of judicial business documented by the data.

II. THE SUBSTANCE OF APPELLATE ACTIVITY

Our concern is primarily with changes in the composition of the business of the courts of appeals. But changes in composition cannot be understood in isolation from changes in volume. A notable trend in the history of the courts of appeals has been the tremendous growth in their caseloads. The number of docketed cases more than doubled between 1895 and 1925 (866 to 2156), and it had almost doubled again by 1960 (3899). But the 1960 caseload was tripled within ten years (to 11,662 in 1970).[6]

This growth has important implications for our interpretation of patterns in court business. We analyze categories of cases as proportions of our samples. A particular category may decline proportionately even though the absolute number of cases in that category has grown significantly. In general, the courts of appeals in the 1970s did more of everything than they did in the 1890s, or even in the 1930s; the issue which our study can address most directly, therefore, is the change in the relative proportion of attention given to different areas of law.

The area of law variable that we have used as the basis for our analysis was designed to provide information about the basic legal and factual character of each case. We identified five such areas, with additional subdivisions in each.

[6] The numbers of cases decided in published opinions have grown somewhat less rapidly than the caseloads as a whole, because of the increasing propensity of the courts of appeals to dispense with published opinions. Even so, the volume of published opinions has risen considerably. In the Ninth Circuit, for instance, the average number of published opinions in our sample years from 1960 through 1975 was seven times the average for the 1895-1910 period; in the Fifth Circuit, the 1960-1975 average was almost eleven times the 1895-1910 average.

Criminal Cases[7]

Table 1 shows the incidence of criminal cases in the three circuits over the 1895-1975 period. There has been a substantial increase in the proportion of criminal cases over time. That increase occurred throughout the study period, but was most notable in the 1960s and 1970s when criminal cases became much more prominent in each circuit even as the overall volume of litigation was growing at a tremendous pace. The proportionate increase in the criminal business of the three circuits is not difficult to understand. It reflects, in part, a well-known growth in the crime rate and an expansion in the domain of federal criminal law and the criminal jurisdiction of federal courts.[8]

Table 1. Criminal Cases in the Second, Fifth, and Ninth Circuits as Proportion of all Cases in Sample Fiscal Years

	Time Period				
Circuit	1895-1910	1915-1930	1935-1955	1960-1975	All Sample Years
	%	%	%	%	%
Second	2.0	7.5	13.6	25.2	12.2
Fifth	4.5	15.0	17.2	27.0	16.0
Ninth	5.0	19.5	18.4	36.0	19.7

Increases in criminal business from 1935-1955 to 1960-1975 also reflect changes in the *rate* of appeal from district court decisions. In 1951 about one in seven convicted defendants appealed; in 1970, slightly more than half did so. During the same period the rate of civil appeals increased only slightly (Goldman, 1973). The expansion of free legal services on appeal for indigent defendants, and the due process revolution that provided new grounds for effective appeals, are largely responsible for this growth.

Of the several subject-matter categories of criminal appeals, three have been most common: crimes against persons or property, what we have called crimes against government (such as counterfeiting, violation of parole, and

[7] This category includes all criminal prosecutions, as well as parole board reviews and habeas corpus actions arising from criminal cases. We created subcategories on the basis of types of criminal offenses (e.g., crimes against persons and property). Habeas corpus actions were tabulated as a separate subcategory, without regard to the original criminal charge involved in these cases.

[8] Indicative of this change is the growth in the length of Part I, "Crimes," in Title 18 of the United States Code. In the 1946 edition, Part I totaled 96 pages in length; in 1976 it totaled 275 pages.

contempt of court, but excluding selective service violations as a separate subcategory), and drug offenses. Each has shown substantial increases in each circuit, particularly between 1935-1955 and 1960-1975. For instance, in the Second Circuit crimes against persons or property rose from less than half of one percent to 3.5 percent of all cases, crimes against government from 3.6 percent to 4.5 percent, and drug offenses from about one percent to about six percent. The reasons for the striking increase in drug cases are obvious. All three circuits also experienced a surge of cases involving liquor offenses during Prohibition. In the Fifth Circuit, where even today several states retain vestiges of Prohibition, liquor cases remain quantitatively significant (2.5 percent of all cases in the 1960-1975 period).

