

CHANGES IN THE CIRCUITS:

Exploring the Courts of Appeals Databases and the Federal Appellate Courts



Continued examination of the docket of the Courts of Appeals, through use of the Songer Database, reveals trends regarding litigation participation and success and judicial behavior.

by **MARK S. HURWITZ** and **ASHLYN KUERSTEN**

Goldman noted nearly a half century ago, “Voting behavior of public decision-makers has been of central concern for political scientists... However, the United States Courts of Appeals, second only to the Supreme Court in judicial importance, have been largely neglected.”¹ As the decades continued, other scholars ultimately took note of these courts, and there is now a relative wealth of knowledge and understanding of them.²

This path from scholarly neglect of these courts to our current comprehension of them was neither straightforward nor sudden. In fact, for an extended period after Goldman’s observation, the Courts of Appeals remained

generally unstudied, as the bulk of judicial research focused on the U.S. Supreme Court. Why these courts were not studied more extensively presents a bit of a puzzle. Congress deemed these courts to be sufficiently important in the judicial hierarchy, establishing the original circuit courts in the First Congress and the modern Courts of Appeals in 1891.³ Since then, the number of cases decided by these courts has increased tremendously, giving them “a pivotal position in our political system”⁴ as their actions “radiate throughout the judicial hierarchy.”⁵ Because of the relative dearth of cases decided each year by the Supreme Court and the appeals courts’ mandatory jurisdiction, the

Courts of Appeals have become effectively the courts of last resort for the majority of cases.⁶ They are responsible for both error correction and, increasingly, national decision making since they also supervise the federal district courts.⁷

Notwithstanding their importance, judicial scholars collectively ignored the Courts of Appeals with the exception of a few notable pioneers.⁸ In their ground-breaking studies, these scholars had to explain convincingly the importance of these courts within the judicial system, as well as go through the time-consuming process of collecting data on the various circuit courts. By the 1990s, however, these early scholars had persuaded the judicial community of the importance of these courts; consequently, efforts began to coordinate the expensive and labor-intensive process of collecting data on all 12 circuits, following Harold Spaeth’s protocol for collection of data on the U.S. Supreme Court (hereafter, the “Spaeth Supreme Court Database”).⁹ Certainly, the most comprehensive undertaking of data collection on the appeals courts was the database assembled by Donald Songer.

The Songer Database

Beginning in 1988, with the support from the National Science Foundation and a Board of Overseers, Songer produced a multi-user database of approximately 20,000 published decisions on the Courts of Appeals (hereafter, the “Songer Database”).¹⁰ Drawing on a probability sample of cases

1. Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV., 374-383, at 374-75 (1966).

2. See, e.g., Howard, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS*, (Princeton: Princeton Univ. Press, 1981); Songer, Segal and Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673-693 (1994); Songer, Sheehan, and Haire, *CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS* (Ann Arbor: Univ. of Michigan Press, 2000); Klein, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* (New York: Cambridge Univ., 2002); Kuersten and Songer, *Presidential Success of Judicial Nominations*, 31 AM. POLITICS Q. 107-137 (2003).

3. Songer, Sheehan, and Haire, *supra* n. 2.

4. Songer, *The Circuit Courts of Appeals*, in Gates and Johnson, ed., *THE AMERICAN COURTS: A CRITICAL ASSESSMENT*, 36-59, at 36 (Washington, D.C.: Congressional Quarterly Press, 1991).

5. Atkins, *Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States*, 24 L. SOC’Y REV. 71-103, at 72 (1990).

6. Howard, *supra* n. 2.

7. Haire, Lindquist, and Songer, *One Principal and Multiple Agents: Supreme Court Auditing of the United States Courts of Appeals*, 37 L.

SOC’Y REV. 143-168 (2003); Klein and Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 L. SOC’Y REV. 579-606 (2003).

8. Goldman, *supra* n. 1; Howard, *supra* n. 2; Songer *supra* n. 4.

9. Spaeth, *United States Supreme Court Judicial Database, 1953-2010 Terms*, (2011), <http://supremecourtdatabase.org>.

10. Songer, *The Multi-User Database on the United States Courts of Appeals, 1925-1996*, (1998). More specifically, the Songer Database is composed of two phases of data. Phase I includes decisions from 1925 to 1988 and includes 15,325 cases, while Phase III includes decisions from 1988 to 1996 and includes 2,880 cases. (Phase II compiles appellate cases that were reviewed by the Supreme Court and is included in the Spaeth Supreme Court Database). Phases I and III are merged and referred to as the Songer Database. The “Songer Database Update” (Kuersten and Haire 2007), which is subsequently discussed in this article, includes additional data on the federal appeals courts from 1997 to 2002 that has been merged with the Songer Database. The Songer Database and the Database Update, as well as other judicial databases, are available at the Judicial Research Initiative (“JuRI”), sponsored by the Department of Political Science at the University of South Carolina, and managed by Kirk Randazzo: <http://www.cas.sc.edu/poli/juri>.

decided from 1925 to 1996 (15 cases per circuit/year from 1925 - 1960 and 30 cases per circuit/year from 1961-1996), information was coded for 229 variables divided into three major categories. The first grouping of cases in the Database, referred to in the documentation as "basic coding," includes several fundamental variables that provide descriptive general information about each decision in the sample. The Songer Database also provides 36 variables devoted to characterizing the parties or litigants involved in the decision, referred to as "parties coding." In addition to recording the names of the first five listed appellants and respondents for each side, the litigants also are classified into categories. This categorization initially distinguishes between natural persons, private business, nonprofit organizations, federal government/agencies, state governments/agencies, local governments, and fiduciaries/trustees.¹¹

The third set of variables in the Songer Database is designed to capture the issue content of the judicial decision. Categories included here parallel the legal policy categories in the Spaeth Supreme Court Database. These variables capture the policy dimensions underlying the disputes that led to the appeal and allow scholars to merge the two databases.¹² The issues raised in the opinion are also captured by variables that are coded from the headnotes. Drawing on the West topics and key number system, headnotes provide information on the legal provisions addressed by the court's opinion. From the headnotes, the Songer Database codes the two most frequently cited constitutional provisions, titles and/or sections of the U.S. Code, Federal Rules of Civil Procedure, and Federal Rules of Criminal Procedure.

Substantive and procedural issues were also coded from the majority opinion. In all, there are 69 variables in this section, all phrased in terms of a 'question.' For example, whether the main issue of a case was resolved in favor of the appellate or respondent (or was "mixed") is coded as a variable. The first set of variables consists of procedural issues that are common

WEIGHTING CIRCUITS

Unlike the Spaeth Database that includes the universe of cases from the U.S. Supreme Court, both the Songer Database and the Update include cases chosen from a random sample of all cases decided for each year and in each circuit of the U.S. Courts of Appeals. Specifically, a random sample of 15 cases per circuit per year were included for years 1925-1960, and 30 cases per circuit per year from 1961-2002. But since the universe of dockets for each circuit in each year of the U.S. Courts of Appeals is different, these data need to be standardized to ensure validity of any inferences made (Hurwitz 2006, 304). We have weighted each circuit by the universe of cases decided for each specific year for the Update. The weighting scheme can be found at: http://www.cas.sc.edu/poli/juri/KH_update_weights.pdf.

to all cases (*e.g.*, threshold questions and indicators of whether or not the opinion engaged in statutory construction, constitutional interpretation, interpretation of court doctrine or circuit precedent). The second set of variables (51 in total) is coded according to a particular case categorization (*i.e.*, criminal, civil-government, diversity, civil-private). For example, for criminal cases, one variable asks whether there was a challenge to jury instructions, while for civil-government cases one variable directs coders to answer whether the court used the arbitrary and capricious standard.¹³

