C. *Courts and the Theory of the State*

GOVERNMENT LITIGATION AND NATIONAL POLICYMAKING: FROM ROOSEVELT TO REAGAN

WOLF HEYDEBRAND

Changes in government litigation during the past fifty years are treated as an indicator of changes in policymaking priorities of various national administrations during that period. Policies of direct government intervention (enforcement) are distinguished from policies of indirect intervention (regulation). They are measured here by U.S. plaintiff and U.S. defendant litigation trends in federal district and appeals courts from 1937 to 1986. Trends in administrative appeals from regulatory agencies, boards, and commissions to the appeals courts are used to estimate the intensity of regulatory activity. There is some evidence of systematic variation in government litigation and administrative appeals due to an "administration" effect, but there are also secular tendencies suggesting a more general "government" effect cutting across various administrations. The implications of the analysis for the theory of the state are discussed.

The theoretical question posed in this article is: What can government litigation tell us about changes in the role of the state and of variations in government policies, notably welfare-state policies of regulation and government intervention and, conversely, neoliberal (laisser-faire) policies of deregulation? This perspective places federal courts and civil litigation in a larger historical and structural context and raises questions about the role of courts and judges as part of the state apparatus. Changes in state functions such as legitimation and facilitation of economic accumulation are reflected in government litigation in which the government either enforces public policy (U.S. plaintiff cases) or is a target of private corporate entities litigating to resist intervention through the application of federal statutes and regulatory rulemaking (U.S. defendant cases and administrative appeals in the higher federal

For helpful comments on previous drafts, I am grateful to Jo Dixon, Marc Galanter, David Greenberg, Christine Harrington, Elizabeth Heydebrand, Frank Munger, Carroll Seron, Steven Spitzer, and Mayer Zald, as well as the participants in the 1987 Conference on Longitudinal Research on Trial Courts, Buffalo, N.Y.

Special thanks are due to Felinda Mottino for superb research assistance and the production of the computer-generated graphs.

LAW & SOCIETY REVIEW, Volume 24, Number 2 (1990)

courts). Public law litigation involving the government should, therefore, be a fairly sensitive indicator of the nature and extent of government policymaking.[1]

In the following section, I discuss some neglected connections between courts and the executive branch, including regulatory agencies. I then address the question of what kinds of analytic distinctions might be useful for observing the relationship between policymaking and litigation. I will illustrate these points using available data. Finally, my discussion and conclusion will suggest certain modifications in the theory of the state that seem necessary in view of the complex interaction between executive, judiciary, administrative agencies, and the corporate economy.

COURTS AS AN ASPECT OF THE STATE

To establish a theoretical link between government policies and litigation is not only to emphasize the macro-social and structural sources of some types of litigation but also to treat courts and the judicial system as aspects of the state (see also Heydebrand and Seron, 1986). My proposal to link litigation in the federal courts to executive actions draws on those recent theories of the state that recognize and seek to explain the structural persistence of both legitimation crises (Habermas, 1975; Wolfe, 1977) and fiscal crises of government (O'Connor, 1973; Rose, 1978). Indeed, most contemporary state theorists agree that the needs for sociopolitical (democratic) legitimation, economic accumulation, and their management by the state place contradictory demands on state man-

[1] Previous research suggests that government activity is a significant source of government litigation (Heydebrand and Seron, 1986). Measuring government activity by the volume of per capita government employment in all eighty-four U.S. judicial districts in 1960 and 1970, the data show that the task structure of district courts, their organizational form, and their judicial outputs are significantly affected by the activity of government agencies at federal, state, and local levels. The purpose of this article is to explore annual changes in government litigation for the last fifty years. In the absence of a continuous measure of government activity, I use the nine national administrations extending between Roosevelt's second term (1937) and the second term of the Reagan administration (1986) as the independent variable. While in one sense this is a crude substitute for more refined measurement, the use of even a small number of different presidential administrations as an independent indicator permits a relatively simple, yet politically sensitive comparison of periods of intense government intervention or welfare-state orientation (e.g., Roosevelt's second and third terms, or the Kennedy-Johnson years) with the period of the neo-liberal Republican ascendancy under Nixon, Ford, and Reagan.

The main proposition to be examined is that government litigation is a significant indicator of the nature and changes of government policymaking. Specifically, I argue that certain types of government litigation vary with the nature and intensity of regulatory policies, i.e., with the extent to which different administrations have promoted or challenged the welfare state as a regulatory mechanism in liberal capitalist democracy. In other words, I argue that changes in government litigation over the last fifty years reflect changes in the policymaking priorities of different national administrations during that period.

agement, and that it is the balancing act between them that characterizes much of the policymaking of modern governments (Alford and Friedland, 1985; Offe, 1984; but see Lehman, 1988). The need to manage the crises of accumulation and legitimation and their inherent conflict is widely credited with having produced government intervention, regulation, the growth of administrative and public law and, generally, the "crisis of crisis management" of the modern welfare state (Offe, 1984). Since the turn of the century, successive national administrations have acted on the perceived need to contain capitalism's tendency toward economic concentration, to restore competition, if possible, and to protect some minimal notion of the public interest (Skocpol, 1980; Skocpol and Finegold, 1982; Skocpol and Ikenberry, 1983; Skowronek, 1982).

In sum, the "typical justifications for regulation" (Breyer, 1982) were the control of monopoly power and excess profits, compensating for externalities and lack of adequate information and, generally, providing a nonsocialist corrective to endemic "market failure" under advanced capitalism and to "save capitalism from itself" (Breyer and Stewart, 1985: 30, 37). All the normative justifications for regulation can be seen as attempts to shore up the legitimacy of the capitalist political economy.[2]

FEDERAL POLICY AND GOVERNMENT LITIGATION: SOME ANALYTIC DISTINCTIONS

The principal hypothesis of this article is that intervention strategies are reflected in litigation. Intervention strategies can be seen as political and legal responses of the federal government to crisis conditions. The form and intensity of these responses will vary with the nature and severity of the crisis as well as with the political philosophy of particular presidents and their administrations. For example, legitimation crises triggered by "market failure" will generally tend to produce more intensive government intervention, especially under Democratic administrations.

