Interest Group Litigation in Federal District Courts*

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Whether interest groups affect the governmental process is one of the most important and enduring questions with which political scientists deal. Indeed, early efforts aimed at addressing it helped transform political science from a discipline concerned primarily with institutions qua institutions to a science intrigued with explaining and predicting the products of those institutions (see Bentley, 1908).

Until recently, however, scholars investigated group influence in rather descriptive or impressionistic ways. Some, working within the pluralist paradigm, focused on broad, macropolitical patterns of group influence (Truman, 1951; Lowi, 1969). Others conducted case studies of the relative influence of groups on legislative and executive decisions (e.g. Fritschler, 1975; Bakal, 1966; Marmor, 1973; Schlozman and Verba, 1973; Costain and Costain, 1978; Chase, 1972; Berry, 1984; Freeman, 1975) or judicial outcomes (Vose, 1972; Kobylka, 1987; Sorauf, 1976). Still others examined groups qua groups as they sought to achieve their goals in the various arenas of government (e.g. Odegard, 1928; McFarland, 1987; Vose 1959). A fourth group attempted to assess "influence" through "agreement scores" designed to indicate the relative support institutional members gave to different organizations (e.g. O'Connor and Epstein, 1983).

Recently, though, several analysts have recognized that studies of group influence in applied, non-experimental settings face an inherent obstacle: they cannot separate the group's influence from other influences, including environmental constraints and the decision-maker's propensity to act in a certain way. Hence, they cannot say with any degree of certainty that a policy-maker would or would not have reached a decision regardless of group involvement. Nor can they specify the causes or consequences of group influence.

Despite this obstacle, a number of scholars have devised rather clever and creative schemes to address issues of group efficacy. For example, those attempting to assess the effect of PAC contributions on Congressional voting now regularly control for ideology, constituency, and "the likelihood that PACs; contribute heavily to members who support them anyway..." (Evan, 1987, p. 115; see also, Welch, 1982; Frendreis and Waterman, 1985). Students of executive decision-making, although less prolific, have been equally sensitive to such issues, examining them from diverse perspectives (Feder, 1977; Gais, et.al., 1984; Peterson and Walker, 1986; Browne, 1986)..

Conspicuously rare among studies of group influence is any attempt to assess systematically group influence on judicial decisions in general and on trial outcomes in particular; indeed, with but two exceptions, scholars working in this area have yet to devise a viable analytic strategy by which to accomplish this objective.<1> Also, conspicuous by its absence is systematic attention to the question of whether groups are successful in their attempts to influence the "law" beyond the decision in their immediate dispute. Do decisions rendered in response to group-sponsored litigation make a greater contribution to the corpus juris and, ultimately, to judicial allocation of value and privilege?

Given growing interest in group use of the courts to achieve policy goals (see Bruer, 1986; Caldeira and Wright, 1988 for recent reviews of this massive literature) and a tremendous body of existing, albeit impressionistic, literature suggesting that groups are highly successful players in the litigation game (see Epstein, 1985), we find these voids puzzling. In response we have examined group influence on decisions of the federal judiciary and the second-order influence of group-sponsored litigation on the evolution of the corpus juris.

The results of this effort are reported in three sections. First, we assemble existing studies of group influence on judicial decisions to create expectations

about their ability to "win" in court and to use litigation as a vehicle to influence the evolution of legal policy. Second, we suggest an analytic strategy and research design to test those expectations. Finally, we report the results of these tests and discuss their implications for the larger question of group influence on judicial policy making.

The "Success" of Groups in the Judicial Arena

The literature on group litigation is replete with success stories; indeed, a mere perusal of works invoking diverse analytic schemes (e.g. Vose, 1955, 1959, 1972; Greenberg, 1974, 1977; O'Connor and Epstein, 1982, 1983; Cortner 1975, 1978) would easily lead to the conclusion that groups never lose in court, or at least in the U.S. Supreme Court, and that their victories transform the law by reallocating value and privilege. Of course, this greatly exaggerates the actual picture, but we do possess numerous reasons to suspect that groups outperform their non-organized counterparts in courts of last resort. For one, the policy-oriented goals of groups (as opposed to the "private," client-oriented objectives of other attorneys) lead them to adopt "winning" strategies. We only have to consider the litigation campaign leading to the NAACP LDF's legendary victory in Brown v. Board of Education (1954) to illustrate this point. When that organization formed in 1909, its main major objective was to eradicate the 'separate-but-equal' doctrine created in Plessy v. Ferguson (1896). It recognized, however, that it could ultimately obtain this goal only if it exercised patience, gradually chipping away at the doctrine through test cases (see Kluger, 1976). Without belaboring the point, suffice it to say that private counsel cannot operate in a similar fashion -- they must act in the best interest of their client, and not for some "greater" policy objective.