The availability of this rich, longitudinal data source now permitted scholars to study the appellate courts

in a detail not previously feasible due to lack of available data.¹⁴ Prior to the release of the Songer Database, most empirical studies on the circuit courts were based on cross-sectional designs limited by the data individual scholars could collect. A wide range of early studies suggested that judges of different parties and appointed by different presidents tended to decide cases in a manner that reflected on the politics of selection.¹⁵ But, these cross-sectional studies did not, indeed could not, assess whether these cleavages varied over time. Utilizing the Songer Database, however, Songer, Sheehan, and Haire¹⁶ suggest that partisan differences in judicial decision making are a post-World War II phenomenon, while Kuersten and Songer show that

11. Within each of these seven categories, litigants are classified even further. For example, those litigants that fall under the private business category are distinguished in terms of the scope of their activity before sub-dividing further categories that clearly delineate the type of business activity with codes that range from single family farms to international oil and gas operations. Litigants that are classified as natural persons are then coded in terms of other characteristics based on information provided in the opinion (*e.g.*, ethnicity, gender, wealth, and citizenship). Information is also coded indicating the identity of counsel representing appellant(s) and respondent(s), the number of attorneys and firms that represent each side, and the name of the first listed counsel and firm for each party.

12. Eight general categories (criminal, civil rights, First Amendment, due process, privacy, labor relations, economic activity/regulation, and miscellaneous) are subdivided into a total of 220 specific case types. For example, thirty-five case types ranging from "excessive force used in an arrest" to "pregnancy discrimination" fall under the category of "civil rights". For each of these case types, the directionality of the

majority opinion was recorded, using the conventions followed in the Spaeth Supreme Court database. In addition, the identity of each judge and the directionality of his/her vote on each issue were recorded.

13. For an excellent discussion on the specifics of the variables in the Songer Database, see George and Sheehan, *Circuit Breaker: Deciphering Courts of Appeals Decisions Using the U.S. Courts of Appeals Data Base*, 83 JUDICATURE 240-247 (2000).

14. The Administrative Office of the U.S. Courts also provides data on appeals court decisions. However, the types of information coded are somewhat limited for social science research. In particular, the lack of information on the appeals court judges who participate in the decision limits the use of the data to research questions and models of decision making that do not take into account judge-level characteristics, including ideology.

15. Goldman, *supra* n. 1; Songer and Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955-1986*, 43 WESTERN POLITICAL QUARTERLY 317 (1990); Howard *supra* n. 2.

16. Songer, Sheehan, and Haire, *supra* n. 2.

presidents differed dramatically in their success of nominating judges who reflected their administration's ideology.¹⁷

Testing propositions with longitudinal data also may provide support for existing research that relies on cross-sectional designs. For example, one cross-sectional analysis of appeals court decision making in three circuits for a single year found that the "haves" come out ahead of other litigants who do not have high levels of resources.¹⁸ These scholars subsequently examined case outcomes in the appeals courts by adopting a similar design, but this time included observations from the appeals court database to cover all circuits over a sixty-four year period. The findings were quite similar, demonstrating that repeat-player litigants with greater resources tended to fare better in these courts, even after controlling for other influences on decision making over a long period of time.¹⁹

With the Songer Database, scholars have been able to explore descriptive statistics over time as well as test a wide variety of hypotheses in more systematic settings. These studies range from analyses of the appeals courts' evolving issue agenda dynamics²⁰ to individual level models of judicial voting behavior.²¹ Data on all circuits over a 77 year time frame also

make possible research that takes into account changing political and legal contexts. For example, increasingly politicized judicial selection procedures over the last two or three decades may contribute to increasingly politicized judicial actors who represent the views of their respective, and more polarized, political parties. Accounts of judicial selection under the George W. Bush Administration,²² as well as early observations from the Obama Administration, suggest that these differences will become more pronounced at all levels of the federal courts. Furthermore, changes in the issue agenda have the potential to fuel variation in decision making, with lower court judges increasingly more involved in politically-charged cases.

The Songer Database Update

Constant change in the political landscape as well as the membership of the federal Courts of Appeals demonstrates the import of updating the Songer Database over time. In this regard, data for the recently released update of the Songer Database (hereafter, the "Songer Database Update") were collected by Kuersten and Haire, two coders of the original Songer Database,²³ with funding again provided by the National Science Foundation. The Songer Database Update comprises appeals court cases

decided from 1997 through 2002, a period characterized by intense partisan strife, divided government, an extremely close presidential election, and administrations represented by presidents of both parties. To ensure consistency, the Database Update replicates the coding scheme and sample procedures developed for the original Songer Database.²⁴

This rich data source included in the Songer Database Update is enhanced by the addition of a number of new variables added to the 229 variables from the original database. These new variables in the Update, which include amicus briefs, litigant attorneys, and the identity of judges who wrote concurring and dissenting opinions, allow for a more heuristic look at a myriad of issue areas in addition to those already coded under the original Songer Database.

Among these newly coded variables, amicus participation was categorized into three separate variables: the exact number of briefs filed, the first listed group to file a brief, and the number filed for both the appellant and respondent. These were added to the Database to address the effect that amicus briefs may have on appeals court decisions and whether the number and perhaps type of amicus brief has any bearing on a final outcome. These variables thus allow scholars to explore whether various interest group organizations had a positive impact on arguably more liberal (*e.g.*, the Ninth) or conservative (*e.g.*, the Fifth) circuits.

The litigant council variables were created due to recent research that suggests that some counsel and litigants differ in their success rate.²⁵ The Update includes the number of firms and attorneys that represented each party, as well as the names of the first listed firm and counsel. This allows scholars to explore how particular law firms fared when representing various classes of litigants.

Analyzing the Courts of Appeals Over Time

We now turn to an examination of the Courts of Appeals by utilizing the Songer Database and the Update, both

17. Kuersten and Songer, *supra* n. 2. As well, the Songer Database has enabled numerous new scholars to study the appeals courts in ways not previously possible. In this regard, the first two dissertations employing the Songer Database were completed by the authors, see Hurwitz, THE NATURE OF AGENDA IN THE UNITED STATES SUPREME COURT AND COURTS OF APPEALS, Dissertation, Michigan State Univ. (1998); Kuersten, AN INTEGRATED MODEL OF COURTS OF APPEALS DECISION MAKING, Dissertation, Univ. South Carolina (1997).

18. Songer and Sheehan, *Who Wins on Appeals: Upperdogs and Underdogs in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 235-258 (1992).

19. Songer, Sheehan, and Haire, *Do the 'Haves' Come out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, 33 L. SOC'Y REV. 811-832 (1999).

20. Hurwitz, *Institutional Arrangements and the Dynamics of Agenda Formation in the U.S. Supreme Court and Courts of Appeals*, 28 L. POL. 321-344 (2006); Kaheny, *Agenda Change in the U.S. Courts of Appeals, 1925-1988*, 20 JUST. SYS. J. 275-296 (1999).

21. Hettinger, Lindquist, and Martinek, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON

FEDERAL APPELLATE DECISION MAKING (Charlottesville: Univ. of Virginia Press, 2006); Kuersten, *supra* n. 17; Kuersten and Songer, DECISIONS ON THE U.S. COURTS OF APPEALS (New York: Garland Publishing, 2001).

22. Neubauer and Meinhold, BATTLE SUPREME: THE CONFIRMATION OF CHIEF JUSTICE JOHN ROBERTS AND THE FUTURE OF THE SUPREME COURT (Belmont, CA: Thomson Wadsworth, 2006).

