

**A LONGITUDINAL EXAMINATION OF THE
PARTICIPATION OF ORGANIZED INTERESTS IN
STATE COURT LITIGATION**

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Scholars of the interest group process have set forth some basic propositions concerning the institutional movement of organizations. They suggest that interactions between interests and institutions may lead the former to try and change the locale of a policy conflict. Changing the site of a conflict, in turn, may expand its scope to incorporate a wider range of interests. In this paper, I sought to apply those propositions to organized participation in state court litigation. In particular, I thought the interaction between two recent institutional trends (the increasing conservatism of the federal bench and the emergence of new judicial federalism) and the objectives of certain kinds of interests would lead them to litigate in state supreme courts. This, in turn, would generate participation by a wider range of interests. Hence, my immediate goals centered on determining whether organized interests have significantly increased their participation in state court litigation and whether different types of interests are involved now than, say, in the 1960s and 1970s.

My results generally confirm these expectations. In the main they indicate the growing presence of amici in state supreme courts; they also show that a wider range of interests now participate. Even so, growth occurred unevenly: some states evinced precisely the kind of patterns I anticipated, while other were far more erratic. In the second part of the paper, I explored various explanations for observed growth patterns. Those centering on institutional characteristics (*e.g.*, reputation and professionalism) were particularly useful.

Frustrated by Change in Federal Courts, A.C.L.U. to Concentrate on States

-Headline, *New York Times*, 30 September 1991

I think it's a logical move for the ACLU. [But we] will take on the ACLU toe-to-toe in the state courts.

-John Scully, Counsel with the Washington Legal Foundation

The American Civil Liberties Union and the Washington Legal Foundation hold polar perspectives on most substantive issues. Even so, their leaders express a point of agreement: after years of litigation in the federal courts, they intend to usher their organizations down the aisles of state judiciaries. That they share this sentiment is not too surprising. As pluralist theorists have long observed, organized interests tend to move to where the action is, so to speak. And as legal analysts have been arguing (or, more pointedly, advocating) the action is moving into state judiciaries.

The justifications behind the arguments offered by interest group and legal scholars are things I take up later. Suffice it for now to write that their claims, and the expectations flowing from

them, provide the motivation for this paper. In particular, I am interested in determining, as the literature suggests, whether organized interests have significantly increased their participation in state court litigation and whether different types of interests are involved now than, say, in the 1960s and 1970s.

In short, I hope to describe interest group involvement in state judicial systems. I view this as a significant enterprise largely because the literature provides a clear lens through which I can develop general expectations about groups and their spheres of activities, and then apply them to the specific topic at hand. But I hope the importance of my project goes beyond the stuff of pure hypothesis testing; I am quite concerned with substance, as well. For nearly five decades, scholars have explored interest group involvement in the federal courts, with their insights providing substantive and, eventually, theoretical breakthroughs (*e.g.*, Barker 1967; Caldeira and Wright 1988; Lawrence 1990; Sorauf 1976; Vose 1959). I have little doubt that examinations focusing on state courts will yield equally important information.

This noted, I make no pretense that this paper will test all the hypothesis, solve all the puzzles, provide all the substance, and lead to entirely new theoretical insights into the workings of groups or state courts. Rather, I see this research as a first, and I think necessary, step. By framing the phenomenon theoretically, describing it, and offering some explanations, I hope that the paper will serve as a foundation on which others might build.

The Spheres of Interest Group Activity

Put quite frankly, most scholars of the group process have not been very interested in courts. Truman all but acknowledged this in the preface of the 1971 (xxxviii) version of *The Governmental Process*. There he listed many works examining group involvement in legislative and executive arenas. When it came to the judiciary, however, he noted that “academic research” had not been “extensive.”

That was in 1971; I don’t think the state of play has changed much. To be sure, leading group textbooks now regularly include sections or even chapters on group litigation (*e.g.*, Schlozman and Tierney 1986; Hrebener and Scott 1987; Mahood 1990). But the studies they contain largely come out of the judicial process and behavior literature, not from the interest group tradition. It remains, for a multitude of reasons, something that is still missing from most major and important studies of group processes (*e.g.*, Nelson and Heinz 1988; Salisbury et al. 1987, 1992).¹

My purpose here is not to bemoan our lack of integration into the mainstream study of interest group processes; others have done that elsewhere (*e.g.*, Walker and Scheppele 1991; Wasby 1986). Rather, it is to forewarn readers that much of what motivates the ensuing discussion (of why we might expect groups to be moving into state courts and what patterns of group participation we might anticipate) comes from a literature that gives only casual, if any treatment, to courts. Still, I-- like many who have proceeded me (*e.g.*, Caldeira and Wright 1988; Olson 1990; Salisbury 1983; Stewart and Sheffield 1987)-- think that literature provides a reasonable point of departure.

A General View of Interest Groups and the Governmental Process

What insights might we take from the interest group literature and apply to courts? First and foremost is that interest groups, which involve themselves in the government process, have the

¹In this important series of works, Salisbury and his colleagues did not purposefully neglect interest group use of the courts. Rather they focus on policy domains that are not particularly attractive to interest group litigators (agriculture, energy, and health; the one exception may be labor).

primary purpose of influencing the process and the products of that process-- policies. In so writing, I am not unmindful of those studies suggesting that groups have other objectives, such as maintaining their organizations (Moe 1980; Wilson 1973), setting institutional agendas (Cobb and Elder 1983), and shaping public opinion (Key 1961). What I do think, though, is that the ultimate and universal objective of influencing the process and outputs of political institutions subsumes all other goals (*e.g.*, Petracca 1992).