Cases involving habeas corpus petitions have also shown major increases. In the 1915-1930 period, habeas corpus actions accounted for one half of one percent of these three courts' business.[9] In the 1960-1975 period their share of appellate business was 5.5 percent in the Ninth Circuit, 6 percent in the Second Circuit, and 9.5 percent in the Fifth Circuit. The great preponderance of habeas corpus actions arose from federal rather than state prosecutions; review of state criminal proceedings constituted a small part of the courts of appeals' business even in the most recent period.

The proportion of criminal cases has been highest in the Ninth Circuit during each time period, but the growth in criminal business and the components of that growth have been similar in the three circuits. Given the differences among the areas served by these circuits, this similarity is remarkable.

Real Property Cases[10]

Table 2 shows that early in our study period the circuits differed substantially in the shares of their work devoted to real property cases. This category accounted for one-fourth of all Ninth Circuit business in the 1895-1910 period and more than one-sixth in the Fifth Circuit. But in the Second Circuit real property cases were statistically unimportant.

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[9] We treated habeas corpus cases as criminal cases, even though technically they are civil actions, because the original disputes were criminal in nature.

[10] These cases concerned ownership and use of real property, including land and real estate. The major subcategory is land ownership and use, excluding zoning. All other property cases were placed in a residual subcategory.

Table 2. Real Property Cases in the Second, Fifth, and Ninth Circuits as Proportion of all Cases in Sample Fiscal Years

	Time Period				
Circuit	1895-1910	1915-1930	1935-1955	1960-1975	All Sample Years
	%	%	%	%	%
Second	0.5	0.5	0.8	1.0	0.7
Fifth	18.0	8.0	4.0	1.0	7.5
Ninth	25.6	9.5	2.4	1.0	9.2

Property cases remained insignificant in the Second Circuit throughout the study period. Meanwhile, they declined in relative importance in the Fifth and Ninth Circuits, with the biggest decreases occurring in the first two decades of the 20th century. By the 1960s and 1970s, property cases constituted only about one percent of the business of each of the three circuits. While the proportionate decline in the Fifth and Ninth Circuits exaggerates the more modest absolute reduction in property cases, an absolute decline did occur. In that respect this category is unique.

The differences among the circuits early in our study period and the later decline in the Fifth and Ninth Circuits both can be understood in terms of the kinds of cases that dominate this category. About 80 percent of the property cases that we found involved land ownership and use. Such cases were relatively common in the Fifth and Ninth Circuits early in their history, because a great deal of land remained open in those areas and provided a basis for potential disputes. The early litigation in the Ninth Circuit featured large numbers of competing mining claims, disputes over federal land grants to railroads, and disagreements about the use of federal timber land. Oil-rich land in Texas was one major source of disputes in the Fifth Circuit. By the 1890s, in contrast, the urbanized and long-settled states of the Second Circuit probably did not have many such disputes to resolve.

In time more of the land in the west and southwest was settled, and the numbers of disputes concerning its ownership and use undoubtedly declined. Moreover, we may speculate that the law which determined rights to land became more certain, making resort to litigation less necessary and less promising (Friedman, 1967). Whatever the reason, what had been one of the most important fields of activity for the Fifth and Ninth Circuits has been overtaken by other sources of

business, and in this respect the three circuits are now similar to each other.

Business Cases[11]

The business cases in our sample were of two types: those involving contract disputes and those involving business organization. As Table 3 shows, the overall proportion of business cases in each circuit remained fairly constant during our first two periods. This proportion then declined in the third period, and the decline accelerated in the most recent period. The subdivision of cases in that table suggests a more complex process of change, but one in which both contract cases and business organization cases have come to assume smaller proportions of the work of each circuit since 1930.

