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THE ROLE OF INTEREST GROUPS IN SUPREME COURT POLICY FORMATION

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INTRODUCTION

As Richard C. Cortner has noted, "cases do not arrive at the Supreme Court's doorstep like abandoned orphans in the night" (1975:vi). In fact, as Clement E. Vose has observed, most important constitutional litigation has been brought to the Court by organized interests in the form of test cases, which often ultimately result in the promulgation of major policy decisions (1972:332-334). Others who also have studied interest group litigation have agreed with this assessment (Barker, 1967; Sorauf, 1976; Manwaring, 1962; Wasby, 1983). Yet, the extent to which important constitutional litigation has been the product of interest group activity has yet to be examined in a systematic light or generally accepted by those who study the judicial process. Thus, the purpose of this paper is to determine the extent to which the issues framed in leading constitutional cases were the result of the actions of organized interests. By

conducting such a study, we hope to demonstrate that external forces play a major role in shaping the most significant aspects of the Court's agenda. Thus, in effect, we attempt to underscore the fact that the judicial branch of government, just like the executive and legislative branches, is highly susceptible to group pressure as Arthur Bentley (1908) long ago noted and should be studied with far greater attention to this perspective.

To facilitate an examination of the critical role interest groups play in judicial policy making this paper is divided into two sections. In the first we examine the course of the research concerning interest group litigation. The second part of this article provides an empirical analysis of the efforts interest groups have made to assist the Supreme Court in its formulation of important public policies.

PART ONE

The notion that interest groups affect the judiciary was first noted in 1908 by Arthur Bentley. He claimed that there were:

> numerous instances of the same group pressures which operate through executives and legislatures, operating also through supreme courts and bringing about changes in law in a field above the legislatures, but short of a constitutional convention; changes which no process of legal or constitutional reasoning will adequately mediate, but which must be interpreted directly in terms of pressures of group interests (1908:338).

In stating his belief of the judiciary's susceptibility to group influence, Bentley noted that the judiciary, like the executive and legislative branches, had entry or pressure points where group influence could be exerted. Although he gave some examples of where he thought interest group or political pressure came to bear on Supreme Court decision-making in general terms, his major aim was simply to note that, contrary to prevailing beliefs, group influence had a pervasive role in all branches of government, including the judiciary (Bentley, 1908:382-399).

It was not until the publication of David Truman's *The Governmental Process* in 1951, that a more detailed examination of the role of group interests in the judicial arena was made. Although Truman offered no quantitative data, he demonstrated how organized interests advanced the selection of "right"-thinking judges, promoted test cases, filed amicus curiae briefs, and otherwise provided a key linkage between the legislative and judicial arenas of government. His examples of litigation activity, given the time period he described, focused of necessity on cases

that involved a clash of economic interests and generally failed to examine the litigious activities of noncommercial disadvantaged groups. But his discussion of the inevitably political role of the American judiciary made it clear that diverse interests would find it helpful and even necessary to move into the judicial forum. In particular, Truman underscored the tendency of groups, whatever interests they represented, to seek redress of their rights in court when they perceived that their political strength elsewhere had diminished.

Truman's conclusions about the importance of interest group involvement in the judiciary were more thoroughly substantiated years later by Clement E. Vose (1955, 1958, 1959, 1972). Between 1955 and 1972, Vose conducted a series of studies that illustrated why and how groups can use litigation to achieve their policy objectives. More specifically, Vose's conclusions were based primarily on analyses of two groups: the National Consumers' League (NCL) and the National Association for the Advancement of Colored People (NAACP).

According to Vose, the NCL, which was organized by several women's associations in 1899 (see Blumberg, 1966; Goldmark, 1953; Nathan, 1926) was one of the first groups to litigate in a systematic fashion (see also O'Connor, 1980). The organization resorted to litigation after several state legislatures passed various kinds of maximum hour laws. The leaders of the NCL quickly realized that litigation would be necessary after several of the employers' associations discussed by Truman (see also Bonnett, 1922; Wolfskill, 1962) organized to challenge the constitutionality of NCL sponsored legislation (Vose, 1958:26).