If this is so, and many interest groups theorists argue that it is, then the second question becomes one of goal maximization. How can organizations influence the process and policies of government? The answer is a deceptively simple one. Ideally, organizations need locate those arenas of government in which they can maximize their goals and, then, adopt strategies and tactics ultimately suited to affecting those institutions. As Scholzman and Tierney (1986, 160) succinctly put it, "an organization is likely to try to locate a controversy in the institutional setting most likely to produce favorable results." But how do organizations select their best target(s) of opportunity?

To this question, scholars have offered many specific answers. A broader and more general way of thinking about this, though, may be through the "where the action is" aphorism. In other words, organizations will move towards those arenas of government which (they perceive) will generate policies on issues of concern or which they can force to generate favorable policies. This does not mean that they will necessarily move out of or avoid institutions where the action isn't; the policy process is too interconnected to believe this to be true. Nor do I wish to imply that "action" simply arises on its own, in a spontaneous way. To the contrary, theorists argue that it is the interaction of organizations and institutions that give rise to a shift in the site of the "action" on any given policy domain (for a summary, see Epstein, Kobyłka, and Stewart 1992).

To animate the argument, let me invoke a simple example, one often used by interest group scholars. Consider a trade association, which is seeking to "persuade a... regulatory agency to drop a potentially burdensome rule." After some effort, the association realizes that it will be unable to do so, say the agency is "captured" by opposing interests and is simply "hostile" to the association's ends. In all likelihood, the association would end up "taking it case to Congress, where it may have enjoyed victories in the past, where it may have many friends, or where its political resources may be brought to bear with more favorable results" (Scholzman and Tierney 1986, 160).

What this example indicates is that "if it has any choice in the matter" organizations will try to move toward institutions that will maximize their objectives. But we must keep in mind that it is the interaction between institutions and organizations that drive the choice itself. Had the agency been inclined to drop the regulation, then the association would not have turned its sights elsewhere; it was the negative reception from the executive agency that led it to Congress.

The picture is, to be sure, more complicated than this. The illustration above represents how interest groups might operate in a world of free choice. It is often the case, though, that "an organized interest has no choice as to the institutional arena in which a policy contest will be waged" (Scholzman and Tierney 1986, 160). That is, interest groups often find themselves in arenas which they know may be less than hospitable to their cause. Why? The answer again is relatively straightforward and certainly well ingrained in the interest group literature: it is because their opponents ("the losers") must move the policy conflict to a more favorable arena. Again consider the trade association example. Naturally, those interests opposing the association would have preferred to remain in the executive arena-- they had been able to convince the agency to maintain the status quo. But when the trade association turned to Congress-- that is, expanded the locus of the conflict to incorporate another institution-- those interests had little choice but to follow suit. They were forced to move to where the action now was, in so far as "the losers" (their opponents) had defined it that way (Schattschneider 1960; Truman 1951, 1971).

Changing the site of the action has an additional effect. When losers "socialize" policy conflicts, they "must enlarge the scope of the conflict by bringing like-minded groups into the

fray” (Schattschneider 1960, 40; O’Connor and Epstein 1985, 247). Put in terms of our illustration,² when the trade association mobilized to pressure Congress for change, it would seek allies in the legislative policy struggle. Their opponents would do likewise (Truman 1951). In other words, new and diverse waves of organizations and interests would enter the conflict, leading to its extension and, perhaps, escalation and expansion.

To summarize, the interest group literature leads us to the following conclusions: 1) Interest groups seek to influence the policy process; 2) Interactions between interests and institutions may lead the former to seek to change the locale of a policy conflict; and, 3) Changing the site of a conflict expands not only its institutional scope. It also extends and may even expand the scope of the conflict to incorporate a wider range of interests.

Interest Groups and the Federal Judiciary

The question for us is whether these insights-- developed largely around the movement of groups in and out of Congress and the Executive branch-- correctly characterize interest group participation in the judiciary. Despite the fact that analysts have yet to apply them systematically to the courts,³ cases studies and anecdotal evidence provide ample reason to think that they do, at least at the level of the U.S. Supreme Court. We know from Vose (1972), for example, that businesses and their organized representatives (*e.g.*, the Sentinels of the Republic, Women Patriot) sought to stop Progressive forces (*e.g.*, the National Child Labor Committee, Women’s Joint Congressional Committee) from convincing Congress to enact the Sheppard Towner Maternity Act. When anti-Progressive forces failed to do so, they took their cause to federal courts, which they viewed-- unlike Congress and even the executive branch-- as hospitable to their claims and where their cause garnered the attention of other interests, both cooperative and competitive (see Vose 1972, 268-269, for amici in *Frothingham v. Mellon*).

In this historical example, and in so many other stories of group involvement in the federal courts, we observe something of the pluralist paradigm at work. Because of the disposition of Congress and the executive, business interests (and anti-progressive groups) moved the site of the action from the legislature to the courts. In so doing, they extended and escalated the conflict, paving the way for additional friends and enemies to enter the fray. In this particular tale it was “conservative” interests who were disadvantaged in the political arenas; it was the Progressives, the “liberal” forces of the day, which went into court to counterbalance those business interests. More typically, I suppose the situation is the reverse but the general pattern of organized involvement in the *federal judiciary* is evident: 1) The interaction between a governmental action and a group’s objective may lead the latter to try and change the locale of the conflict from the political branches to the federal courts and 2) Expanding the site of the conflict to envelope the judiciary also extends, and may escalate, the conflict to incorporate a wider range of interests.