Table 3. Business Cases in the Second, Fifth, and Ninth Circuits as Proportion of all Cases in Sample Fiscal Years

	Time Period				
Circuit	1895-1910	1915-1930	1935-1955	1960-1975	All Sample Years
	%	%	%	%	%
			All Business Cases		
Second	34.9	36.7	30.4	17.2	29.8
Fifth	46.0	48.0	33.2	17.5	36.0
Ninth	27.1	30.0	26.4	13.0	24.3
			Contract Cases		
Second	21.2	24.7	10.0	11.6	16.2
Fifth	29.0	26.0	21.2	13.5	22.3
Ninth	20.1	16.0	16.4	9.0	15.1
			Business Organization Cases		
Second	13.6	14.1	20.4	5.6	13.6
Fifth	17.0	22.0	12.0	4.0	13.7
Ninth	7.0	14.0	10.0	4.0	9.2

In absolute numbers, of course, business cases have increased in each circuit. But presumed increases in business activity and contractual relations have not produced sufficient expansion in appellate litigation to keep pace with the general

[11] This broad category includes two somewhat different kinds of cases. The first concerns contracts, both between business entities and between businesses and consumers. Contract actions were subdivided according to the type of contract and the situation (e.g., insurance, employment, marine). The second kind of case in this category concerns business organization and management. Organization and management cases were subdivided between bankruptcy and all other actions (e.g., corporate finance, disputes over organizational control). It should be noted that both business and personal bankruptcies are included in the bankruptcy subcategory.

growth in caseloads. As a result, disputes within the business world have become a less important part of the work of the courts of appeals.

In the contract subcategory, one type of contractual relationship is responsible for much of the decline in the proportion of cases. In the 1895-1910 period, more than one-quarter of the contract cases in the Ninth Circuit and more than one-third in the Second and Fifth Circuits were classified as marine; these cases generally involved contracts for the conveyance of goods by ship, and came under the admiralty jurisdiction of the federal courts. By 1960-1975 marine cases had declined considerably: from about 7.5 percent to 1.5 percent in the Second Circuit, from 10 percent to 1 percent in the Fifth, and from 5.5 percent to 1 percent in the Ninth. This decline constitutes close to half the total decline in contract cases. While marine cases have not disappeared from these courts of appeals, they no longer constitute a large share of appellate work.

Most other classes of contract cases also have declined as proportions of the total caseload. The most notable exception is employment contracts in the Second Circuit, which jumped from 1 percent to 6 percent of all cases in the most recent period. In addition, insurance cases in the Fifth Circuit rose in the two middle periods before assuming approximately the same proportion of the circuit's business (6 percent) as during the first period. The failure of contract cases to keep pace with other sources of appellate business might be attributed generally to the increased capacity of businesses to utilize nonjudicial mechanisms to resolve contract disputes (Macaulay, 1966; Mentschikoff, 1961; Bonn, 1972). We might expect the largest enterprises to be most successful in utilizing these mechanisms; this is important because these enterprises, with their interstate scope, would otherwise be especially likely to contribute to federal litigation (Macneil, 1980).

More than 80 percent of the business organization cases in each circuit involved bankruptcy, and bankruptcy cases account for almost all of the decline in organization cases in the 1960s and 1970s. The proportionate decline in bankruptcy cases is impressive because the numbers of bankruptcy filings in the district courts have increased spectacularly since the mid-1940s. The number of district court filings dropped from about 70,000 in 1932 to about 10,000 in 1946, but from that point on a steady increase took place, bringing the total filings in 1975 to 254,000 (Adm. Office of the U.S. Courts, 1947: 85; 1975: 151).

Why did bankruptcy appeals fail to increase in the same manner as criminal appeals?

At least part of the answer lies in the sources of the increase in bankruptcies. Bankruptcy cases that reach the courts of appeals tend to involve business bankrupts with extensive assets and debts; this is understandable because such cases have relatively high stakes. But the bulk of the increase in bankruptcies in the postwar period has come from individuals rather than business entities, largely because of the growth of consumer credit (Jacob, 1969: 26-32; Stanley and Girth, 1971: 18-36; see also Seron, 1978: 31-34). Moreover, the tenfold increase in business bankruptcies between 1947 and 1975 was largely due to small businesses with relatively few assets (Stanley and Girth, 1971: 2, 112-114). Thus the potential for increased appellate litigation was more limited than the aggregate figures would suggest. But it also is true that the bankruptcy system has had some success in recent decades in limiting district court review of referees' decisions, and in turn this has limited the growth of appeals (Stanley and Girth, 1971: 155-158).

During the first two time periods the Fifth Circuit had a considerably larger proportion of business cases than either of the other circuits. After 1930, the circuits became more similar in their attention to business cases. By 1960-1975 each had about the same proportion of its opinions devoted to business disputes—a proportion that was approximately half the proportion in 1895-1910.