Thus, as Vose and others have noted, the NCL found itself in an unusually difficult legal position. Unlike other groups that had used the courts, (see Truman, 1951:494)[1] the NCL was *not* challenging the constitutionality of state or federal laws. Rather, because its leaders had lobbied for the legislation under attack, the NCL was forced to rely on state attorneys general to defend such laws. Realizing that the efforts of various states could be capricious at best,[2] the NCL initiated a new tactic at the insistence of its general counsel Louis Brandeis; in *Muller* v. *Oregon,* 208 U.S. 421 (1908), which involved a challenge to the constitutionality of Oregon's maximum hour legislation, it convinced Oregon to allow Brandeis to litigate on the state's behalf.

As noted by Vose (1957, 1958, 1972) (see also O'Connor, 1980), Brandeis' and the NCL's role in *Muller* was revolutionary for two reasons: first, Brandeis' insistence on sole control on behalf of the NCL pioneered a relatively new form of litigation. While the NCL's name did not appear on the brief nor did Brandeis accept any money for his efforts, *Muller* represented one of the first instances of this type of group sponsored

litigation. In fact, the control of litigation insisted upon by Brandeis as a condition for his involvement now has become a classic interest group strategy, generally, and one which has been traditionally associated with the NAACP Legal Defense Fund's (LDF) efforts, more specifically (see, Belton, 1978; Vose, 1959; Wasby, 1983; Westin, 1975). A second significant aspect of *Muller* was the brief submitted by Brandeis, itself. After realizing that "there was little legal precedent upon which to base his defense of Oregon's maximum hour legislation" (O'Connor, 1980:70; Vose, 1958), Brandeis asked NCL leaders to gather statistical information indicating that lengthy work days could be detrimental to women (see Murphy, 1982; Vose, 1958). This "Brandeis Brief" established an important precedent: today both interest groups and private attorneys rely heavily on statistical and other forms of nonlegal information to buttress their arguments when they ask the Court to make policy changes (see Kluger, 1976; Levin and Moise, 1975; Rosen, 1972; Sanders et al., 1982). Thus, control of litigation, coupled with Brandeis' novel methods, not only led to the NCL's victory in *Muller,* but also established important legal and procedural precedents for other interest group litigators. Vose's study of the NCL, then, provided useful information about its efforts in the judicial forum. In general, he found that the NCL was forced to use litigation when its legislative victories were challenged in court.

Vose's examinations of the NAACP (1958, 1959) however, suggest other explanations for interest group litigation. He found that the NAACP and its independent Legal Defense Fund's resort to litigation to end restrictive covenants revealed that reliance on litigation was critical; as a group litigating on behalf of a disadvantaged interest, the NAACP leadership realized that they would be unable to attain their goals in the legislative arena. But, as Vose's study clearly indicated, the NAACP's recognition of the utility of litigation did not automatically lead to success. In fact, Vose's examination of the NAACP's lengthy struggle to end restrictive convenants revealed that at least three factors were critical to its eventual success: first, after realizing that the judicial arena was the only potentially amenable forum for the major advancement of minority rights, the NAACP recruited experienced attorneys well-trained in the complexities of civil rights law (Vose, 1959). Vose believes that this task was facilitated by the heavy concentration of black lawyers in several northern cities including Chicago and New York, and by the fact that the vast majority of these attorneys had been trained by educators at the Howard Law School in Washington, D.C. who shared the same legal philosophy. Thus, within a relatively short time period, the NAACP was

able to recruit well-trained attorneys and to establish a crucial network of cooperating attorneys sympathetic to its cause. This network assisted the NAACP's development of a direct sponsorship strategy.