Another related advantage of interest groups concerns their relative disinterest in lower courts, other than as avenues of access to the federal courts and as forums in which to build solid records for later appeal. Groups, like other litigants, realize that trial judges possess substantial discretion as "triers of fact" and that their evaluations of evidence and testimony are important cues for appellate judges (Rowland, Carp and Todd, 1988). Nonetheless, the group litigant is less concerned than the private litigant with the trial judge's legal interpretations. Thus, in contrast to the private counsel, who wants victory early and swiftly at the trial court level, the interest group attorney is willing to risk unfavorable rulings at the bottom rungs of the judicial ladder, in pursuit of a favorable policy resolution in the U.S. Supreme Court.

The "willingness" of interest groups to take risks at the trial court level opens various windows of opportunity toward that end. For one, they will often "load" the trial court record with seemingly unrelated and potentially irrelevant information, which may "annoy" the judge, but will provide arsenal for later appeal. For another, many groups bring similar litigation into diverse geographical districts (and then circuits) where they know they will "lose," just to increase the possibility of a "split," which in turn increases the probability of obtaining plenary review by the Supreme Court (see Ulmer, 1984). Such tactics provide interest groups with a strategic advantage in the high Court, but are certainly impractical, and, perhaps, distasteful to the private counsel and to the trial court judge looking for speedier "justice."

Finally, literature suggests that organized pressures possess resources to maximize their courtroom efforts, resources that private counsel either do not share or have to a far lesser extent (see Epstein, 1985; O'Connor, 1980).<2> The first is sufficient funding to undertake litigation. Obviously, both groups and private counsel (or more precisely, their clients) need money to prepare

cases for trial. But for groups, looking toward a Supreme Court appeal, money is often more critical and relatedly, more plentiful. That is, their decision to enter litigation often hinges on funding; in fact, many groups will not even take a case for which they lack sufficient money to carry an appeal to the highest court. Belton (1978) credits the LDF's success in the area of employment discrimination partially to its recognition and accumulation of proper funding. Conversely, Gelb and Palley (1982) argue that some women's rights litigators wisely avoided this area because they lacked such resources.

Second, sometimes groups request like-minded organizations and/or the U.S. Solicitor General's Office to file reinforcing amicus curiae briefs. The former often helps the Court to see the greater policy implications of a case (see Sorauf, 1976; Vose, 1959); the latter, of course, is a prime "repeat player," a most successful Court litigator (see Krislov, 1963; Scigliano, 1971).<3>

A third method by which organizations can "enhance their chances for success is to sustain their use of the courts over as long a period as possible--longevity" (Epstein, 1985, p. 12). Indeed, it is through sustained and continuous use of the legal system that groups can amass numerous advantages, such as "advance intelligence," "credibility," and expertise (Galanter, 1974).

Finally, organizations long have recognized the importance of priming the Court even before they enter its corridors. One method by which they can accomplish this involves "inundating" law reviews with articles "presenting constitutional justification for their cause," which they later cite in legal briefs (Epstein, 1985, p. 13; Newland, 1959).

In short, these and other tactics of litigation<4> make interest groups "repeat players" in the judicial system; private counsel -- "one-shotters"

(Galanter, 1974). What is intriguing about most of these "resources," however, is that they are probably not particularly important at any level of the judiciary beyond its apex. Could a well-timed law review article, for instance, possibly help an organization achieve legal victory in federal district court? Do groups or the Solicitor General's Office ever file amicus curiae briefs in trial courts? And, even if they did, would they be helpful? Do victories (or losses) at the trial-court level influence decisions in subsequent, analogous, disputes? Does the reasoning codified in these decisions help reformulate the common law?

In sum, the literature tells us that disparities between the goals, foci, and, resources of the private bar and interest group attorneys generally work to the advantage of pressure politics. But, for various reasons, those advantages may come into play at the Supreme Court level, alone. It even may be reasonable to suspect that the private bar actually outperforms its organized counterpart at lower levels, particularly at trial.

At least two factors suggest the viability of such a conclusion. First, the localism inherent in trial court decision making will work to the advantage of the attorney most-schooled in the particular mores and procedures of those courts. In many instances, that attorney will be the private counsel, who not only lives in the community, but has probably appeared many times in that same courtroom -- obviously not characteristics shared by the Washington, D.C. or New York-based interest group representative. Consider the many accounts detailing the unwelcome reception Thurgood Marshall of the LDF received as he attempted to litigate cases in trial courts throughout the country (see Kluger, 1976). In short, a role reversal of sorts occurs: local attorneys become "repeat players;" interest groups -- "one-shotters."

Second, the goal structures of trial courts are far more congruent with those of private counsel than with those of interest groups (Posner, 1985;

Priest, 1980). Simply stated, most trial judges view themselves as adjudicators of law, not interpreters or policy-makers (Carp and Wheeler, 1972; Posner, 1985). That is, their job is to mediate disputes between two competing parties, making decisions that create "winners" and "losers," but not policy. Private attorneys maintain similar objectives; unlike groups, they have little interest in evoking precedent-setting rulings. Rather, they want to act in the best interest of their client, which means winning the dispute, the battle if you will, and not necessarily the greater moral or legal war. What this, in turn, implies for the relative impact of interest groups and private counsel at the trial court level is this: the latter will have the "edge" because of the way in which they frame their cases, a manner that will be far more appealing to and congruent with the goals of trial court judges.