23. Kuersten and Haire, *Extending the Multi-User of Decisions of the U.S. Courts of Appeals 1997-2002*, 2007, <http://www.cas.sc.edu/poli/juri>.

24. Further, reliability of the coding scheme was rigorously tested. To ensure continuity in the data input, one coder input all variables coded. At the end of the data collection phase, the dataset was randomized and the top five percent of the cases were given to a different set of coders to be recoded. A correlation coefficient was run for each variable; the result was .98.

25. Haire, Lindquist, and Hartley, *Attorney Expertise, Litigant Success, and Judicial Decision Making in the United States Courts of Appeals* 33 L. SOC'Y REV. 667-686 (1999); McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success* 57 J. POL. 187-196 (1995).

TABLE 1. Proportional Agenda Space in the Courts of Appeals for Criminal, Civil Rights/Liberties, and Economic Cases, 1925 to 2002

Issue	Years									
	1925-32	1933-40	1941-48	1949-56	1957-64	1965-72	1973-80	1981-88	1989-96	1997-2002
Criminal	14.4	9.4	17.7	18.7	26.0	37.5	34.3	26.3	34.9	35.3
Civil Rights/ Liberties	1.4	1.4	2.6	3.3	3.8	8.6	14.3	19.4	18.1	23.5
Economic	73.1	86.1	74.4	71.8	65.9	48.8	48.5	51.6	44.7	39.1

Note: Each cell represents the percentage of cases for the sample years in which each particular issue area appeared on the dockets of the Courts of Appeals. Percentages for the sample years do not add up to 100% because we included "miscellaneous" and "not ascertained" cases in the analysis for purposes of determining the total number of cases (see Appendix B for coding details).

of which together include data from a sample of cases decided from 1925 through 2002.²⁶ We follow the lead of George and Sheehan,²⁷ who illustrated what the original Songer Database could teach us about the behavior of the judges and these appellate courts in three areas of interest: 1) agendas, 2) litigant participation and success, and 3) judicial behavior. More particularly, by employing an organizational structure similar to that suggested by George and Sheehan, we analyze the Courts of Appeals from 1925 through 2002 by utilizing both the Songer Database and Update, as we seek to understand the agenda of these courts, whether rates of liberalism have changed within in these issue areas, whether the participation and success of various groups of litigants have changed, and whether contemporary judicial behavior has diverged from decades past.²⁸

Agenda Space

One of the more important issues scholars can explore with the Database concerns which cases reach the courts as part of their dockets. Some have argued that determining the cases or issues that an institution decides is among the most important of its actions.²⁹ Of course, while that may be true of a court such as the Supreme Court or state supreme courts with discretionary jurisdiction, the federal Courts of Appeals must decide every case that is properly appealed to them based on their mandatory jurisdiction over federal appeals. Thus, the cases that reach

the Courts of Appeals tell us much about what society deems important in terms of litigation priorities, and has recurring effects throughout the legal profession.³⁰

The literature on agendas in the Courts of Appeals, once limited to Goldman,³¹ Howard,³² and a few others, has been augmented by research applying the Songer Database, as several scholars have explored the changing agenda in the appeals courts through much of the twentieth century.³³ In particular, they showed that these courts' dockets, once dominated with traditional economic cases, were shifting over time, as economic cases were diminishing in relative agenda space at the appeals courts. Hurwitz³⁴ followed up by systematically testing influences on both the appeals courts' and the Supreme Court's agenda and found that both courts influenced the agenda of the other, and were affected as well by other factors, depending upon the issue area before the court.

In the Database, cases are coded into one of eight broad issue types: criminal, civil rights, First Amendment, due process (non-criminal), privacy, labor relations, economic activity and regulation. These broad issue types are then divided into 220 specific subcategories (*e.g.*, due process rights of prisoners, school desegregation, abortion, etc.).³⁵

Using the Songer Database and Update, we analyze changes in agenda space within these courts from 1925 to 2002. Table 1 indicates that the agendas of these courts continue to be dynamic in nature. This

table shows the relative agenda space accorded to the major issue areas of criminal procedure, civil liberties, and economic cases from 1925 to 1996 in eight year increments, with the final column aggregating the data for 1997 through 2002.

As Table 1 confirms, the appeals' courts' docket, once dominated by economic cases, has transformed to one with more civil liberties and criminal procedure cases, combined, than economic cases. The agenda space previously occupied by economic cases was first replaced by criminal procedure cases beginning in the 1960s. Then, as the percentage of criminal procedure cases in the appeals courts leveled off in recent years, particularly in the most recent

26. The original Songer Database as well as the Update are collectively referred to as the "Database."

27. George and Sheehan 2000, *supra* n. 13.

28. Since the Songer Database and Update consist of a sample of an equal number of cases per circuit in each year, yet the various circuits are very different concerning their output of cases, we weight the analysis to reflect this divergence in caseloads in the circuits. See Appendix A for details on weighting techniques we employ.

29. Pacelle, *THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA* (Boulder: Westview Press, 1991); Schattschneider, *THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* (New York: Holt, Rinehart, Winston, 1960).

30. Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 L. Soc. Inq. 897-940 (1998).

31. Goldman, *supra* n. 1.

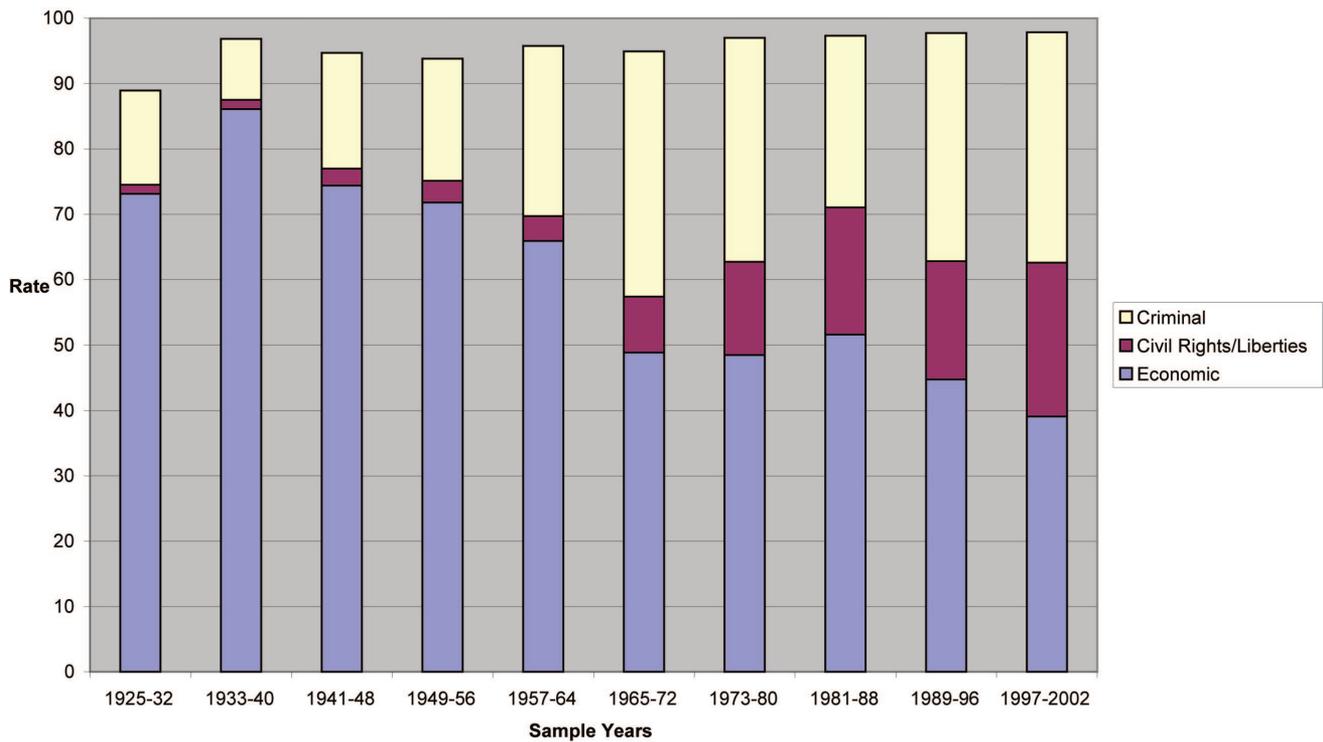
32. Howard, *supra* n. 2.