Public Law Cases[12]

The three circuits have had different patterns of public law business. As Table 4 shows, the proportion of public law cases has remained quite stable over time in the Second Circuit. In the Ninth Circuit the proportion of public law cases always was substantial, but it rose considerably at about the middle of our study period. In the Fifth Circuit public law cases initially were relatively uncommon, but a marked increase occurred during the same period as the more limited increase in the

[12] All civil cases involving government activity fall into this category, with two exceptions. The first is those cases in which government acts as an "ordinary litigant" (e.g., disputes over land ownership, liability for automobile accidents). The second includes two types of cases that fit better in other categories, zoning and workers' compensation. The subcategories of public law include several areas of economic regulation, such as labor and antitrust, as well as such basic areas of activity as patents, taxation, and regulation of aliens. As the example of patent law indicates, some cases in this category do not involve government directly as a party.

Ninth Circuit. The three circuits reached similar levels by the most recent period, when each of the circuits devoted more than one-third of its published opinions to the public law cases.

Table 4. Public Law Cases in the Second, Fifth, and Ninth Circuits as Proportion of all Cases in Sample Fiscal Years

	Time Period				
Circuit	1895-1910	1915-1930	1935-1955	1960-1975	All Sample Years
	%	%	%	%	%
Second	40.4	39.7	37.6	38.4	38.9
Fifth	8.5	12.5	31.2	35.0	22.3
Ninth	21.1	22.0	42.8	39.5	32.0

The overall picture provided by Table 4 is inadequate for an understanding of the evolution of public law business. It is useful to examine that process in more detail by looking at the major subcategories of public law cases in each circuit. Table 5 shows the proportions of cases in the major subcategories for the Second Circuit; slightly more than 80 percent of all public law cases in that circuit fell into these four fields. These data depict a dramatic process of change that is largely concealed by the overall proportion of public law cases.

Table 5. Selected Subcategories of Public Law Cases in Second Circuit as Proportion of all Cases in Sample Fiscal Years

	Time Period				
Subcategory	1895-1910	1915-1930	1935-1955	1960-1975	All Sample Years
	%	%	%	%	%
Regulation of business practices	0.0	2.5	4.4	7.6	3.7
Regulation of labor relations	0.0	0.5	2.0	10.6	3.2
Patent-trade-mark copyright	21.2	22.6	6.8	3.0	13.0
Tax	16.7	7.0	17.2	7.6	12.2

In the period from 1895 through 1910 public law cases fell overwhelmingly into two categories: patent-trademark-copyright (primarily patent) and taxation (primarily customs duties). Over time the proportion of patent cases has declined precipitously. This decline probably reflects the increased

capacity of businesses to avoid litigation, a capacity that also helps explain the relative decline in contract cases. It also stems from the growing perception of judicial hostility to patents since the 1930s, which has discouraged patent owners from going to court (Fortas, 1971; Ladd, 1959).

Tax cases have followed a more erratic path, with the most recent trend a substantial decline. Customs cases left the Second Circuit and other courts of appeals with the establishment of the Court of Customs Appeals in 1909 (Rightmire, 1918: 28-33). The relative decline in tax cases in the most recent period may seem puzzling in light of the increasing breadth and complexity of the income tax laws, but that decline resulted primarily from the tremendous growth in other types of court business.

Helping to replace patent and tax litigation have been cases arising out of "modern" government regulation of the economy. The growth of federal regulatory activities, particularly since the 1930s, has led to litigation questioning the correctness of regulatory decisions. Thus the labor and business regulation categories, which contained no cases in our earliest period, came to include nearly one-fifth of the work of the Second Circuit in the most recent period. This proportionate increase, of course, severely underestimates the absolute growth in regulation cases in recent years—a growth rivaled only by criminal cases.