In addition, the network allowed the NAACP to keep abreast of potentially good test cases, a second factor noted as critical to its success by Vose. Even though the NAACP filed an amicus curiae brief as early as 1915 to challenge the constitutionality of Louisiana's grandfather clause, its leaders shortly thereafter realized that direct sponsorship of test cases would be the most expedient way to achieve its policy goals in the judicial forum. In fact, as Vose has noted, control over the course of litigation, especially at the trial court level where a good record could be established for later appeal was of particular importance to the NAACP's ability to obtain judicial invalidation of restrictive convenants through liberal construction of the state action requirement of the Fourteenth Amendment.[3]

A third factor that has been noted as critical to the LDF's success was its receipt of obvious support from other litigators. The assistance and support of the U.S. government in court, generally in the form of amicus curiae briefs, for example, lent legitimacy to the NAACP's claims. In turn, this led to an almost one-sided presentation of race cases thereby increasing the likelihood of the NAACP's ability to garner major policy changes from the Court. Thus, according to Vose, the NAACP's simple recognition of the utility of litigation was only the first step in achieving its policy goal—open housing. In addition, skilled attorneys, utilization of a test case strategy, and cooperation with other interest group litigators contributed to its ultimate success in *Shelley* v. *Kraemer* 334 U.S. 1 (1948), in which it forced the Court to deal with state judicial policies that allowed the enforcement of restrictive covenants.

The publication of *Caucasians Only* (1959) and its detailed account of the NAACP's efforts to affect policy-making through judicial lobbying prompted further exploration of this phenomenon. In general, studies conducted subsequently examined the NAACP's activities in other areas, other interest groups, and/or the stategies that they employed (Barker, 1967; Birkby and Murphy, 1964; Kellogg, 1967; Marshall, 1969; Miller, 1966; Murphy, 1959; Osborne, 1963).

During the 1960s, the results of these explorations began to lead to important contributions concerning the impact of groups in the judicial policy-making process. For example, David Manwaring's (1962) examination of the Jehovah's Witnesses use of a test case strategy to convince the U.S. Supreme Court to invalidate state compulsory flag salute laws indicated that groups other than the NCL and NAACP could effectively

change policy through litigation. And, in addition to studies of other interest group litigators, researchers began to recognize that direct sponsorship of litigation was not the only tactic utilized by groups.

Writing in 1963, Samuel Krislov noted that while amicus curiae (friend-of-the-court) briefs were originally used to provide the Court with information not presented by either party to the lawsuit, "The amicus is no longer a neutral, amorphous embodiment of justice, but an active participant in the interest group struggle" (1963:703). He concluded that the United States Supreme Court treats amicus briefs "as a potential litigant in future cases, as an ally of one of the parties or as a representative of an interest not otherwise represented . . ." (1963:704).

Based on this and the numerous other studies being conducted at the time, Richard C. Cortner was able to formulate a theory of interest group use of the courts in 1968. Cortner found that what he termed "disadvantaged groups," including the NAACP and the Jehovah's Witnesses:

> 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 abilities to attain successfully their goals in the electoral process, within the elected political institutions 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 (Cortner, 1968:287).

Thus, by 1968, those exploring the role of interest groups in litigation had well-documented the pervasive role that particular interest groups played in the judicial forum. In sum, their research indicated that politically disadvantaged groups used either amicus curiae briefs or test cases to influence the Supreme Court's policy-making in highly salient areas of the law.

Research of this nature, however, virtually came to a halt in 1969. In that year a report of an investigation of the role of interest groups in Supreme Court litigation conducted by Nathan Hakman was published. Hakman found that interest groups filed amicus briefs in only 18.6 percent of the 1,175 "noncommercial" cases decided by the U.S. Supreme Court between 1928 and 1966. As our discussion indicates, participation as amicus curiae is only one kind of litigation activity, but Hakman took this as a reliable indicator that interest group activity was far less frequent than was commonly assumed. Based on these findings, he attacked the view that participation as an amicus curiae was a form of political action.

