

THE AMERICAN COURTS

A CRITICAL ASSESSMENT

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13. COURTS AND INTEREST GROUPS

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In the fall of 1969, Justice Hugo Black received a visit from an old friend, Thomas G. (“Tommy the Cork”) Corcoran. Black and Corcoran had known each other since the 1930s when they both were “zealous advocates of the New Deal”; Black had even hired Corcoran’s daughter, Margaret, as a law clerk. Lately, though, the relationship had taken a turn for the worse. Black had nothing but disdain for Corcoran’s present occupation, as a lobbyist for organizational and corporate interests.

Nevertheless, Black was pleased to see his old acquaintance. At least he was until Corcoran revealed the purpose of his visit—to put in a good word for a corporation seeking a rehearing from the Supreme Court.¹ As the story goes (Woodward and Armstrong 1979, 79-85), Black was shocked and dismayed; he regarded as taboo any mention of a pending case to a sitting justice of the Court. He banished Corcoran from his office and from his life, the relationship irreparably damaged.

What Black’s reaction to Corcoran’s visit suggests, of course, is that judges consider themselves above the ordinary pressure tactics used by groups to influence elected officials. Though lobbyists line the corridors of the Capitol to converse with members of Congress, such is not the case in the Marble Palace, the Supreme Court building. The rules of the legal game simply prohibit direct encounters.

Hence, if interest groups wish to influence the outcomes of legal disputes, they must find alternative routes of “lobbying,” routes that correspond to the norms of the judiciary. In this chapter, we explore the various strategies groups have developed to affect judicial decision making, as well as several related aspects of interest group litigation: the frequency of group participation, the sorts of organizations most typically found in judicial corridors, the types of issues engendering group interest, and the question of efficacy: Are their efforts successful? First, though, we consider several issues endemic to the study of group litigation: the development of this line of inquiry and its place within the larger study of group politics.

The Study of Interest Group Litigation

To scholars studying interest group behavior in the more political institutions of government—the executive and legislative branches—Justice Black's reaction to Corcoran's visit would seem anomalous. After all, members of Congress and the bureaucracy maintain regular contact with representatives of pressure organizations, so-called lobbyists. Indeed, it would be virtually impossible to study the policy-making process in the United States without considering the role of organized pressure groups.

A plethora of research highlights the intensity of pluralism within the elected institutions. In their survey of Washington, D.C.-based organizations, Kay Schlozman and John Tierney (1986) found that 98 percent of their respondents contacted governmental officials directly "to present their point of view" and that 85 percent actually helped draft legislation (p. 150). Jeffrey M. Berry's more contextual work (1989) further describes the extent to which lobbyists are willing to go to make their presence felt. As he notes:

Contrary to the image of lobbyists as back-room operators, much of their time is taken up trying to be visible. They spend valuable time at congressional hearings even though nothing of great consequence is likely to happen there. Still, it's a chance to touch base with other lobbyists and congressional staffers. They'll make repeated visits to Capitol Hill offices. . . . (p. 79)

By the same token, research by Robert Salisbury and his colleagues (1987) illustrates the depth of pressure group involvement in the governmental process. They asked organizations involved in several discrete policy areas (such as agriculture, the environment) to identify allied and adversarial groups existing within that domain. Each nominating organization listed hundreds of different groups lobbying in the various areas.

That the environment within which the Court works has become increasingly populated by organized interests is undoubtedly true: virtually every case heard by the justices during the past terms has generated some interest within the pressure group community. Consider the Court's recent foray into abortion, *Webster v. Reproductive Health Services* (109 S.Ct. 3040 [1989]), in which more than 400 groups participated, expressing their views on reproductive freedom.²

Cases like *Webster* provide substantial proof that groups attempt to influence the outcome of judicial decisions. Surprisingly, though, it took many years and many studies to convince the academic community of this; in fact, only during the past decade has the study of group

litigation sparked the imagination of increasing numbers of students of the judicial and group processes.

It is, indeed, surprising that this line of inquiry took so long to reach fruition when we consider that the works of the great pluralists—Arthur Bentley (1908) and David B. Truman (1951)—both included discussions of interest group involvement in the judiciary. Bentley's *The Process of Government*, one of the first studies to acknowledge that organized interests played any role in the policy process, included a chapter on the judiciary.³ In the book, he argued that there were "numerous instances of the same group pressures which operate through executives and legislatures, operating also through supreme courts" (1908, 338). Truman's (1951, 1971) *The Governmental Process*, an expansion of Bentley's work, reiterated the role organized pressures play in all arenas of government, including the courts. As he claimed, "The activities of the judicial officers of the United States are not exempt from the processes of group politics. . . . Though myth and legend may argue to the contrary . . . the judiciary reflects the play of interests, and few organized groups can afford to be indifferent to its activities" (1971, 479).

These works, particularly Truman's, generated great excitement among academics, many of whom quickly turned their attention to interest group involvement in the legislative and executive branches. In the preface to his revised edition of *The Governmental Process*, Truman (1971) listed scores of works examining group involvement in these institutions. When it came to the judiciary, however, he noted that "academic research" had not been "extensive" (p. xxxvii). In fact, he cited but one work focusing exclusively on organizational involvement in the legal system: Clement E. Vose's (1959) *Caucasians Only*, an examination of the National Association for the Advancement of Colored People's (NAACP's) efforts to end racially based housing discrimination.⁴

This sole exception, though, was an important one: scholars uniformly praised *Caucasians Only* for its meticulous documentation of the NAACP's litigation campaign in the restrictive covenant cases. Virtually every leading textbook of the day on American government, the interest group process, and the judiciary cited Vose's work approvingly. For all this attention, though, that book and Vose's other works (1955, 1957, 1958, 1966) generally failed to spawn broader interest in the subject of group mobilization of the law.

In retrospect, we can point to a number of factors that inhibited the growth of this area of inquiry during the 1950s and 1960s. An important one was that some confusion existed over its appropriate academic classification. Was it a unique phenomenon that was best

examined by students of the judicial process, or was "it general enough to be treated profitably by interest group analysts" (Epstein, Kobyłka, and Stewart, 1991)? Because scholars, including Truman, could not agree over the answer to this question, the study fell between the cracks. Those exploring pluralism in the elected institutions tended to leave "the courts" to judicial researchers, apparently believing that certain "attributes" of legal lobbying set it "apart from other forums" (Vose 1981, 13). Yet, with only a handful of exceptions (see Barker 1967; Cortner 1964, 1968; Hakman 1966, 1969; Manwaring 1962), students of the law showed little inclination to study group use of the judiciary.

Why did students of the courts, in particular, virtually ignore this area of inquiry? For one thing, the whole idea that interest groups attempt to influence judicial outcomes seemed so counterintuitive as to border on the ludicrous. At that time, many analysts viewed the Court as operating in a wholly different context than Congress or the president, a context that placed it above the ordinary political pressures. As such, they asked why interest groups would even attempt to lobby justices, as their pleas would fall on deaf ears.

The seminal empirical studies of the day reinforced these views. Those conducted by the behavioralists (see Schubert 1959, 1965; Spaeth 1963) argued that justices based "their decisions solely upon personal preferences"; and, because they lacked "electoral accountability," they did not have to cloak those views to satisfy any constituency (see Rohde and Spaeth 1976, 72). Even more damaging were the analyses of Nathan Hakman (1966, 1969). After examining group involvement in Court cases from 1928 through 1966, he concluded that organizational presence in the legal system was virtually nonexistent. His works went so far as to call the entire line of inquiry "scholarly folklore" and to suggest that Vose's study represented the exception, not the rule.⁵

Further repelling scholars from this area was the difficulty of collecting data about group involvement in the Court. Obstacles here were (and continue to be) numerous. For one, unlike students of the legislative and executive processes, who can readily obtain interviews with politicians and their staff, those of the Court are often less successful: justices of the Supreme Court are not inclined to talk to scholars about particular cases, or much else, for that matter. And, when they will talk, the justices limit the kinds of questions they will answer.⁶

Hence, if scholars want to explore interest group involvement in the judiciary, they must rely on two other sources, neither of which is flawless. The first is contact, either through interviews or mail questionnaires, with group representatives. Such data provide researchers with insight into the ways in which groups frame legal arguments, into how they perceive the legal environment, and into more basic

issues: why they choose to litigate, the resources they appropriate to court suits, and so forth. Although this is valuable information, it also is one-sided data: we learn a great deal about how groups relate to the judiciary, but not vice versa. Moreover, the use of interview and survey data often raises questions of reliability and validity: Would another researcher evoke the same responses from interviewees? Do all subjects understand and react to questions in the same way? Concomitantly, as we describe later, even identifying a sampling frame can pose complex questions: for example, should we survey all groups or just those that use litigation?