State Courts as Increasingly Attractive Arenas

²I have taken some liberties here. To be precise, Schattschneider (1960, 40) argued that “the most powerful of special interests” desire to keep government excluded from conflicts. It is “losers in the private conflict” that must “socialize” it to “involve public authority.”

³Of course, I speak only of this particular dimension of the interest group literature. A handful of scholars have applied other facets to judicial lobbying. Olson’s (1990) examination of interest group litigation in federal district courts, for example, draws on Lowi’s typology to develop expectations about the patterns of organized activity.

I see no reason to suspect that these observations would not hold for interest group involvement in state courts. Indeed, at least historically, they seem quite apt. Consider, for example, early litigation over working conditions. After the National Consumers' League (NCL) convinced several states to enact maximum hour work laws, employers "organized to defeat legislation in the courts," state courts, that is. In response, the NCL "organized a Committee on Legislation and Legal Defense of Labor Laws to 'assist in the defense of the laws by supplying additional legal counsel and other assistance'" (Vose 1958, 26). From there, litigation battles escalated with numerous amici curiae, states, and others lining up on both sides (O'Connor 1980; Vose 1972).

By the time the legal system condoned the range of worker protection laws, the loci of organized activity had shifted from state to federal courts. Why this occurred in the source of speculation, with many factors probably contributing (see Pacelle 1991). What is relevant here is that we have at least two reasons-- the conservatism of the federal bench and the emergence of new judicial federalism (elaborated below)-- to suspect that state courts are once again "where the action is" and, as a by-product, the arenas of increasing attraction to a wide range of interests. In other words, the interaction between these two recent institutional trends and the objectives of certain kinds of interests would lead them to expand their participation to encapsulate state supreme courts. This, in turn, would generate an escalation of participation by a wider range of interests. Let me elaborate.

As I suggest above, the first trend is the increasing conservatism of the federal courts, a phenomenon that is not too difficult to explain. Since 1968, the United States has elected but one Democratic president, Jimmy Carter. And while President Carter had the opportunity to appoint 258 individuals to the lower federal courts, the federal district and appellate courts (not to mention the Supreme Court) are now more heavily loaded with Nixon, Reagan, and Bush appointees (Goldman 1991).⁴ It is, thus, hardly surprising to hear interest groups, particularly those seeking to expand rights and liberties, talking of resort to the state courts.

A second trend is the growing importance of state courts as policy makers. Several factors account for this,⁵ the most important of which is the emergence of "new judicial federalism," a "renewed willingness of state courts to rely on their own law, especially state constitutional law, in order to decide questions involving individual rights" (Abrahamson and Gutman 1987, 90). The origins of new judicial federalism lie with the Burger Court,⁶ which was "directly and

⁴For many reasons, this presidential-appointment dynamic is quite significant in setting the tenor of federal court decisions. Put simply, appointments by Republican Presidents (especially Reagan and Bush) have driven the federal bench further and further to the right (Alumbaugh and Rowland 1991).

⁵There are at least two others. First, state supreme courts are now "the final decision makers on most issues of commercial, property, family, inheritance, tort and criminal law, as well as state constitutional issues and local governmental powers and procedural issues" (Meeker 1986). Indeed, as Glick (1991, 87) points out a paltry two percent of state decisions ever get appealed to the U.S. Supreme Court. Another factor is more structural in nature: through the creation of intermediate appellate courts, many states have provided increased opportunities for their highest courts to exercise policymaking functions. Such courts, as they do in the federal system, act as "screening" devices, thereby giving those above them more discretion over their dockets. Presumably, courts in such states will spend less time and resources on "trivial" disputes and more on those with significant policy implications (Atkins and Glick 1976; Fino 1987).

⁶Some suggest that it was Justice William Brennan who set the ball in motion. In a seminal 1977 *Harvard Law Review* article, Brennan asserted that the then-Supreme

indirectly” responsible for it. The Court “*directly encouraged*” renewed use of state courts by “limiting access to federal forums...” As Tarr and Porter (1982, 919) wrote,

In a series of cases the Court revitalized the ‘equitable abstention’ doctrine as a barrier to removal from state to federal courts, discouraged federal injunctive relief against the enforcement of state law, instituted limits on federal *habeas corpus* relief, and imposed stricter limitations for raising claims in federal courts.

The Burger Court also “*indirectly encouraged* states to base their decisions on their own constitutions by conservative interpretation of the federal constitution.” Between 1972 and 1980, the Court reversed 20 liberal state court decisions largely on the grounds that in those rulings, courts interpreted federal constitutional guarantees more broadly than it had (Linde 1980, 389). Moreover, by refusing to review decisions that are clearly based on independent state grounds,⁷ it indicated that state courts can insulate more protective civil liberties rulings...by basing them on state constitutional guarantees” (Tarr and Porter 1982, 922).⁸

Summary of Literature

The observations of interest group theorists provide a useful context for considering why organizations seek to attain their policy goals in the federal judiciary and how, in so doing, they escalate conflicts to encapsulate greater numbers of similar and diverse interests. In my view, we also can apply this framework to state court litigation. In particular, as I argue above, the interaction between institutional action (i.e., the increasing conservatism of the federal courts and the growing importance of state judiciaries) has, perhaps, triggered interests, especially those seeking expansions of rights and liberties, to relocate the locale of policy conflicts into state courts. If that has occurred, then I would expect to find that others-- both friends and enemies-- have followed suit.

