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Commercial Litigation in West Virginia State and Federal Courts 1870-1940

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This article describes litigation by and against businesses in the state and federal courts of West Virginia between 1870 and 1940.¹ I am interested in the causes of trends over time in state and federal courts and, in particular, the reasons for differences between the state and federal courts' handling of these cases.² In my examination of the commercial litigation in this era I have kept in mind two general theories put forward by others. First, some historical studies have suggested that commercial litigants had a disproportionate influence on the development of private law and procedure and on the specialized role federal courts played in the legal system of the nineteenth and early twentieth centuries.³ Second, other studies argue that

* Visiting Professor of Law, State University of New at Buffalo. I would like to thank Professors Charles McCurdy and Dirk Hartog for comments on earlier drafts. I owe much to a group of dedicated research assistants who labored in the circuit court records for over a year maintaining both dedication and a sense of humor. I owe special thanks to Cindy Williams for her continuing assistance with the Appalachian Collection materials at West Virginia University. The research has been supported in part by an Appalachian Studies Fellowship from Berea College and by National Science Foundation grant SES-8121320.

1. Results of this research are also described in Munger, "The Function of Law and Civil Litigation Rates: Theories, Critique and Tests of Hypotheses," (unpublished, 1983); and Munger, "Examining the Functions of Courts through Historical Research on Litigation: Results of a Quasi-Experiment based on Three West Virginia counties," (unpublished, 1983).

2. This research has roots in both the Legal Realist tradition of court studies and in the more recent interest of legal anthropologists in lower courts in modern society. The longitudinal and quantitative study of trial courts is of very recent origin and still stands somewhat apart from mainstream theoretical and conceptual discussions of legal institutions. See, e.g., Friedman and Percival, "Tales of Two Courts: Litigation in San Benito and Alameda Counties," 10 *Law and Society Rev.* 267 (1976); McIntosh, "The Private Use of A Public Forum: A Long Range View of the Dispute Processing Role of Courts," 77 *Am. Political Science Rev.* 991 (1983); Daniels, "Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties," 19 *Law and Society Rev.* 381 (1985).

3. See, Wechsler, "Federal Courts, State Criminal Law and the First Amendment," 49 *N.Y.U.-L. Rev.* 740 (1974); Tony Freyer, "The Federal Courts, Localism, and the National Economy," 53 *Bus. Hist. Rev.* 343 (1970).

commercial litigation is a response to underlying social disorganization in which litigants (especially litigants capable of long term planning) seek rational rules to guide conduct and eliminate further conflict.⁴ The first theory develops the view that the legal system may be manipulated or dominated by particular classes and that litigation reflects the interests of such classes (hereinafter referred to as the dominant litigant perspective).⁵ The second evolves from the perspective that law is a form of social control and predicts that courts will be used most during periods in which normal commercial relationships have been disrupted by rapid social change (hereinafter referred to as the social control perspective).⁶

These two perspectives do not necessarily conflict, since they focus on different aspects of social conflict and its relationship to the state. Yet, they have frequently been used to support views of litigation which are quite dissimilar. While the dominant litigant perspective has been developed to suggest that the *outcomes* of litigation favored the interests of powerful commercial actors, the social control perspective has been used to argue that litigation more often reflected shared community values.⁷ The dominant litigant perspective has been used to suggest that commercial litigants engaged in a long term strategy for resisting state regulation by means of the federal courts. The existence of such a strategy implies, among other things, a shift in commercial litigation from state to federal courts in order to resist state regulatory power. In addition, it implies selective use of the courts (i.e. litigation will rise when there is an opportunity to extend the power of the actor). On the other hand, the social control perspective has been used to suggest that litigation in a developing economy (e.g. Wisconsin's economy between 1836 and 1915) has closely tracked the community's support for the development of natural resources, by increasing as the pressure for and consequent pace of development grew, and declining as values began to shift toward enterprise accountability after 1900. These implications are both interesting and amenable to examination using information about litigation rates.

4. See, e.g., Friedman and Ladinsky, "Social change and the law of industrial accidents," 67 *Colum. L. Rev.* 50 (1967).

5. See, e.g., Horwitz, *The Transformation of American Law* (1977).

6. This assumption is rooted in the sociological tradition of Max Weber, and especially the functionalist interpretation of Weber rendered by Talcott Parsons. See, Parsons, *The Structure of Social Action*, (1937); Bohannan, "The Differing Realms of the Law," 67 *Am. Anthropologist* 33 (1965).

7. For an example of the dominant litigant perspective, see, Wechsler, *supra*, note 3. The assumption that law represents a community consensus on important questions concerning allocation of power, and thus plays a system-preserving role, is the foundation for relationships between law and economic development described in the work of James Willard Hurst. See, Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1916* (1964).

However, neither theory is satisfying as an explanation of litigation. Historical accounts have frequently revealed the complexity of the relationship between litigants. The preexisting, often continuing, social relationship which underlies the litigation has an important bearing on a parties' decisions to pursue disputes to court.⁸ In the vast majority of the cases in state and federal courts parties are not strangers. Some form of prior relationship preceded the conflict or dispute, such as a course of dealing, an employment relation, a creditor-debtor history or similar continuing mutual interest. The dominant litigant perspective is often unsatisfying because the research supporting it has paid so little attention to the development of a coherent view of litigation as a process. Instead, these studies choose to emphasize the advantages which flow from the vast resources of wealthy and/or corporate litigants. It is also assumed that the greater ability to plan and control the environment, which is enjoyed by dominant litigants, is associated with a desire to litigate selectively to "play for rules".⁹ Yet, these assumptions are rarely examined empirically, and thus it is not clear by what process (or whether) commercial litigants actually dominate legal disputes to control the rate at which conflicts are brought to courts, manipulate the choice of forum in which they are litigated, or influence the outcomes of litigation. Moreover, the dominant litigant perspective fails to adequately explain the following questions: *why* dominant litigants want to litigate, whether litigation is an effective means of extending the power of dominant litigants, whether litigation is seen as less costly than alternative forms of conflict resolution, and whether litigation is forced on "dominant" classes in some situations when other alternatives are foreclosed.

The social control theory is unsatisfying for the simple reason that it pays no attention to the process by which conflicts are brought to courts, and fails to consider the characteristics of particular litigants which influence the decision to pursue litigation.¹⁰ Contrary

8. Particularly stimulating has been the work of Stewart Macaulay, see, e.g. "Non-Contractual Relations in Business: A Preliminary Study," 28 *Am. Sociological Rev.* 55 (1963). More recently, the same perspective has been developed by others. See, e.g. Yngvesson, "Reexamining Continuing Relations and the Law," 1985 *Wis. L. Rev.* 623.