Given these issues, most of those studying group litigation have acknowledged the need to supplement interview data with data from the Court's records. Here, they also face obstacles, albeit of a different ilk. Because the usual sources of Court opinions—the reporter systems—contain incomplete information about group involvement in cases, scholars must turn to legal briefs. Such briefs are readily available to most researchers only in microfiche form, making for a tedious data-collection process. What further complicates matters is that even these legal briefs may not necessarily provide a full picture of group involvement in specific cases; for example, some attorneys fail to list their organizational affiliation on the briefs. It is common knowledge that the NAACP Legal Defense Fund (LDF) sponsored *Brown v. Board of Education of Topeka* (347 U.S. 483 [1954]), but nowhere does the brief mention that group. Even more troublesome is that it is virtually impossible to identify groups that might have assisted lead counsel (that is, provided legal expertise and/or funds), but chose to conceal their involvement. So although legal briefs constitute the primary data sources for those studying group litigation, they are imperfect gauges that tend to underestimate organizational involvement in cases.

In short, during the 1950s and 1960s those who wished to study group participation in the judicial process faced a bumpy road. Not only did the evidence point against widespread pluralism in the legal system, but gathering data to the contrary proved to be most difficult.

The decades of the 1970s and 1980s, though, saw a resurgence of interest in this area of inquiry. In part, this came about because scholars began to marshal a great deal of evidence dismissing the notion that the Court was impervious to outside influences, including interest groups, public opinion, and the like. So too they began to question whether Hakman's data accurately portrayed group involvement in the Court. After publication of Frank J. Sorauf's (1976) investigation of religious establishment suits and Karen O'Connor's (1980) of sex discrimination cases, both of which provided ample evidence of group involvement in the judiciary, some suggested that Hakman's analysis

was bound to past Court eras and that pluralism in the judicial process was on the rise.

Indeed, since 1980, scholars have published nearly fifteen books and thirty articles directly on the subject of interest group litigation. Also significant is that textbooks on interest groups (see Hrebenar and Scott 1982; Schlozman and Tierney 1986; Berry 1989) and on the Court (see Baum 1985; Wasby 1988) devote full sections, if not chapters, to the subject, when just a few years earlier a paragraph would have sufficed.

Clearly, difficult problems of data collection remain, but no longer do scholars have to be exhorted to this area of inquiry. A new generation of analysts finds the counterintuitive aspect of group involvement in the judiciary intriguing, rather than bemusing. And their interest has created a new conventional wisdom about group litigation: that "the external environment under which the judiciary operates is, in important respects, similar to that of other governmental institutions" (Epstein, Kobylka, and Stewart 1991, 1).

Needless to say, these recent studies have opened many doors into the world of group litigation. In the next sections, we enter that world, reporting current knowledge of the strategies and tactics of group litigation, the kinds of groups involved in the judiciary, the sorts of issues that attract groups' attention, and the issue of efficacy—do groups matter? We also speculate on some unexplored terrain, areas of interest for future research.

Strategies and Tactics of Group Litigation

In the introduction to this chapter, we told of the story of Justice Black's reaction to his face-to-face lobbying encounter with Tommy Corcoran. If that story carries any moral, it is this: groups and their representatives must avoid direct encounters with justices and judges. This is a reality of the legal system to which virtually all scholars submit; even Truman recognized that direct lobbying of judges would violate the norms of the judiciary. As Truman and others (see Vose 1959) demonstrated, to avoid breaching these traditions while attempting to influence judicial decisions, groups rely on two legal strategies: they sponsor test cases and they file *amicus curiae* briefs. These practices continue to be the major approaches used by organizations to influence court decisions.⁷

Sponsorship of Test Cases

In general, groups sponsor test cases—those designed to test specific legal arguments—by supplying the attorneys and funds necessary to carry an appeal to the U.S. Supreme Court. Consider the 1988

case of *Bowen v. Kendrick* (108 S.Ct. 2562 [1988]), in which American Civil Liberties Union (ACLU) attorneys helped other organizations, taxpayers, and clergy to challenge the Adolescent Family Life Act (AFLA), a law providing federal grants to agencies and groups, including those with ties to religious organizations, for "services and research in the area of premarital adolescent sexual relations and pregnancy."⁸ The alleged purpose of this act was to address the "severe adverse health, social, and economic consequences" associated with adolescent pregnancy, by involving a "wide array of community groups. . ." (42 U.S.C. 300z[a][5]). The law, though, placed several restrictions on potential grantees; most important, they could not use any AFLA funds to promote abortions.

In its legal briefs and in oral argument before the U.S. Supreme Court, the ACLU alleged that the process by which groups obtained funding under the act (and their use of those monies) violated the religious establishment clause of the First Amendment. That is, because some of AFLA's grantees were religious organizations, the ACLU argued that the act permitted too much intermingling of church and state.

To substantiate these claims, ACLU attorneys loaded their briefs with facts about the selection process; for example, they claimed that the director of the program selected grant evaluators who were affiliated with religions and who "understood that the legislation was intended to require religious indoctrination to achieve" its goals. They also presented profiles of some of the organizations that obtained funding and of those that were rejected; indeed, their data indicated that a large proportion of applicants receiving grants were affiliated with religious groups, while those rejected "were told they had not received funding because their programs promised 'no involvement of religious groups.'" Finally, they excerpted sections from successful applications to demonstrate that organizations were, in fact, using government funds to promote religious views. As one applicant, the Southeastern Missouri Association of Public Health Administrators, wrote:

One of the most obvious tools which can be used to change the attitude of young people toward sexual activity . . . is the use of the religious foundation as a support for sexual education. Most major religions see sexuality as being of God and can therefore . . . help young people to learn about their bodies and the values that relate to their sexual functioning in a context that is consistent with the tenants [*sic*] of their particular faith.

As *Bowen* highlights, groups often supply litigants with attorneys and present legal arguments to the Court. Previous analyses reveal, though, that direct sponsorship can entail a good deal more (see Wasby

1986). Consider *Muller v. Oregon* (208 U.S. 412 [1908]), a test case sponsored by the National Consumers' League (NCL), one of several organizations founded during the Progressive Era to secure protective legislation for women workers (Vose 1957, 1972). To accomplish this objective, NCL members lobbied state legislators across the country.

At first, this strategy worked quite well: by the early 1900s several states had enacted maximum-hour work laws. The NCL's victory in Oregon, which passed a ten-hour work law for laundresses in 1903, was particularly encouraging. Within two years, though, an employer challenged the Oregon law, arguing that it violated constitutional guarantees. Indeed, his argument rested on solid legal ground: in *Lochner v. New York* (198 U.S. 45 [1905]), the U.S. Supreme Court had ruled that a ten-hour work law for bakers went beyond the state's "police powers."

With nothing but unfavorable precedent on their side, Oregon state attorneys were in a bit of a quandary; after all, they had to find some legal ground on which to defend their state's law. The NCL, too, was troubled; having worked hard to secure passage of the law, it did not wish to see its victory nullified by a court. To safeguard against this possibility, NCL leaders contacted Boston attorney and future Supreme Court justice Louis Brandeis.⁹ After considering their predicament, Brandeis agreed to assist NCL leaders under two conditions. First, he demanded sole control over the case, a condition to which Oregon happily acceded. Second, he asked NCL members and volunteers to gather "*facts, published by anyone with expert knowledge of industry and its relationship to women's hours of labor*" (Goldmark 1953, 148-149, italics in original). Given the unfavorable state of the law, Brandeis needed such data to bolster his case.

Within two weeks NCL workers compiled vast statistical evidence indicating that long work hours could be detrimental to women's reproductive systems. Brandeis's resultant legal argument before the U.S. Supreme Court, often called the Brandeis Brief, relied almost exclusively on this "social science" data: the 113-page brief contained but 2 pages of legal argument! Nonetheless, in a unanimous decision, the Court adopted Brandeis's position; in fact, it cited and "actually commended" the Brandeis brief (Vose 1972, 173).