Court had brought to a halt the expansion of rights (under the federal constitution) ushered in by the Warren Court. As such, he urged state jurists to view their constitutions as sources for the expansion of rights.

⁷For an analysis of the relevant cases, see Abrahamson and Gutman 1987.

⁸It was in recognition of this conservative trend, coupled with the Court’s willingness to provide clear standards to state courts about the kinds of ground on which they needed to rest their decisions to avoid Supreme Court review, that many scholars, judges, and lawyers (see Collins, Galie, and Kincaid 1984) have made the plea for new judicial federalism. Others have been equally enthusiastic and have added to the list of arguments in favor of shifting to the states. Analysts note, for instance, that some state “bill of rights provide a solid framework for judicial activism” and in many instances, “are more precise and detailed” than their federal counterpart. Tarr and Porter (1982, 923) note, for example, that while the U.S. Constitution forbids laws “respecting the establishment of religion,” some states “explicitly” prohibit the use of government funds for “any sectarian purpose.” Others point to the fact some state constitutions afford greater protection of rights and liberties than the federal constitution (e.g., privacy and equal rights provisions). And they generally suggest that state constitutions are “longer and more detailed...giving more opportunity for the development of an independent body of law” (Howard 1976).

To put it all rather succinctly, I would anticipate two findings: first, organized activity in state judicial systems has increased over the past decade and second, the scope of that activity has expanded to incorporate a diverse range of interests.

A Research Strategy

I have, thus far, generated two expectations for the participation of organized interests in state judicial systems. Before I explain specifically how I propose to test them, some general observations about my research strategy are in order. The first concerns my choice of courts. For this study I explore litigation in the same 16 state courts selected by Kagan and his colleagues (*e.g.*, 1977; 1978) for their seminal works on state supreme courts: Alabama, California, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and West Virginia. I chose these for the same reasons they offer (see Kagan et al., 1977) and the additional one that I would benefit from the insights (and the data) generated by their research.

Second, as I imply, my study-- like Kagan et al. (1977)-- limits itself to state courts of last resort. I have no theoretical reason to believe that my expectations would not apply to lower state courts, in much the same way some propositions developed around the Supreme Court also hold for lower federal courts.⁹ For this study, though, it seems reasonable to start with the highest courts in each state.

Finally, my study is limited to organizational involvement as amici curiae. Although the friend of the court brief is, as Caldeira and Wright (1988, 11) note, just one of many tactics available to organized interests, participation as amicus has figured as an indicator of interest groups activity in virtually every pertinent study.” Many reasons exist for this, not the least of which is this: like reporters of Supreme Court decisions, those for the states do not generally note the group affiliation of attorneys for the parties to a given suit (the attorneys themselves rarely do so on their briefs). In contrast, the reporters *generally* do identify the affiliation of amici.

This noted, let me explain how I gathered the data by which to consider my propositions. First, for each state included in my sample, I conducted the following LEXIS search: AMICUS or AMICI for years 1965, 1970, 1975, 1980, 1985, and 1990. For each case resulting in a full opinion and containing at least one friend of the court brief,¹⁰ I recorded the number of briefs filed and the number of amici per brief.¹¹ The number of cases containing one or more amicus curiae briefs, the number of briefs filed and the number of amici, then, constitute various measures of the amount of participation occurring over time in a given state.¹²

⁹My LEXIS search revealed significant amicus curiae activity in several lower courts, including courts of appeals in Michigan and Minnesota.

¹⁰This search, of course, picked up orders, cites, and so forth. I counted only amicus participation in full opinion cases.

¹¹Unlike the *U.S. Reports*, the state court reporters (or at least the ones I used) do not generally use “et al.” to denote the presence of cosignatories. Counting the number of amici from the reports themselves, without having to go to the briefs, thus, was possible. There were, however, a half dozen or so exceptions-- briefs listed as “et al.” In all but two, I was able to identify the cosigners from the courts’ opinions.

¹²Owing to distinctions in the way states report amicus curiae participation, this was not necessarily an ideal approach. In particular I hit two major problems. First, and most severe was that I could not record any information for California other than the number of briefs filed. The reporter system only identifies then names of the attorneys filing briefs; it does not identify the names of amici. It is even difficult to count the number of

Since I am also interested in determining whether a wider range of interests are participating as amici curiae, I categorized each amicus into the two distinct classification schemes illustrated in Table 1. The first is a relatively straightforward one, which tried to ascertain the sorts of actors participating: government, group, unidentified participant,¹³ corporation or business. The second sought to identify the substantive issue interest of the participating amicus.¹⁴

-Table 1 about here-

As I point out in notes 12, 13 and 14, this strategy is not without its share of technical or operational concerns. In general, though, I think the resulting data set provides a reasonably good indication of the depth and breadth of amicus curiae participation.

The Participation of Organized Interests in State Courts: How Much and Who?

My primary tasks center on determining whether interest groups have significantly increased their participation in state court litigation and whether more (and different) types of interests are involved now than in the 1960s and 1970s. In some sense, these represent intra-court concerns. Hence, the most promising approach to addressing them is to look at patterns of participation and so forth on a court-by-court basis; and that is generally the way I chose to approach them. By the same token, I am interested in “average” patterns. Figures 1 and 2, accordingly present three types of “participation” information across the 16 states and for each (at five year intervals between 1965 and 1990): the number of cases containing at least one amicus curiae, the number of briefs filed, and the number of amici. Figures 3 and 4 display data on the kinds of interests participating in state court litigation.