33. Kaheny, *supra* n. 20; Songer, Sheehan, and Haire, *supra* n. 5; Kuersten and Songer, *supra* n. 2.

34. Hurwitz, *supra* n. 20.

35. See George and Sheehan, *supra* n. 13.

FIGURE 1. Proportional Agenda Space in the Courts of Appeals for Criminal, Rights/Liberties, and Economic Cases, 1925 to 2002



time period, civil liberties cases continued to gain relative importance in the appeals courts.

Figure 1 illustrates these changing agenda trends, as civil liberties

and criminal cases currently consume the bulk of the agenda space in these courts. Economic cases still take up considerable agenda space, as corporate interests continue to utilize the federal appellate courts. But, economic cases have dwindled in terms of relative importance in the Courts of Appeals. Clearly, litigants are making value judgments by not appealing as many economic cases, deciding instead to bring criminal and civil liberties cases before these appellate courts.

There are, of course, some limitations to this analysis of relative agenda space, in part because the Database and Update include a sample of published opinions, excluding unpublished opinions that have no precedential value. Since judges decide which cases to publish,³⁶ the cadre of unpublished decisions arguably may reflect the ‘loss’ of importance of economic cases on these courts’ agendas if judges are deciding not to publish

decisions for a systematic reason. Some scholars have demonstrated differences between published and unpublished decisions, such as in employment discrimination cases,³⁷ in penalty severity in environmental civil litigation,³⁸ in litigation challenging the U.S. Forest Service,³⁹ in appellant success rates,⁴⁰ and in cases involving high degrees of complexity, novelty, and discretionary interpretations of facts and evidence.⁴¹

In their comprehensive study employing the original Songer Database, Songer, Sheehan, and Haire⁴² suggest that decisions involving policy making are published while arguably less important, routine decisions are unpublished. Nevertheless, they recommended caution when interpreting their results.⁴³ We make a similar claim, for at this stage we cannot assess whether the original Database, the Update, or our findings on agenda space are the product of some degree of sample bias. Certainly, this

36. Songer, *Criteria for Publication of Opinions in the United States Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307-313 (1990).

37. Siegelman and Donohue, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. SOC’Y REV. 1133-1170 (1990).

38. Ringquist and Emmert, *Judicial Policymaking in Published and Unpublished Decisions: The Case of Environmental Civil Litigation*, 52 POL. RES. Q. 7-37 (1999).

39. Keele, Malmshiemer, Floyd, and Zhang, *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMP. STUD. 213-239 (2009).

40. Songer and Sheehan, *supra* n. 18.

41. Olson, *Studying Federal District Courts Through Published Cases: A Research Note*, 15 JUST. SYS. J. 782-800 (1992).

42. Songer, Sheehan, and Haire, *supra* n. 2.

43. See Christianson, Szmer and Kuersten, *The Efficiency of Federal Appellate Decisions: An Examination of the Population of Published and Unpublished Decisions from 1976-1997*, JUST. SYS. J. (forthcoming 2012).

TABLE 2. Participation Rates in the Courts of Appeals for Individuals, Government (all levels), Business, and Non-profit Organizations, 1925 to 2002

Type of Litigant	Years									
	1925-32	1933-40	1941-48	1949-56	1957-64	1965-72	1973-80	1981-88	1989-96	1997-2002
Individuals	23.5	20.5	21.5	26.5	29.4	33.3	31.2	31.7	36.9	55.0
Government	35.2	21.4	27.6	42.3	27.9	33.6	35.3	33.6	34.5	17.9
Business	40.8	43.0	38.3	36.6	33.0	25.9	25.3	26.5	22.2	22.0
Non-profits	0.9	1.4	1.8	1.6	3.6	2.5	4.4	4.6	3.6	3.6

Note: Each cell represents the percentage of cases for the sample years in which each appellants and respondents participated in the Courts of Appeals. Percentages for the sample years do not add up to 100% because we added appellants and respondents together for a single "participation" rate; as well, we included "miscellaneous" and "not ascertained" cases in the analysis for purposes of determining the total number of cases (see Appendix B for coding details).

is a limitation of the original Database and Update that needs remedy, as the relative number of published cases has fallen considerably over the time period covered by the Database and Update. Moreover, since relatively few decisions presently are published, the ones that are published represent the cases that appeals court judges deem salient and thus worthy of publication. These decisions whether or not to publish portray a bias between cases the judges conclude should serve as official precedents or have important policy implications *vis-à-vis* those decisions considered routine or inconsequential. As a consequence, the comparative agendas of the Supreme Court and Courts of Appeals may become more similar over time as fewer appeals court decisions on the merits are published, despite formal differences between these levels of court with respect to their discretionary and mandatory jurisdiction. These issues demand further attention by scholars.

Litigant Participation and Success

Scholars recently have increased their attention to the litigants that choose to participate in these appellate courts. While most of the literature in this area has focused on litigants before the Supreme Court, the Songer Database and Update allow scholars to examine whether particular types of litigants are increasingly utilizing these appellant courts. The Database coding scheme identifies the first and

second appellants and respondents in each case, as well as the total number of parties for each category within the Database. These include natural persons, businesses, three levels of government, nonprofits, and fiduciaries. The Database further allows for an examination of specific federal agencies as litigants, and specific types of businesses.

Table 2 provides the participation rates over time for individuals, government, businesses, and non-profit agencies. As the literature provides,⁴⁴ individuals and non-profits are generally categorized as "underdogs" due to their relative lack of litigation resources and experience, while business and government entities are the "upperdogs" who have the resources and experience to gain access to the courts. Interestingly, this table indicates that individuals (those generally with the least resources) participate more than government or businesses over the final time period covered by the Update. In fact, in this most recent time period participation rates by individuals are more than double the average for their rate in the first half of the twentieth century. Individual participation in the appeals courts apparently has supplanted that of government. Participation rates for government remained relatively stable across the time period, until a drop in the most recent time period. Business participation dropped in the first half of the time period, then remained relatively stable through the present.

Finally, while participation by non-profit groups is significantly higher today than in the past, it is negligible compared to court access by the other parties.

These trends are illustrated in Figure 2, which shows that relative access to these appellate courts by individuals has increased over time, while the utilization of these courts by all levels of government as well as businesses has declined. It is likely that the comparative increase in individual participation and concomitant decrease in business participation is linked to the respective increase of civil rights and liberties cases and decrease in economic cases, though more systematic research is necessary to confirm this conjecture.