The point of this story is quite simple. Supplying attorneys to needy litigants is insufficient. Rather, we now know that groups seeking to sponsor litigation often prime the Court before they enter its corridors. Like the NCL, many other organizations rely on social science evidence to do just that (see Loh 1984). Most illustrative was the NAACP LDF's legal brief in *McCleskey v. Kemp* (481 U.S. 279 [1987]), which presented statistical evidence indicating that Georgia

juries were more likely to give the death penalty to blacks (those who had killed whites) than to whites. Other group attorneys write journal articles to achieve similar ends (Newland 1959). Prior to its litigation involving racial discrimination in housing, the NAACP LDF and its allies "inundated law reviews with articles presenting constitutional justification for their cause," which they later cited in their legal briefs (Epstein 1985, 13; see also Vose 1959).¹⁰ Moreover, interest group preparation for litigation may begin even before a case has crystallized. In *Muller*, the NCL had no choice but to defend the legislation it had initiated. It is often true, though, that groups take offensive postures, initiating challenges to laws, not defending them. In such circumstances, groups must formulate priorities and then select cases best meeting those objectives (Sorauf 1976). Again consider *Bowen v. Kendrick*. If the ACLU wanted to participate, it had no other option but to mount a challenge to the Adolescent Family Life Act. After all, because Congress had already passed the law, the organization was forced into an offensive posture.

Given the complexity involved in directly sponsoring litigation, why do groups even attempt to lobby the judiciary? After all, would it not have been easier for the NCL to have allowed Oregon attorneys to defend their state's laws or for the ACLU to have watched passively as citizens and clergy hired their own counsel to challenge the Adolescent Family Life Act? Groups and scholars offer a number of explanations. First, it is arguably true that many organizations have insufficient status to accomplish their objectives in the more political branches and processes of government. The most obvious example of this was the NAACP's quest to attain equal status for blacks. When that organization formed in 1909, southern state legislatures denied blacks access to their floors, placed barriers to the ballot and to quality education, and so forth. Because such attitudes made it virtually impossible for the NAACP to achieve its objectives in traditional arenas, it turned to the courts. As Richard Cortner (1968) has argued, the NAACP and other *politically disadvantaged* groups

are highly dependent upon the judicial process as a means of pursuing their policy interests usually because they are temporarily or, even permanently, disadvantaged in terms of their ability to attain successfully their goals in the electoral process, within the elected institution or in the bureaucracy. If they are to succeed at all in the pursuit of their goals they are almost compelled to resort to litigation. (p. 287)

Put in this context, the ACLU was the politically disadvantaged group in the *Bowen* litigation because a majoritarian branch of government, Congress, had enacted the AFLA. To challenge it, then, the ACLU

was forced into legal arenas. And, even there, it had to counter the arguments of the U.S. solicitor general, who represents the U.S. government in Court—no small feat for any organization!¹¹

Many studies conducted in the 1970s and early 1980s (see O'Connor 1980; Wenner 1984) reinforced Cortner's basic conclusion: in general, it is politically disadvantaged groups that seek redress through the legal system. Yet since most of these analyses focused on organizations representing inherently disadvantaged groups (such as blacks, women, environmentalists), such empirical verification was inescapable: studies solely of disadvantaged groups that use the courts are bound to find that such interests do, in fact, litigate.

In the late 1980s, though, when it became apparent that many groups, seemingly representing "advantaged" interests, were using the courts, some began to question seriously the generalizability of Cortner's thesis. Why, for example, were business interests and trade associations turning to court litigation? After all, one could hardly label the Chamber of Commerce or the American Booksellers' Association disadvantaged interests. Consider even the National Consumers' League—that group actually won in state legislatures before moving into the legal system.

As more and more apparent exceptions emerged to Cortner's proposition, scholars (see Gates and McIntosh 1989) began to suggest other motivating factors behind group litigation. Some hypothesized that, like the NCL, many of today's organizations go to court to support laws for which they fought in the elected institutions. After Congress passed legislation limiting Medicaid funding for abortions in 1976, pro-life groups went to court to defend it, fearing that the Carter administration would provide inadequate representation (see Epstein 1985). Others argued that because many groups now perceive the Court as the final arbiter of the law, they believe that a victory there has a degree of permanency often lacking in congressional legislation. To see the wisdom in this belief, we only have to consider the Jehovah's Witnesses' successful litigation campaign to overturn mandatory flag salutes (pledges of allegiance).¹² Despite public opinion, protests, and state legislation to the contrary, it stands as good law. Still another proposition was that organizations found themselves in adversarial relations with groups that were litigating and thus had no choice but to oppose their efforts in the judicial arena. Seen in this light, once the ACLU and other pro-choice groups moved the abortion debate into the legal system, they practically forced pro-life organizations to follow suit (see Rubin 1987).

Recent research has begun to test systematically some of these explanations. Patrick Bruer (1987) surveyed 712 Washington, D.C.-

based organizations, asking them to enumerate their reasons for using litigation (if they did). His results suggest that several factors contribute heavily to the decision to litigate: the policy opposition faced by the group in other arenas, the scope of the group's interests and its policy focus, and the legal environment. Others, such as the group's litigation budget and its constituency (that is, whether it represented minority interests), had no apparent explanatory value.

This and several other attempts at exploring group litigation from a broader perspective are not without problems. In Bruer's case, the source from which he draws his sample—*Washington Representatives*—may help explain his results. This reference contains only Washington, D.C.-based organizations, while many litigating groups, particularly those representing minority interests (such as the NAACP LDF) are located outside of the D.C. area. Thus, Bruer's sample may have been less than reflective of the litigating population.

These issues aside, survey research is an important advancement for this line of inquiry. As Bruer notes:

Much of the research on use of the courts by organizations to influence public policy has focused on particular types of groups litigating in selected policy areas. The in-depth case studies suggest some broader hypotheses to account for organizational use of litigation to achieve policy goals, *but do not provide the information needed to test the applicability of these possible explanations across groups and issues.* (1987, 35; emphasis added)

Survey research of the sort he conducted can accomplish that objective if researchers take proper care in developing their sampling frame and, as we discuss later, in dealing with other issues related to scientific inquiry.

The Amicus Curiae Brief

Though its benefits are considerable, direct sponsorship also carries significant costs. Not only is it difficult to execute, but it can be extremely expensive to implement, running into hundreds of thousands of dollars. Moreover, just as it can produce extraordinary victories, direct sponsorship can result in devastating losses. Fifteen years after *Muller*, the NCL lost a major case involving minimum wage legislation.¹³ Some argue that this defeat ultimately led to the demise of the organization. For these and other reasons (see Barker 1967), many groups file amicus curiae briefs in addition to or in lieu of direct sponsorship.

The translation of the Latin *amicus curiae* is "friend of the court"; but this strategy actually involves befriending a party to a suit, not the Court.¹⁴ That is, nonparties file amicus curiae briefs in support of one

of the litigants in a case; filers themselves are not direct participants. Again, consider *Bowen v. Kendrick*. As illustrated in Table 13-1, organized interests filed thirteen amicus curiae briefs onto which more than eighty groups signed. Moreover, interests filed on both sides of the case: eight briefs supported the ACLU's position, while five asked the Court to uphold the act.

Beyond overcoming the deficits of the sponsorship approach, why do so many groups file these briefs? One reason is that they desire input into a case, but are unable to sponsor it. Americans for Effective Law Enforcement (AELE), founded in 1966 to reinforce the efforts of prosecutors in criminal cases, relies exclusively on the amicus curiae strategy. Because U.S. and district attorneys and other governmental litigators "sponsor" its position, this is the most direct way it can accomplish its objectives.

Sometimes groups file briefs at the request of other groups (see Caldeira and Wright 1988; O'Connor 1980). Such coalition building manifests itself in a number of ways; for example, again consider Table 13-1, which depicts briefs filed in *Bowen*. As we can see, almost thirty groups signed onto one brief, written by the National Coalition for Public Education and Religious Liberty.¹⁵

Finally, many groups believe that a well-crafted brief can influence the outcome of a Court decision. The ACLU holds this policy on amicus curiae activity: "Amicus curiae participation will ordinarily present no problems beyond simple questions whether an appropriate civil liberties question is involved and whether an amicus brief *will be helpful to the court* and generally advance the purpose of the ACLU" [emphasis added].¹⁶ Other group representatives agree, but for different reasons. One suggested that the amicus curiae is more effective than sponsorship because it allows them "to take a broader perspective" by "paring down other issues" of little interest. Another stated that his group thought the amicus to be a more "informed source [bringing] in more empirical intellectual data" than briefs filed by the parties.