-Figures 1 and 2 about here-

Given the interactive nature of my expectations, ideally we should consider all four figures in tandem. Let us begin, then, with the participation levels presented in Figures 1 and 2. The first, which provides median participation rates across the 16 states,¹⁵ suggests that amicus curiae participation is on the rise, especially since the mid-1980s. The median number of cases containing at least one amicus curiae brief increases from a low of three in 1965 to a high of 18.5 in 1990. The number of briefs filed and the number of total amici evince similar upswings, with medians rising from five and six in 1965 to 28 and 34 in 1990.

briefs filed in a given case. Second, for one year included in this study (1980), the reporting of amici in Minnesota changed. For that year, I was unable to code amici into substantive categorizations.

¹³I use the term unidentified participant, rather than individual, because in a few instances what seemed to be an individual amicus turned out to be a group. For most states, this was a rare occurrence. But it was the norm for California, which notes only the attorney filing the brief. In one case, for example, the reporter listed attorneys Paul Halvonik et al. as the amicus filer. The opinion identified the amici as the League of Women Voters and the Committee for Fair Elections.

¹⁴I selected these from among many alternatives. For example, I could have used an ideological or a pure pluralistic scheme. For present purposes, though, I thought it important to tap into the substance of the issues represented by participating interests.

¹⁵I use medians instead of means for a traditional reason (i.e., the presence of extreme values), a point to which I will return.

In Figure 2, I disaggregate the data to the individual state level. For purposes of presentation, I have compressed the states into one figure. As a result, the numerical scales for each state differ, so I do not encourage comparisons, *just yet*. Even so, a few patterns emerge. Obviously, almost all states mirror the aggregated patterns evident in Figure 1. Most courts of last resort received more amicus curiae briefs in 1990 than in 1965. In some instances, the increases are quite stark; amicus curiae participation in Illinois, for example, exhibits almost perfect monotonic growth. So too the ratios of briefs to cases to amici generally have increased. Alabama is quite exemplary of this. In 1965 the average amicus curiae case contained one brief signed by one friend. In 1990, those figures increased to 1.4 briefs (per case), each signed by 1.16 amici.

Taken together, these general trends indicate that amicus curiae participation has increased. However, because the data presented in Figures 1 and 2 include all amici, they do not necessarily indicate that more organized interests are participating; they just suggest that state courts of last resort are receiving more amicus curiae briefs. To consider this, let us turn to Figures 3 and 4, which present data on the kinds of amici participating in state court litigation. The bar graphs indicate the percent of total participants comprised by each actor (business, unidentified, group, and government). The pie graphs¹⁶ divide amici into substantive categories for years 1965 and 1990. If my expectations are founded in fact, then we should see both the percent of groups (in the bar graphs) and the slices of the pies increasing (indicating participation by a wider range interests).

-Figures 3 and 4 about here-

The bar graphs displayed in Figures 3 and 4 show, however subtly, the expected pattern. In 1965, on average groups *qua* groups constituted about 55 percent of all amici, while government and unidentified participants-- about 22 percent each. In 1990, the percent held by groups rose to 68. Naturally, this held in the balance of states as well (see Figure 4), with some more exaggerated than others. In Illinois and Minnesota, for example, interest group presence increased rather monotonically over time. But they are the anomalies, that is, group presence-- as a percent of all participants-- did not grow as fast as I anticipated. Still, the bar graphs do indicate at least two patterns consistent with my expectation: the decreasing presence of unidentified amici¹⁷ and the increasing participation of business interests. If we consider only governments and unidentified interests as non-organized amici and groups and business as organized ones (as does much of the interest group literature), we do observe the predicted upswing. Collectively in 1965 organized amici constituted 55 percent of all amici; that figure jumped to about 77 percent in 1990.

Where we see more dramatic alterations are in the pie charts, which depict the changing composition of interests represented by amici. Consider, first, the means displayed in Figure 3. In 1965, interests representing four substantive areas dominated: businesses, governments, religions, and civil liberties (see Table 1 for examples). By 1990, eight different kinds of organizations demanded some slice of the pie. Government and business continue to participate but legal, health, and educational organizations are playing a greater role than ever before. We also see organizations representing lawyers (*e.g.*, state bar associations) and other "legal" interests filing or co-signing briefs in increasing numbers. What is interesting, though, is that two of the categories-- women, public affairs-- remain virtually unrepresented in state litigation. Given a spate of commentary (Kolbert 1989; Marcus 1989) emphasizing the need for women's

¹⁶ Pie charts are abused and maligned graphic devices (Cleveland 1985, 264). Yet, they are well suited for these data because of the large number of categories.

¹⁷As note 13 implies, some of these unidentified amici are probably groups (this was certainly true for California, which is not represented in Figures 3 and 4); still, the balance are individuals.

organizations to take particular causes into state courts (*e.g.*, abortion), we might expect to see them participating more as the decade wears on. But, for now, they remain a trivial presence in state courts.

To greater and lesser degrees the individual state courts reflect these overall patterns. In every state represented in Figure 4, a wider range of groups participated in 1990 than in 1965. Particularly interesting are Illinois, Kansas, Michigan, Minnesota, and New Jersey where we see, by 1990, virtually every group type represented.