Apart from the question of intensity, however, intervention strategies differ in form. Two main forms are distinguished here. Intervention can occur through direct use of the courts by the government or, indirectly, through administrative regulation. *Direct intervention*, a form of active public policy enforcement, is reflected in suits by the government against some party (U.S. plain-

[2] For specific examples of different types of government intervention, see (1) the antitrust litigation by the government against the electrical industry around 1960 (Geis, 1967; Smith, 1961; Walton and Cleveland, 1964); (2) litigation generated by the civil rights and welfare legislation of the 1960s (Friendly, 1973; Graham, 1970; Handler, 1978); (3) the enforcement of federal statutes concerning corporate crime (Barnett, 1981; Schneider, 1982); and (4) in the early 1980s, the Reagan administration's tightening of the welfare screws, e.g.,changing the eligibility rules for social welfare and disability payments, leading to a temporary explosion of suits against the government (Mezey, 1987).

tiff cases). Cases in point are government enforcement of civil rights statutes or antitrust statutes, indeed, government-initiated suits in response to violations of any federal statutes.

U.S. defendant cases (i.e., suits against the government), on the other hand, can be seen as reflecting *indirect government intervention*. They result from the challenges of government regulations, federal statutes, and regulatory rules mounted by the "policy-takers" (Offe, 1981: 138)—by private corporations, local governments, local social institutions such as school districts, hospitals, housing authorities, or special-interest groups and associations.

While the measurement of direct and indirect intervention in the form of U.S. plaintiff and U.S. defendant cases is most appropriate at the level of the U.S. district courts because, as the trial courts of the federal judiciary, they have original jurisdiction over these cases, intervention is also observable at the appellate level, although with a difference. In the U.S. Circuit Courts of Appeal, two types of cases of interest here are litigated: *regular appeals* of U.S. cases from the district courts, and *administrative appeals* from most regulatory agencies, boards, and commissions. If the government is either initially a plaintiff or a defendant in the district court or in the regulatory process, the *rate of such appeals* reflects the *intensity of regulatory activity* and thus the intensity of indirect government intervention.[3]

The particular form of intervention—direct or indirect—may be seen as resulting from the application of different political and administrative philosophies to the solution of social and economic problems. Thus, direct intervention (U.S. plaintiff cases) represents a more activist and possibly a more coercive, even punitive form of enforcement, a stance that may conceivably vary as well with the political temperament of the particular U.S. Attorney General in the Department of Justice (e.g., the continuation of the 1959–60 prosecution of the electrical industry through 1961 under Robert Kennedy). Indirect intervention (U.S. defendant cases), by contrast, represents a more regulatory form in which the burden of challenging the government is placed on those who are affected by policy, most likely with the expectation or hope that they will acquiesce on the basis of a sense of cooperation or even consensus.[4]

[3] As suggested by an anonymous referee, administrative appellate litigation can also be seen as a function of the political orientation of agencies and courts. Where such orientations are consistent, a party is not likely to win in one and lose in the other; when they are inconsistent, a party losing in the agency may win in court. Nevertheless, regulatory rulemaking and policymaking drives much of appellate litigation. In the last twenty years, over 80 percent of U.S. cases at the appellate level have originated as U.S. defendant cases in district courts. These cases reflect the intensity of indirect government intervention even though the statistics do not show who won or lost in the district courts.

[4] The indirect nature of this form of intervention is also underlined by the fact that Congress has a significant role in the promulgation of regulatory

As explained by modern state theory, problems of legitimation at the system level generate costly forms of government intervention, among them a high rate of government litigation. Indeed, various national administrations have faced contradictory pressures of both legitimation and fiscal crises. How have these contradictory pressures on intervention affected litigation? On the face of it, it stands to reason that fiscal crises at the level of national government or the economy lead to a reduction of regulation or outright deregulation and, hence, to a decline in U.S. defendant cases as well as administrative appeals. Enforcement of public policy (U.S. plaintiff cases), however, may actually increase, especially where policy is targeted at generating government revenues (e.g., tax cases) or preventing a drain of government resources (social security and disability payments, recovery of loans and overpayments, foreclosure and bankruptcy).

DIRECT AND INDIRECT INTERVENTION: GOVERNMENT LITIGATION IN THE DISTRICT COURTS

The evidence for the general hypothesis of an effect of national policymaking on litigation can be presented in a number of ways, chiefly through examining the U.S. caseload in absolute numbers as a proportion of actions under statutes in U.S. district courts, as well as U.S. appeals and administrative appeals in U.S. courts of appeal during the past forty to fifty years, depending on the availability of data. Let us begin with government litigation in the district courts, specifically with the composition of U.S. cases.

---

policies, even though their implementation and application at the level of the regulatory agencies will—through executive appointments—tend to reflect the choices, style, and philosophy of the incumbent president and his advisers. For example, in *Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance*, 463 U.S. 29 (1983), a Supreme Court decision finding that the National Highway and Transportation Safety Agency's views of detachable automatic seat belts were arbitrary and capricious, Justice Rehnquist, in a dissenting opinion, stated:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

A similar example of changed agency views under President Reagan is illustrated by a series of recent decisions by the Federal Energy Regulatory Commission which were also overturned by higher federal courts (Green, 1987).

U.S. Cases: Plaintiff vs. Defendant

U.S. cases showed unusual increases twice during the past fifty years. The first increase came in the second and third terms of the Roosevelt administration, reaching a historic high of almost 80 percent of the entire civil federal district court caseload in 1946 when Truman was president. The second rise, which began under the Ford administration, continued under Carter and Reagan until 1985 but declined in 1986.