Hakman even refuted the belief that direct sponsorship was a tactic employed by interest groups. In fact, he argued that the activities of the

NAACP and Jehovah's Witnesses were not representative of the Supreme Court's docket. Thus, Hakman concluded that scholarly insistence that interest groups lobbied the judiciary to achieve policy changes, either as amicus or direct sponsors, was mere "scholarly folklore" (Hakman, 1969:199).

Hakman's findings ended the decade long attempt to determine the role that groups played in the judicial policy-making process. In fact, the only works published during the 1970s were commenced before publication of Hakman or were those that further chronicled the NAACP's activities. Virtually all of this research, however, continued to provide evidence of a significant organizational role in Supreme Court litigation. For example, Steven Puro, in a longitudinal examination of interest group activity as amicus curiae during the period 1920 through 1966, examined the participation and motives of several organizations' involvement in Supreme Court litigation. His analysis revealed that "underdog groups and those who espouse liberal positions [were] more likely to appear as amicus curiae . . . [and] that their positions were more likely to prevail" (Puro, 1971:254-255). Even though Puro found overall amicus activity rates identical to those found by Hakman who observed only noncommercial cases, he identified certain groups including the AFL-CIO and the ACLU, which regularly participated and, perhaps more important, believed that their participation had an important impact on the Supreme Court.

Several years later, Frank Sorauf (1976) published the results of a longterm research effort on the role of interest groups in church-state litigation. Through an examination of 67 lawsuits filed in federal courts between 1951 and 1971, he found extensive interest group participation in which two opposing coalitions of interests appeared in the majority of cases.

Karen O'Connor's *Women's Organizations' Use of the Courts* (1980) is a more recent attempt to examine particular litigation strategies including the amicus curiae. She found a number of factors contributed to a group's success and that the importance of each factor varied with a group's adoption of a particular litigation strategy. O'Connor classified the strategies of women's rights groups according to whether they were oriented toward actual court victories, publicity for the group, or involvement as amici. Contrary to Hakman's assertions, she found that women's rights organizations had participated in the vast majority of gender-discrimination cases brought to the Court and that the nature of each group's involvement was based on its adoption of a particular strategy (1980:16). Organizations participated as amici for a number of reasons, but chief among them was a group's financial situation—many

simply were unable to fund major litigation from the trial court level. Through interviews with the counsel of record for most major cases, as well as with lawyers who submitted organization amicus curiae briefs, she found that none of the representatives of women's rights organizations agreed with Hakman's conclusion that there were but "few instances . . . in which attorneys considered the amicus procedure to be an important part of their litigation strategy" (Hakman, 1969:237).

Even though this and other studies (Belton, 1978; Berger, 1979; Cowan, 1976; Greenberg, 1977; Greenwald, 1977; Meltsner, 1973) continued to document interest group use of the courts, many, like Hakman, believed that these well-documented reports were merely idiosyncratic and not representative of Supreme Court litigation as a whole. Believing that Hakman's conclusions stood as a barrier to the furtherance of continued research in this area, in 1981 we replicated and updated his analysis (O'Connor and Epstein, 1981-82).

Between 1970 and 1980, we found that amicus curiae briefs were filed in more than one half of all noncommercial full opinion cases decided by the Supreme Court. And, as indicated in Table 1, which provides a