In sum, the factors analysts have used to explain group success at the appellate level may be limited to that judicial forum; indeed, we could argue that those factors working to the advantage of interest group attorneys in the U.S. Supreme Court (e.g. stategies and policy orientations) may have a diametrically opposing impact in trial courts. Figure 1 presents a more formalized version of this argument. Here, we depict the federal judiciary as a multi-dimensional pyramid, trichotomized vertically by the different court levels and horizontally by various case stimuli and responses. As depicted, the argument is disarmingly simple: the interest group "edge" accrues exponentially as litigation moves up the pyramid, the private counsel "advantage" similarly diminishes.

(Figure 1 about here)

From the "pyramid model" and the extant literature we can derive two propositions about group influence in the federal trial courts:

1. Because group advantages are mitigated by the localism advantages of private litigators, groups will be less likely than individuals to prevail in federal trial courts. But, they will be more likely than private litigants to prevail on appeal.
2. Because groups are more interested than private litigants in shaping public policy, group litigation will engender more significant precedent and exert a greater influence on the corpus juris at all levels of the federal judiciary than will private litigation.

Group Influence on Judicial Decision Makers: A Research Strategy

To test these expectations we need to compare the relative "success" of groups and non-groups in the trial and appellate courts and the relative impact of sponsored and unsponsored litigation on the corpus juris. Yet, exploring the relationship between pressure group politics and ultimate policy outcomes in any political forum is a mighty tricky and dangerous business. As we have suggested, some have tried to use aggregated success scores for groups versus non-groups; others simply analyze already successful campaigns. What these approaches ignore, of course, is a well-established fact of decision-making: Politicos, be they judges, members of Congress, or bureaucrats, have pre-established and -developed cognitive systems, which influence their framing and evaluation of disputes. Thus, to assess accurately the impact groups may

have on decision-making, we must control for the schematic predilections of individual judges.

Such a task may seem impossible to achieve. After all, we cannot place judges in a laboratory and subject them to various stimuli, while controlling for others. What we can do, however, is take a lesson from other social scientists who have faced a similar dilemma. Consider psychologists attempting to reconcile the nature-nurture debate (i.e. Are we more or less products of genetics or of socialization processes?): they brought together identical twins, separated from birth, to observe similarities and differences in behavior, hypothesizing that the more similar, the greater role of genetics; the more different, the greater role of socialization. The ingenuity of this design, of course, lies with the subjects themselves: because twins possess identical genetic structures, psychologists can control for as much variation in "nature" or "propensity" as possible.

In the ideal world, we would, of course, apply a pure version of this design to judges: surely, as we have previously noted, "the most accurate way of examining a group's effectiveness and ability to influence a judge's decision is to determine whether a group litigant is more successful than other litigants presenting the same case to the same judge. [But, of course,] the same judge does not hear identical cases under control for group participation" (Epstein and Rowland, 1987, p. 285). What we can do, however, is "pair" or "match" cases presenting "analogous facts and law" to the same judge during the same year. Indeed, the "twin" cases could be "identical" in all but one respect: one case would be sponsored by an interest group; the other--by private counsel. Such a strategy would allow us to control for all relevant differences among cases and judges (i.e., stimuli and responses) and, thus, we could focus specifically on potential attorney effect.

To implement this plan, we followed a multi-staged data collection strategy. First, we selected several areas of law on which to focus this initial inquiry: employment discrimination, the environment, and religion. These represent issues identified by researchers as containing participation by both a private counsel and interest groups (see O'Connor and Epstein, 1982). We then identified all cases involving those issues decided by federal district court judges between 1976 and 1980.<5> Next, we sorted cases of the same general legal issue (e.g. employment discrimination) by year (e.g. 1976), by particular issue (e.g. age discrimination, race discrimination), and then by judge. Such a procedure resulted in an initial list of "pairs," cases of analogous stimuli, decided by the same judge, the same year. Finally, to determine whether each of our pairs actually contained one group case and one non-group case, we wrote to all participating attorneys. This was a necessary step since attorneys rarely list their affiliation on legal briefs.

After completing this final step, we recognized the necessity for a slight change in our research plan. We, like others (see Salisbury, 1969), discovered that the groups represented in our dataset were not of equal "importance." Or, at the very least, some did not conform to the literature's view of a "group litigant." That is, our "group" category contained two sorts: national organizations (classic "repeat players") with the long-term policy goals and resources suggested as critical to litigation success and local, ad hoc groups with specific goals. Therefore, in the analysis below we compare the relative influence of national "repeat players," local ad-hoc groups, and non-group litigants on trial and appellate outcomes and on the subsequent evolution of legal precedent.

In the end, we were left with 20 acceptable pairs, representing a range of geographical districts and judges (see Appendix A). For each dispute, we

determined which litigant prevailed at trial, whether the decision was appealed, and, if so, which litigant(s) prevailed at each level of appeal.