The most important subcategories in the Fifth Circuit are shown in Table 6. In that circuit there has been relative

Table 6. Selected Subcategories of Public Law Cases in Fifth Circuit as Proportion of all Cases in Sample Fiscal Years

	Time Period				
Subcategory	1895-1910	1915-1930	1935-1955	1960-1975	All Sample Years
	%	%	%	%	%
Regulation of business practices	3.0	1.5	4.0	3.5	3.1
Regulation of labor relations	0.0	0.5	6.0	10.0	4.3
Tax	1.5	7.0	13.2	7.5	7.7
Abuse of gov't. authority	0.0	0.0	1.2	6.0	1.8
Race discrimination	0.0	0.0	0.0	5.5	1.3

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stability in the proportion of cases concerned with regulation of business practices. But there was a dramatic increase in labor relations cases, following a period of rapid expansion in the union movement in the South during and after the Second World War. The South became a major battleground between organized labor and management, and the growth of the union movement there was reflected very clearly in the docket of the Fifth Circuit.

The pattern for tax cases was similar to that in the Second Circuit, except for the low proportion in the first period that reflected minimal customs business. Patent-trademark-copyright was a negligible source of business throughout the study period. What sets the Fifth Circuit apart is its large proportion of race discrimination cases in the most recent period. The proportion of race cases, 5.5 percent, indicates that a substantial part of the Circuit's attention was given to a relatively narrow class of cases, and that proportion highlights the distinctiveness of the deep south Circuit. An equally substantial growth in cases arising from alleged abuses of government authority reflects the startling growth of the circuit's criminal business: three-quarters of these cases in the 1960-1975 period concerned motions to vacate sentences.

Table 7 displays comparable data for the Ninth Circuit. The business regulation category is omitted because it included too few cases. Labor cases also have been relatively rare. Clearly the growth of government economic regulation has been less important in shaping Ninth Circuit business than it

Table 7. Selected Subcategories of Public Law Cases in Ninth Circuit as Proportion of all Cases in Sample Fiscal Years

	Time Period				
Subcategory	1895-1910	1915-1930	1935-1955	1960-1975	All Sample Years
	%	%	%	%	%
Regulation of labor relations	0.5	0.5	6.0	4.0	2.9
Patent-trade-mark copyright	10.0	6.5	5.6	4.0	6.5
Tax	3.0	2.5	16.0	13.0	9.0
Aliens	5.0	7.0	6.4	3.0	5.4
Abuse of gov't. authority	1.5	2.0	5.2	7.5	4.1

has been in the Second and Fifth. The Ninth Circuit has no commercial center comparable to New York City, and the development of the union movement has not been as continuously tumultuous as in the South. As a result, government regulation of commerce and labor relations has not given rise to a comparable body of appellate business.

Two categories of cases have been most responsible for the recent growth in public law business in the Ninth Circuit: taxation and abuse of government authority. The latter, as in the Fifth Circuit, has been a byproduct of increases in criminal prosecutions; it consists chiefly of civil rights claims by prisoners and motions to vacate sentences.

Cases involving aliens set the Ninth Circuit apart from the Second and Fifth. These cases consist primarily of actions by immigrants to remain in the United States by thwarting government efforts to deport them. Although New York City is most famous as an entering point for immigrants, it is the Ninth Circuit in which immigration cases have been most important. In the early years virtually all these cases involved Orientals, and this reflected their special status under our immigration laws.

The distribution of public law business varies considerably by circuit. Moreover, patterns of growth in public law cases have been quite different—from the tremendous rise in cases in the Fifth Circuit to the absence of proportionate growth in the Second Circuit. But in one important respect the three circuits now are similar: in each, public law issues now comprise the largest single category of appellate business.

Tort Cases[13]

The data in Table 8 reveal that tort cases have declined somewhat as a proportion of the business of all three circuits. Tort litigation has increased subtantially, but not at a rate sufficient to keep pace with the more rapidly growing fields such as criminal law and public law (see Shapiro, 1977: 319-320). Most tort cases in these circuits arise from transportation mishaps, and the evolution of tort business can be understood in terms of changes in the utilization of transportation systems.

[13] All tort cases fall into this category, as well as workers' compensation cases. Cases are subdivided according to the situation and type of tort: e.g., motor vehicle, product liability, workplace accidents.