9. Galanter, "Why the 'Haves' come out ahead: Speculations on the limits of legal change," 9 *Law & Society Rev.*, 95 (1974).

10. The contrast between social control theory and what historians have discovered in pursuing this theory is most clearly seen in the seminal work of Hurst, *supra*, note 7. Hurst's study has stimulated further work in large part because he is such a careful observer of details of the legal process. Thus, while claiming that legal process reflects and restores a consensual community order in response to threatened disorder caused by economic change, his precise and insightful descriptions show not only that the common law produced manifest dysfunctions, but also achieved its stability through the hegemony of industrial interests in the state legislature. Hurst also notes the different patterns of reliance on public forums for dispute resolution by enter-

to this theory, involving legal process is not a simple reflection of the pace of economic change, or of social disruption, but is itself the terrain of conflict in which intervention by courts has a different value for various parties.¹¹

Both perspectives lack a specific understanding of the relationship between classes of litigants. Neither the occurrence of events which disrupt "normal" relations nor the existence of opposing economic or political interests among social actors with unequal power is sufficient to explain why litigation occurs. Litigation is a behavior which arises from variable contexts. The history of the relationship between potential litigants may determine the way in which conflicts arise and opposing claims are formed, as well as the ways alternative resolutions are selected. The capacity of particular types of actors, both individuals and organizations, for litigation varies. Litigation is also a social relationship which has a structure, including a particular degree of mutual commitment (at the very least to engage in controlled conflict), and an ideological component (in the form of understanding rights, appropriate forms of conflict resolution and expectations about outcomes). The social characteristics of litigants may account for the various patterns of litigation among different types of litigants notwithstanding similar conditions of economic stress or disruption.¹²

prises of different sizes (for example, the giant, Weyerhaeuser Lumber Company rarely appeared in the records which Hurst examined). A recent comparative study of debt litigation in trial courts makes a similar point concerning the oversimplification of the litigation process by social control or legal rationalization theories. Kagan, "The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts," 18 *Law and Society Rev.* 323 (1984).

11. For an exemplary study of the impact of social organization on social control which raises and discusses issues bearing on the rate at which conflicts are discovered and processed by legal institutions, see Mayhew, *Law and Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination* (1968).

12. See, Yngvesson, *supra*, note 8; Black, "Social Control As a Dependent Variable," in Black (ed.) *Toward a General Theory of Social Control*, Volume 2 (1984). This perception has found increasing support, particularly since the appearance of Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law and Society Rev.* 95 (1974). Galanter's article presents an engaging contrast between "one shot" and "repeat player" parties in litigation. Galanter suggests that the OS and RP status of the plaintiff or defendant has a significant predictable effect on the conduct and outcome of litigation, because of the unequal distribution of resources, experience and stakes. Although widely cited Galanter's engaging conceptualization has stimulated little empirical research. Also supporting this view, the critical legal studies movement has gained respect, arguing that law is an ideology. Law is viewed as an ideology both because it reflects broad currents of thought extending beyond the legal system, and because trends in court use depend on what potential litigants, lawyers, and others think about litigation. See Gordon, "Legal Thought and Legal Practice in the age of American Enterprise, 1870-1920," in Geison (ed.), *Professions and Professional Ideologies in America*, (1984); Gabel, "Reification in Legal Reasoning," in Quinney and Beirne (eds.), *Marxism and Law*, (1982).

This article explores some of the implications of all three perspectives. The importance of social and economic disruption as a stimulus to litigation is examined through trends in the civil litigation rate relative to the pace of economic change in a rapidly developing geographic region. The dominance of commercial actors relative to other actors is explored by examining patterns of litigation outcomes, and the apparent capacity of some litigants to manipulate access to more favorable forums (in particular through removal of cases from state courts to federal district court). The pre-litigation relationship between potential litigants determines the kind of claims made in litigation, and thus the timing and preference for litigation over alternative means of conflict resolution. Decomposition of an aggregate civil litigation rate by types of litigants reveal important differences linked to an actors' litigation capacity, as well as to the characteristics of the relationship between conflicting parties which have a bearing on use of the courts.¹³

West Virginia's Economic "Take-Off" and the Civil Litigation Rate

Between 1870 and 1940 West Virginia experienced rapid economic growth and social development. The State's economy was tied primarily to two extractive industries, lumbering and coal mining. These businesses began to play an important role as early as 1860.¹⁴ Three West Virginia counties were selected for this study. Two of the counties experienced a take-off in coal mining, one in 1870 (Fayette County), the other about 1900 (Raleigh County). The third county (Summers) had no coal or coal industry, but until the end of the period under study was the local base of operations for the Chesapeake and Ohio Railroad. The C. & O. Railroad was instrumental in the development of the coal industry in Fayette and Raleigh counties.

In the 1870's, Fayette averaged under a half million tons of the coal per year.¹⁵ Fayette Countys' average coal production was over

13. Only a few trial court studies have focused on litigants as a determinant of dispute processing in courts. See, Miller and Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," 15 *Law and Society Rev.* 525 (1980/81); McIntosh, "A State Court's Clientele: Exploring the Strategy of Trial Litigation," 19 *Law and Society Rev.* 421 (1985). Both studies provide starting points for examining litigants and the changes in the relationships between them. Many of the variables used in other litigation studies to predict litigation patterns, such as economic and demographic changes, or the doctrinal basis for the dispute, are indirect measures of litigant interests, but not of capacity, ideology, or, in any systematic sense, the relationship between the litigants.

14. Ambler, *A History of West Virginia* (1933); Williams, *West Virginia and the Captains of Industry* (1976).

15. These figures are taken from the West Virginia Department of Mines, *Annual Report*, available from 1888 in a nearly continuous series. Information on the coal industry and railroad development prior to 1888 is available in scattered primary and secondary sources. The principal secondary sources used here are Eavenson, *The*

1.2 million tons by 1890, 3.8 million tons by 1900, and over 7.7 million tons by 1910. Raleigh County, which adjoins Fayette to the south, produced less than 80,000 per year in 1900. Raleigh county's average coal production reached 1.6 million tons by 1905, and 4.5 million tons by 1915. By 1925 Raleigh had surpassed Fayette and became the leading coal producing county in the state with an average production of 9.8 million tons per year.

Between 1880 and 1930 Fayette's population grew from eleven thousand to over seventy-two thousand. During the same time period, the population of Raleigh County grew from twelve thousand in 1900 to sixty-eight thousand. The population of Summers County, the non-coal county, grew from nine thousand in 1880 to sixteen thousand in 1900. Its population leveled off after 1900, increasing to just over twenty thousand by 1930.