On its face, this pattern is not particularly revealing. It seems to support the notion that the Roosevelt administration was the first to intervene heavily in the economy and, hence, the first to generate a surge in government litigation. But why should the same be true of both Carter and Reagan?

To begin to unravel some of the underlying aspects of this counterintuitive pattern, we need to decompose U.S. cases into their two major component parts. This analysis shows that what unites both Roosevelt's third term and both Carter's and Reagan's terms is not regulatory intervention but *direct intervention* in the form of public policy enforcement (U.S. plaintiff cases), due in part to economic exigencies generated by World War II and the economic crisis of the late 1970s and early 1980s (see Fig. 1). The Carter and Reagan administrations shared a policy of direct intervention. The main factor in the rise of U.S. plaintiff cases was the litigation by the government concerning contract actions. For example, recovery of overpayments, already at a high level in 1980, rose from 15,423 to 40,544, or 163 percent, under Reagan from 1980 to 1986. Certain real property actions, notably foreclosures, rose by 67 percent. All U.S. plaintiff actions rose from 39,810 in 1980 to 60,779 in 1986, or 53 percent. By contrast, tax suits dropped by 158 percent during the same period, and the enforcement of labor laws, notably the enforcement of the Fair Labor Standards Act, by 96 percent.

U.S. defendant cases, on the other hand, show a somewhat different pattern. Such cases hovered between 2,000 and 6,000 cases from 1937 to 1961, then increased steadily to about 27,000 in 1982, suddenly surged in 1983 and 1984 (75 percent in two years), and finally dropped to about 31,000 in 1986. The main factor in the surge of U.S. defendant cases during Reagan's first term was not regulatory intervention but civil rights cases, prisoner petitions, and especially Social Security cases, most of which are customarily appealed from the Social Security Administration to the U.S. district courts, with the government as the defendant.

A preliminary conclusion from the analysis of Figure 1 is that the Reagan administration was *not* averse to government intervention. Both U.S. plaintiff and U.S. defendant cases peaked in the mid-1980s, suggesting a very active pursuit of different forms of controlling the legal environment. Indeed, some observers feel

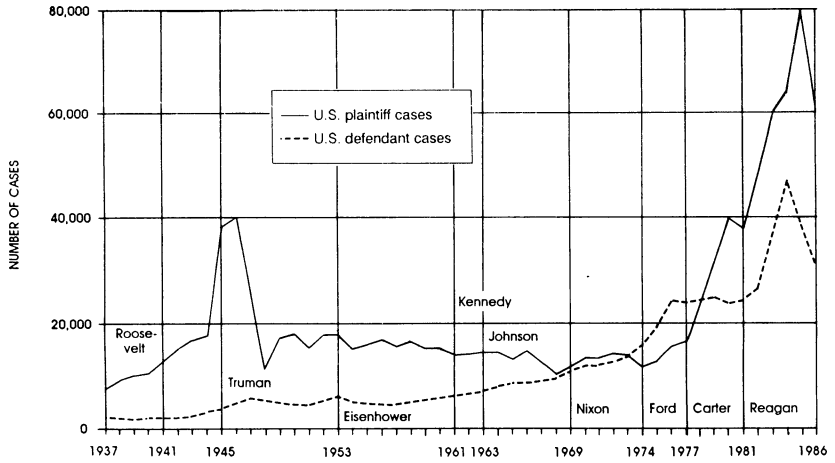

Figure 1: U.S. plaintiff and defendant cases in U.S. district courts, 1937–1986 (1937–41: data for 84 districts only; 1942–86: data for all districts).

SOURCE: U.S. Administrative Office, *Annual Reports of the Director*

that under Reagan policymaking and political rhetoric diverged widely. As Seidman and Gilmour (1986: 132) suggest: "Contrary to [President Reagan's] expressed intentions, the policies and procedures now in force are calculated to produce a federal government that is more centralized, more intrusive, and more bureaucratic."[5]

[5] Still another interpretation of government intervention stresses the complexity, even indeterminacy, of the hypothesized nexus between policymaking and litigation. In periods of fiscal crisis, a given national administration may not only choose to withdraw from intervention and regulation, initiate deregulation, or restructure regulation by centralizing the relevant decisionmaking process in or close to the White House (Seidman and Gilmour, 1986: 128). It may also actively support or stimulate selective aspects of the economy through tax credits, loan guarantees or bailouts, increased defense budgets and military expenditures, and, generally, neocorporatist policies of subsidy of the private sector by public expenditures, subcontracting, and public-private partnerships. The drive for privatization of government services through grants and service contracts has significantly changed the allocation of government resources. Under Reagan, "the stepped-up defense program has meant an increase both in the number of companies competing for government contracts and in the percentage of their income derived from government sales" (*ibid.*, p. 133). Moreover, a "proliferation of mandates and requirements [has] been attached to federal grants running the gamut from nondiscrimination, environmental protection, and labor standards to cost principles and audit. Comparable provisions may be included in contracts with private companies supplying goods and services to the government" (*ibid.*). These forms of "indirect administration," then, may generate new levels and types of competition as well as new economic complexities and uncertainties. One of the consequences of such developments, in turn, may be the use of courts to "clarify" the meaning and extent of federal rules, mandates, and requirements (in spite of a general policy shift toward deregulation) and an increase in U.S. defendant cases as a kind of secondary effect of indirect administration and intervention. It may therefore be necessary to move outside the current analytic framework and inquire into the types, levels, and dynamics of government activity as a process, a task that cannot be pursued in the present

Actions under Statutes in District Courts

Using U.S. cases as an indicator of the effects of government intervention *underestimates*, if anything, the extent of public law litigation. To gauge the incidence of public law litigation, I have examined the recent trend of actions under statutes (AUS), including federal question cases, as well as their composition in terms of U.S. cases only (Figures 2 and 3).[6]

In absolute numbers, AUS increased from 12,613 in 1942 to a high of 125,953 in 1984 (almost 900 percent). The rise of public law litigation in the last 45 years is not simply a function of the rise of civil litigation, however. Viewed as a proportion of total civil filings in U.S. district courts between 1942 and 1986, AUS peaked in 1945 and 1946 under Truman (almost 70 percent), declined to a low of 23 percent at the end of the Eisenhower administration, and then rose steadily from the beginning of the Kennedy administration to the end of the Ford administration in 1977 (Fig. 2). AUS then tended to decline under Carter and Reagan, but not to the level of 1961. Actions under statutes thus have played a significant role in the expansion of civil litigation which began in the 1960s.