Measuring Group Influence

To test our first expectation, we simply measured "success" as whether the group or the non-group won at the various levels of the federal judicial system. We then compared success scores of the non-groups, local ad-hoc groups, and national groups.

Devising a strategy by which to explore our second expectation, concerning the second order influence of groups on precedent and legal policy, was a bit more difficult. As our literature review indicates, group litigants (particularly national organizations) tend to be less concerned with the "outcomes" of their instant disputes than with "shaping" the law or moving it in the direction of their policy goals. They can achieve this objective when litigation culminates in a Supreme Court decision that overturns negative precedent and channels their goals into public policy. This pinnacle of group influence is epitomized by landmark cases, such as Brown, in which group goals become part of the "law." For such cases the influence of group litigation on the law is as obvious as it is significant. But only a handful of cases reaches this pinnacle. What about the interstitial, incremental contribution of "lesser" cases? Although they may be individually less important, their aggregate contribution may be quite significant.

Unfortunately, aggregate interstitial contributions also are less obvious and much more difficult to identify and measure. Because the norms of precedent mean that codified decisions become part of "law," however, we can estimate second-order influence by the relative contribution of sponsored and

unsponsored litigation to the corpus juris. We do so by comparing the quality and quantity of citations engendered by group and private litigation in Shepard's Citation classification system.

Shepard's is widely used in legal scholarship to evaluate the status of existing precedents (Johnson, 1979). For each published federal judicial opinion, it reports the ultimate resolution on appeal, the frequency of citation by other courts in subsequent cases, and, often, "the quality of citation." In his study of lower-court decisions Johnson (1979) aggregated these "qualities" into three categories: "compliant" (defined by Shepard's as "following" or "harmonizing"), "evasive" (cited by Shepard's as "distinguished" or "limited"), or discordant (dissenting, vacating or reversing).<6> We adapt Johnson's operationalization to our study of trial-court litigation, adding a fourth category common in the Shepardizing of district court opinions: indeterminate (a listed citation with no qualitative assessment).

In sum, to estimate the second-order influence of interest groups we compare the quantity and quality of citation reported in Shepard's Citation classification system for sponsored and unsponsored litigation. Because the number of private and group cases is not equal, we compare the number of compliant, evasive and discordant cites per case for all cases and for each category of cases.

Findings

The Distribution of Cases and Litigants

Appendix A details the the distribution of issues and litigants for our paired cases. The employment discrimination disputes rendered eight matched

pairs; however, because one judge tried two sponsored and one unsponsored case, this set includes nine sponsored and eight unsponsored disputes. Each of the group cases in this category was litigated by national "repeat players" with long-term policy goals, extensive litigation experience, and substantial litigation resources. All of the defendants in these cases were businesses or local governments, as were the plaintiffs in non-group employment cases.

Our design constraints limited us to six religion disputes, three sponsored and three unsponsored. Again, the non-group litigants (defendants and plaintiffs) were private schools or local governments. Two of the group cases were litigated by the ACLU, the third by the Society for Krishna Consciousness. Although the latter does not litigate as frequently as the ACLU, the scope of its litigation goals led us to classify it as a national repeat player.

The set of environmental litigants is quite diverse. They include nine group litigants, seven of which were local, ad hoc groups focusing on narrow objectives. The Pacific Legal Foundation and the Sierra Club, national repeat players, litigated the two remaining cases.

Because we are interested in two facets of interest-group litigation, we present the results of our inquiry in two sections. First, we report the relative success rates of our "matched" litigants at each level of the federal judiciary. Then, we compare the quantity and quality of citation engendered by group and non-group litigants.

Litigation Success Rates

Table 1 summarizes the relative success scores. As indicated, our expectation that groups would be less "successful" than non-groups at trial is validated. Groups were substantially less victorious, winning only 19 percent of

their cases, than were non-groups (35 percent), a finding buttressed by a similar pattern under controls for presiding judge. Thus, the theoretical advantages of localism and the norms of trial litigation seem to outweigh group advantages at this level.

- Table 1 Here -

As expected, the performance of group litigants improved in the Courts of Appeals. At this level, groups prevailed 43 percent of the time. Given their failure rate in trial courts, this is a significant improvement, consistent with the anticipated advantages of group litigants as they move up the appellate ladder. But non-group litigants also were more successful at this level, prevailing in three of six cases and receiving a mixed review in a fourth. Thus, although groups perform better at this level, they remain less successful than non-group litigants.

According to previous research, group advantages should be most apparent before the Supreme Court. Organizations, such as the NAACP, the Legal Defense Fund, and the Sierra Club, have the resources, experience and policy focus to prevail before a Court in which these characteristics would seem to give them a distinct advantage over local, private litigators. As indicated by Table One, however, group litigants in our data set were zero-for-three before the Supreme Court. By contrast, non-group litigants were two-for-two. In short, our expectations were reversed: At the judiciary's apex, where policy goals should be maximized, litigation was unsuccessful, creating precedent contrary to group goals.