The "take-off" of the coal industry is reflected clearly in the production and population statistics of the three counties. At the same time, the effects of the cycle of expansion and contraction which characterized the late nineteenth-century American economy

first Century and a Quarter of American Coal Industry (1942) and Nelson, *The Chesapeake and Ohio Railroad* (1927); Eller, "Mountain Road: A Study of the Construction of the Chesapeake and Ohio Railroad in Southwestern Virginia, 1867-1873," unpublished masters thesis, University of North Carolina, 1973; Thomas, "Coal Country: The Rise of the Southern Smokeless Coal Industry and Its Effect on Area Development, 1872-1910," unpublished Ph.D. dissertation, University of North Carolina, 1971.

were particularly acute because of the dependence of West Virginia's extractive industries on capital and markets controlled by absentee owners tied to eastern financial interests.¹⁶

The civil litigation rates which appear in Figures 3 and 4 are based on the combined civil caseloads in the state circuit courts for each of the three counties, and on the civil caseload of the Federal District Court for the Southern District of West Virginia.¹⁷ The rate of

16. See Williams, *supra*, note 13, Chapter 5.

17. For each of the three counties, Fayette, Raleigh and Summers, all state circuit court cases between 1872 and 1925, 1930 and 1940 were included in the study, excluding only criminal cases and administrative matters such as appointment of court officers, paying court accounts, and licensing (preachers, pistols, etc.). State county court cases were also included for the period 1872-1880, during which they sat as courts with jurisdiction overlapping that of the circuit courts in many matters. The federal sample included all cases filed in the Charleston Division of the Federal District Court for the years 1881-1885, 1890-1910, 1915, 1920, 1925, 1930, 1935, 1941. The Federal District Court records located in Charleston, West Virginia reflect the changing administrative organization of the District Court. From 1864 to 1901 the state of West Virginia comprised a single federal district. In 1901, the Southern District of West Virginia became a separate jurisdiction. However, prior to 1901 the Court had a regular term at Charleston covering twenty-six counties. In 1898, separate terms were established for Huntington and Bluefield, covering six and four counties respectively, which were previously included within the Charleston subdivision. In 1913, Lewisburg acquired its own term covering one county, and in 1940 Beckley Division began hearing cases for four counties. Each change resulted in a reduction of the territory served by the Court sitting in Charleston. For purposes of

civil litigation in the state circuit courts (standardized on population of the three counties) shows a steady downward trend from an initially high rate during the years of regional take-off.¹⁸ The litigation rates declined until the most intense period of growth in Raleigh which occurred between 1910 and 1915. There was a distinct slump during World War I, followed by a marked rise during the post-war boom. After peaking in the mid-1920s, the civil litigation rate fell steadily until 1940.¹⁹ The pattern in Federal District Court is similar, although the caseload of the Southern District of West Virginia was so small (approximately fifty cases a year) that a single major commer-

this study, only the changes which occurred in 1898 resulted in potentially significant reduction in the caseload of the Charleston subdivision. No dramatic decline is visible in the caseload statistics, and, indeed, as explained in the text, the litigation rates seem quite consistent with the patterns for state courts throughout the seventy year period under study. Between 1898 and 1940, the territory over which the Charleston subdivision assumed primary responsibility remained intact, with the exception of the loss of a single county in 1913. Upon inspection of the Lewisberg term records it was apparent that very few cases were lost as a result of this transfer. Rates for the Charleston subdivision have been computed using the population of the state as a whole (the absolute value of the rates having little significance in any event).

18. On problems associated with the standardization of litigation rates, see Munger, "Examining the Functions of Courts," *supra*, note 1.

19. I have shown elsewhere that this general pattern holds for all three counties. Munger, "The Function of Law and Civil Litigation Rates," *supra*, note 1.

cial failure could dramatically affect its caseload, as in 1915 when the receivers of an insolvent bank sued one hundred eight debtors, swamping the District Court's caseload (see Figure 4).²⁰ Although further decomposition of the state and federal civil litigation rates may reveal a different pattern for particular litigants or types of cases, it is clear that economic growth does not produce a steady increase in the overall civil litigation rate.

Decomposition of the civil litigation rate reveals more sharply contrasting trends. Figure 4 displays the civil litigation brought by business (standardized on population of the three counties). The effects of the take-off in Fayette (1870-1880) and in Raleigh (1905-1915) were accompanied by increases in the litigation rate. Steady growth in Fayette (1880-1900) was accompanied by steady decline in the commercial litigation rate, which was interrupted by resurgence after lows during the depression in the early 1890s. World War I depressed commercial litigation, while the boom following the

20. No correction has been made in these tables for the loss of territory by the Charleston Division of the Federal District Court for the Southern District of West Virginia in 1898 or 1913. See, *supra*, note 16.

war led to a sudden upsurge. Contributing to the large increase in the commercial litigation rate in 1922 was a series of strikes by miners, which was accompanied by hundreds of retaliatory evictions from company housing. Excluding these cases, the increase in 1922 is sharply reduced, but the overall trend would remain unchanged. The Great Depression appears to have produced a further overall decline in the commercial litigation rate in the years sampled (1930, 1940 for the state courts).

The pattern of litigation by businesses in federal district court was similar, but less clearly associated with specific short term changes in the economic fortunes of each county. The decline between 1880 and 1905 was steady and monotonic as the region underwent steady growth. The increase in the litigation rate between 1905 and 1915 was much more dramatic, even excluding the litigation caused by the single bank failure in 1915. Similarly, the recovery following World War I was marked by a steady increase in litigation to 1930. During the Great Depression litigation in federal court appears to have declined steadily relative to population.

In both state and federal courts, the convergence of a rising commercial litigation rate with rapid economic growth is striking. In addition, the decline during periods of contraction or depression is just as obvious. However, this pattern was not a simple reflection of the business cycle, since litigation rates in both state and federal courts between the initial take-off in Fayette and the take-off in Raleigh county decline steadily. Finally, the increase in the litigation rate during initial take-off does not seem to be an artifact of the imbalance between economic activity and population, since the increase is not changed by standardizing litigation on more direct measures of economic growth, such as coal production or the number of mines, rather than population.²¹

If the litigation rate for all companies is decomposed into rates for specific types of firms the general conclusion that businesses chose to litigate during periods of rapid expansion is strengthened. Figure 5 shows the civil litigation rates for coal companies, railroads and banks in the circuit courts of the three West Virginia counties. The civil litigation rate for coal companies (as plaintiffs) follows the trend of industry expansion quite closely with relative maxima about 1880, 1905 and again in the early 1920s.²² The litigation rates in 1903 and

21. Standardizing coal company litigation on tons of coal produced, the number of mines in operation in each county, or the number of employees at work in the mines of each county yields largely similar patterns. See Munger, "Examining the Functions of Courts," *supra*, note 1. The differences between them may be important in more precise forms of analysis, but not at the level of the generalizations reported here.