What, then, can we conclude about amici participation within the states? On the one hand, it does seem that the interest group literature provided a reasonable framework to study use of state courts by organized interests. Theoretically, we anticipated that groups would be participating more now than ever before and that a wider range of interests would be involved. The data presented in Figures 1 through 4 seem to confirm those expectations. On the other hand, at least one unanticipated finding emerged: vast differences exist among the states, particularly in terms of the actual number of amicus curiae participations (see Figure 2). Compare, for example, the Y-axes of Maine and Kansas. Both evince upward trends. But, at their heights in 1990, the number of amicus cases in Maine did not quite reach the 10 mark, while in Kansas it surpassed 30. More obviously, some states do not manifest the observed participation patterns displayed in Figure 1. Idaho, for instance, evinces rather erratic patterns, with the total number of amicus cases failing to reach 10 for any given year; Rhode Island's numbers are consistently low over the 25-year period.

Differences among the states are even more vividly portrayed in Figure 5, which shows the proportion of full opinion cases containing at least one amicus curiae brief.¹⁸ The points for each year indicate the individual states; the line depicts the average of the proportions across the 16 states. Put simply, quite a bit of variation exists; the 1990 proportions, for example, had a mean of .13, with a range of .54 and a standard deviation of .15.

-Figure 5 about here-

Explaining Differences among the States

My theoretical discussion treated states as monolithic entities, as equally attractive arenas for amici to enter. Yet, as Figure 5 clearly indicates, that was naive. Apparently, interest groups do not find state courts in, say, South Dakota as attractive as those in New Jersey. The question, then, is what factor(s) differentiate the South Dakotas from the New Jerseys? One way we can begin to address this question is to take the most obvious difference, that depicted in Figure 5, and ask why so much variation exists in amicus curiae participation across the 16 states?¹⁹

Conceptually speaking, this is not an easy question to address. Interest group scholars have virtually ignored organized efforts in the states, and their counterparts in law and courts, while

¹⁸In other words, the proportion=

$$\frac{\text{n of cases containing one or more amicus curiae briefs}}{\text{total n of cases decided with opinion}}$$

Data for the denominator come from three sources: author correspondence with administrators of the various states, annual reports of the National Center for State Courts, and Kagan et al. 1977.

¹⁹This is the only measure on which I can compare all 16 states. Happily, given the rudimentary nature of this work, it may be the most important dimension.

increasingly cognizant of state courts, have evinced similar disinterest.²⁰ Notable exceptions exist on both sides, though, and it is from them that we can generate some expectations about variation in the use of state courts of last resort. Indeed, based on my reading of that literature (*e.g.*, Morehouse 1981; Thomas and Hrebenar 1990,1992) it seems that three interrelated factors explain the relative “strength of a group system” within states:²¹ state characteristics, institutional characteristics, and institutional rules. As is the case with most of this sort of work, scholars developed these to explain variation in interest group strength in arenas other than the judicial.²² Still, I think they can be transposed to the courts.

States Characteristics

Beginning with the state itself, Thomas and Hrebenar (1992) (see also, Morehouse, 1981; Zeigler, 1983; Zeller 1954) find a few factors associated with the relative strength and growth of interest group systems: political parties and political attitudes.²³ The first is a traditional factor: many (*e.g.*, Morehouse 1981) argue that the stronger the party system, the weaker the pressure group system. Accordingly, scholars have found that the South generally possesses the strongest interest group systems; the Far West, ones that are moderate; and, the Midwest and Northeast, relatively weak systems. The second factor, “political attitudes,” is one that could cut both ways: liberal attitudes might decrease or increase interest group attraction to a given state’s legislature, depending on the policy domain. It does seem, though, that courts in relatively liberal states are more likely to innovate and experiment (*e.g.*, Collins, Galie and Kincaid 1986). Given my earlier arguments about state court litigation as a reaction to the growing conservatism of the federal judiciary, a positive relationship should exist between liberalism and amicus curiae participation.

To consider the extent to which these two state attributes (party and attitude) explain variation in amicus curiae rates among the 16 states, I first needed a standardized measure of the change in participation for each state. Since a regression slope (indicative of the average change in Y associated with a one-unit change in X) neatly approximates such a measure, I sought to obtain one for each state. To do so, as illustrated in Figure 6, I simply regressed participation proportions (number of cases containing one or amicus curiae brief/number of opinions), Y, on a counter (0 through 5, representing the 5 year intervals), X, for each state. The resulting 16 slopes,

²⁰There have been some studies of amicus curiae in the states but they are dated (*e.g.*, Glick 1971) and/or overly legalistic (Angell 1967; Covey 1959; Northwestern 1960; Piper 1967; Wiggins 1976) or not particularly on point. For example, Songer and Kuersten (1992) have written an intriguing paper exploring the *impact* of amicus curiae briefs in several state supreme courts.

²¹Thomas and Hrebenar (1992), for example, argue that “eight major factors” explain the relative “strength of a group system” within states. These factors, in turn, seem to fall neatly into the three interrelated groupings

²²It is true that Thomas and Hrebenar attempted to integrate the judiciary into their studies of interest group politics in the four regions. The factors they elucidate, though, have far more applicability to the “political” branches and processes.