In *Bowen*, we see all of these various views represented in more specific form. Catholic Charities, U.S.A., filed because it had financial interests at stake: it had received AFLA funding. Conversely, the National Family Planning and Reproductive Health Association participated because many of its members "sought AFLA funds and had been denied because they refuse[d] to abide by the anti-abortion . . . provisions." Religious organizations submitted amicus curiae briefs for myriad, and often conflicting, reasons. One organization, representing orthodox Jews, filed in support of the act, claiming that even though none of its constituents received AFLA funds, it was "concerned because religious organizations" should be able "to participate in social

Table 13-1 Amicus Curiae Participants in *Bowen v. Kendrick*

Groups arguing to strike down the law

1. Council on Religious Freedom
2. The Committee on Public Education and Religious Liberty
3. NOW Legal Defense and Education Fund, National Abortion Rights Action League, American Association of University Women, American Humanist Association, Black Women's Agenda, B'nai B'rith Women, Inc., Center for Law and Social Policy, Committee to Defend Reproductive Rights, Equal Rights Advocates, National Emergency Civil Liberties Committee, NOW, National Women's Health Network, National Women's Political Caucus, Northwest Women's Law Center, United States Student Association, Voters for Choice, Women's Law Project, Women's Legal Defense Fund, Zero Population Growth
4. American Public Health Association, American Psychological Association, Planned Parenthood Federation of America, Inc., National Family Planning and Reproductive Health Association, Inc.
5. National Coalition for Public Education and Religious Liberty (and members of its national organization: American Ethical Union, American Humanist Association, Americans for Religious Liberty, Board of Church and Society of the United Methodist Church, Central Conference of American Rabbis, Committee for Public Education and Religious Liberty, Council for Democratic and Secular Humanism, MCPEARL, Michigan Council about Parochialism, Missouri Baptist Christian Life Commission, Missouri PEARL, Nassau-Suffolk PEARL, National Association of Catholic Laity, National Council of Jewish Women, National Education Association, National Service Conference of the American Ethical Union, New York State United Teachers, Ohio Association for Public Association and Religious Liberty, People for the American Way, Public Funds for Public Schools of New Jersey, Union of American Hebrew Congregations, Unitarian Universalists Association), Advocates for Children of New York, Inc., Association for Supervision and Curriculum Development, National Association of Elementary School Principals, National Congress of Parents and Teachers, Sex Information and Education Council of the United States, Society for the Scientific Study of Sex
6. Anti-Defamation League of B'nai B'rith, Americans for Religious Liberty
7. Baptist Joint Committee on Public Affairs, American Jewish Committee, Americans United for Separation of Church and State
8. Unitarian Universalist Association, United Synagogues of America, Catholics for a Free Choice, and Episcopal Women's Caucus

Groups arguing to uphold the law

1. The Rutherford Institute and the Rutherford Institutes of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, Minnesota, Montana, Ohio, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia
2. Catholic Charities, U.S.A., Catholic Health Association of the United States
3. United States Catholic Conference
4. Catholic League for Religious and Civil Rights and Concerned Women for America
5. National Jewish Commission on Law and Public Affairs

Note: Numbers preceding group names indicate briefs filed.

Source: Adapted from BNA Microfiche Brief Series, Docket Number 87-253.

welfare programs that have legitimate secular objectives" (Brief of National Jewish Commission on Law and Public Affairs, 1988). Another Jewish group, however, argued against the law, suggesting that counseling often "occurs pursuant to overtly religious Christian curricula prepared by Churches . . . and involves proselytizing" (Brief of Anti-Defamation League of B'nai B'rith, 1988). Still other religious organizations were more concerned with the broader implications of the Court's decision on First Amendment law. So, too, women's groups presented a diverse range of reasons for participating. While the National Organization for Women (NOW) Legal Defense and Education Fund argued that the law "restricts and coerces women in their reproductive decisionmaking," Concerned Women for America claimed that the law wisely protected traditional family values.

What these examples suggest, of course, is that interest groups participate as *amici curiae* for many reasons. Even within the same litigation, as *Bowen* illustrates, groups attempt to advance their unique, and often divergent, perspectives.

Recent studies have attempted to sort through these seemingly idiosyncratic explanations to reach generalizations about *amicus curiae* participation. An important step in this direction was research reported by Gregory Caldeira and John Wright (1989b) in which they sought to explain organizational decisions to file *amicus* briefs on petitions for certiorari. To explore this issue, they sent surveys to all organizations ($n = 1,150$) that participated as *amici* during the 1982 term of the Court. In the end, they found that four factors contributed to the decision to participate: the significance of the case to the group's members, the "existence of conflict," keeping group members "satisfied," and the "perceived efficacy of the briefs" on the Court's decision. Other previously considered important indicators (such as the group's litigation budget and the number of staff attorneys) failed to contribute significantly to group decision making.

As we have already suggested, survey research is not flawless. For one thing, studies like Bruer's and Caldeira and Wright's, which paint broad pictures of group strategies and tactics, tend to lose some of the contextual and descriptive elements that made the works of Vose, Cortner, and others so intriguing. In short, just as we can criticize the case studies because they overemphasize detail and description, we can find fault with the opposite characteristics of survey research.

The discrepancy between the Bruer and Caldeira and Wright sampling frames brings another problem to light. Bruer sampled all organizations, including ones that do not litigate; Caldeira and Wright surveyed only known Court participants. Which approach is best depends on the nature of the research question. Bruer, in some ways,

cast his net broader than did Caldeira and Wright, focusing on litigation as but one strategy groups use to influence the governmental process. The alternative approach, though, tells us a great deal more about litigation per se.

Despite these concerns, broad-based survey research represents an important step. Though we may lose some of the detail about specific litigation campaigns (in the style of Vose and Cortner), we can now begin to test long-held propositions about strategies and tactics, which in turn will help us to develop a more precise picture of group involvement in the judicial process.

Concluding Remarks on Strategies

In the end our knowledge about the strategies and tactics groups use to advance their objectives has expanded greatly since the early writings of Truman and Vose. We have explored in some detail group use of sponsorship and of *amicus curiae* briefs and we know something of why groups use them.

Much work remains, though, before we have a fully developed picture of this aspect of group litigation. For one thing, have we tapped all the strategies groups use to influence the judiciary? The external environment surrounding Court cases of the last decade or so suggests that we have not. Again, consider the Court's 1989 abortion decision, *Webster v. Reproductive Health Services*. Although groups filed seventy-eight *amicus curiae* briefs, their litigation strategy was far broader: after the Court announced its intention to hear the case, groups on both sides of the issue held vigils outside of the Court, marched and protested throughout the nation, and sought to influence public opinion through the media. In short, pro-life and pro-choice forces treated the Court as if it were Congress considering a piece of legislation, not a judicial body deliberating points of law. This sort of group involvement in cases—attempts at manipulating the external environment within which the Court operates—is a fascinating aspect of the litigation process. Yet, except to note that some groups attempt to garner publicity for their causes (see O'Connor 1980; Olson 1984), we have failed to include it in our discussions of group strategies and tactics.¹⁷

For another, we have not fully explored the kinds of tactics groups use to influence judicial decisions once they decide to sponsor a case or participate as *amicus curiae*. Consider again Table 13-1. One of its most striking features is the number of groups signing on to each *amicus curiae* brief. Such massive participation suggests that groups are attempting to build coalitions, to present the Court with united fronts. Again, coalition building as an interest group tactic has been the subject

of many works that explore decision making in the elected institutions (see Wilson 1973; Hall 1969; Salisbury et al. 1987). Yet beyond acknowledging that the average brief contains multiple interest group co-signers, we have left unaddressed many questions: What kinds of groups form alliances, how do groups with generally divergent interests unify around particular legal causes, and what kinds of litigation networks have developed among various organizational types?¹⁸

Finally, we need to consider issues of research design and strategy. Are questions of group strategies and tactics best addressed through survey research or through case studies? Or perhaps we should blend methodologies so that we can capture all aspects of the phenomenon.

Addressing these and related questions and concerns will not be an easy task; it will require scholars to reconsider some basic issues of research design and to reopen substantive debates by plowing through fields of court briefs and opinions and group records. Yet if we are to understand fully the whys and hows of group litigation, we must turn our attention to these evolving issues.