Who has access to, and then in fact utilizes, the federal judiciary is an important question for purposes of democratic theory. Arguably, the judiciary should be easily accessible to those without sufficient resources, such as individuals, since the other institutions of government demand sincere financial resources beyond the reach of most to lobby and otherwise gain access.⁴⁵ Our result that individuals are the most litigious type of party before the Courts of Appeals in the most recent time period lends support

44. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* 9 L. Soc'y REV. 95-160 (1974).

45. Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. PUBLIC L. 287-307 (1968)

FIGURE 2. Participation Rates in the Courts of Appeals for Individuals, Government (all levels), Non-profit Organizations, and Businesses, 1925 to 2002

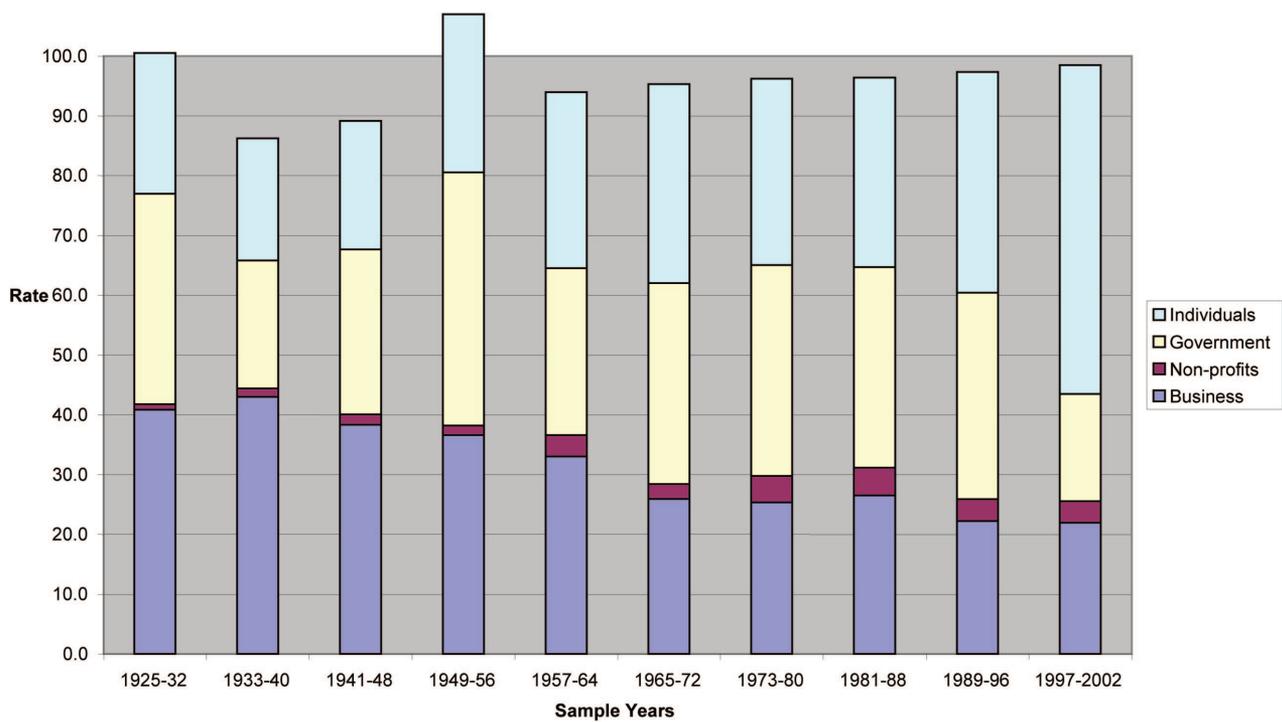
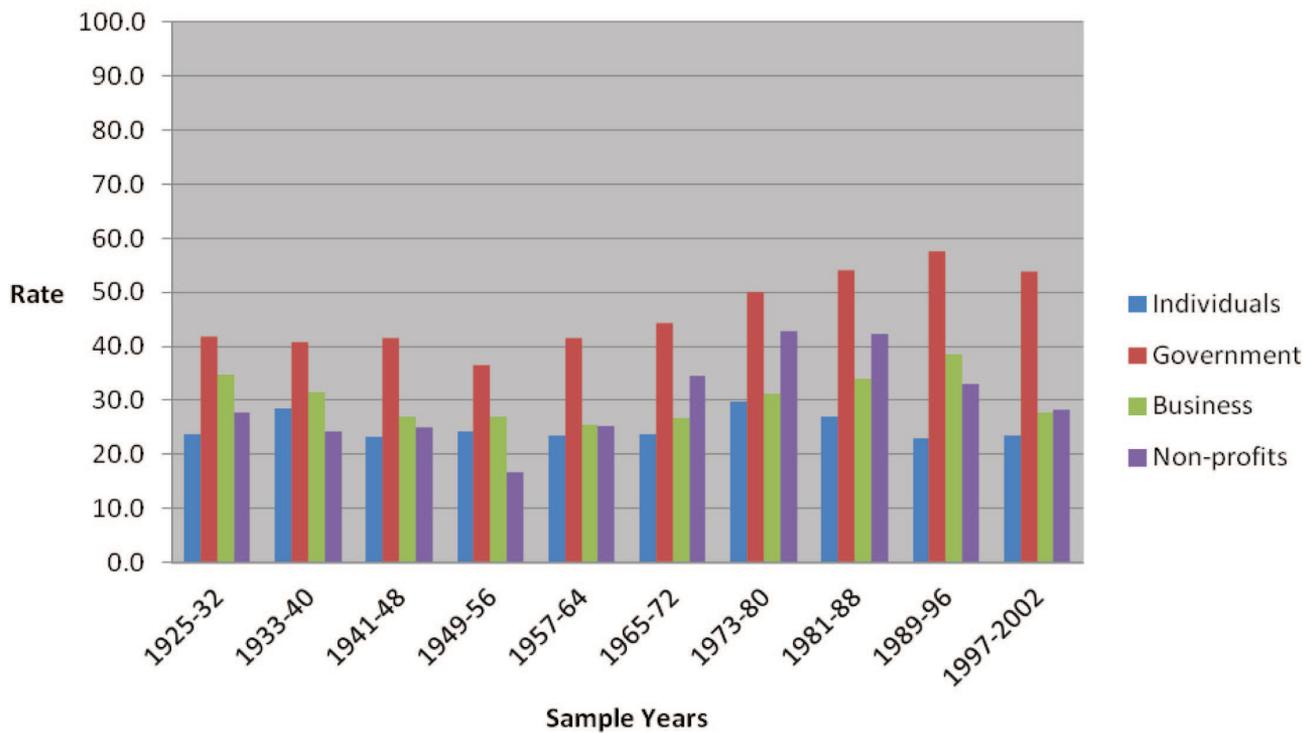


TABLE 3. Success Rates in the Courts of Appeals for Individuals, Government (all levels), Business, and Non-profit Organizations, by Appellants and Respondents, 1925 to 2002

Type of Litigant	Overall	Years									
		1925-32	1933-40	1941-48	1949-56	1957-64	1965-72	1973-80	1981-88	1989-96	1997-2002
All Appellants	29.7	31.3	32.0	28.1	27.4	26.3	26.3	33.4	33.1	30.6	27.3
All Respondents	70.1	68.8	68.6	72.3	73.3	73.9	74.2	66.7	67.1	69.3	66.1
Individual Appellants	25.0	23.7	28.5	23.2	24.3	23.4	23.6	29.7	27.1	23.0	23.4
Individual Respondents	55.5	56.9	62.9	64.2	54.3	61.9	64.3	55.6	48.5	42.8	60.9
Government Appellants	47.7	41.8	40.9	41.7	36.5	41.6	44.3	50.0	54.1	57.5	53.7
Government Respondents	75.1	77.4	72.4	77.1	78.0	76.9	77.4	72.3	72.5	75.8	69.7
Business Appellants	30.4	34.7	31.4	27.1	27.0	25.4	26.7	31.2	34.1	38.5	27.6
Business Respondents	67.4	65.8	67.8	69.2	74.9	72.5	69.7	58.0	66.4	65.8	61.2
Non-profit Appellants	34.9	27.7	24.2	24.9	16.7	25.3	34.4	42.9	42.3	33.0	28.2
Non-profit Respondents	72.1	54.8	77.5	74.4	82.3	88.3	75.3	64.6	58.8	73.1	84.7

Note: Each cell represents the percentage of cases for the sample years in which respective appellants or respondents won their case in the Courts of Appeals (see Appendix B for coding details).