22. See especially Nelson, *supra*, note 14, and Lambie, *From Mine to Market: The History of Coal Transportation on the Norfolk and Western Railroad*, 1954.

Figure 5.
Civil Litigation Rates 1870-1940
Selected Companies State Circuit Court

1922, which produced very high figures for those five year periods, were a product of hundreds of retaliatory evictions from company-owned housing made by mine owners in response to labor strikes.²³ Even with these cases excluded, the pattern remains. The litigation rate for coal companies reached a relative minima in the mid-1890s and during the Great Depression.

Railroad litigation peaked in the early 1870s, as railroads fought for legal title to rights of way using state statutory authority to condemn land.²⁴ The early 1900s were a period of rapid railroad expansion, as Raleigh county was opened. The Virginian Railroad, which was formed in 1906, entered into competition with the Chesapeake and Ohio for the coal trade. Railroad litigation declined sharply following periods of land acquisition and start-up competition, reaching relative minima in the late 1880s and after 1910.²⁵

Bank litigation steadily increased as the economy grew. The pattern of bank litigation suggests that banks litigated when the market was most competitive. This observation is supported by the statistics from 1910-1925, a period of local industry and railroad consolidation in which many of the smaller coal companies and smaller railroads were driven out of business or absorbed by larger companies.²⁶ Bank litigation in the state circuit courts appears to have declined after 1925.²⁷

These trends suggest that companies chose to use the courts during periods of rapid expansion rather than during contraction or periods of steady growth.²⁸ The correlation between litigation and economic change is rough and imprecise, and, as the examination of litigation process and litigation outcomes in the following two sections of this article suggest, other factors also shape these patterns.

23. See Munger, "Social Control of an Emerging Industrial Proletariat: Conclusions from a Litigation Study of Southern West Virginia Courts, 1872-1925," (unpublished, 1985).

24. 54 W. VA. Code §48 (1900).

25. Litigation *against* railroads follows quite a different pattern, of course, consisting largely of tort cases. Following start up litigation, railroads tended to be almost exclusively defendants in tort cases in state court.

26. See, for example, Nelson, *supra*, note 14, and Bowman, *The New River Company, 'Serving the State, Nation and World for Seventy Years'* (1976).

27. Post 1925 state court data were collected for the years 1930 and 1940 only. Therefore, the apparent decline must be viewed in light of the real possibility that the actual fluctuation in caseload and litigation rate is quite different, for example, rising sharply after 1930 and declining sharply in the late 1930s.

28. A caution is warranted that these are impressions based on relatively informal inspection of the data. For a more rigorous, statistical, evaluation of these arguments made to this point in this article see, in Munger, "Law, Change and Litigation: A Critical Examination of an Empirical Research Tradition." Forthcoming in *Yearbook of the Institute for the Sociology of Law for Europe*.

TABLE 1
Percent Company Litigants by Time Period West Virginia State Circuit Court Cases 1870-1940

Type of Plaintiff or Defendant	Time Period													All Years
	1872 to 1875	1876 to 1880	1881 to 1885	1886 to 1890	1891 to 1895	1896 to 1900	1901 to 1905	1906 to 1910	1911 to 1915	1916 to 1920	1921 to 1925	1930	1940	
Coal Co. Plaintiff	.1	.2	1.3	.2	.6	.9	3.0	2.4	2.3	3.2	13.3	.8	.3	3.9
Coal Co. Defendant	.5	.7	.8	1.4	4.3	5.2	5.1	5.4	6.6	4.1	4.5	2.4	2.3	4.0
Railroad Plaintiff	2.6	.5	.7	.2	1.4	1.3	2.6	3.7	.9	.7	.5	.5	.1	1.3
Railroad Defendant	3.1	1.0	4.2	2.5	5.7	3.9	3.8	5.7	6.9	4.1	2.3	2.3	.1	3.8
Bank Plaintiff	.4	1.2	1.2	1.3	1.2	1.7	1.1	2.7	4.5	3.1	4.8	9.5	4.4	3.1
Bank Defendant	.2	.06	.1	.6	1.0	1.9	.6	.4	1.2	.9	1.0	3.8	1.8	1.1
All Company* Plaintiffs	15.2	19.3	14.8	14.2	18.1	12.6	15.8	20.2	21.1	16.0	33.8	29.3	12.3	21.0
All Company Defendants	12.6	11.1	12.2	12.2	20.2	16.3	16.3	20.0	24.7	17.5	17.4	24.5	16.0	17.3
Number of Cases	1261	1645	1458	1464	1853	2101	2795	3018	3622	2779	5820	1206	937	29,959

* These rows include cases in which companies were either plaintiffs or defendants, respectively, including coal company, railroad bank cases.

TABLE 2

Percent Company Litigants by Time Period West Virginia Federal District Court Cases, 1881-1941

Type of Plaintiff Or Defendant	Time Period											All Years
	1881 to 1885	1891 to 1895	1896 to 1900	1901 to 1905	1906 to 1910	1915	1920	1925	1930	1935	1941	
Coal Co. Plaintiff	.0	0	3.9	6.5	7.4	1.0	7.5	2.5	2.6	8.0	1.0	3.2
Coal Co. Defendant	9.1	2.9	9.8	8.7	20.3	6.2	2.5	9.3	3.9	3.0	2.0	8.8
Railroad Plaintiff	2.4	1.2	2.0	3.6	2.3	0	0	5.6	5.1	2.0	1.0	2.6
Railroad Defendant	13.0	4.7	10.3	6.5	8.7	5.2	75.0	5.6	1.7	5.0	0	8.6
Bank Plaintiff	1.6	4.7	3.9	5.1	6.0	58.3	2.5	.6	2.8	5.0	2.1	9.6
Bank Defendant	.4	1.7	2.9	3.6	2.6	3.1	0	.6	1.7	5.0	2.1	2.1
All Company Plaintiffs*	21.6	26.9	21.7	24.0	40.0	61.4	15.0	11.2	17.5	22.8	10.6	28.3
All Company Defendant	32.7	29.2	40.0	30.0	57.6	39.6	82.5	24.2	18.6	39.6	33.0	37.5
Total Number Cases	254	171	203	138	217	192	40	161	177	101	94	1748

* These rows include cases in which companies were either plaintiffs or defendants, respectively, including coal company, railroad and bank cases.