The breakdown of AUS into U.S. plaintiff and U.S. defendant cases displayed in Figure 3 reveals a fascinating pattern of reversals in the priorities of U.S. national administrations and shows a striking contrast to Figure 1. First, we can see now that the surge of AUS in 1945 and 1946 was almost entirely due to U.S. plaintiff cases, that is, the enforcement of public policy in the transition from a wartime to a peacetime economy. The role of government as enforcer dropped sharply in 1948 but rose in the early 1950s (possibly due to the Korean War); it has been relatively low and stable since 1954.

By contrast, U.S. defendant AUS remained at a relatively low level throughout World War II and the postwar period. The rise of AUS since 1961 observed in Figure 2 was due essentially to a rise in U.S. defendant cases (Fig. 3). Figure 3, moreover, reveals that in 1961 the composition of U.S. AUS changed; the volume of U.S. defendant AUS began to exceed that of U.S. plaintiff actions. In 1961, U.S. defendant AUS constituted about 50 percent of total U.S. AUS. The curve rose briefly under Kennedy in 1962, but from 1963 continued a steady rise, especially under Nixon and Ford, slowed under Carter, and rose again to over 80 percent of all U.S. AUS under Reagan. This change in the composition of U.S. AUS suggests that the Reagan administration's use of indirect intervention in terms of public law litigation was not as unusual as

article (but see generally Seidman and Gilmour (1986) for an analysis of the shift "from the positive to the regulatory state" under Reagan).

[6] I am following here Abram Chayes's (1976) suggestions concerning the significance of public law litigation, the inclusion of federal question litigation in this category, and the contrast between public law litigation and more traditional forms of litigation and adjudication.

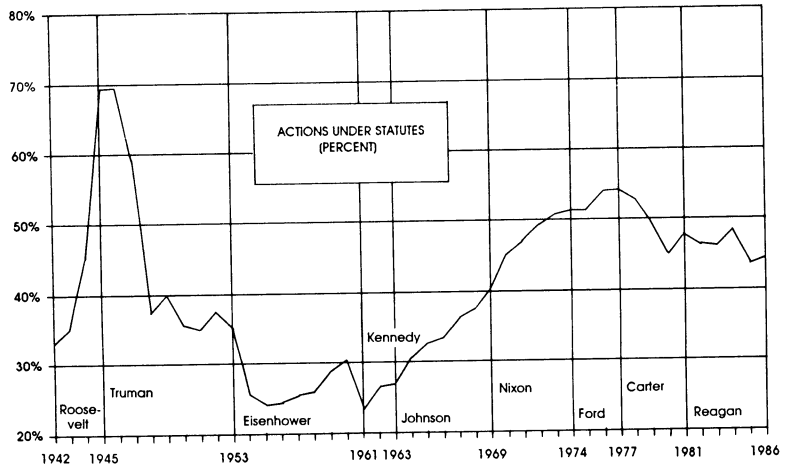

Figure 2: Actions under states as a percentage of total civil cases in U.S. district courts, 1942–1986

SOURCE: U.S. Administrative Office, *Annual Reports of the Director*

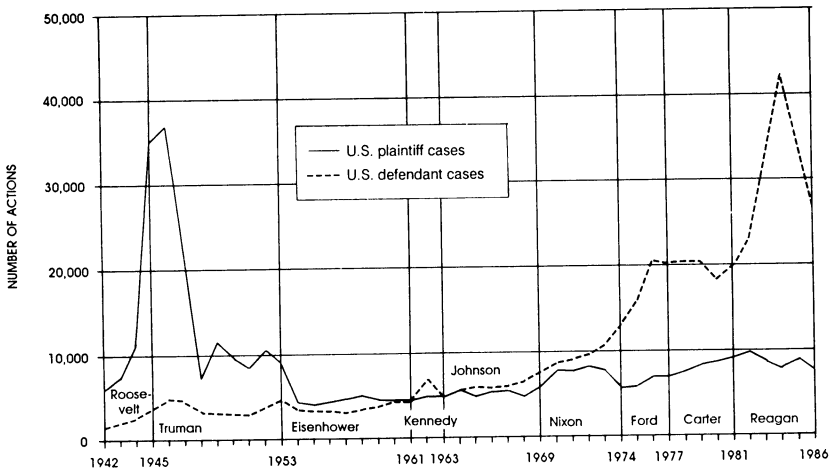

Figure 3: U.S. plaintiff and defendant actions under statutes in U.S. district courts, 1942–1986

SOURCE: U.S. Administrative Office, *Annual Reports of the Director*

appeared at first to be the case (compare Figs. 1 and 3). While the proportion of U.S. defendant AUS appears to be particularly sensitive to variations in policies of different presidential administrations, there is also an unmistakable secular increase between 1945 and 1985 that cuts across administrations. It is almost as if a given administration, while adding its own policy variants to the trend,

cannot return to the initial baseline but must build on the historic legacy of the respective previous administration.[7]

GOVERNMENT LITIGATION IN THE APPEALS COURTS

The U.S. caseload in appellate courts can be seen as reflecting the intensity of government activity which, once filtered through the district courts, continues to impose itself on the agenda of the appeals courts. The number of civil appeals has increased from 1,946 in 1942 to 24,291 in 1986, roughly comparable to the overall increase in the total number of appeals. Civil appeals as a proportion of total appeals has hovered between 66 percent and 86 percent, and has stood around 80 percent since 1980.