Why the relative failure of groups at the upper echelon of the federal judiciary? The most obvious reason can be traced to our case categories and to the policy predilections of the Supreme Court at the time of these appeals. In most of our disputes group litigants called for stricter environmental regu-

lation, stricter regulation of employers, or stricter interpretation of the religious clauses of the First Amendment. Moreover, as noted in the description of our data, "non-group" litigants included state governments and, in one case, the federal government. To examine these factors more closely we turn to a more detailed comparison of litigation success rates, depicted in Table Two.

- Table 2 Here -

Table Two offers several helpful insights into group-litigation failures. First, they are concentrated in environmental disputes, most of which involve group challenges to governmenal implementation of environmental statutes. Environmental groups were zero-for-nine before the trial courts and fared only slightly better as they moved up the judicial ladder. A closer look at the environmental cases also indicates that most of our group litigants were not the policy-oriented repeat players envisioned by our model. One of the nine environmental disputes was litigated by the Sierra Club, which lost at trial but ultimately prevailed in an appeal. Seven of the nine, however, were local, "ad hoc" groups, possessing neither the resources and long-term policy goals associated with national repeat players nor the "localism" advantages of "local" repeat players. It is not surprising, therefore, that they were singularly unsuccessful litigants.

By contrast, non-groups were more successful environmental litigants at all levels of the federal judiciary. Although this may seem anomalous at first blush, a closer look at these litigants reveals otherwise. Among our non-group environmental litigants were the federal government and the state of California, both of which have substantial litigation resources. Moreover, in seven of the cases lost at trial by environmental groups, the defendant was the federal government or a state. In short, for environmental cases, the modal dispute was between local, ad hoc groups (possessing none of the advantages associated

with group litigants) and governmental litigants (possessing many of those advantages).

Group litigants fared far better in disputes involving religion. The reasons for this are straightforward. Two of the "group cases" were initiated by the ACLU, the third by the Krishna Society-- both of which have broad policy goals and substantial litigation resources. The defendants were local governments, and the disputes were, without exception, constitutional challenges to local practices. Thus, federal judges were not asked to correct a government's implementation of its own statutes.

Despite the relative success of groups in religion disputes, they were no more victorious than their non-group counterparts at the appellate level. Indeed, private litigants won both appellate decisions, while a group litigant (ACLU) lost a major case (Lynch v. Donnelly) in the Supreme Court. Thus, the data fail to confirm our expectation that group advantages would translate into successful litigation as disputes moved up the judicial ladder.

Again, we ask why, why the relative failure of group litigants? It is dangerous to generalize from six disputes, but it is difficult to ignore the burden imposed by the current Court on liberal groups. The most dramatic group "failure" was a 4-5 defeat in the Supreme Court. Otherwise, groups would have lost only a single trial case in this set. Yet, we cannot ignore the fact that in disputes involving religion, like in environmental cases, the group advantages and relative appellate successes anticipated by the pyramid model are not present.

The pattern established for religion disputes is largely replicated for employment cases. Group litigants are more likely to appeal their loses and to have their victories appealed. But differences between group and private success rates are difficult to discern at the trial or appellate levels. Most group liti-

gation (seven cases) was sponsored by the NAACP Legal Defense Fund, the quintessential national repeat player. Most of the defendants in these cases were private employers or local governments. And, most of the "private" disputes were initiated by employers challenging administrative interpretation of discrimination statutes. Thus, group litigants seemed uniquely poised to win these cases.

But, again, why do these advantages fail to translate into favorable litigation outcomes? It is not possible to answer this question confidently based on 17 disputes. A partial explanation, however, emerges from a more textual examination of the opinions engendered by these disputes. In almost every case (14) the judge was asked to review the decision of an administrative agency (e.g. Office of Civil Rights). And, in each of these cases the judge proved deferential to state or federal administrators. Thus, as with environmental cases, judges were more likley to hold for governmental authorities than for group or private litigants.

In combination, the data lead to some interesting conclusions. Overall, group litigants were no more successful than non-group litigants. This pattern, at least for these matched disputes, does not change as litigants and their cases move up the judicial ladder: A group is no more likely than a private litigant to win in the Courts of Appeals or in the Supreme Court.

Why then, do groups expend the resources--time and money--to pursue federal litigation? A complete answer to this question, while well beyond the scope of this paper, certainly would involve some consideration of factors internal to groups, such as expressive benefits (see Salisbury, 1969). That is, even when they lose their cases, "expressive" groups are seldom worse off than when they initiated the dispute. For example, creche displays are no more prevalent in Christmas decor since Lynch than they were before. Thus, whether

they win or lose, expressive groups do what their members expect them to do--express member preferences in the judicial arena (see Kobylka, 1987).