Companies As Defendants: Rates of Trial and Settlement

The litigation rates examined to this point have shown that companies, as plaintiffs, litigated when business opportunities were expanding rapidly. However, companies were as likely to be defendants as plaintiffs in litigation. Tables One and Two show the relative frequency of cases brought by and against companies in each time period. In state circuit court, companies were more likely to be plaintiffs. Yet, in federal district court, companies were more often defendants. While companies were more frequently defendants in state court litigation from 1876 until 1890 (a period of credit expansion and industrial growth), during the next surge in the West Virginia economy from 1905-1925, companies were, by a wide margin, more frequently defendants. After 1925, companies were, once again, more often plaintiffs. The reversal in the role of companies in state court litigation after 1905 was due more to a rapid expansion in legal action against both coal companies and railroads between 1905 and 1925, than to a decline in the number of cases brought by the firms in these industries.

The difference between the frequency of plaintiff company cases and defendant company cases over the seventy year period is much larger in the federal district court than in the state circuit courts. In federal district court companies as a whole were more frequently defendants than plaintiffs in all time periods except one. In the next section I will discuss the specialized role which federal district court appears to have played in commercial litigation.

Both coal companies and railroads tended to be defendants rather than plaintiffs in state and federal court. Though in the case of railroads, the difference was small in the federal district court, and from 1925 on railroads were more likely to be plaintiffs than defendants in that court. Railroads were more frequently defendants than plaintiffs in state courts in all periods, and usually by a wide margin. Coal companies were relatively active as plaintiffs in state court, but the overall difference in numbers of cases in which they were plaintiffs and defendants was small. Banks, in both state and federal court, were more likely to be plaintiffs than defendants. Yet, that trend reversed during the periods of economic contraction between 1890-1900 and 1930-1940. During expanding or level economic activity banks may have sued the recipients of bank credit; during economic decline evidently banks themselves were the targets of litigation by creditors.

As plaintiffs, companies won over 94% of the cases they allowed to proceed to trial. (See Table Three) As defendants they lost only about 84% of their cases at trial (while all defendants lost about 89%). Both as plaintiffs and defendants, companies reached non-trial resolutions in a greater proportion of their cases than other litigants. The

TABLE 3
Trial Court Outcome in State Circuit Court (By Type of Litigant) and Federal District Court

Outcome	State Court Cases								All State Cases	All Federal Cases
	Coal Companies		Railroads		Banks		All Companies			
	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff	Defendant		
Judgment for Plaintiff	70.7	45.6	58.4	21.8	76.9	56.0	67.7	45.2	55.7	48.8
Judgment for Defendant	2.6	9.0	5.0	9.7	1.9	8.9	4.2	8.7	6.9	9.1
Settled or Plaintiff Dism.	25.9	43.6	33.5	65.6	21.1	33.1	27.2	44.0	46.6	38.9
Arbitrated	.3	.3	0	.1	0	0	.1	.2	.2	.1
Removed to Federal Court	.1	1.0	2.1	2.4	0	.3	.3	1.0	.3	—
Other	.4	.3	1.0	.3	.1	1.4	.4	.5	.4	3.6
Number of Cases	1176 (100%)	1214 (100%)	382 (100%)	1151 (100%)	917 (100%)	293 (100%)	6216 (100%)	5295 (100%)	29,959 (100%)	1817 (100%)

difference was slight for company plaintiffs (23.6% non-trial outcomes for company plaintiffs versus 20.7% non-trial outcomes for all plaintiffs). The difference was larger for company defendants, who reached non-trial resolutions in 39.3% of all cases (compared with 20.7% for all defendants).

In the role of defendant, coal companies fared about the same as the average for all company defendants in cases which went to trial (losing 83.5%). By contrast, railroads, as defendants, lost only 69.1% of all cases which went to trial. In 38.2% of cases in which they were defendants, coal companies settled out of court or the plaintiffs dismissed the case. In over 60% of the cases in which they were defendants railroads settled or obtained a voluntary dismissal.

The striking contrast between railroad and coal company litigation poses an interesting question about the source of the differences between these patterns. One hypothesis might be that the mix of cases brought against the two types of companies were different, affecting the pattern of case outcomes. At least with respect to cases arising from employee injuries or deaths, this appears to be the case, since comparison of the outcomes of all tort cases against railroads with the outcomes of tort cases against coal companies shows that the settlement rate is quite similar for these cases.²⁹ A second hypothesis concerns the relative litigation capacities of the two types of companies. The more sophisticated organizational structure and greater financial resources of a monopoly capital enterprise such as the Chesapeake and Ohio Railroad contrasted sharply with the occasionally wealthy but relatively unsophisticated mining company.³⁰ The Chesapeake and Ohio Railroad, chief among the defendant railroads in this study, had salaried corporate counsel as well as retained local counsel.³¹ Railroads, to a much greater degree than coal companies, were selective about litigation, settling more often than coal companies, and winning much more often at trial. Further, the larger railroads were incorporated in other states, giving them the option of removing cases against them to federal court. Both as plaintiffs and defendants, railroads removed cases more than twice as frequently than other companies in state court litigation. Removals, however,

29. Munger, "Tort Litigation in West Virginia, 1872-1940: The effects of Appellate Decisions on Circuit Caseloads," (unpublished, 1985).

30. Chandler, *The Railroads: The Nation's First Big Business* (1965); Chandler, *The Visible Hand: The Managerial Revolution in American Business* (1977), Chapter Two.

31. Chandler, *The Visible Hand*, *supra*, note 29, at 94. Tracing the appearances in court by lawyers representing the Chesapeake and Ohio Railroad Company in Fayette County reveals that the Railroad was represented on most matters by an established law firm in Charleston, West Virginia. Many coal companies, by contrast, tended to use attorneys based in Fayetteville, a small, rural county seat. While the C & O tended to choose a law firm and stay with it, few coal companies were represented by a single attorney or firm.

comprised only a small fraction of the outcomes in state court cases, and the effects of differences in litigation capacity, if any, appear to lie in the management of non-trial outcomes.

The Special Role of the Federal District Court in Commercial Litigation

The special jurisdictional requirements of federal district courts meant that a federal forum was available only to certain classes of litigants.³² The federal question requirement (including suits involving federal labor injunctions, patent infringements, and federal regulatory enforcement) ensured that federal courts had a higher proportion of commercial litigants and litigants with property and commercial interests extending across state lines than state courts. Therefore, it is not surprising that a larger overall proportion of the plaintiffs and defendants in the Federal District Court for the Southern District of West Virginia were companies than in state circuit courts. Further, companies were much more likely to be defendants than plaintiffs in the Federal District Court. Although West Virginia law required corporations doing business in the state to be subject to state court jurisdiction, as a practical matter, litigation against "foreign" (i.e. out-of-state) corporations was frequently initiated in federal court or removed there by the defendant.³³ Although removal occurred in only .3% of all state cases in the study, cases removed to federal court from a state court comprised about 10% of the U.S. District Court caseload.