FIGURE 3. Appellant Success Rates in the Courts of Appeals for Individuals, Government (all levels), Businesses, and Non-profit Organizations, 1925 to 2002



to this aspect of democratic theory. Apparently, individuals (whether with or without resources) have determined that it presently is worth attempting to secure their rights in the federal appeals courts.

While individuals may have relatively easy access to the Courts of Appeals, an important finding indeed, this does not necessarily portend that these courts are sympathetic to their litigious efforts. Thus, we also want to understand differences in the success rates of these participants. In this regard, the literature shows that the “haves” or “upperdogs” in litigation generally come out ahead of the “have-nots” or “underdogs,” in part due to the repeat player status and resource advantages of upperdogs. The literature provides that the appeals courts are no exception to this rule.⁴⁶ Have these various generalizations persisted into the most recent time period? Table 3 and Figures 3 and 4 indicate that these expectations

continue to hold for both appellants and respondents, respectively. That is, success rates have remained relatively stable over time, including the most recent time period analyzed, with the “haves”—particularly government—consistently succeeding over individuals in litigation in the Courts of Appeals. The data also show that the success rates of all respondents are much higher than those for appellants, as appeals courts are most likely to affirm.⁴⁷

Judicial Behavior/Court Liberalism

Once a case is appealed and is on the docket of the Courts of Appeals, jurisdiction mandates the court resolve the issues in the case. One way of determining how these courts decide the cases before them is through the relative liberalism of the courts, an aggregate measure than can be compared over time.⁴⁸ Measuring judicial behavior by a court’s decision making is a staple of the political science and

legal literatures. In particular, the study of dynamic liberalism in any institution tells us much about the political process.⁴⁹ Numerous studies of judicial politics have incorporated dynamic liberalism as both independent and dependent variables, and its importance is difficult to underestimate, particularly within the Courts of Appeals.⁵⁰

Table 4 compares the overall dynamic liberalism of the appeals

46. Galanter, *supra* n. 44; Songer and Sheehan, *supra* n. 18; Songer, Sheehan, and Haire, *supra* n. 19.

47. In this regard, contrast these success rates for appellants and respondents in the appeals courts with those at the Supreme Court, where petitioners (appellants) are much more likely to win their cases due to the Supreme Court’s tendency to reverse; see Sheehan, Mishler, and Songer, *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464-71 (1992).

48. Songer, Sheehan, and Haire, *supra* n. 2.

49. Erikson, MacKuen, and Stimson, *THE MACRO POLITY* (Cambridge: Cambridge Univ. Press, 2002).

50. Songer, Sheehan, and Haire, *supra* n. 2.

FIGURE 4. Respondent Success Rates in the Courts of Appeals for Individuals, Government (all levels), Businesses, and Non-profit Organizations, 1925 to 2002

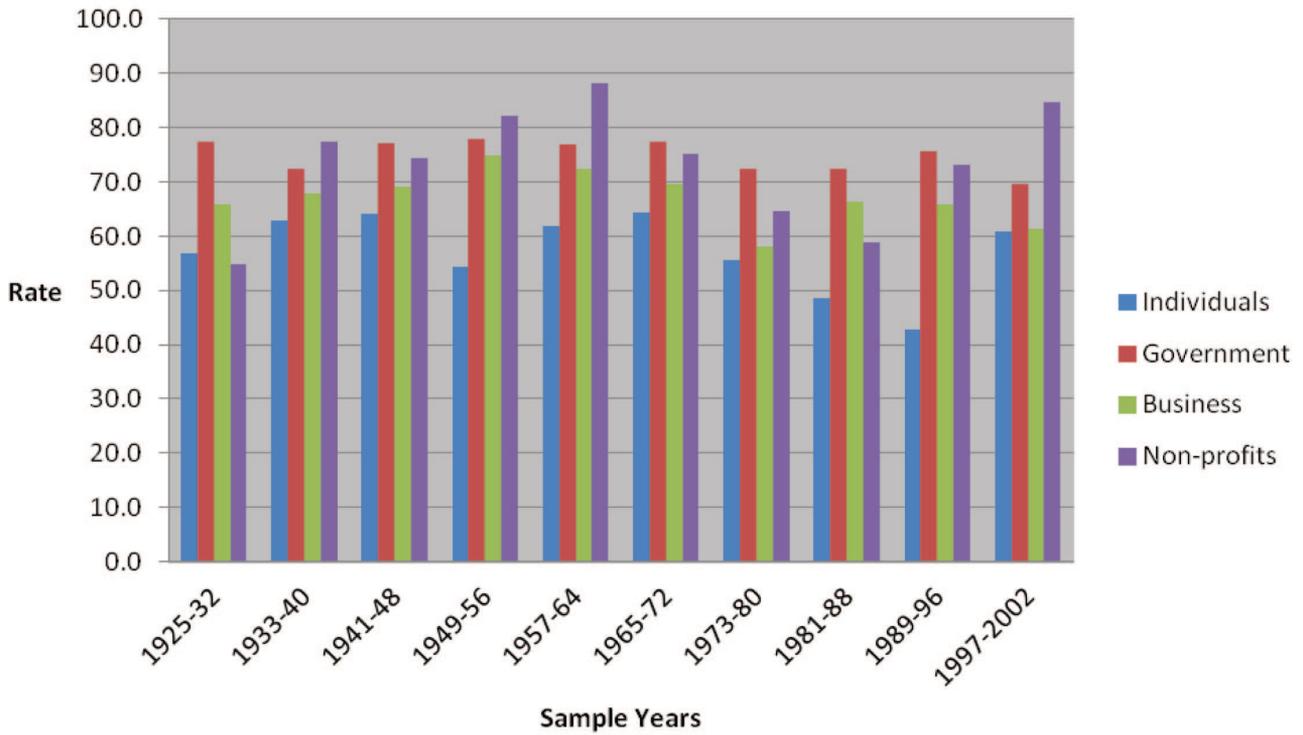


TABLE 4. Relative Liberalism for Judges in the Courts of Appeals for Criminal, Civil Rights/Liberties, and Economic Cases, 1925 to 2002

Issue	Years									
	1925-32	1933-40	1941-48	1949-56	1957-64	1965-72	1973-80	1981-88	1989-96	1997-2002
All Issues	43.6	48.1	46.5	44.4	42.0	37.4	43.3	40.4	31.3	32.7
Criminal	22.2	27.8	19.8	21.0	19.0	19.7	23.4	21.5	15.8	20.0
Civil Rights/ Liberties	27.4	30.4	29.9	32.3	41.1	41.2	47.3	43.5	36.8	34.9
Economic	49.1	51.0	54.6	52.2	52.6	52.6	58.6	50.8	43.3	55.8