U.S. Appeals from District Courts

Of these civil appeals, total U.S. appeals have increased in absolute numbers, but their proportion has generally edged downward from a high of 47.2 percent in 1947 to 26.4 percent in 1986 (see Fig. 4). Again, however, the distinction between U.S. plaintiff and U.S. defendant appellate cases is important and revealing. While the number of U.S. plaintiff appeals has been numerically small and stable, U.S. defendant appeals have increased steadily since 1960 and have virtually dominated the U.S. appellate caseload since 1970, when more than 80 percent of all U.S. appeals filed in appeals courts have been U.S. defendant cases (Fig. 4). The rise of U.S. defendant cases in appeals courts roughly corresponds to the rise of U.S. defendant cases in district courts. In other words, the rise of U.S. defendant litigation in the lower courts means that a sizable proportion, perhaps as much as half of all U.S. cases, are appealed by those affected by regulatory policies. Conversely, the government is likely to appeal cases it has lost at the district court level, especially since the prestige of government policies rides in part on how well the courts uphold the government on appeal. Simple arithmetic would therefore help to account for the continued presence of government litigation at the appellate level, and hence the continued intensity of government intervention.[8]

---

[7] This generalization seems to be supported by an analysis of the litigation profile of cases involving "enjoining and review of federal agencies" in U.S. district courts, i.e., suits against the government generated by the regulatory and rulemaking activity of certain federal agencies. Plotting the movement of this numerically small category of cases in district courts from 1937 to 1960 reveals successive growth and decline patterns but a slight secular increase, with a tendency for low points to be higher than those in the previous cycle. One might, of course, expect short-term downward trends after a surge of litigation due to a kind of learning process whereby established judicial decisions signal to future litigants what they can or cannot expect from the courts, thereby temporarily discouraging or simply obviating the need for litigation (from personal communication with David Greenberg; see also Galanter, 1983b).

[8] While the absolute number of U.S. defendant appeals has increased, the

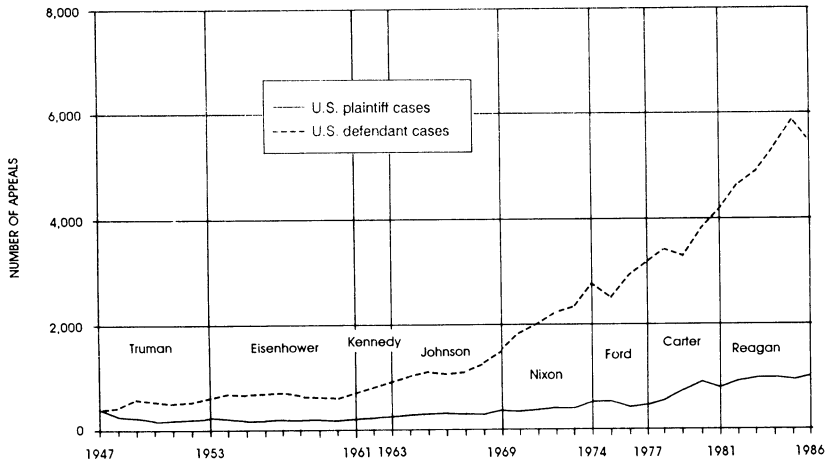

Figure 4: U.S. plaintiff and defendant appeals in U.S. courts of appeal, 1947–1986

SOURCE: U.S. Administrative Office, *Annual Reports of the Director*

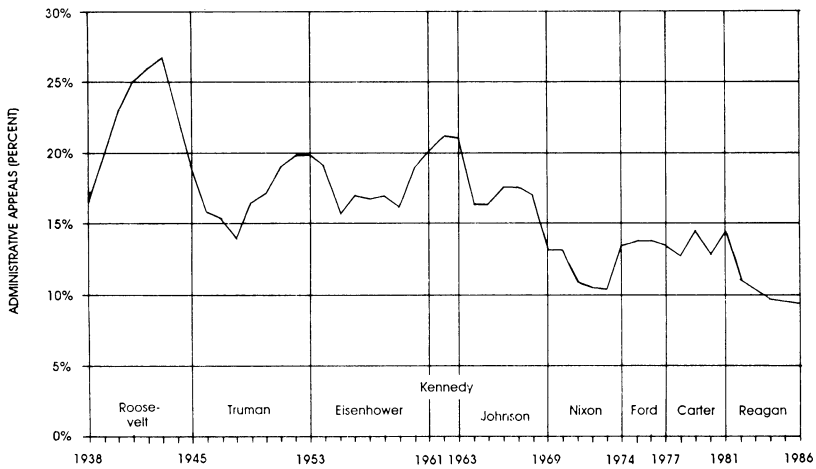

Figure 5: Administrative appeals as a percentage of total appeals in U.S. courts of appeal, 1938–1986

SOURCE: U.S. Administrative Office, *Annual Reports of the Director*

proportional composition of U.S. appeals has remained roughly the same since 1950. This relative stability of the composition of the U.S. appellate caseload might also reflect the fact that, at higher levels of the judicial system, there is a greater degree of autonomy and selectivity as to which and how many cases are accepted for review. Thus, there may be a certain degree of continuity in the appellate caseload from year to year, reflecting the operation of autonomous professional and organizational criteria internal to the higher courts perhaps as much or more than external and political-economic determinants of appellate litigation. For example, of those appellate U.S. defendant cases that are appealed, in turn, to the U.S. Supreme Court, a higher proportion (often

I conclude from this analysis that the ramifications of indirect government intervention are clearly felt throughout the federal judicial system, and that the continued high proportion of U.S. defendant cases in appeals courts is a telling indicator of the government's attempts at indirect administration and crisis management.[9]

Administrative Appeals

The final piece of evidence for the proposition that governmental policymaking, directly and indirectly, is an important determinant of litigation comes from an analysis of administrative appeals that originate in the formal and informal rulemaking and adjudication by regulatory agencies. Administrative appeals to the U.S. courts of appeal grew from 540 in 1938 to 3,069 in 1987, an almost 500 percent increase in five decades. These figures, however, hide significant patterns of variability that reflect the welfare-state policies or neo-liberal "supply-side" policies of various U.S. national administrations as well as other external events such as congressional (re)action and wartime exigencies.