The importance of commercial cases in the Federal District Court is also reflected in the types of cases it heard. While about 20% of all state court cases were based on contract, nearly 30% of the federal cases were contract cases. The proportion of contract cases in both state and federal courts tended to follow the economic fortunes of the region, reaching their highest points in both state and federal courts in 1870-1885 and between 1920 and 1930 (see Tables Four and Five). The proportion of federal court cases based on commercial transactions of all types (including cases in equity): averaged over 38%. It is likely that many of the cases involving title to land were motivated by the value of the mineral or timber rights. The proportion of land title cases declined steadily in both state and federal courts, but the proportion of the federal court caseload comprised of property cases was about four times higher than in the state courts. During this period, federal regulatory enforcement, in particular food and drug law cases and exise cases, grew to about one quarter of the entire civil caseload of the Federal District Court.

32. See Wright, *Federal Courts* (1976), Chapters 3 and 4.

33. 54 W. VA. Code 330 (1900).

TABLE 4
Percent Type of Case by Time Period West Virginia State Circuit Courts, 1872-1940

Case Type	Time Period													All Years
	1872 to 1875	1876 to 1880	1881 to 1885	1886 to 1890	1891 to 1895	1896 to 1900	1901 to 1905	1906 to 1910	1911 to 1915	1916 to 1920	1921 to 1925	1930	1940	
Contract	41.8	42.2	20.8	17.1	17.5	11.4	10.7	14.2	16.2	12.5	23.2	26.6	9.7	19.4
Tort	2.7	2.2	3.8	4.6	6.3	3.9	3.9	6.1	5.2	4.1	3.4	5.1	7.8	4.4
Property	12.0	9.0	12.1	11.1	9.9	7.2	12.5	10.0	6.2	6.6	9.7	4.6	3.9	9.0
Admin. Law	.7	2.0	.8	.5	.5	1.0	1.0	1.3	1.0	1.0	.5	.2	.3	.9
Other	42.8	44.6	62.5	66.8	65.8	76.5	71.9	68.4	71.4	75.8	63.2	63.5	78.3	66.3
Number of Cases	1261 (100%)	1645 (100%)	1458 (100%)	1464 (100%)	1853 (100%)	2101 (100%)	2795 (100%)	3018 (100%)	3622 (100%)	2779 (100%)	5820 (100%)	1206 (100%)	937 (100%)	29,959 (100%)
Commercial Cases*	52.2	51.5	31.8	27.9	27.6	20.4	20.4	19.3	20.9	16.6	26.8	33.7	12.5	25.5

* Includes cases in contract plus cases in equity involving debt or security for debt.

TABLE 5
Percent Type of Case by Time Period West Virginia Federal District Court, 1881-1941

Case Type	Time Period											All Years
	1881 to 1885	1891 to 1895	1896 to 1900	1901 to 1905	1906 to 1910	1915	1920	1925	1930	1935	1941	
Contract	22.4	13.4	13.8	17.4	19.3	77.6	80.0	46.0	48.0	18.8	5.3	29.6
Tort	8.0	4.7	11.3	8.0	11.0	5.2	5.0	6.2	5.6	17.8	19.1	7.4
Property	14.5	21.6	17.2	22.5	16.6	1.0	0	1.2	.6	.9	0	10.0
Admin. Law	0	.6	.5	.7	0	6.8	2.0	26.0	39.5	16.8	26.6	9.4
Other	55.1	5.7	52.7	51.4	53.1	9.4	13.0	20.6	6.3	45.7	49.0	43.6
Number of Cases	254 (100%)	111 (100%)	203 (100%)	138 (100%)	217 (100%)	192 (100%)	40 (100%)	161 (100%)	177 (100%)	101 (100%)	94 (100%)	1748 (100%)
Commercial Cases ^a	39.0	29.2	24.6	25.4	31.3	79.2	90.0	49.0	49.2	28.7	9.6	38.7

* Includes cases in contract plus cases in equity involving debt or security for debt.

It has been suggested in a number of studies, based on leading federal cases, that between 1870 and 1940 the federal courts were a haven for corporations seeking a free hand in the penetration and development of regional economies.³⁴ Consistent with this theory, the caseload of the Federal District Court for the Southern District of West Virginia was predominantly, if not exclusively, associated with the management of commercial transactions. This, and the evidence of ideological sympathy with commerce, suggests that corporations which met the diversity requirement might have preferred to handle state court litigation against them by removal to federal court.³⁵ While a greater proportion of company defendants, in particular railroads, removed cases to federal court than non-company defendants, the proportion of cases removed was exceedingly small (1% by all company defendants; 2.4% by railroad defendants). This was true in spite of the more favorable trial outcomes for defendants in federal court than in state court (Table Three). This can partly be explained by the relatively high success rate of railroads in state court litigation (fewer than one quarter of the railroads' cases were lost at trial in the state courts). While the coal industry lost nearly half of all cases (as defendants) in state court, the possibility of removal to federal court was unavailable to all but the very largest companies (i.e. those incorporated in another state).

*Civil Litigation Rates and Understanding Litigation "In Context:"
Two Hypotheses*

In his 1982 article which assessed our knowledge of the sources and significance of litigation, Marc Galanter sounded a cautionary note about attaching too much significance to numbers of cases alone.³⁶ The work of Galanter, and others in recent years, has increased our understanding of the process by which cases were brought to the courts. This process and its complexity suggest that litigation rates, without additional information, can provide only clues, rather than answers to our understanding of commercial litigation. Clearly, comprehending the importance of litigation rates is a no less significant task than understanding the value of legal institutions themselves in context. Decomposition of the civil litigation rate in West Virginia provides an illustration of Galanter's point. Decomposition of the overall civil litigation by type of litigant reveals a number

34. See *supra*, note 3.

35. Federal judgeships were treated as a form of patronage by the political parties in West Virginia, both of which represented the interests of a rising business elite after 1890. See, Williams, *supra*, note 13, pp. 144ff.

36. Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society," 31 *UCLA L. Rev.* 4 (1983).

of underlying patterns. Thus, the composite civil litigation rate does not measure a unitary process and provides at best an ambiguous guide to the significance of litigation. The many patterns of involvement in litigation suggest that different types of litigants have different reasons for litigating and a different likelihood of litigating.³⁷ Each decomposition of the litigation rate by type of litigant provided evidence of a different pattern of involvement with law.