Table 1. Amicus Curiae Participation in Supreme Court Cases, 1970–1980*

	% With Amicus Briefs		*% Without Amicus Briefs*		*Total Number of Cases per Category*
		N=		N=	
Unions	87.2%	(75)	12.8%	(11)	86
Sex Discrimination	77.5	(31)	22.5	(9)	40
Race Discrimination	67.7	(42)	32.3	(20)	62
Free Press	66.7	(16)	33.3	(8)	24
Information Act	63.6	(7)	36.4	(4)	11
Church–State	62.9	(22)	37.1	(13)	35
State–Federal Employees	55.0	(11)	45.0	(9)	20
Military	52.9	(9)	47.1	(8)	17
Indigents	52.5	(32)	47.5	(29)	61
Obscenity	51.6	(16)	48.4	(15)	31
Conscientious Objectors	50.0	(5)	50.0	(5)	10
Elections	48.9	(23)	51.1	(24)	47
Free Speech	44.8	(13)	55.2	(16)	29
Criminal	36.8	(120)	63.2	(206)	326
Others	64.0	(27)	36.0	(15)	42
Totals	53.4	(449)	46.6	(392)	841

**Source:* O'Connor, Karen and Lee Epstein, 1981–82. Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's 'Folklore.' *Law & Society Review* 16:316. Reprinted with permission.

subject matter breakdown of amicus participation during the 1970s, if we eliminate criminal cases, the rate of amicus participation rose substantially, to 63.8 percent. Thus, "whether or not Hakman was correct in disparaging the 'folklore' of studies of judicial interest group activity, the same conclusion cannot be drawn today" (O'Connor and Epstein, 1981-82:318).

PART TWO

While our reexamination of Hakman and other analyses provide concrete evidence that interest group involvement during the Burger Court era is exceptionally high, it is still unclear whether interest groups' efforts to lobby the Court are a recent phenomenon or one that long has been engrained in the judicial policy-making process.

Research Methods

To examine systematically the role that interest groups play in constitutional litigation that has led to major policy decisions we conducted this research in two stages. The first stage involved the selection of our dependent variable, important constitutional cases. We operationalized the concept of "important constitutional case" by defining it as any case identified in *Landmark Briefs and Arguments of the Supreme Court of the United States* (Kurland and Casper, 1975) or the *Guide to the U.S. Supreme Court* (Congressional Quarterly, 1979:877-902). One hundred and ninety-three cases were found in the *Landmark* series, and 247 in the *Guide.* One hundred and thirty of these cases appeared in both. Thus, these 322 "important" cases were included for analysis.[4]

The second stage of this project involved an examination of the important cases to determine whether or not they were the product of interest group efforts to lobby the Supreme Court. As Vose (1981) has noted, this is not an easy task. Generally, interest groups identify themselves only on amicus curiae briefs and not on those filed on behalf of parties to the suit. Thus, numerous other sources were consulted to determine group involvement.

The litigation in several cases, for example, including *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and *Shelley* v. *Kraemer* (1948), have been well documented (Vose, 1955, 1958, 1981; Kluger, 1976; Greenberg, 1977), thus allowing us to classify these cases as group cases immediately. The majority, however, have not been subject to intensive scrutiny and therefore required us to consult a variety of primary sources. For those cases not readily classifiable, we made lists of every participating at-

torney and the date that the case was decided. With this information in hand, we then consulted several biographical sources including *Who's Who in America, The New York Times Obituary Index* and *The New York Times* or appropriate local and/or regional newspapers. Another extremely important data source was LEXIS, a legal information retrieval system. The names of each attorney participating in every case were entered to determine whether they were affiliated with an organization[5] or whether a discernable pattern to their representation was apparent.

Findings

Fifty-three percent (n=163) of the 306 important constitutional cases were sponsored by organized interests before the U.S. Supreme Court during the time period studied here.[6] Interestingly, this percentage nearly approximates that of amicus curiae participation found in the decade of the 1970s (O'Connor and Epstein, 1981-82), a period that Henry R. Glick (1983:45) has called one of "substantial and growing" interest group involvement in litigation. Even though we expected that interest group participation would be high given the indications of numerous case studies, this exceptionally high sponsorship figure dramatically illustrates the political nature of the courts and the role groups play in the judicial process—at least in highly significant litigation.

A closer examination of the important cases reveals that interest group participation in cases found *both* in the *Guide to the U.S. Supreme Court* and in *The Landmark Brief* series was even higher. In fact, interest groups sponsored fully 60 percent (n=77) of these 128 cases.