Consider Figure 5, which plots the proportion of administrative appeals in U.S. appeals courts from 1938 to 1986. At least eight phases can be distinguished, even though there appears to be a secular downward trend.

1. Under Roosevelt's second and third terms, administrative appeals rose from 16.5 percent in 1938 to 26.7 percent in 1943, mainly as a result of NLRB activity. The administrative appeals rate started to decline in 1944 and 1945, most likely due to wartime exigencies and the need to restructure and rechannel the economic energies of the nation. While the rise can be ascribed to the legitimation crisis of the Depression, the decline is probably attributable to the need for economic mobilization associated with World War II and its aftermath.

2. Under the Truman administration, the rate of administrative appeals declined further to 13.8 percent in 1948. Two sets of events, conflicting in their implications, are reflected in the continued downturn under Truman and the reversal after 1948. One was the 1946 passage by Congress of the Administrative Procedure Act (APA), which introduced more formal procedures into regulatory decisionmaking, imposed a kind of judicialization on the adminis-

more than 90 percent) is routinely dismissed or denied because the docket of the Supreme Court is highly screened and protected.

[9] Other empirical research tends to support this conclusion. For example, in their study of the evolution of appellate litigation from 1895 to 1975 in three U.S. circuit courts, Baum, Goldman, and Sarat (1981–82: 308) argue that "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 appeal as well as the caseload problems from which these courts increasingly suffer."

trative process (e.g., hearing examiners—since 1972 called administrative law judges—were introduced) and increased the supervisory powers of the courts over the administrative agencies. The net effect of the APA was probably to reduce the administrative appeals rate.

Second, wartime acquiescence of labor and business shifted back to more aggressive positions, resulting in an increased rate of appeals from the Tax Court and the NLRB.

3. During the Eisenhower years throughout the 1950s, there seems to have been a continuation of only a moderate level of regulatory activity. In other words, while the appeals rate declined decidedly during the first two years of the Eisenhower administration, it did not fall below Truman's low point of 13.8 percent in 1948.[10]

4. In 1961, the administrative appeals rate kept climbing as one would expect from the Kennedy social agenda. The high administrative appeals rate of about 21 percent under Kennedy in 1962–63 is second only to Roosevelt's 26.7 percent in 1943.

5. With the Johnson administration from 1963 to 1968, we see a return to the activity level of the Truman-Eisenhower years, with only a slight increase around 1966 and 1967. The Great Society obviously spawned much less administrative appellate litigation than either the New Frontier or the New Deal. Was the Vietnam War a factor in the need to loosen the economic screws, just as had been the case in World War II and perhaps in the Korean War as well? Did the Johnson administration in its last year

[10] There is at least one anomaly in Figures 2 and 5 that requires comment. Administrative appeals as well as U.S. defendant AUS increased during President Eisenhower's last two years in office, counterintuitively anticipating the regulatory surge of the Kennedy years. Why would a Republican president tighten the regulatory screws during the last years in office, thus generating suits against the government as well as administrative appeals? The events surrounding the antitrust litigation of the government against the electrical industry in 1959 suggest an answer (I am grateful to David Greenberg for drawing my attention to both the issue and the sources; see point (1) in note 2). Due to federal grand jury investigations and indictments of the rigged bidding and price fixing involving heavy electrical equipment contractors and the Tennessee Valley Authority, the Republican administration suddenly found itself involved in a large number of civil and criminal antitrust suits. Not only was an important election year coming up, but the Democrats, through the hearings of the Senate Subcommittee on Antitrust and Monopoly, chaired by Democratic Senator Estes Kefauver, were mounting a political attack on the laisser-faire policies of the Republicans. It is conceivable (and as much as suggested by Walton and Cleveland, 1964: 116) that in order to undercut and disarm Democratic criticism of the regulatory hands-off policy under Eisenhower, the Republican administration decided to pursue a tougher policy of enforcement and regulation, accentuated by Eisenhower's well-known finger-wagging at the "military-industrial complex." Given the extent of political manipulation that has pervaded American politics in recent years, this supposition appears to be an altogether mild and credible one (see also Edelman, 1988). But whether this reasoning can be applied as a form of negative evidence (or as an exception proving the rule) in interpreting unusual litigation patterns requires, of course, more detailed historical work.

(1968–69) face such a low level of political support and consensus that it had to cut back on its regulatory agenda?

6. Under the Nixon administration, the administrative appeals rate continued to decline, reaching a low of 10.3 percent in 1973 due to a decline in FCC, NLRB, and INS cases. Although one would expect a decline under a Republican administration, the consequences of the Vietnam War may have had a continued impact as well.

7. The rate of administrative appeals resumed at a higher level with Gerald Ford, 13.4 percent in 1974 and 13.7 percent in 1975, and continued at that level with Jimmy Carter until energy (FERC) and labor (NLRB) problems raised the rate to 14.5 percent in 1979. The relative similarity of the patterns under Ford and Carter suggests that the national administrations of the 1970s faced common problems and adopted similar policy stances to solve them. One such problem was an increase in the need for regulation, especially environmental protection, but there was also an increase in regulatory centralization (see Seidman and Gilmour, 1986: 129–30).