Table 8. Tort Cases in the Second, Fifth, and Ninth Circuits as Proportion of all Cases in Sample Fiscal Years

Circuit	Time Period 1895-1910	1915-1930	1935-1955	1960-1975	All Sample Years
	%	%	%	%	%
			All Tort Cases		
Second	20.2	14.6	17.6	16.7	17.3
Fifth	22.0	15.5	13.6	19.5	17.4
Ninth	18.1	15.5	8.4	10.5	12.8
			Employee Injury		
Second	4.0	6.0	5.6	6.1	5.4
Fifth	15.0	8.5	8.4	8.0	9.9
Ninth	10.6	4.5	3.6	5.5	5.9
			Other Personal Injury		
Second	16.2	8.5	8.8	6.1	9.8
Fifth	4.0	2.5	3.2	4.0	3.4
Ninth	1.5	4.5	3.2	1.0	2.6

In the Fifth and Ninth circuits the relative decline in tort business can be attributed to a decline in railroad cases. In both circuits railroad employees were the plaintiffs in most employee injury cases, suing primarily under the Federal Employers' Liability Act. Railroad accidents involving non-employees also have declined proportionately. In the Fifth Circuit the decline has been from about 4 percent of all cases in the 1895-1910 period to 2.5 percent in the most recent period; in the Ninth Circuit it has been from about 2 percent through 1930 to a negligible share of business in recent years.

In the Second Circuit the significant decline is in maritime torts. In the first period maritime accidents accounted for 12 percent of all business; in the last period they accounted for only 1 percent. Together, marine tort and marine contract cases constituted nearly 19 percent of the Second Circuit's business in 1895-1910, and less than 3 percent in 1960-1975.

These declines are understandable, in that railroad and marine shipping have not grown as rapidly as other sources of court business. But we might have expected motor vehicle transportation, which *has* grown at a tremendous pace, to have compensated for the downward trends in other forms of transportation. That this has not occurred is chiefly a function of jurisdictional rules. Marine cases go to federal court under admiralty jurisdiction. Railroad employee cases are federal because of the Federal Employers' Liability Act, and railroad accidents are relatively likely to meet the diversity of citizenship and minimum damages requirement for federal cases. In contrast, motor vehicle accidents have no special

status under federal law except insofar as they may qualify for diversity of citizenship jurisdiction. A substantial number of such cases do come to the federal district courts (approximately 11 percent of the total district court caseload in fiscal 1970), but because they usually involve individuals rather than large organizations, and because they concern primarily factual rather than legal issues, review in the courts of appeals is sought at a relatively low rate. Nevertheless, 3 percent of all litigation in the Second Circuit during the 1960-1975 period involved automobile accident cases. Such cases are much more dominant numerically in the state courts (see Kagan *et al.*, 1977: 144).

III. DISCUSSION

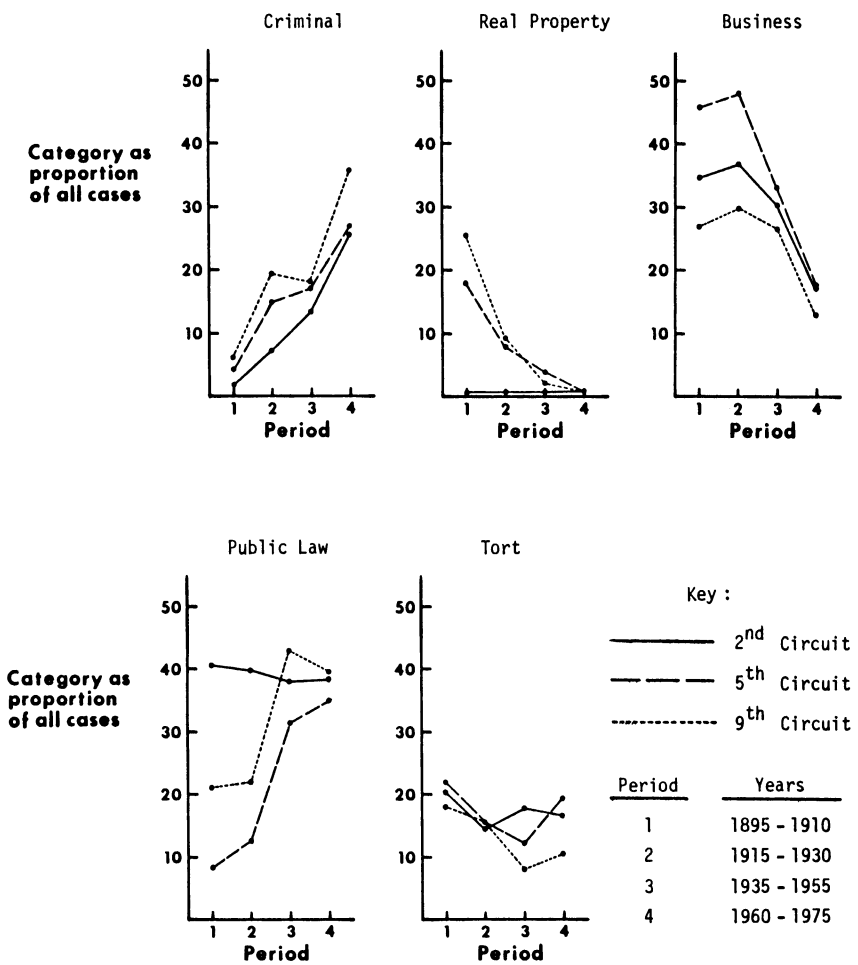
The trends that we have found in the business of three courts of appeals are complex, but many of the most notable changes point toward the same conclusion: the business of the Second, Fifth, and Ninth Circuits, once dominated by private economic disputes, now emphasizes disputes involving government activity. A large proportion of these disputes are essentially noneconomic in character.