While this interest group sponsorship rate is exceptionally high, further analysis of cases contained in either series reveals several other interesting patterns. For example, as indicated in Table 2, there is significant variation among policy areas. Noncommercial cases, for example, attracted significantly more group sponsorship than did commercial or criminal cases. In fact, if criminal cases were eliminated from this analysis, the overall sponsorship rate increases from 53.3 to 60.6 percent. The finding that criminal cases attract significantly less interest group activity than other areas is consistent with the findings of others. For example, as mentioned, our longitudinal study of interest group participation as amicus curiae revealed that interest groups participated far less frequently in this kind of litigation (O'Connor and Epstein, 1981-82; Casper, 1972, and Hakman, 1969:228).

There are several possible explanations for this historical phenomenon: first, liberal groups generally have chosen to concentrate their efforts elsewhere because indigent criminal defendants enjoy con-

Table 2. Interest Group Sponsorship in Noncommercial, Commercial and Criminal Cases

	Sponsored	
Case Type	*Percent*	*(N=)*
Noncommercial	77	154
Commercial	35	95
Criminal	21	57

stitutionally guaranteed representation. In *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), for example, the U.S. Supreme Court applied the Fourth Amendment's guarantee of right to counsel to the states. While this right does not apply to all appellate stages, state supported public defender officers or court appointed counsel regularly fill this void. Second, because of the nature of the criminal justice process, interest groups generally are unable to foresee the "test case" quality of most criminal prosecutions and therefore do not want to risk their limited resources on "trivial" cases, whereas, they can frame the issues for appeal in many noncommercial cases. Finally, conservative groups, who might have an interest in "law and order," rely on state prosecutors to represent their interests. For example, the founder of one conservative firm—Americans for Effective Law Enforcement—has noted that, "It is the duty of a prosecutor to request a reviewing court to uphold a conviction or to find that a state statute is unconstitutional" (AELE, n. d.:1).

Although the commercial case sponsorship rate is lower than that of noncommercial cases, the relatively high rate found in Table 2 is noteworthy given that many of these cases were sponsored by businesses. In Galanter's (1974) terms, large corporations are classic "repeat players." They were *not* included here as "group interests" even though according to Galanter they enjoy substantial benefits in court because of their frequent appearances. Rather, many of the commercial cases that were sponsored between 1870 and 1969 were brought by employer associations or groups specifically representing employer interests, and not business, *per se.* Beginning in 1902 the American Anti-Boycott Association, later known as the League for Industrial Rights, sponsored several significant cases including the *Danbury Hatters* case, 208 U.S. 274 (1908).

In that case, the Anti-Boycott Association represented a haberdasher's attempts to end a union boycott of his company's products. All during the course of the litigation, the Association provided assistance at every

step. Through its careful planning, the Association won a major victory when it was able to convince the Supreme Court that certain provisions of the Sherman Anti-Trust Act were applicable to union activity.

In addition to the Anti-Boycott Association, several other groups were specifically created by employers to litigate on their behalf. For example, the Executive Committee of the Southern Cotton Manufacturers specifically resorted to litigation when it failed to block passage of the Owen-Keating "Child Labor" Act. Once again, through extremely careful planning, the Executive Committee was able to convince the Court to invalidate the act of Congress that the Committee believed adverse to its interests. As Benjamin Twiss (1942) has noted, such litigation would not have reached the Court had it not been for the financial backing of an organized interest.

A second interesting pattern that emerges from the data is the increase in group sponsorship over time as revealed in Figure 1. Sponsorship rates, in fact, jumped from 33.3 percent during the 1870s to 54.1 in the decade of the 1960s.