The Frequency of Organized Participation before the U.S. Supreme Court

How much litigation engenders group participation as sponsors and amici curiae? Although this is a basic question, it is somewhat difficult to address. As we mentioned earlier, Court records may provide a less than complete picture of the extent of interest group involvement in the judiciary. Even legal briefs filed by attorneys sometimes fail to indicate group presence when some does exist. Nevertheless, in the absence of a better alternative, we can use these briefs and other case records to provide some general indication of the extent to which groups participate in litigation.

Based on our examination of Court records and briefs, we find that during the 1987 term of the U.S. Supreme Court, organized interests represented appellants in 38.2 percent of the cases and appellees in 44.2 percent.¹⁹ Overall, they participated as sponsors in 65.4 ($n = 89$) of the 136 cases decided with full opinion. Fully 80 percent included the presence of at least one amicus curiae brief filed by organized or governmental interests; indeed, the average "amici" (that is, a case with one or more amicus briefs) attracted 4.2 briefs.²⁰ All in all, during the term, the justices received nearly 460 amicus curiae briefs onto which more than 1,600 groups and governmental interests signed!

As impressive as these figures might seem, they are even more so if we consider Table 13-2, which displays past and present interest group involvement as amicus curiae. Based on his data for the years between

Table 13-2 Amicus Curiae Participation before the Supreme Court

Years	Cases with amicus curiae briefs		Total number of cases
	%	N	
1928-1940	1.6	3	181
1941-1952	18.2	67	368
1953-1966	23.8	149	626
1970-1980	53.4	449	841
1988 ^a	80.1	109	136

^a Represents the 1987 term. Includes all cases, not solely those involving noncommercial issues.

Sources: For 1928-1980, Karen O'Connor and Lee Epstein, "An Appraisal of Hakman's 'Folklore,'" *Law and Society Review* 16 (1982): 701-711. (Reprinted by permission of the Law and Society Association.) For 1988, collected by the author.

1928 and 1968, it is easy to see why Hakman (1969) concluded that a view of Supreme Court litigation as "a form of political action" or "pressure group activity" was mere "scholarly folklore" (p. 199). A study (O'Connor and Epstein 1982) examining participation between 1970 and 1980 found a greater group presence, but, as we can see, far below the level reported here.

What factors might account for this rather dramatic increase in group participation before the Court? Though we can only speculate, three seem particularly relevant. First, the number of organizations dedicated to using litigation to achieve policy ends has skyrocketed over recent years. In 1976 a survey of public interest law (Council for Public Interest Law) included 92 groups; a similar one published in 1989 (O'Connor and Epstein) included more than 250. Stated simply, more organizations will inevitably generate more group-backed litigation. Second, as Schlozman and Tierney (1986) have demonstrated, more pressure group activity exists in general: "It is not simply that there are more organizations on the scene, but that these organizations are more active as well . . . [there is a] remarkable increase in the volume of organized activity" (p. 388). Overall, then, during the past decade, interest groups have moved into all arenas of government at record levels.²¹

Third, the Supreme Court itself has encouraged organized group litigants to take refuge in its corridors (see Orren 1976; O'Connor and Epstein 1984a). For one thing, the justices have freely acknowledged the special role "private attorneys general," that is, public interest law groups, can play in litigation. Writing in 1963, the Court (*NAACP v.*

Button, 371 U.S. 415 at 429) proclaimed, "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts... Under the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances" (pp. 429-431). Fifteen years later, the justices (*In re Primus*, 436 U.S. 412 [1978]) reinforced this view, acknowledging the role played by the sponsor of *Bowen*, the ACLU, "in the defense of unpopular causes" (p. 427). For another, the Court has upheld congressional legislation authorizing awards of attorneys' fees to groups defending the public interest in particular areas of the law. Such monies have allowed groups to pursue a wide range and volume of litigation (O'Connor and Epstein 1985).

Finally, the Court has taken few steps to discourage groups from participating as *amicus curiae*, in particular, even though its rules allow for it to do so. That is, the Court can reject motions to file third party briefs if the parties refuse to give consent.²² Between 1969 and 1981, however, it denied only 11 percent of the 832 motions for leave to file as *amicus curiae* (O'Connor and Epstein 1983b).

Why the Court has allowed, even encouraged, group use of the judiciary has been the subject of a great deal of speculation. Some have suggested that the justices, like members of Congress, view groups as the fonts of important information that otherwise would not have come to their attention. Evidence of this, though, is somewhat circumstantial. Karen O'Connor and I (O'Connor and Epstein 1983b) found that justices frequently cite *amicus curiae* briefs in their opinions; others, conducting studies of particular cases or groups, aver that legal opinions and briefs often parallel each other. Illustrative is the case of *South Dakota v. Opperman* (428 U.S. 364 [1976]), in which the Court considered the constitutionality of car searches (inventories) pursuant to impoundment. Chief Justice Burger's majority opinion, which upheld the search, relied heavily on a survey conducted by an *amicus*, indicating that impoundment inventories rarely garnered criminal evidence (see Epstein 1985). Others suggest that some members of the Court, particularly those who have held political office, view interest groups as a routine part of the governmental process, including that of the judiciary. Interviews with several justices, in fact, reveal that they would be surprised if organizations did *not* try to influence their decisions (see Epstein 1989b).

Regardless of the Court's motivation, the increasing presence of organized interests in judicial proceedings has certainly transformed the environment within which it operates. Consider Hakman's (1969) conclusion about that environment in 1969: that cases "are carried to the Supreme Court primarily to resolve the immediate disputes among

private adversaries" (p. 245). Surely, the converse is true today; if anything, today's cases represent the struggle of interests to etch into law their broader policy views. Virtually every brief filed in *Bowen* attested to this fact, indicating to the Court the wide-ranging effect its opinion would have on the larger body of First Amendment law. Some even pointed to the significant financial and social implications of the litigation. As Catholic Charities suggested, unless the Court upheld the act, "the delivery of important social services will be jeopardized and curtailment of these services will hurt literally tens of millions of needy persons." Hakman's second conclusion, that "contrary to some scholarly speculation, litigants in court cases are not pawns or symbols and are usually not manipulated by behind the scenes groups or organizations" (1969, 246), also may have been true twenty years ago, but now is controvertible. The vast majority of court cases attract group participation. On that score, then, Cortner's (1975) observation is far more apt: "Cases do not arrive at the Supreme Court's doorstep like abandoned orphans in the night" (p. vi). Instead, as *Bowen v. Kendrick* illustrates, a great many Court disputes exist because a group brought them to the attention of the justices.

As Table 13-2 reveals, undoubtedly, group presence in the judicial process has reached an all-time high. Pluralism is the new reality in Court, no longer a part of scholarly folklore. Indeed, the study of this particular dimension of group litigation has advanced light years since Hakman wrote in 1969. Scholars now recognize that they must dig deep into the Court's records simply to identify group participants. Even so, many important questions remain. For one, has group presence increased in other judicial forums? Research on U.S. courts of appeal (McIntosh and Parker 1986) and on state supreme courts (Epstein 1989a) indicates that groups are moving into these arenas, albeit at a slow pace. We do, however, have reason to suspect that groups will be stepping up their lobbying efforts in state supreme courts, in particular. As the U.S. Supreme Court has conferred greater authority to states in diverse legal areas, their courts of last resort will become more important and influential policy makers (see Tarr and Porter 1988). A wide range of interests might now find these forums appealing targets for their lobbying efforts.

For another, we have yet to examine the incidence of group litigation from a longitudinal perspective, asking what drove up organizational litigation rates over time. As Table 13-2 suggests, between 1928 and 1987 groups moved into the judicial arena at an astounding pace. Although several factors probably contributed (such as more groups, awards of attorneys' fees) to this phenomenon, we have not explored it systematically.

In my view, this is a particularly important research question because its answer might reveal a great deal about the Court as an evolving institution. When patterns of behavior, such as marked increases in group participation before the Court, “experience abrupt changes . . . they should be treated not as idiopathic curiosities, but as perplexing phenomena worthy of systematic analysis” (Walker, Epstein, and Dixon 1988, 361). Indeed, research that examined the Court from a macro, longitudinal perspective has provided us with a richer understanding of how previously anomalous practices become norms (see Caldeira and McCrone 1982). Certainly we should try to do the same for interest group litigation.