Increases in criminal cases and cases involving government economic regulation are matched by a decline in contract and bankruptcy cases and, in the Fifth and Ninth Circuits, in land disputes as well. A general sense of the change can be obtained by looking at the proportion of each court's business that was devoted to criminal and public law cases. For each circuit, that proportion rose steadily from the first period to the last. The increase was relatively modest in the Second Circuit, from 42 percent to 64 percent; but it was far more substantial in the other courts: from 13 percent to 62 percent in the Fifth Circuit, and from 26 percent to 76 percent in the Ninth Circuit.

The strength of this trend should not cause us to conclude that private economic disputes have disappeared from the courts of appeals. Such cases have, in fact, increased considerably in absolute numbers. The courts of appeals still play active policy-making roles in economic disputes in the private sector. But the growth in such cases has been far outdistanced by the growth in cases involving government in a more direct way. This change, of course, has not been unique to the federal courts of appeals. Rather, it seems to be a part of a general trend in the business of appellate courts in the United States (Frankfurter and Landis, 1928; Gressman, 1964; Kagan *et al.*, 1977). The rapid growth in judicial business

involving government in a direct way, and the causes of that growth, have received a great deal of recent attention from scholars (Chayes, 1976; Horowitz, 1977). Certainly a primary cause is the growth in government and its activities. The courts themselves, however, have played an important and not uncontroversial role in attracting such cases to the judicial system. The implications of the growth in cases involving government activity for the policy roles of the courts of appeals are uncertain. The resolution of numerous challenges to government action is not synonymous with an active public policy role. At the same time, the potential role of the courts of appeals in social policy clearly has grown with the changes in their business.

Figure 1. Proportions of Cases in Five Major Categories, By Circuit



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A second pattern in court business shown by our data is a degree of convergence among the three courts. In general, the business of these circuits has become more uniform. This trend is shown in Figure 1, which focuses on the five major categories of cases. In their first two decades these three courts had vastly different dockets. Since then these differences have been reduced a great deal. All differences have not disappeared—and the aggregation of cases into five categories obscures some of the variation that still exists—but they have become much less pronounced.

To some extent, this consequence results from changes in the circuits themselves. But the activity of the federal government also has had a homogenizing effect. Most obviously, the growing volume and scope of federal activity has helped to increase the levels of public law business in the Fifth and Ninth Circuits so that this now is the largest category of cases in all three circuits. More subtly, the tremendous growth in criminal cases has had the effect of reducing proportionate differences among the circuits in other fields, most notably the business category. The impact of federal government policy and activity on the business of the federal courts of appeals cannot be ignored. These courts continue to serve as arbiters of essentially private disputes, but increasingly this function has been overtaken by the task of arbitrating disputes arising from government decisions. Policies of the federal government and the problems associated with them now provide the basis for most federal appellate activity. In this sense, the legislative and executive branches of the federal government are largely responsible for a historic transformation in the activities of the courts of appeals as well as the caseload problems from which these courts increasingly suffer.

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