²³Thomas and Hrebenar also claim that high levels of socio-economic development are strongly associated with strong interest group systems. Their argument is that as state “economies and social structures [become] more diverse, this would increase the number of groups operating, which in turn would increase competition,” in all governmental institutions. There is, however, a good deal of controversy over this view (see, generally, Gray and Lowery 1988).

thus, provide a convenient (and standardized) dependent variable.²⁴ To measure political attitudes, I used Klingman and Lammer's (1984) "general policy liberalism" score, which (for those states included here) ranges from 11.52 (New Jersey), indicating a high degree of liberalism to 8.18 (Alabama).²⁵ For the "political party" factor, I simply adopted Morehouse's characterization of state pressure group systems as strong (1), moderate (2), weak (3), depending largely on the strength of their party systems.²⁶

-Figure 6 about here-

Next, I regressed the participation slopes, Y , on the general policy score and on the Morehouse assessment. Figure 7 displays the results of those bivariate regressions, including the plots of the residuals against the estimated values. As we can see a reasonably strong and positive relationship exists between liberalism and participation. The Morehouse estimate is not as robust and, worse yet, it is the wrong direction: it suggests that the strength of a pressure group system is inversely related to amicus curiae participation. What is more, if we reestimate the equation without the California outlier,²⁷ the Morehouse remains positive *and* becomes a satisfactory predictor of growth.²⁸

-Figure 7 about here-

One interpretation for this result is simply that characterizations of pressure group systems--*developed largely around the relative strength of interest groups and political parties in legislative and executive politics*-- do not transfer well to the courts. A closer look at the two indicators of state characteristics, though, tells a *somewhat* different story: a relatively high and positive correlation (.62) exists between the general policy score and the Morehouse assessment (and, of course, between the former and region).²⁹ What this means is that states with lower levels of policy liberalism evince stronger pressure group systems, generally.³⁰ But this was not exactly the case for amicus curiae participation. Rather, amici seem attracted to states that are more liberal (*e.g.*, New Jersey), which are generally located in regions that presumably have weak pressure group systems (*e.g.*, the Northeast).

In short, based on my sample, it is clear that a relationship exists between participation rates and the political environment, with that rate increasing faster in more liberal states. Measures of pressure group strength (*e.g.*, Morehouse's),³¹ most of which correlate highly with region, however, are not as helpful.

²⁴The slopes ranged from .00 to .24 with an average of .04.

²⁵Klingman and Lammer's scores (for all states) range from 1.86 to -2.06. I added ten points to each score to remove the negative signs.

²⁶I eschewed Thomas and Hrebenar's assessment (1990, Table 4.3) believing it to be too current to capture the range of my data.

²⁷As readers will note, California is an outlier in virtually all regressions. I shall speak to this shortly.

²⁸The reestimated equation is: $Y = -0.15 + .025 \text{Morehouse}$
(.007)

²⁹Recall the Morehouse assessment (and its successors) is highly correlated with region.

³⁰Since the general policy liberalism score is also highly correlated with measures of socio-economic development (Klingman and Lammers 1984), it would seem to cast some doubt on the argument explicated in note 23.

³¹The Hrebenar-Thomas assessment produced an equally unsatisfactory estimate.

Institutional Characteristics

Certain institutional characteristics apparently impact the strength of pressure group systems. According to accounts of state interest group activity, a particularly important factor is the level of institutional professionalization: the more professionalized the institution, the more likely it will be to attract interest groups. Why this is so is reasonably obvious for legislatures.³² Nonetheless, if we think of some state supreme courts as more “professional” than others-- may be they have better reputations or perhaps their structure is more conducive to “important” rulings-- it transfers well to the judiciary. For one thing, interest groups looking to lobby state courts might be more inclined to enter those with the “most prestige,” the “best reputations” (Meltsner 1976). The logic here is straightforward enough: the greater the reputation and prestige of a court, the more likely that other state supreme courts (and even federal courts) will cite its opinions and adopt its rationale (Caldeira 1983, 1985; Glick 1991).³³ For another, I suspect that interests would be more inclined to file in state supreme courts with the greatest potential to make policy. By all accounts (*e.g.*, Neubauer 1991) those with relatively high discretion and low caseloads are in the best position to do so.

To explore the relationship between institutional characteristics and participation rates, I relied on three measures. The first is a legal professionalism index developed by Glick and Vines (1973, 12). The scores for states included here range from California’s 21.7 (most professional) to Alabama’s 6.0 (least). The second is Caldeira’s reputational ranks (1983, 89). For states in this study, those ranks range from California’s 1 (best reputation) to South Dakota’s 49 (worst). The final measure is a typing system developed by Kagan et al. (1977), which ranges from those courts that have little control or discretion over their caseloads (Type 1) to those that have a great deal (Type 3). Following the analysis above, I regressed the slopes on all three measures.

As we can see in Figure 7, the results are quite satisfactory. Even with the California outlier, both rank and professionalism produce significant estimates. Type is less successful, but not devoid of explanatory power. In short, it does appear that certain institutional characteristics have made some courts-- over the 25-year period-- more attractive to organized interests than others. Apparently, interests view courts that are more professional and prestigious as providing more return for their “amicus curiae” investment.

Institutional Rules

To the extent that they can effect the relative ease with which organized interests can lobby legislatures, impact the outcome of elections, and so forth, scholars argue that institutional rules and policies explain variation in pressure group strength.³⁴ Again, I think we find some

³²As Thomas and Hrebener write (1992, 161): “Increased social and economic diversity will likely increase professionalism in government, as well as bring pressure for increased state services. The combination of these developments will likely increase the number and range of groups operating, the level of professionalism and techniques of lobbyists...”

³³It is true that those courts most willing to play an activist role (*i.e.*, expand rights and liberties) are those analysts rank as the more “prestigious” (see Glick 1991).