Two widely shared conclusions about commercial litigation have been supported by the West Virginia data in this article, but the data also reveal that the circumstances producing the patterns are considerably more complex than the explanations which are usually given for them. First, commercial litigation increases during economic growth. The explanation given by social control theories is that social breakdown and reorganization accompanying growth of a new industry creates a need for legal intervention.³⁸ In brief, the decomposition of litigation rates undertaken here supports not one, but many patterns of intervention through law, with a different one for each pairing of classes of litigants. Given this (unpredictable) variation, social control theory is a useless generalization which reduces to a study of litigants in context. In addition, evidence from West Virginia suggests that federal court litigation was dominated statistically by commercial cases during the late nineteenth and early twentieth century in America. Nonetheless, the examination of federal and state litigation in West Virginia does not reveal an exclusive or predominant role for federal courts in commercial litigation.³⁹ Management of litigation in the state courts was as important to the growth of industry as attacking barriers to national commerce through the federal courts.

1. The Division of Labor Between State and Federal Courts

The hypothesis that federal courts developed a bias favoring national commerce and were a refuge for corporations from state regulation and local political resistance may be substantiated by the evolution of such doctrines as federal abstention, the dormant commerce clause, and theories of substantive due process.⁴⁰ Yet, as these data show, the importance of this ideological role must not be allowed

37. Galanter, *supra*, note 11.

38. For a discussion of theories which depict law as providing rules of conduct which keep other institutions in order, see note 6.

39. Again, this conclusion is reached without benefit of analysis of issues raised in the litigation. Some types of issues may have made the Federal versus state court choice more critical than others. These results in no way conflict with other perspectives on the specialization hypothesis.

40. See, Wechsler, *supra*, note 3; Gunther, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 *Harv. L. Rev.* 1, 42 (1972).

to overshadow the fact that most corporate litigation remained in state courts. Not only were most cases initiated in state courts, but most stayed there. During the period of this study there was little evidence of a shift in the focus of corporate litigation, statistically speaking, from state court to federal court. This conclusion was reached, of course, entirely without the benefit of careful analysis of the doctrinal or issue-specific importance of individual cases, a significance which will have to be assessed before a final evaluation of these results can be made. In addition, corporations met with considerable success in state court litigation at the trial level. Corporations, on the whole, enjoyed the generally high success rate of plaintiffs, and averaged slightly better than the overall success rate for civil defendants. Some corporations manipulated cases in and out of court with much greater success than the average. In short, for at least some types of cases there may have been little reason for avoiding state court. For other types of litigation, and especially for in-state corporations, there could be no avoiding suits in local courts. Therefore, corporations had to confront local politics and interests, and were forced to develop political and economic strategies in that environment. The evolution of American capitalism is not only a story of increasing resort to higher levels of political intervention and of centralization of intervention in the national government in the interests of growing corporations, but a story of ideological and economic conflict and accommodation at the community level.⁴¹

Courts As Trouble Shooters During Social Development

The trends in litigation in the West Virginia state and federal courts suggest that corporate litigation represented a strategy rather than a necessity. The pattern of increasing litigation during economic expansion was not paralleled by increasing litigation during economic contraction and the social breakdown accompanying contraction. This suggests that litigation represented a kind of legal opportunism in periods when the risks of legal conflict were a gamble accompanied by opportunities for gain. Thus, the initial burst of corporate litigation represented an aggressive assertion of rights in land, minerals and timber, not contract, tort, or debt litigation. Moreover, the data suggest a pattern of aggressive litigation during *take-off* not merely as an automatic accompaniment to economic growth.

The aggressive use of litigation was made apparent by the

41. For insightful history of common people and the intersection of their history with the history of industrial elites see Gutman, *Work, Culture, and Society in Industrializing America* (1977); Gaventa, *Quiescence and Rebellion in an Appalachian Valley* (1980); Corbin, *Life, Work and Rebellion in the Coal Fields: The Southern West Virginia Miners, 1880-1922* (1981).

differences in litigation among major entrepreneurs. Figure Six presents a further breakdown of the litigation rate, the litigation of a single company—the Chesapeake and Ohio Railroad Company. Over seventy percent of the litigation undertaken by the C & O between 1870 and 1930 in the state courts in this study involved acquisition of resources, primarily land. The corporation brought only a handful of lawsuits in state or federal court for any other purpose, and the cases brought for acquisition of resources were concentrated in two five year periods. The C & O's principal role in state court was as a defendant, and, as already discussed, the railroad developed considerable facility in avoiding losses in that forum.

The litigation of coal companies, while following the same temporal pattern, including litigation primarily during take-off, is quite different in other respects. Overall, more than 43% of all cases brought by coal companies in the state courts in this study were de novo hearings in cases decided initially by Justices of the Peace involving local credit, contracts for supplies, minor torts, and employment matters. More than 33% of all coal company cases were suits to evict employees from company housing. These cases reflect much more clearly the day to day problems of creating and running a business than the litigation by the C & O. While the analysis of these data are not complete, many of these coal companies were small. The source of the difference in the patterns may be explained by variations in company size, as well as the difference between the manner in which operation of a coal mine and the operation of a railroad depended on the public authority of the courts.

Comparing litigation of the C & O with the litigation of the largest coal companies yields a different kind of contrast. The MacDonald Coal Company, one of the largest in Fayette County after 1900,

brought a total of 10 lawsuits in state court and none in federal court. The Raleigh Coal and Coke Company, the largest in Raleigh County, brought fourteen cases in state court and none in federal court. For both coal companies the cases were evenly distributed over the period of the study with a slight concentration during rapid growth. These patterns suggest that the legal concerns, and consequently the strategy for handling them, were quite different for major railroad and major coal entrepreneurs. As defendants, the railroads were sued largely in tort, the coal companies mostly in contract. The relative success of railroads in handling these suits has already been noted.

Based on these data, we can only guess the sources and significance of the differences. Nonetheless, pursuing explanations will be the work of the balance of this study. Several lines of inquiry can be suggested. The relative legal skill of attorneys who represented various entrepreneurs is one factor which might account for some of the observed differences. Secondly, the leverage which entrepreneurs possessed in relationships with other companies or with employees is another important factor. The leverage might have consisted of good will, a basic similarity of outlook and understanding of ground rules, or outright economic and political power. The latter is a possible reason for the relatively small number of tort cases brought against coal companies, despite state statistics showing substantial carnage in the mines. About 5% of all *reported* accidents were litigated. Different entrepreneurs enjoyed different degrees of legal autonomy in terms of the prevailing tolerance for private management of social relations. Railroads were among the first to feel the pressure of declining autonomy. While West Virginia enacted laws to regulate many aspects of the formation and operation of railroads in the nineteenth century, considerably less energy was focused on coal companies.⁴² Resisting the movement to greater social accountability became a political and practical problem for different corporations at various points in time. Legal involvement was thus dependent on political conditions, as well as specific relationships to creditors, suppliers, employees or customers.