Participants in Supreme Court Litigation

Are certain kinds of groups more likely than others to litigate in the U.S. Supreme Court? Broad-based research, using interest groups as the unit of study, suggests not. One analysis (Schlozman and Tierney 1983) found that nearly 75 percent of all organizations have litigated at least once. The Supreme Court Database Project reinforces this conclusion: between 1952 and 1986, almost 2,400 organizations, falling into twenty substantive categories (health groups, labor unions, and so on), appeared before the Court. *Bowen* again is exemplary: as Table 13-1 indicates, participating groups ranged in orientation from liberal to conservative, from religious to secular, and from overtly feminist to traditional.

If we look beyond *groups* as the units of analysis to the cases themselves, however, a slightly different picture emerges. Tables 13-3 and 13-4 display litigants, organized by the sorts of interests they represent, participating as sponsors and amicus curiae in the 1987-1988 cases.²³

Let us first consider groups as sponsors of litigation. As Table 13-3 depicts, commercial interests (such as a chamber of commerce, Delta Airlines) dominated pressure group activity in the Court. Indeed, if we exclude governmental concerns (for example, the United States, Texas, Dallas), commercial interests sponsored more litigation than all others combined. As we might suspect, legal groups (such as the American Bar Association, Pacific Legal Foundation) also sponsored a significant number of cases. They appeared on behalf of appellants or appellees in 18 of the 136 cases.

Turning to the amicus curiae participants depicted in Table 13-4, we see that two interests dominate filings: governmental and commercial ones. Collectively, they account for nearly 50 percent of the briefs. Legal and civil liberties/criminal justice groups filed another 25 percent, with the remaining quarter scattered among the various interests.

Table 13-3 Sponsors of Supreme Court Litigation, 1987 Term

Sponsor	Appellants		Appellees	
	%	N	%	N
Governments	39.7	54	35.3	48
Commercial interests	23.5	32	27.2	37
Private counsel	22.1	30	20.6	28
Legal groups	5.9	8	7.4	10
Labor unions	2.9	4	2.2	3
Education	1.5	2	—	—
Health	1.5	2	1.5	2
Religion	1.5	2	1.5	2
Other groups	1.5	2	2.2	3
Civil liberties	—	—	2.2	3
Total		136		136

Source: Data collected by the author.

These data are of considerable interest for a number of reasons. For one, despite new research to the contrary (see Caldeira and Wright 1990; Bruer 1987), conventional wisdom certainly holds that public interest law groups and civil rights/liberties groups dominate litigation. Although they are supporting players, based on the data presented here, they are far from the leading participants. That distinction belongs to commercial groups and governmental interests.

This finding raises a second point of interest. Many scholars have tended to conceptualize court “lobbying” as something entirely different from what occurs in the legislative and executive branches. To some extent, this is a reasonable distinction—the kinds of strategies and tactics used by groups in judicial arenas, for example, are not like those employed elsewhere. On the other hand, though, the sorts of participants engaged in judicial, executive, and even legislative lobbying are monolithic. That is, contrary to conventional beliefs, the same sorts of interests that lobby other branches of government also do so in the Supreme Court. Writing in 1950, E. E. Schattschneider (1966) noted that groups representing *advantaged* interests were far more abundant and influential in the governmental process. As Schlozman and Tierney (1986) found more than three decades later, “It is clear that Schattschneider’s observations . . . are apt today. Taken as a whole, the pressure community is heavily weighted in favor of business organizations” (p. 68).

Though these data reveal a great deal about the differing participants before the Court, they are more suggestive than explana-

Table 13-4 Amicus Curiae Participants in Supreme Court Litigation, 1987 Term

<i>Amicus curiae participant</i>	<i>Percent of total amicus curiae filers</i>	<i>N</i>
Commercial interests	24.3	111
Governments	24.3	111
Legal groups	12.9	59
Civil liberties	10.7	49
Religion	4.8	22
Public affairs	4.4	20
Women	3.7	17
Health	3.7	17
Education	3.3	15
Labor	3.3	15
Other groups	2.9	13
Consumer	1.5	7
Total		456

Note: Includes only the interest that filed the brief, not cosigners.

Source: Data collected by the author.

tory: by describing the sorts of interests currently appearing before the Court, they help us frame the kinds of questions we might ask in the future. One that clearly arises involves the role of business interests in litigation. Like other recent studies, ours found that the business community—trade and professional associations and businesses and corporations—is among the most active legal participants. To date, however, the vast majority of research has focused on public interest law firms and other legal groups. Certainly, then, the time has come for us to turn our sights to the role these business groups are playing in the litigation game and the way their participation may be affecting the legal environment.

Another issue involves our categorization of interest types: How should we classify groups appearing before the Court? This is an important question because we recognize that different kinds of groups behave in different ways. Caldeira and Wright (1990), for example, found that some groups (such as public interest law firms, citizen advocacy groups) are less likely to participate at the certiorari stage than on the merits; the converse is true of corporations. O'Connor and I (O'Connor and Epstein 1983c) demonstrated that liberal groups generally prefer to sponsor cases while conservative groups are more likely to file amicus curiae briefs (see also Bradley and Gardner 1985).

Though we recognize that different group types “manifest different” behavior “relevant to political action” (Kobylka 1987, 1065), we have not reached consensus over the most appropriate way to categorize groups. Caldeira and Wright based their classification on membership characteristics; the Supreme Court Database Project used a more substantive schema (health, education, and so on); and O'Connor and I used ideology. But certainly other possibilities exist; for example, we could adopt Jack Walker's (1983) typology, in which he classified groups by their sources of income. Or we could use Mancur Olson's (1965) and James Q. Wilson's (1973) categorization, which is based on group goal structures.

In my view, though, it is not necessary for all litigation scholars to classify groups in the same way; even students of the interest group process, generally speaking, have yet to do so. What is important, though, is that we understand the implications of our results and how they might vary solely because of the way we have classified groups. Future research ought to be sensitive to these issues, perhaps demonstrating the extent to which our findings are merely artifacts of a particular typology or classification scheme.

Issues Attracting Amicus Curiae Participation

What sorts of issues generate organizational participation? Table 13-5 depicts the percentages of sponsorship and amicus curiae participation in the different kinds of issues the Court heard during the 1987 term.²⁴ Let us first consider the sponsorship rates. Not surprisingly, six of the eight issues attracting more than average group attention represent topics of traditional concern to organizational litigants. As Frank J. Sorauf's (1976) work on religious cases and Lettie Wenner's (1984) on environmental campaigns make abundantly clear, these areas hold considerable interest for vast networks of group litigants. By the same token, it is not surprising to find substantial group interest in cases involving finances; after all, as shown in Table 13-4, business interests are among the most active Supreme Court litigators.

Based on other scholarly analyses, we also are less than startled by the dearth of participation in cases of criminal law and procedure. For a number of reasons, this area is not particularly ripe for group participation. As one source (O'Connor and Epstein 1984a) explains: “Indigent criminal defendants [already] enjoy constitutionally guaranteed representation. . . . While this right does not apply to all appellate stages . . . public defender offices or court appointed counsel regularly fill this void.” Moreover, “because of the nature of the criminal justice process, interest groups generally are unable to foresee

Table 13-5 Participation of Groups as Sponsors of Litigation by Issue, 1987 Term

Issue	Cases sponsored by groups ^a		Cases with amicus briefs		Total number of cases ^b
	%	N	%	N	
Religion	100.0	4	100.0	4	4
Environment	100.0	8	87.5	7	8
Procedure	100.0	8	75.0	6	8
Labor relations	91.7	11	100.0	12	12
Finances	85.0	17	65.0	13	20
Freedom of expression	76.9	10	100.0	13	13
Benefits	71.4	5	85.7	6	7
Discrimination	69.2	9	92.3	12	13
Property/boundaries	66.7	2	100.0	3	3
Torts	60.0	3	60.0	3	5
Immigration/deportation	25.0	1	50.0	2	4
Federalism/institutionalism	25.0	1	100.0	4	4
Criminal law	22.6	7	64.5	20	31
Total	65.1	86	79.5	105	132

^a Excludes governments as sponsors.

^b Four cases did not fit compatibly into any of the above categories. Three of the four were sponsored by organized interests. All four contained at least one amicus curiae brief, raising the total percentage to 80.1.

Source: Data collected by the author.

the 'test case' quality of most criminal prosecutions and therefore do not want to risk limited resources on trivial cases" (pp. 72-73).