Impact of Group Litigation on Common Law

The second expectation derived from the pyramid model was that group litigation would make a larger contribution to legal precedent-- corpus juris-- and, therefore, have a larger policy impact than non-group litigation. As indicated in Table Three, this expectation is fulfilled. Indeed, group litigation generated approximately four times more citations per disputes than did non-group litigation. This pattern is remarkably consistent across citation categories, even though groups appear to be particularly adept at generating evasive or discordant citations.

- Table 3 Here -

To some degree, the disproportionate number of group disputes resulting in appellate litigation accounts for this disparity. The 21 group cases resulted in 17 appellate reviews, while the 20 non-group disputes resulted in only eight reviews. Such is consistent with assumed differences in group and non-group motivation: because appellate opinions are more likely than trial opinions to be cited, the willingness of policy-oriented group litigants to appeal losses and the tendency of non-groups to appeal group victories means that group litigation contributes more to the corpus juris than does non-group litigation.

As depicted in Tables 4 and 5, differences in citation rates also can be understood by looking at these differences under controls for case category. Again, environmental cases were somewhat anomalous. Neither sponsored nor unsponsored environmental disputes were as likely as the other dispute categories to generate citations. This is partially true because the appeal rate was

lower for environmental than for other types of litigation. But lower appeal and citation rates themselves indicate something about the type of groups and non-groups that initiate environmental litigation. As noted above, seven of the nine environmental cases were brought by local, ad hoc groups, which do not have the resources, policy goals or litigation experience that make national "repeat players" such formidable litigants. Likewise, five of the nine non-group litigants were governmental entities with policy goals, litigation experience and substantial resources. Thus, because neither group nor non-group litigants in this category fit the assumptions of our model, it is not surprising that our environmental cases do not resemble (i.e. do not generate the rates of appeals or of citations) employment or religion disputes.

- Tables 4 & 5 Here -

The religion citations are dominated by a single group-sponsored dispute--Lynch v. Donnelly-- which engendered almost 200 citations.<7> But, because the group litigant (ACLU) lost before the Supreme Court, it could be argued that the citations tended to narrow the scope of the establishment clause. Therefore, although the ACLU did sponsor landmark litigation, it is questionable whether the contribution of this litigation to constitutional law and public policy was that envisioned by the group.

As with religion disputes, private litigants or national, repeat-player groups brought all of the employment discrimination cases. And, although the total citation rate for these disputes replicates that for religion disputes, a single case did not dominate those citations. Moreover, employment cases generate substantially more discordant and substantially fewer compliant cites (for groups and non-groups) than do religion cases.

The reasons why employment disputes, especially those litigated by groups, generate so many discordant citations cannot be discerned directly from our

data. It is instructive to remember, however, that 10 of the original 17 employment disputes were appealed and that the law in this policy arena (e.g. affirmative action) remains ambiguous and unsettled. This may account for the frequency with which these disputes generate discordant citations as they were applied to subsequent analogous cases.

Although the quantity and quality of citation varies among case categories, Tables Four and Five relate a rather clear story. Group litigation results in more citations overall and more citations per dispute than does non-group litigation. This finding is consistent with the pyramid model's assumptions and with the findings of previous research. When viewed in light of litigation success rates, however, this finding raises questions about the efficacy of litigation as an interest-group strategy.

Discussion

Implicit in questions about the efficacy of group litigation is the nature of the link existing between court success and citation rates. When groups lose, especially before the Supreme Court, and those losses engender a host of citations, has the group squandered valuable resources and helped build a body of case law contrary to its policy goals? Ultimately the answer to this question is a function of group goals-- external and internal. We can derive a tentative answer, however, by recoding the large number of "indeterminant" cites (i.e., those cited without comment by Shepard) into "implicitly compliant" or "implicitly discordant" cites as an estimate of the quality of group influence on the corpus juris. We do so by coding any indeterminant cite of a group loss at trial or on appeal as "implicitly discordant" and any indeterminant cite of a

group victory as "implictly compliant." Using religion as an exemplar category, the results of this reconfiguration are presented in Table Six.

- Table 6 Here -

As indicated, more than half of the citations to group-sponsored cases are explicitly (e.g. reversed) or implicitly negative. Indeed, the rate of implictly negative citations is almost double the rate of implicitly compliant citations. Lynch, a case the ACLU won at trial and in the Court of Appeal but lost before the U.S. Supreme Court, accounts for much of this imbalance. Thus, we cannot generalize with confidence. Nonetheless, this result does suggest that scholars (and, perhaps, the groups they study) should examine more closely the link between litigation success and the quality of contribution to legal policy.

Notes

<1>To assess the influence amicus curiae briefs may have on the Court's decision to grant certiorari, Calderia and Wright (1987) developed a measure designed to control for the Justices' decisional propensity. Stewart and Sheffield (1987) considered assumptions of group litigation success "by examining the impact of litigation by civil rights groups and other concurrent civil rights activity upon the political mobilization of black citizens of Mississippi. . ." (p. 780).

<2>Much of this discussion is derived from Epstein, 1985.

<3>After years of debate, recent research suggests that this may be a highly effective tactic, particularly at the review stage (see Calderia and Wright, 1987).