Note: Each cell represents the percentage of cases for the sample years in which a liberal decision was issued by the Courts of Appeals (see Appendix B for coding details).

courts over our time period of study. Since a court’s decision making is often a function of the cases on a court’s agenda, Table 4 further categorizes

51. Hendershot, Hurwitz, Lanier, and Pacelle, *Dissensual Decision Making: Revisiting the Demise of Consensual Norms with the U.S. Supreme Court*, POL. RES. Q. (forthcoming 2013).

these results by the three major issue areas examined (economic, criminal, and civil liberties), since these discrete issues areas are often based on very different dynamics.⁵¹

As Table 4 seemingly illustrates, the appeals courts are most liberal in economic cases while most conservative

on criminal procedure cases. The conservatism in criminal appeals is likely the result, at least in part, of convicted defendants who appeal their cases *in forma pauperis*, but with little basis for reversal. Interestingly, the low level of liberal decisions in criminal cases (that is, decisions favoring the

CODING

Coding of Variables for Current Analysis

Issue Areas Discrete issue areas in our analysis stem from the Songer Database and Songer Database Update as follows:

Classified as	If GENISS equals:
Criminal	GENISS = 1 (criminal appeals)
Civil Liberties	GENISS = 2 (civil rights), 3 (First Amendment), 4 (due process), or 5 (privacy)
Economic	GENISS = 6 (labor), or 7 (economic activity or regulation)

Also included GENISS = 9 (miscellaneous) and GENISS = 0 (not ascertained) for purposes of determining the total number of cases in each sample year.

Liberalism Percentage of cases in which directionality is consistent with a liberal outcome. Directionality is based on the DIRECT1 variable in the Songer Database and Songer Database Update. If DIRECT1 = 3, we code the case as a liberal decision. We do not include cases in the analysis in which directionality could not be ascertained or the outcome could not be classified (if DIRECT1 = 0).

Participation Coding of appellants and respondents stem from the Songer Database and Songer Database Update as follows:

Classified as	If GENAPEL1 or GENRESP1 equals:
Individuals	GENAPEL1/GENRESP1 = 7 (natural persons)
Business	GENAPEL1/GENRESP1 = 1 (private business, including criminal enterprises)
Government	GENAPEL1/GENRESP1 = 3 (federal government, including DC), 4 (sub-state government), 5 (state government, including territories and commonwealth), or 6 (level of government not ascertained).

To determine participation rates, we took the sum of GENAPEL1 and GENRESP1 for each participant, divided by the total for the sample years, then multiplied by 100. We included Miscellaneous (GENAPEL1/GENRESP1 = 8) and Not Ascertained (GENAPEL1/GENRESP1 = 9) cases in the analysis for purposes of determining the total number of cases in the sample years.

criminal defendant) has remained relatively stable over the entire time period observed, despite transformation of constitutional mandates in criminal procedure.⁵² One might surmise that, with the rise of Legal Aid and other programs designed to provide criminal defendants with free counsel at the trial and appellate stages, the rate of liberalism would decrease over time as the number of frivolous appeals increases. Or, one might surmise otherwise that providing defendants with competent defense representation on their appeals would serve to increase reversals and thus liberalism over time. Interestingly, neither conjecture seems to be the case. Instead, the relative rate of liberalism remained at a somewhat consistent level over all the years observed.

However, a quite different pattern is noticed in civil liberties cases. Here,

the relative rate of liberalism started off low (about 30 percent of cases were decided in a liberal direction), then peaked in the 1970-80s at a time subsequent to the Supreme Court's apex of liberalism in the 1960s. Most interesting, perhaps, is the subsequent and sudden decline of liberal outcomes in civil rights and liberties cases, as these new data show that liberalism dropped off substantially, making the most recent time period nearly a century prior.

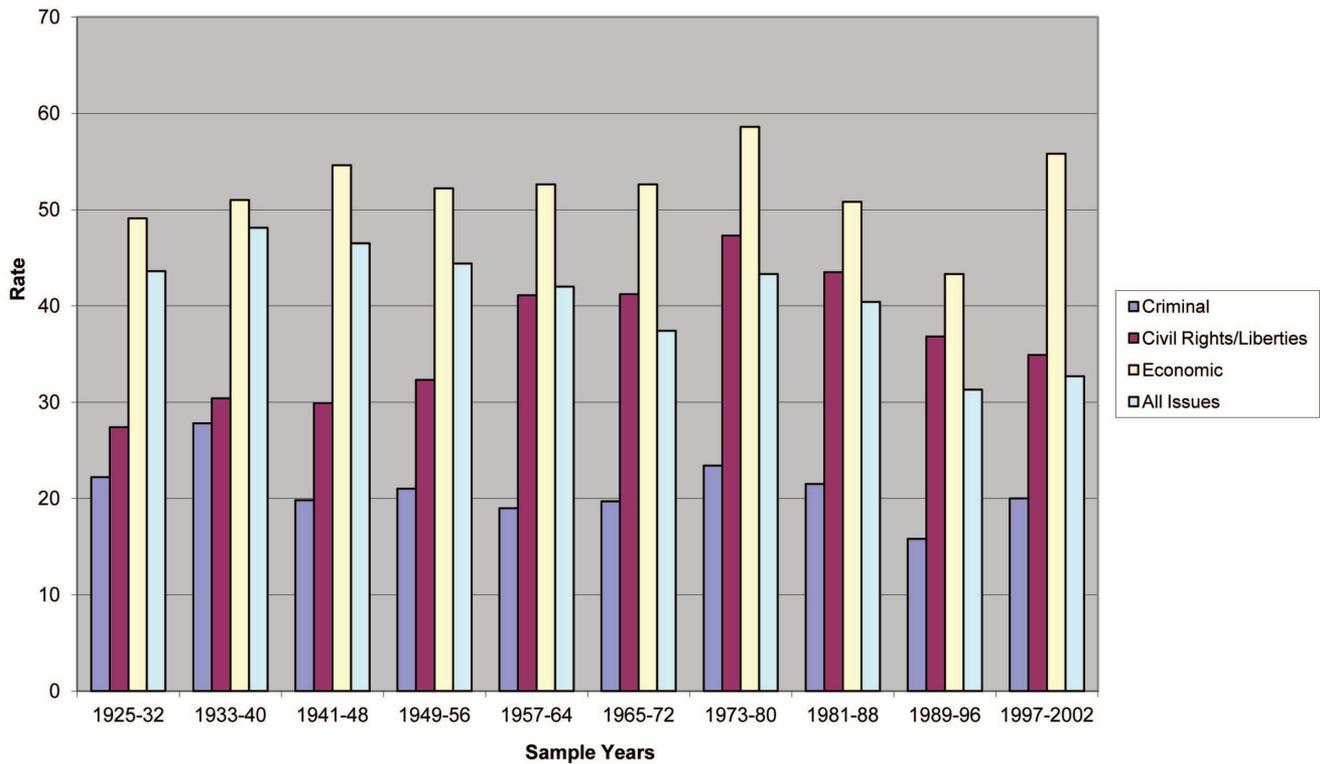
Figure 5 illustrates the dynamic nature of liberalism over the time period of our analysis. Two distinct changes in appellate courts are apparent. First, the distinctions between criminal procedure and civil liberties cases demonstrate that these broad issue areas are truly distinct from each other; thus, they ordinarily should not be aggregated into a single, broad civil

liberties category as often occurs in the literature.