³⁴For example, the greater the regulations on lobbyists, the less likely we would find a strong pressure group system. This is, however, something of a chicken and egg problem. Morehouse (1981) argues that states containing powerful group systems fought against “comprehensive regulations.”

correlates to courts.³⁵ State courts have different rules governing participation as an *amicus curiae* and it may be that some encourage participation (*e.g.*, those that require no formal application, consent or motion) while others do not (*e.g.*, those that mirror the U.S. Supreme Court's: potential amici must obtain the written consent of the parties and, if refused, permission of the Court).

"Formal" rules, of course, might belie the overall receptivity courts afford to amici curiae; the U.S. Supreme Court's "reinterpretation" of its own policies well-illustrates this (O'Connor and Epstein 1983). Put somewhat differently, courts may have rather foreboding rules but engage in action that undermines them. Accordingly, we also should consider the more "informal" policies pursued by state courts. For example, if a particular state court often cites amicus curiae briefs in its opinions, regardless of its formal policy it would send a message to potential participants that the justices (or their clerks) at least read the briefs.

My consideration of formal rules is simple enough: I regressed the slopes on an index of formal rules governing amicus curiae participation (from least to most stringent). As we can see in Figure 7, the results are rather dismissal. The formal rules explain practically none of the variance in growth rates. Only slightly more promising are the results of my investigation of informal policies. For reasons I suggest above, I used a mean citation rate (citations to amici curiae/number of cases in which one or more amicus brief appeared) as an indicator of "informal" action. The coefficient fails to attain statistical significance at even a .10 level; it does, though, come reasonably close if we remove the California slope and reestimate the equation.

Even so, of all three sets of variables considered here, those representing institutional rules are the weakest explainers of the growth of amicus curiae participation. I do not want to ascribe too much importance to this finding; after all, it may be an artifact of my measures. Yet, at least within the confines of the analysis, it seems that the reputation and professionalism of state courts are far greater motivating forces for amici than, say, formal rules.

California

The results of the bivariate regressions are reasonably encouraging. With the exception of institutional rules, those factors that seem to explain interest group strength in state legislative and executive arenas are also helpful in understanding the relative growth of amicus curiae participation in courts. As Figure 7 indicates, though, California is an outlier in virtually every regression.

The literature is in disagreement over the propriety of dropping outlier cases (compare Jackman 1989 and Hick and Patterson 1989). I see no need to enter that thicket, but I think the issue is worthy of explanation-- why is California the outlier? Figure 2 provides part of the explanation: as we can see, California evinced a monotonic growth pattern until 1990, when the number of briefs fell below the 1970 mark. This is not to say that the state had low levels of participation in 1990; in fact, 29 percent of its 120 full opinion cases contained at least one amicus curiae brief. But recall it was the slope-- over the 25 year period-- that constituted the dependent variable. Hence, because of the drop off in 1990, that figure was relatively low at least compared to California's extraordinarily high "ranks" on almost all of the independent variables: Put simply, the explanatory variables anticipated a larger slope than California actually evinced.

To what extent does this muddy my analysis? The answer depends on whether 1990 is the onset of a trend or is an anomaly. If it is the former, then California will remain an outlier, worthy of more in-depth analysis. Should 1990 turn out to be an exceptional year, then the explanations considered above should envelope California as well as they do the other 15 states.

³⁵Propositions emanating from new institutionalism have been applied to state supreme courts with some measure of success (Hall 1987).

Conclusion

Scholars of the interest group process have set forth some basic propositions concerning the institutional movement of organized interests. They suggest that interactions between interests and institutions may convince the former to try and change the locale of a policy conflict. Changing the site of a conflict, in turn, expands its scope to incorporate new institutions and, perhaps, a wider range of interests.

In this paper, I sought to apply those propositions to state courts. In particular, I thought the interaction between two recent institutional trends (the increasing conservatism of the federal bench and the emergence of new judicial federalism) and the objectives of certain kinds of interests would lead them to expand their participation to encapsulate state supreme courts. This, in turn, would lead to an escalation of participation by a wider range of interests. Hence, my immediate goals centered on determining whether organized interests have significantly increased their participation in state court litigation and whether different types of interests are involved now than, say, in the 1960s and 1970s.

My results generally confirm these expectations. In the main they indicate the growing presence of *amicus curiae* briefs in state supreme courts; they also show that a wider range of interests now participate as friends of the court. It was true, though, that growth occurred unevenly: some states evinced precisely the kind of patterns I anticipated, while other were far more erratic. In the second part of the paper, I explored-- with some measure of success-- various explanations for observed growth patterns. Those centering on institutional characteristics (*e.g.*, reputation and professionalism) were particularly useful.

In the end, then, what conclusions can we reach about the participation of organized interests in state court litigation. Among the most important lessons, it strikes me, is the utility of interest group theory in helping us to understand patterns of behavior in legal systems. As I noted earlier, that literature gives only casual, if any treatment, to courts. Still, it provided a useful framework for studying groups in court. It helped to explain general patterns of group participation and provided insight into why some states evinced more participation than others.

This noted, where might future research take us? First, it would be interesting, and certainly important, to examine other organizational strategies in state court litigation. Are interests sponsoring more cases, for example? Second, I suspect that the high level of case aggregation at which I worked may have masked important trends; indeed, scholars of the interest group process are paying increasing attention to "policy domains" (*e.g.*, Salisbury et al. 1987). Subsequent work, thus, might want to explore group participation in specific legal areas to explicate more fully the structure of group conflict and cooperation in the courts. Finally, future research might attempt to apply some of the relatively well-entrenched propositions developed around group litigation in federal courts to that occurring in the states. Not only would such efforts provide insight into the world of group litigation. They also might give us a richer understanding of the American legal system.

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