A final possible source of variation in the use of legal resources, including litigation, lies in the attitudes toward law and legal process of the owners, financiers or managers of companies. Ultimately, there could not have been a use of the legal system unless someone believed that the law was relevant to some objective. By the 1870s the larger railroads had established legal departments. These experts surely helped plan the expansion and development of the railroad, including setting patterns for handling land acquisition, labor rela-

42. 54 W. VA. Code 9 49-75 (1900). In addition, a special statutory provision placed special restrictions on "foreign" railroads' use of the state courts. 54 W. Va. Code § 30.

tions, tort litigation and the like, although at present this is no more than an unconfirmed hypothesis. Thus, railroads may have been among the first corporations to plan for the legal consequences of development. The legal theories of these lawyers, as planners, became an important source for the development of the law.⁴³

Most coal companies in the period before 1900 did not have house counsel or even retained counsel. The uses made of attorneys and the courts thus frequently depended on the decisions of owner-entrepreneurs rather than of trained managers or lawyers. Justus Collins, a successful coal baron with mines in Fayette and Raleigh counties, illustrates the entrepreneur's use of counsel to solve problems.⁴⁴ Already an important owner in 1902, Collins perceived a need to consult an attorney in a controversy with a railroad. He knew none locally, contacted an attorney friend in Cincinnati, who declined the business on the grounds of conflict of interest. Collins was eventually referred to a friend of the friend. Throughout his correspondence with this attorney, Collins was quite specific about the nature of the legal problem and the legal theory he thought should be the basis for a remedy against the legal system (as Collins saw it a violation of the Sherman Antitrust Act). Four years later, in a land title dispute with an adjacent mine owner, Collins hired a different attorney, one reputed to be an expert in injunctions and land titles. His goal was settlement and the matter was never litigated. During the same period Collins was in touch with several other attorneys about the same matters. Nothing in the correspondence suggests much deference to the attorneys, or that Collins was committed to buying advice from one source, or even one source at a time.

Collins handled problems involving shareholders of his corporations and labor relations with employees without an attorney, and apparently without considering or perceiving the utility of consulting an attorney about these problems. We do not know how he made these decisions. Were his decisions pragmatic, made in the belief that courts and lawyers were only a last resort when self-help failed? Or, did he believe that agreements with railroads and titles to property

43. Gordon, *supra*, note 11. It is no surprise, perhaps, that the legal theories of lawyers become law. However, the origins of lawyers' legal theories comprise terrain just now being charted. These studies lead away from a calculus of client interests and cost/benefit to the factors which influence a lawyer's view of the valid starting points for legal behavior. In my own work I am exploring one step beyond this horizon, namely the boundaries set by clients on the work of lawyers.

44. Collins appears in the accounts of others. Graebner, *Coal-Mining Safety in the Progressive Period* (1976); Williams, *supra*, note 13; Corbin, *supra*, note 40. Thus, Collins' views have, perhaps, received unwarranted emphasis because of the rare availability of such rich archival material on a coal entrepreneur. Additional sources will be required for any degree of certainty with regard to entrepreneurs' views of law or legal process.

were governed by "rights," while other business relations were matters of convenience and private understandings? Were his expectations shaped by the ideology so clearly evident in the majority opinions of the West Virginia Court of Appeals of the day in which law as a neutral and objective science cleared the way for free exercise of will, allowed the powerful to exercise their justly acquired power rather than reaching an accommodation among competing social interests?⁴⁵ No research has been done to answer these questions about the beliefs of this class of entrepreneurs toward law, but their behavior as managers surely had a strong influence on the development of the law, and on litigation patterns in particular. The initiative of corporations in litigation, the different problems faced by entrepreneurs in different businesses of various sizes, and the incorporation of law into managerial ideologies all may help explain the relationship between economic development and use of the courts for commercial litigation.

Conclusion

The analysis of litigation in West Virginia has demonstrated the value of disaggregating civil litigation rates to permit interpretation in a meaningful context. Decomposition of the civil litigation rate allows consideration of the effects of different contexts. I have argued that the relationship which existed between actors in conflict provides a unit of analysis for examining the effect of these contexts.

The characteristics of specific actors affect both their capacity for litigation and their motivation to pursue litigation to resolve conflict. Pursuing the factors influencing the decisions to litigate led me to examine not only the economic objectives of each actor, but also the capacity of each actor and their orientation with respect to law, and the influence of buyers employed by them. The vast majority of relationships out of which litigation arises are ones in which the actors have (or have had in the past) some degree of commitment to continuing interaction. Thus, while litigation is frequently viewed as a characteristic of conflict between strangers, it may also be viewed, and perhaps with greater insight as a component of continuing social relationships. Since this is so, litigation, as well as the effects of litigation, can be understood only if the history of the relationship of the parties is known and examined.

The benefit derived from this approach is not limited to increasing our understanding of the specific role of litigation in the business relations of different types of enterprise, but also extends to increas-

45. Reid, *An American Judge: Marmaduke Dent of West Virginia* (1968).

ing our understanding of the function of law in a broader historical context. The historical context which linked many of these observations of West Virginia litigation was the economic transformation which occurred between the mid-nineteenth and mid-twentieth century. In the late nineteenth and early twentieth centuries, American society experienced a general institutional reordering accompanying the rise and consolidation of monopoly capitalism.⁴⁶ Two features define this transformation: the increasing size and power of leading commercial actors, and a shift in the internal organization of companies from individualistic and opportunistic leadership to a bureaucratic orientation.⁴⁷ The stresses of development and realignment of economic and political power which accompanied the rise of monopoly capital also created opportunities for conflict resolution through adjudication. As these data suggest, both aspects of the transformation of capital contributed to the increasing capacity of the largest economic actors to manipulate access to the legal process. At the same time, there are important differences among the patterns of litigation by large economic actors, due both to processes by which ideology and power shaped decisions to litigate and to the capacity of law to affect particular kinds of businesses.

46. Williams, *supra*, note 13.

47. Chandler, *supra*, note 24; Nobel, *America By Design: Science, Technology, and the Rise of Corporate Capitalism* (1977).