A second interesting finding concerns the differences between overall liberalism and that for the various issue areas (e.g., criminal, civil liberties, and economic cases). When the liberalism for all issue areas is examined, these courts seemingly have become more conservative over time. But, rates of liberalism are relatively consistent for all three issue areas, particularly criminal and economic issues. It appears, then, that the overall liberalism figure is a function of the types of cases on its agenda. As our analysis reveals (see Table 1 and Figure 1), these courts now decide relatively fewer economic cases (the issue area in which the courts are most liberal), while deciding more criminal and civil liberties

⁵² See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

FIGURE 5. Relative Liberalism in the Courts of Appeals for Criminal, Civil Rights/Liberties, and Economic Cases, 1925 to 2002



cases (the issue areas in which the courts have proven more conservative over time).⁵³ These trends suggest that the appeals' courts on the whole are not necessarily becoming more conservative; rather, their dynamic agendas have had an effect on the rate of overall liberalism. That is, there is currently an emphasis by litigants on bringing more criminal and civil liberties cases before these courts, cases which the appeals courts have been deciding more conservatively than their economic counterparts.

Conclusions

This study presents a number of descriptive findings from the latest

data on the Courts of Appeals, and we believe they show that empirical results can tell us quite a bit about the dynamics of political institutions, including the federal appeals courts. For one, if there is a single idiom that can be said about the appeals courts, it is that the more recent data indicate both "change" and "continuity."⁵⁴ That is, some facets of the appeals courts remained relatively constant over the time period, including the most recent years of this study. These primarily involve both agendas and decision making in criminal procedure cases, where we observe somewhat continuous rates over time. On the other hand, change is also indicated, particularly when we look at both agendas and liberalism of civil liberties and economic cases over time.

It seems axiomatic that the term "dynamic" is an appropriate manner of characterizing the appeals courts.

This suggests that the data-collection efforts of these courts in a longitudinal fashion will benefit scholarly knowledge in the future. It would be impossible, or at least entirely unfeasible, to study trends in the appeals courts over so long a time period, whether in descriptive fashion as we have done here, or more systematically,⁵⁵ without the availability of the Songer Database. Scholars today are well aware of the importance of studying the Courts of Appeals, as it is no longer necessary for leading scholars to plead that it behooves us to study these courts. With the availability of the Update to the original Database, many more scholars will have the opportunity to examine the appeals courts in more detail than even Songer enabled with the release of his Database.

For example, research has indicated that presidents are strategic in nominating judges to the lower federal courts who perpetuate that

53. In fact, the appeals courts' rate of liberalism in criminal cases is relatively analogous to jury acquittal rates. See Vidmar, Beale, Rose, and Donnelly, *Should We Rush to Reform the Criminal Jury? Consider Conviction Rate Data*, 80 JUDICATURE 286-90 (1997).

54. Songer, Sheehan, and Haire, *supra* n. 2.

55. See, e.g., Hurwitz, *supra* n. 20.

administration's ideology. Since the Carter Administration, presidents have appointed an increasing number of nontraditional judges to the appeals court bench.⁵⁶ Conclusions drawn from early research on the policy consequences of diversification of the federal bench has been tentative due to the limited number of female and minority judges.⁵⁷ One recent analysis suggests that the concern over a small "N" was justified. Drawing on the Songer Database, which includes a much larger number of nontraditional judges and their decision making, this study found very modest gender-based differences in decision making by judges on the U.S. Courts of Appeals.⁵⁸ With substantially greater numbers of women and minority judges appointed by Presidents Bill Clinton and George W. Bush, the extension of the database in the Update will finally permit scholars to address, in a meaningful fashion, the very heart of agenda setting and judicial decision making, among other issues, by examining a wide variety of question associated with judicial gender and race. For example, do panels with a majority of non-traditional judges decide cases differently? Does the demographic makeup of the entire circuit mediate the effects of non-traditional judges at the panel level? And additionally, whereas most studies have focused on policy differences between non-traditional judges, the extension of the database also presents the opportunity to examine whether there are gender- or race-based differences in other aspects of judging, including the propensity of judges to dissent.

Of course, while the Database and Update are extremely useful to scholars and others interested in the Courts of Appeals, that only published cases are included serves to limit a fuller understanding of the appeals courts. This is becoming progressively clear as a greater proportion of cases are unpublished (and, of course, available to both the legal and scholarly communities), while the precedential value of these unpublished cases is increasing. For instance, the Federal Rules of Appellate Procedure (FRAP) currently provide that appeals courts no longer can restrict citation to their

unpublished opinions.⁵⁹ This recent change to the FRAP, along with other local rules in several circuits, have made unpublished cases increasingly prominent and important. Yet, lawyers still find it frustrating when an opinion that is "on point" is unpublished, while scholars do not always have access to a sufficient sample of unpublished cases.

This begs the question: would our findings look different if a sample of all appeals court decisions, published and unpublished, were included? The answer likely is yes. For instance, we can speculate that the success rate of criminal defendants would not be as high if unpublished decisions were analyzed, since routine criminal appeals that are affirmed are likely not slated for publication. Analogously, the success rate of government would likely be higher if unpublished opinions were included in the study. We can speculate further that the relative proportion of economic cases may be higher than reported in the Database and Update, as business interests continue to bring their interests in the appeals courts, even as the Supreme Court has decreased these types of cases on its docket since the New Deal transition. Fewer reported economic cases in the appeals courts in turn would likely influence rates of dynamic liberalism. Consequently, while our findings would probably look somewhat different if we had the ability to analyze all appeals court cases, we can only contemplate as to what specific differences would accrue and the degree to which they would transpire. Nevertheless, with thousands of appeals court decisions decided each year, it may not be feasible to examine all appeals court cases. Thus, the Database and Update remain tremendously useful as we strive to explain and understand those decisions appeals court judges deem salient and influential.

We believe our study clearly instructs that continued updates of the Songer Database are necessary if scholars are to maintain the high level of inquiry we have seen, particularly in the years since Songer released the Database. Further, including at

least a sample of unpublished decisions—if examining all appeals court decisions proves unfeasible—would allow for comparative studies of published and unpublished counterparts, as well as a fuller comprehension of the Courts of Appeals. This final step would enable us to update our knowledge and understanding of the system of courts Goldman⁶⁰ explored nearly 50 years ago which remain among the most prominent within the U.S. judicial system. ★

MARK S. HURWITZ, PH.D, JD

is Associate Professor in the Department of Political Science at Western Michigan University. (mark.hurwitz@wmich.edu)

ASHLYN KUERSTEN

received her Ph.D from University of South Carolina in 1997 and is Associate Professor in the Department of Political Science at Western Michigan University. She and Dr. Susan Haire were the co-PIs for the Update of the Courts of Appeals Database. (ashlyn.kuersten@wmich.edu)

56. Kuersten and Songer, *supra* n. 21.

57. Songer, Davis, and Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the US Courts of Appeals*, 56 J. Pol. 425-39 (1994).

58. Songer, Clark, and Wood, *The Effects of Judge Gender in Appellate Courts: A Comparative Cross-National Test*, 2003 Meeting American Political Science Assoc., Philadelphia, PA. See also Boyd, Epstein, and Martin, *Untangling the Causal Effects of Sex on Judging*, 54 Am. J. Pol. Sci. 389-411 (2010); Hurwitz and Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity across 20 Years*, 29 JUST. Sys. J. 47-70 (2008); Kuersten, Manning, and Carp, *Do Women Judges Vote Like Their Brethren? Gender and Decision Making in the Lower Federal Courts*. 2002 Meeting Southern Political Science Assoc., Savannah, GA.

59. FRAP 32.1: Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007. [subpart (b) omitted] (Added Apr. 12, 2006, eff. Dec. 1, 2006)

60. Goldman, *supra* n. 1.