<4>Other factors include "full time staff and attorneys, or skilled and dedicated workers" and "sharp issue focus" (see O'Connor, 1980, p.17; Vose, 1981).

<5>We obtained these cases through WESTLAW, a legal information retrieval system.

<6>Compliant cites are those in which judges indicate that they are following or justifying their decision by reference to the cited precedent. Evasive cites are those in which judges evade the precedent decision by distinguishing it from the case at hand or narrowing its interpretation to obviate its applicability to the case at hand. Discordant cites include criticism of the prior decision and/or refusal to apply it to the case at hand (Johnson, 1979).

<7>Moreover, as a major interpretation of the religious establishment clause, Lynch can be expected to generate more citations in the future.

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Table 1
Group and Non-Group Success Rates

LITIGANT	COURT LEVEL		
	District % won (N)	Court of Appeals % won (N)	Supreme % won (N)
Group	19% (21)	43% (14)	0% (3)
Non-Group	35 (20)	58 (6)*	100 (2)

*One case resulted in a "mixed" decision.

Table 2
Litigation Success Rates by Court, Issue, and Litigant

LITIGANT (Issue)	COURT LEVEL		
	District % won (N)	Court of Appeals % won (N)	Supreme % won (N)
Employment			
private	35% (8)	50% (3)	-----
national group	33 (9)	43 (7)	0% (1)
Religion			
private	33 (3)	100 (1)	100 (1)
national group	66 (3)	100 (1)	0 (1)
Environment			
Non-Group			
U.S.	100 (1)	100 (1)	100 (1)
State	25 (4)	0 (1)	-----
private	50 (4)	-----	-----
Group			
local	0 (7)	20 (5)	0 (1)
national	0 (2)	100 (1)	-----

Table 3
Litigant Citation Rates by Quality of Citation

LITIGANT	CITATION FREQUENCY				
	Comp.	Evas.	Discord.	Indeter.	TOTAL
Non-Group					
Citations	14	18	3	189	224
Cites Per Dispute	.7	.9	.15	9.5	11.2
Group					
Citations	45	128	67	783	1020
Cites Per Dispute	2.1	6.1	3.2	37.5	48.6

Table 4
Citation Frequency By Litigant Type

ISSUE Litigant	CITATION FREQUENCY				
	Comp.	Evas.	Discord.	Indeter.	TOTAL
Employment					
Private	4	11	1	116	132
National	13	89	48	511	660
Religion					
Private	4	5	0	34	43
National	25	35	8	166	234
Environment					
Non-group					
U.S.	3	0	0	8	11
State	1	2	1	18	22
Private	2	0	1	13	16
Group					
Local	5	1	5	49	60
National	2	3	4	57	66