Turning to amicus curiae participation, we first note that most of the varying issues generated substantial levels of amicus curiae briefs; virtually all areas exceed the 50 percent mark found for the 1970-1980 years. Given that 109 of the 136 cases contained at least one brief, this is far from surprising. Interestingly, though, the overall patterns have remained rather stable since the 1970s. Our study (O'Connor and Epstein 1982) of noncommercial litigation, for example, found that cases involving labor, discrimination, and First Amendment issues generated the most participation. Today we see that those areas continue to attract group interest. Moreover, in the 1970-1980 period, groups filed amicus curiae briefs in only 36.8 percent ($n = 120$) of the 326 criminal cases; though that figure rose to 64.5 percent in 1988, criminal law remains as one of the legal areas least likely to generate group participation.

The data displayed in Table 13-5 provide some indication of interest group involvement in particular legal issues before the Court.

They reveal the presence of an active pressure group community, which has penetrated deeply into the Court's plenary docket. What they might conceal, however, are possible interactions between groups and issues, two of which seem likely. First, as we know, the Court's docket periodically undergoes an evolutionary process: it closes the window on some legal areas, while opening it to others (Pacelle 1987). What role do organized interests play in this process? Do they provide justices with the levers used to pry open some areas of the law to judicial scrutiny and with the hammers used to shut others? Previous analyses suggest that groups, in fact, do play some role in setting the Court's agenda. Case studies demonstrate that organizations brought to the Court's attention some of the following issues: capital punishment (Meltsner 1973), abortion (Rubin 1987), gender-based discrimination (O'Connor 1980; Cowan 1976), racially based discrimination (Kluger 1976; Vose 1959; Cortner 1988), and free speech (Cortner 1975). Work by Caldeira and Wright (1988) argues that briefs filed by organized interests help the Court to set its plenary docket, perhaps cuing it to important issues. Future work should combine these two approaches, focusing systematically on the particular substantive issues groups bring (and do not bring) to the justices' attention.

Another likely interaction occurs in the opposite direction—the effect of the Court's resolution of particular issues on group decision making. Joseph Kobylka's (1987) research argues that groups can respond to Court decisions in one of three ways: they can exit the arena, they can increase their efforts, or they can continue to seek redress through the legal system. Through use of an experimental design, Kobylka sought to discover which of these options libertarian groups selected in response to a major legal shift in obscenity law. In general, he found that politically motivated organizations (such as the ACLU) opted out, while groups with material interests mobilized and accelerated their court efforts.

Kobylka's study is quite illuminating: not only does it suggest that groups play a role in setting the Court's agenda, but it also demonstrates that organizations respond to changes in the legal environment. Future research should continue along these lines, exploring specific interactions between the Court and organizations and how they might vary by type of group and legal issue.

Issues of Efficacy

The strategies and tactics, frequency, and issues of interest reveal a great deal about group litigation in the U.S. Supreme Court. The picture is less than complete, though, because it fails to provide any indication of whether groups, as sponsors or as amici,

have any effect on judicial decision making. In other words, do groups matter?

In large measure, the answer to the question depends on how we define *matter*. One way is to ask whether groups influence the Court's decision to hear cases on the merits. That is, do group-backed cases stand a better chance of receiving full treatment by the Court? The answer is, unequivocally, yes. As recent research (Caldeira and Wright 1988) suggests:

When a case involves real conflict or when the federal government is a petitioner, the addition of just one amicus curiae brief in support of certiorari increases the likelihood of plenary review by 40%-50%. Without question, then, interested parties can have a significant and positive impact on the Court's agenda by participating as amici curiae prior to the Court's decision on certiorari or jurisdiction (p. 1122).

Another way scholars explore issues of group efficacy is to look at the end of the judicial process, asking whether group-sponsored litigation has a broader impact on society. Research published in 1987 by Joseph Stewart and James Sheffield addressed this very issue, examining whether group cases affected "black mobilization in an environment most resistant to change"—counties in Mississippi. The results indicate that, in fact, litigation sponsored by civil rights organizations helped "boost black voter registration and black candidacies for public office" (pp. 780-781).

Clearly, then, groups *do* make a difference at the onset (the decision to hear cases) and at the end (the impact of decisions) of the judicial process. But what about at that important middle stage—do groups actually affect the justices' opinions? Once again, we can turn to a variety of indicators of "effect." For one, we can look at the overall success of group and nongroup litigants; this tells us whether groups are winning more cases in particular legal areas than private counsel. Past studies, relying on success rates as indicators of interest group efficacy, reveal that groups do win more cases. Susan Lawrence's (1989) analysis of the Legal Services Program (LSP), for example, discovered that it "secured victories in 62 percent of their 119 Supreme Court cases." Based on this and other findings, she concluded that "the LSP's appellate advocacy and the Court's review of its cases gave the poor a voice in Supreme Court policymaking and doctrinal development" (p. 270).

Table 13-6 depicts success rates for group- and nongroup-sponsored cases involving discrimination decided during the 1987 term. Though the number of cases is rather small, a pattern certainly emerges. Whether groups support the party alleging discrimination or

Table 13-6 Success Rates in 1987 Term Cases Involving Discrimination

	Successful cases		Total number of cases
	%	N	
Success of parties <i>alleging</i> discrimination			
Cases sponsored by groups	69.2	9	13
Cases not sponsored by groups	80.0	4	5
Cases not sponsored by groups	62.5	5	8
Success of parties <i>defending</i> claims of discrimination			
Cases sponsored by groups	30.8	4	13
Cases not sponsored by groups	50.0	2	4
Cases not sponsored by groups	22.2	2	9

Source: Data collected by the author.

defending claims of discrimination, they win at greater rates. When groups charged discrimination, they attained 11 percent greater success than their nongroup counterparts; by the same token, group defendants of discrimination won 50 percent of their cases while all defendants of discrimination won 30.8 percent.

Another way to measure effect is to determine whether the justices adopt legal arguments advanced by groups. One study exploring the percentage of opinions citing amicus curiae briefs found that 18 percent mentioned a nongovernmental friend of the court. The 1987-1988 data indicate that almost 35 percent ($n = 38$) of all decisions in which at least one amicus curiae brief was filed mentioned directly a friend of the court brief. This finding again reinforces the notion that the justices find some utility in arguments made by amici, despite the large number of participants.

Finally, scholars have conducted studies of specific cases to determine what, if any, influence groups had on the outcome. Indeed, the first rigorous study of group litigation, Vose's (1959) *Caucasians Only*, was an analysis of the NAACP LDF's role in the restrictive covenant cases. Others, including Richard Kluger's (1976) exploration of the LDF and school desegregation litigation, and David Manwaring's (1962) of the Jehovah's Witnesses and the flag salute cases, followed similar approaches. And, not surprisingly, they reached the same conclusion: groups do affect decisional outcomes.

Hence, over the years, many different kinds of analyses have depicted organizations as winners in the litigation game, participants who rarely, if ever, lose cases. Most recently, though, several challenges

to this conventional view have emerged. The first was an empirical investigation, invoking an experimental design, to determine whether groups are more apt to win their cases than individuals. This study (Epstein and Rowland 1989) paired cases involving the same legal issues and decided the same year by the same judge; the only difference between the two was that one was sponsored by a group, the other by private counsel. It found no significant differences in judicial resolution of group and nongroup cases.

So, too, scholars now recognize that organizations are but one of many factors influencing the justices and that their models of group efficacy must contemplate such known determinants of judicial voting as *precedent*, *case facts*, and *ideology*. Again consider the ACLU's challenge in *Bowen*. On the surface, its arguments seemed to have merit—the Adolescent Family Life Act (AFLA) did involve government expenditures to religious organizations and thus might entail impermissible entanglement between church and state. Yet, only four of the nine justices adopted the ACLU's arguments; the majority voted to uphold the law.

Why did the ACLU lose *Bowen*? Though we can only speculate, the three factors specified above seem highly relevant. For one, the Court interpreted its own past decisions (that is, precedential cases) as working against the ACLU's claim. Chief Justice Rehnquist wrote for the majority that “this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs. To the contrary in *Bradfield v. Roberts* (175 U.S. 291 [1899]), the Court upheld an agreement between the . . . District of Columbia and a religiously affiliated hospital whereby the Federal government would pay for the construction of a new building on the grounds of the hospital.”²⁵

Moreover, the fact situation of *Bowen* was unfavorable to the ACLU's position. That the U.S. Congress had enacted the AFLA was a particularly acute problem for it because the Court rarely overturns federal legislation, and, more pointedly, has almost never done so in cases involving federal monies to religious organizations. Had a state legislature enacted the AFLA, the ACLU's chances for victory would have improved markedly.²⁶

Finally, we must consider the ideological predilection of the current Court. Scholars (see Kobylyka 1989) have portrayed the Burger and Rehnquist Courts as relatively conservative in the area of church-state relations. In fact, Chief Justice Rehnquist has “adopted the position that the [First Amendment] was intended only to prevent the establishment of a national religion” and not to dissuade other forms of intermingling between church and state (Redlich 1987, 90). It is hardly

surprising, then, that his opinion in *Bowen* ran directly counter to the ACLU's position.