8. The decline of the administrative appeals rate after 1981 is clearly the result of the steps the Reagan administration took to control or eliminate regulation (Breyer and Stewart, 1985: 159–60). Administrative appeals stood at 3,800 in 1981, 14.4 percent of total appeals. In 1987, they had declined to 2,723 or 7.7 percent. This historic low at the end of the fifty-year period reviewed here contrasts sharply with the historic high of the Roosevelt administration.[11]

In sum, the current (and possibly temporary) decline of administrative litigation in appeals courts seems to reflect a definite

[11] Deregulation can, of course, be achieved not only by an elimination of rules or executive orders but also by a cutback in personnel that may be silently imposed for fiscal or other reasons (see, e.g., Newman and Attewell, 1985; Calavita, 1983). Limited resources may, in turn, lead to qualitative changes in the nature of government litigation, for example, by the acceptance of *nolo contendere* pleas instead of guilty pleas by the Department of Justice. This practice was, indeed, a factor in settling the many government cases generated by the electrical antitrust litigation in the early 1960s. "Probably half of such cases are settled either by a nolo plea or a consent decree. Both sides save the time and money which a trial would involve. This arrangement is especially important to the government in view of limited resources of the antitrust division of the Justice Department" (Walton and Cleveland, 1964: 33).

Still another method of achieving de facto deregulation is to change the quality of the regulatory process itself. Paralleling the shift from formal adjudication to bargaining, negotiation, and informal dispute resolution in district and appeals courts, there is an increase in the privatization of dispute processing in administrative agencies (Harrington, 1988). This phenomenon can be ascribed to a shift in the policies governing the regulatory process and that results in lower administrative appeals rates. In other words, the traditional model of administrative law and policymaking has also been shifting toward a technocratically inspired model, i.e., one that is oriented toward informal bargaining, negotiation, economic incentives, and trade-offs, and an emphasis on problemsolving rather than rule enforcement.

policy stance which seeks to replace the welfare-state policies of past administrations with a new approach to regulation, namely, minimalist regulation (see also Harrington, 1988). Litigation in federal courts at both the district and appeals court levels thus results in large part from changes in governmental policies and the different types and degrees of direct and indirect intervention.

VARIABILITY VS. SECULAR TENDENCY

While to support the hypothesis of a link between intervention and litigation the preceding interpretation has emphasized variations in the proportion of administrative appeals, one may draw an additional and perhaps alternative conclusion from the appeals court data (Fig. 5). Why would the proportion of administrative appeals, perhaps the most sensitive indicator of the confrontation between government and the economy at the higher levels of the third branch, nevertheless tend to decline, an obvious deviation from the pattern for other forms of government litigation? To distinguish between short-term and long-term decline of the proportions of U.S. and administrative appeals, it may be necessary to step back from these particular data and to inquire into the general trend of interaction between government and economy, a task that can only be sketched here.

One could propose the hypothesis that American industrial development in the nineteenth century may have been a factor in increasing litigation (see, e.g., Munger, 1988; Toharia, 1976) but that the government and its agencies have taken over that role in the twentieth century. It appears that since the New Deal and World War II the corporate sector has been much more interested in resolving disputes in informal negotiation outside the judicial arena than in formal litigation. As described above, results from the district court study suggest that the effect of government activity is very strong in those types of judicial decisionmaking that deviate from the model of full-blown adjudication, especially settlements in civil cases and plea bargaining in criminal cases (Heydebrand and Seron, 1990). It is conceivable, then, that the downward trend of appellate government litigation is also the result of a learning process in which the corporate sector provides the model. It stands to reason that the executive branch, especially the Department of Justice, acts as the transmitter of the corporate model into government and into those activities that are most in need of "modernization" and rationalization. In other words, the government may be learning to be more cost effective and to avoid the costs, complexities, and uncertainties arising from litigation and judicial decisions. As Seidman and Gilmour (1986: 132) put it: "Growth of the regulatory state has converted the one unelected branch of government, the Judiciary, from a relatively neutral umpire or referee to an active player in the administrative

game." Similar views have been expressed by other observers (Lorch, 1969) and, from within the judiciary, by Appeals Court Judge Patricia Wald (1983; for further discussion, see Heydebrand and Seron, 1987).

DISCUSSION AND CONCLUSION

The results of this analysis can be summarized as follows. There has been considerable variation among national administrations during the past fifty years. The two polar opposites are the welfare state of Roosevelt's New Deal and the neo-liberal administration of Reagan. The New Deal responded to the legitimation crisis of the 1930s with policies that produced more federal intervention in the form of U.S. plaintiff litigation and more regulation as well as administrative appeals. The Reagan administration responded to the fiscal crisis of the 1970s and 1980s not only by deficit financing but also by deregulation, which led to a reduction of challenges to regulation. These two polar opposites of government policies— indeed, state forms—do in fact generate different kinds of litigation profiles.

In between these two poles, there are combinations of both direct and indirect intervention suggesting that specific administration policies may alter the role of the state to some extent. Federal policymaking responding to unique exigencies such as wars, energy crises, and specific unanticipated fiscal problems will modify the role of the state and its relationship to government litigation. This flexibility of government policymaking, therefore, produces mixed forms and may, in fact, contribute to the simultaneous implementation of contradictory policies leading to patterns of litigation that do not unequivocally reflect one particular or coherent policy stance.

Lower rates of appeal under the Reagan administration may represent the effect of political choices, namely, the decision to deregulate. But lower appellate litigation rates may also be evidence of a long-term trend in government's use of legal strategies. Lower litigation levels in the courts of appeals suggest that government may be "learning" to avoid the costs and uncertainties of judicial decisionmaking and to prefer informal negotiation and dispute resolution to the formal rationality imposed by adversary procedures in courts, especially at the appellate level.

According to this interpretation, successive governments build on the achievements of previous administrations, retaining workable solutions and mechanisms of crisis management developed earlier. Certain aspects of welfare policy, regulation, and public policy enforcement and the use of the corporate model for organizing the structures and methods of government may thus be carried over, as it were, from previous pages of history and confound the clarity and coherence of particular state models, be they Republi-

can or Democrat, instrumentalist or structuralist, accumulative or harmonious (Wolfe, 1977). A shift from formal legal rationality to informal bargaining, negotiation, and settlement as mechanisms of dispute resolution might foreshadow the rise of a more technocratic mode of crisis management that either bypasses the judiciary or incorporates it into the agenda of the executive branch.