Table 5
Citations Per Case: A Comparison of Litigants

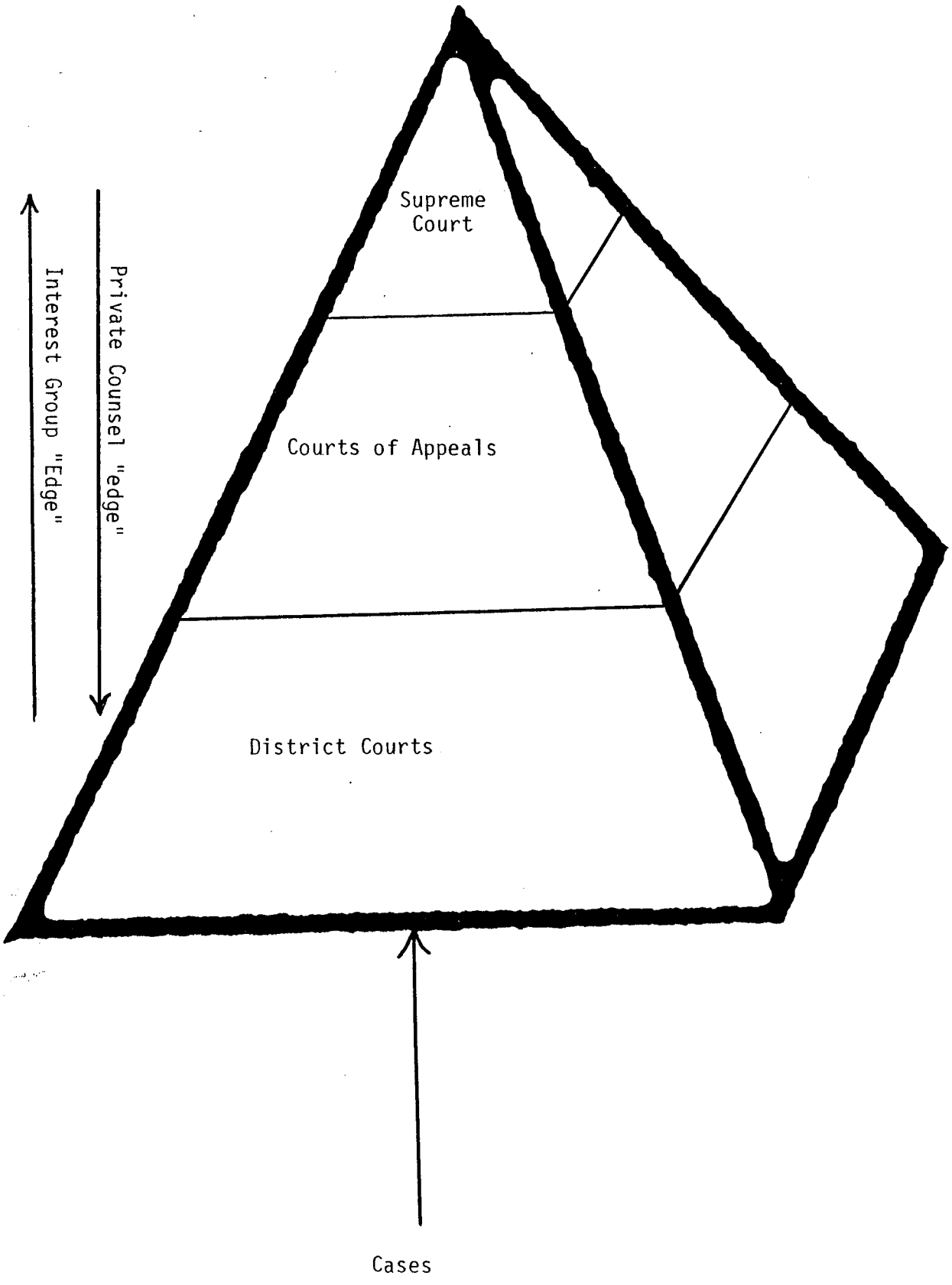
ISSUE / Litigant	CITATION FREQUENCY				
	Comp.	Evas.	Discord.	Indeter.	TOTAL
Employment					
Private	.5	1.4	.13	14.5	16.5
National	1.4	9.9	5.3	56.7	73.3
Religion					
Private	1.3	1.7	0	11.3	14.3
National	8.3	11.7	2.7	55.3	78.0
Environment					
Non-Group	.67	.22	.22	4.3	5.4
Group					
Local	.71	.14	.71	7.0	8.6
National	1.0	1.3	2.0	28.5	33.0
All Cases					
Non-Group	.7	.9	.15	9.5	11.2
Group	2.1	6.1	3.1	37.3	48.6

Table 6
Litigant Citation Rates by Quality of Citation: Religious Disputes

LITIGANT	CITATION FREQUENCY					
	Compliant		Discordant		Evasive	Total
	Implicit	Explicit	Implicit	Explicit		
Group	65	2	124	8	35	234
Per Case	21.6	.67	41.3	2.7	11.7	78
Non-Group	----	2	17	3	21	43
Per Case	----	.67	5.7	1	7.0	14.3

Figure 1

A Pyramid Model of Group Litigation



Appendix A
Paired Cases: Issues and Litigants

ISSUE	LITIGANT
Religion	
1. 425 F.Supp. 176	Krishnas
441 F.Supp. 312	private counsel
2. 526 F.Supp. 1271	ACLU
511 F.Supp. 166	private counsel
3. 525 F.Supp. 1150	ACLU
525 F.Supp. 1045	private counsel
Environment	
1. 466 F.Supp. 527	California
463 F.Supp. 335	Pacific Legal Foundation
2. 447 F.Supp. 753	Cit. for the Manag. of Alaska Lands
462 F.Supp. 1155	Alaska
3. 451 F.Supp. 96	Whitman Council
461 F.Supp. 266	United States
4. 460 F.Supp. 248	Ohio
460 F.Supp. 237	Worthington Civic Association
5. 479 F.Supp. 815	Coal. for Canyon Preservation
473 F.Supp. 310	private counsel
6. 504 F.Supp. 753	California
501 F.Supp. 269	Homeowners' Association
7. 497 F.Supp. 504	Comm. to Save the Fox Building
497 F.Supp. 1377	private counsel
8. 433 F.Supp. 906	Environmental Aid
471 F.Supp. 958	private counsel
9. 481 F.Supp. 195	private counsel
481 F.Supp. 397	Sierra Club
Employment	
1. 407 F.Supp. 745	private counsel
413 F.Supp. 142	LDF
2. 441 F.Supp. 881	LCCRUL
436 F.Supp. 1273	private counsel
3. 441 F.Supp. 846	LDF
435 F.Supp. 310	private counsel
4. 438 F.Supp. 390	private counsel
443 F.Supp. 1164	LDF
5. 464 F.Supp. 1005	private counel
80 F.R.D. 109	LDF/LCCRUL
80 F.R.D. 93	LDF
6. 443 F.Supp. 789	private counsel
78 F.R.D. 73	LDF
7. 468 F.Supp. 1302	LDF
476 F.Supp. 1048	private counsel
8. 83 F.R.D. 449	NAACP
475 F.Supp. 958	private counsel