What conclusions can we reach about the efficacy of interest group activity in the Court? On one hand, studies focusing on organizational litigants conclude that groups do, in fact, influence judicial decisions. Clearly, they affect the certiorari process and they seem to win a great proportion of their cases. On the other hand, we must temper those conclusions by considering the other forces that affect the course of judicial behavior. Seen in this light, interest groups are but one of many factors that contribute to the Court's output.

An important endeavor for future research, then, will be to determine the relative weight of this group contribution compared with other factors. This, of course, will be a difficult research challenge, and perhaps one that will force us to reconsider issues of group efficacy. For far too long, we have focused exclusively on litigation victories when, as this and other studies have indicated, groups do lose cases. Future research should seek to explore factors affecting the ability of organizations to win *as well as* those influencing defeats in the American legal system.

Conclusion

This chapter has explored the world of interest group litigation by focusing on patterns of organizational involvement during the Court's 1987 term and on a specific case decided during that term, *Bowen v. Kendrick*. Overall, this analysis has confirmed a great deal of our knowledge about group mobilization of the law. As conventional views suggest, groups are resorting to litigation in record numbers. The vast majority of court cases generate considerable interest from the pressure group community. Groups are continuing to use both tools of litigation—sponsorship and amicus curiae briefs—to influence the Court. In short, as Schlozman and Tierney observed of interest group activity in general, we find *more of the same* in the legal arena.

Conversely, there have been several changes in organizational use of the Court, which suggest interesting avenues for further research. These include:

- Other strategies groups use to influence Court decisions, such as protests and demonstrations
- Coalition building and group litigation networks
- Interest group participation in other judicial forums
- Factors driving groups into the judicial arena over time
- The role of the business community in court

- Interactions among case issues, their judicial resolution, and interest group decision making
- Interest group efficacy, with emphasis on group wins as well as group losses

Our exploration has also identified several areas, relating to the nature of scientific inquiry, which certainly deserve further consideration: classification schema and their effect on our findings, and appropriate sampling frames for survey research. In proposing these avenues of research, we recognize the many obstacles that lie ahead. If anything, this chapter has revealed that studying groups that litigate is a complex task, requiring scholars of the judicial process to explore unfamiliar terrain. Done with care, though, such analyses are bound to provide us with a greater appreciation and richer understanding of the courts, and of the governmental process more generally.

Notes

1. *Utah Public Service Commission v. El Paso Natural Gas*, 395 U.S. 464 (1969).
2. Organizations and other interests filed seventy-eight briefs in *Webster*, breaking the previous record of fifty-seven set in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (see Behuniak-Long 1989).
3. As Truman noted (1971), prior to Bentley scholars were concerned with formal institutional processes (how a bill becomes a law) or the output of those institutions (“the law”).
4. Truman mentioned two other works (Peltason 1955; Schmidhauser 1960), neither of which focuses exclusively on group litigation.
5. As I describe later in this chapter, many studies have reached a conclusion opposite Hakman’s, so that we now can apply his term to his own work—it represents scholarly folk wisdom.
6. I was fortunate to interview five members of the Supreme Court on the subject of interest group litigation. Though I found these interviews to be useful, I am still not entirely convinced about their legitimacy as primary data sources (see Epstein 1989b).
7. A third strategy is intervention. This occurs when a group “voluntarily interposes in an action . . . with leave of the Court” (Black 1968, 956). Because this is a difficult strategy to pursue, presenting numerous procedural obstacles, most groups eschew it for sponsorship or participation as *amicus curiae*.
8. In representing these various plaintiffs, ACLU attorneys had to demonstrate that they were the appropriate parties to bring suit. According to the ACLU’s briefs, the various clergy “alleged injury not only as taxpayers but also to their religious ministries.” Apparently, they held views “antithetical” to those AFLA wished to promote and thus were ineligible for funding (Brief for Appellees, 1988).
9. By obtaining its own counsel, the NCL also was ensuring that its position would be adequately represented in Court. In *People v. Williams* (189 N.Y. 131 [1906]), NCL leaders watched in horror as a state court struck down an NCL-backed maximum-hour law in part because the government’s attorneys never appeared to defend the law. Afterward, an NCL leader claimed that “never again would we be caught napping. Never again would we leave the defense of a labor law to an indifferent third assistant attorney general” (Goldmark 1953, 148-149, quoted in O’Connor 1980, 68).
10. Other tactics include: continued and repeated use of the legal system (see Galanter 1974); obtaining attorneys committed to and schooled in organizational goals (see Greenberg 1974); and a sharp focus on a particular legal area (see O’Connor 1980).
11. A large body of scholarly and journalistic literature indicates that the solicitor general, a presidential appointee who represents the U.S. government in the Court, is a most successful litigator. Some even go so far as to call him the “tenth justice.” For an interesting account of the role of the solicitor general in recent years, see Caplan 1987. For scholarly assessments, see Segal 1984; Krislov 1963; Puro 1971; Scigliano 1971.
12. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). For an excellent account of its litigation history, see Manwaring 1962.
13. *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923). For an account of the NCL’s activity in *Adkins*, see Vose 1972.
14. This was not always the case. For a fascinating history of the evolution of the brief *amicus curiae*, see Krislov 1963.
15. The groups listed on the inside cover of this brief are constituent members of the National Coalition for Public Education and Religious Liberty.
16. For more on the ACLU’s (and other groups’) view of *amicus curiae* participation, see O’Connor and Epstein 1989.
17. O’Connor (1980, 17) stresses the importance of generating “well-timed” publicity to the legal efforts of women’s rights groups. Yet, as she noted, “studying the impact of prior publicity . . . creates unique problems” for social scientists (p. 50). Indeed, disentangling the effect of publicity-oriented strategies from actual litigation campaigns presents an interesting research challenge.
18. Work by Salisbury et al. (1987) has begun to address many of these questions. Their research has moved away from a focus on specific institutions of government to one on policy areas. Unfortunately, many of the issues they chose to examine are not ones typically associated with organizational litigation.
19. I collected the data for the 1987 term reported in this chapter. Information on cases comes from the *Supreme Court Reporter* (S.Ct.); data on *amicus curiae* participation and on sponsorship rates come from the BNA Microfiche Brief Series. To obtain a copy of the dataset, contact me via

- Bitnet at H6FR1001 @ SMUVM1 or by post at Southern Methodist University, Department of Political Science, Dallas, Texas 75275.
20. This figure excludes amicus curiae briefs filed by individuals on behalf of themselves or other individuals.
 21. Hakman (1969) found that groups participated as amicus curiae in only 18.6 percent of the 1,175 noncommercial cases decided by the Court between 1969 and 1980. In replicating and updating Hakman's analysis, O'Connor and I (1982) reported amicus curiae participation in about 50 percent of noncommercial litigation occurring between 1969 and 1980.
 22. According to the Court, "A Brief of an *amicus curiae* [filed on the merits] may be filed only after order of the Court or when accompanied by written consent of all parties to a case" (338 U.S. 959-960). For a concise history of the development of this rule, see Caldeira and Wright 1990.
 23. The Supreme Court Database Project coded all amicus curiae participants (1952-1986) into these group types. I used the project's codebook to classify each group.
 24. Cases were coded on the basis of the major legal issue resolved by the Court.
 25. In cases involving questions of church-state relations, the Court applies a three-prong test, asking whether the aid (1) has a "valid secular purpose," (2) has the "primary effect of advancing religion," and (3) creates "excessive entanglement of church and state." See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The majority asserted that the AFLA passed this test; the dissenters argued that it failed to meet these requirements.
 26. As Wasby notes (1988), "Throughout our history, the Court has invalidated state laws more frequently than federal laws" (p. 79). Indeed, since the early 1800s, the Court has struck down as unconstitutional more than 1,500 pieces of state legislation, while (discounting the legislative veto case, which invalidated more than 200 sections of federal laws) it has overturned fewer than 200 congressional acts.

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