The two interpretations may not be incompatible. We may be able to detect an "administration effect" in addition to a more secular "government effect." Both would emanate from government policymaking. But while the "administration effect" reveals the unique constellation of political and socioeconomic elements in individual administrations, the broader "government effect" reveals a historical tendency that all administrations share to some extent.

The patterns of appellate litigation suggest that both processes—deregulation and technocratic reform—may be occurring simultaneously. It is true that the high appeals rate of the New Deal contrasts sharply with the low rates of the Reagan administration. But the fifty-year span in question may already provide a sufficiently long baseline to suggest a true long-term decline that may continue regardless of the specific national administration in power.

The preceding considerations suggest the need to modify the theory of the state in at least three respects. First, courts are an inherent part of the state, although the nature and extent of this inclusion may vary historically *within* one particular national context as well as structurally *between*, for example, common law and code law systems. From this perspective, litigation and the courts are not so much dependent variables from the viewpoint of the state as they are constituent elements of the American polity and the state itself. In this view, the existence of a link between government policy and litigation is taken for granted, whereas the nature of the link or its historical transformation is not.

Second, the relatively monolithic, homogeneous, and unitary image of *the* state is an abstraction that needs to be modified and concretized. Most state theories speaking of *the* state refer tacitly only to the executive branch, occasionally the legislative (but see Skowronek, 1982). This unitary image belies the internal heterogeneity, differentiation, fragmentation, tensions, conflicts, and contradictions of modern American state forms. I am not referring here to the functional conflicts between legitimation, accumulation, external defense, and internal security but rather to structural or "regional" conflicts between the branches of government, or between federal, state, and local levels of government, between military and civilian government interests, between administrative agencies and the judiciary (see also Dougherty, 1986; Lorch, 1969).

The confrontation between the executive and the judicial branches is nowhere more visible than in the litigation of government cases in federal courts, if one sets aside the few spectacular

reversals of administration policies by the Supreme Court, starting with the setback of Roosevelt's court-packing attempt by the Court itself. Of particular significance here is the relative independence, in the common law context, of legal-professional interests, and the ideology of judges, defense counsel, private attorneys, and various other legal-professional constituencies (see also Jacob, 1972: 16, and generally Heinz and Laumann, 1983). While the values and priorities of this group are by no means homogeneous, it is useful to keep in mind the contrast between the interests of state managers in the executive branch and the legal culture of the judicial branch. The potential conflicts between the branches of government, that is, within the state as a whole, are thus an important object of analysis, giving courts a certain prominence as institutional actors within government, even though their political role compared to that of the nineteenth century may have declined, as Skowronek (1982) suggests.

Third, different theories of the state may well be not mutually exclusive but complementary and sequentially compatible, especially when seen from a historical perspective. We need to take account of the historical transformation of American society, economy, and state from local to national to international entities, from competitive to corporate to oligopolistic, from isolationist to interdependent. From this perspective, different state forms may be seen to emerge in different historical phases of development. Without claiming a perfect fit between theory and historical reality, different theories of the state and law may adequately reflect one or the other historical period and thus have relative validity (see also Przeworski, 1985: 7ff.; and Wolfe, 1977). For example, the twentieth-century growth of administrative and public law litigation both reflected and stimulated the growth of administrative and public law, especially when seen in the context of American common law and the evolution of judge-made law. A fairly unique American state form developed in the Progressive Era, with the executive branch emerging as the decisive actor on the political scene. The expansion of regulatory activity during and after the New Deal accentuated that shift in the balance of governmental powers. The role of courts and judges, especially in the federal system, shifted as well. As Bernard Schwartz (1984: 24) argues: "The history of the development of administrative law was one of constant expansion of administrative authority accompanied by a correlative restriction of judicial power . . . the scope of judicial review of administrative decisions was consistently narrowed."

Yet the argument of historical uniqueness, just like that of American exceptionalism, should not be exaggerated. There is no clear-cut evidence of a unidirectional development in the interaction between courts, administrative agencies, and the presidency. Various types of national administrations and patterns of policymaking have produced considerable historical variability in the

phenomenology of the American state, as my interpretation of the federal litigation statistics suggests. The variations and patterns within the development of the American form of government point to both structural and historical factors that find expression in the evolution, however uneven, of federal litigation during this century. Even such a relatively short-term pattern as the downward trend of administrative litigation and its acceleration during the last three Republican administrations since 1968 may well be significant and signal the emergence of a techno-corporatist state form (Heydebrand, 1983). In short, different state theories—instrumentalist, functionalist, historical-dialectical, pluralist, corporatist—appear to be relevant to the different aspects and phases of the historical process contemplated here.

There is a decided need for theory to understand and explain the dynamic interplay between the branches of government, especially between the executive and the judiciary, and to come to grips with the changing role of government in relation to economy and society. A theory of the state that incorporates the institutional and political role of the courts appears not only appropriate but necessary for interpreting long-term litigation trends. It is not sufficient to treat litigation simply as the end product of a process of dispute resolution that varies across time and space, to revert to a reductionist, biological-evolutionary model of litigation, or to abdicate from theorizing altogether because of a knee-jerk reflex against any theory as too grand and global.

There is also a need to link the theory of the state with democratic theory, on the one hand, and organization theory, on the other (see Alford and Friedland, 1985, for a significant step in that direction). Litigation practices are affected not only by legal precedent and the signaling or radiating effect of specific decisions on whole populations of cases but also by the management practices of court administration and by the market behavior and public choices of individuals—by processes that affect the production of political consensus at the micro level. State theory must be joined by political sociology, organization theory, and comparative history to make sense of the complex issues involved. Litigation is a highly dynamic social process and must be studied in the context of a broader theoretical framework than has traditionally been the case. This article has taken a preliminary step in that direction by linking both government policymaking and litigation to the historical transformation of the contemporary state.