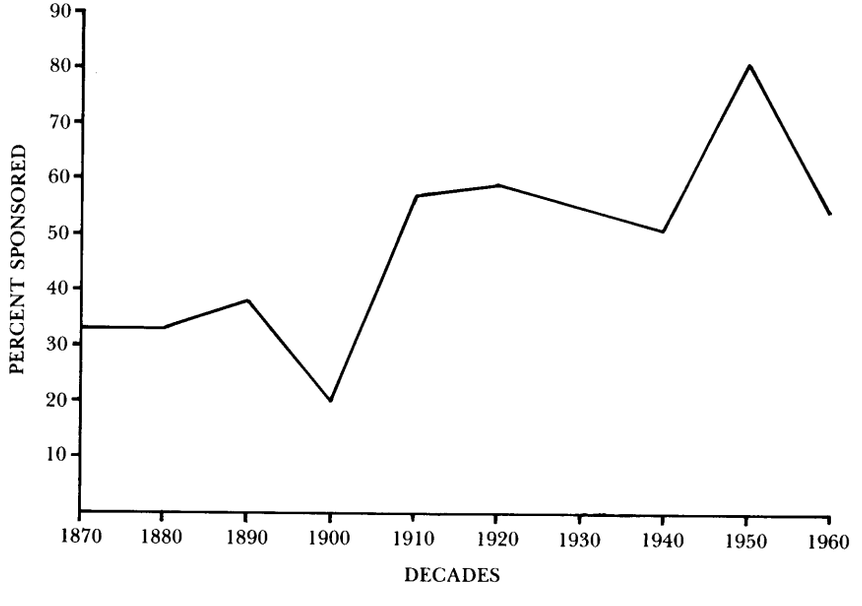

Figure 1. Interest Group Sponsorship of Important Constitutional Cases

As indicated by Figure 1, interest group participation in several decades is particularly noteworthy. The decades of the 1870s and 1880s, for example, reveal a surprisingly high proportion of sponsored cases given that few have noted the importance of groups during that decade. During that era, landmark cases such as the *Slaughterhouse* cases, 16 Wall. 36 (1873) and *Minor* v. *Happersett,* 21 Wall. 162 (1875) were brought to the Court by organized groups as test cases. *Minor,* for example, was sponsored by the National Woman Suffrage Association (NWSA) to test the parameters of the Fourteenth Amendment. After women's rights activists sensed the futility of lobbying for a constitutional amendment to enfranchise females, the NWSA decided to bring a series of test cases to Court, hoping to convince the Justices to construe the Fourteenth Amendment liberally. The *Slaughterhouse* cases were brought for a similar reason by the Butcher's Benevolent Association. Neither challenge was successful.

It should be noted, however, that of the 16 cases that we coded as missing, (see n. 6) six occurred during these two decades. All involved some form of race discrimination. Our initial examination of these cases leads us to believe that all six also were sponsored because it does not seem reasonable to assume that the vast majority of these plaintiffs could have afforded to bring these cases without some kind of organizational support. For example, in the *Chinese Exclusion Case,* 130 U.S. 581 (1889) which involved the constitutionality of congressional action designed to exclude aliens, it is difficult to see how a poor Chinese immigrant could have afforded to retain the services of leading lawyers of the day including James Coolidge Carter, a one time president of the Chicago Bar Association. And, in fact, our initial investigation leads us to believe that these cases, along with several others, were sponsored by major railroads who had an important financial stake in the outcome of these cases. However, because we lacked evidence of direct ties, we were unwilling to include them for analysis here at this time.

In contrast, the decade of the 1900s is also interesting for its apparent absence of group activity. Of the 15 cases decided during this period, only 20 percent initially appeared to be sponsored by organized interests. A more in-depth examination of the attorneys representing the named parties, however, revealed that a high proportion were what we have identified to be "movement" attorneys, those involved in several organizations and who held strong ideological positions (see Twiss, 1942; Vose, 1972). Of the 12 cases with no apparent group participation, eight were argued by movement attorneys including Joseph H. Choate, Jr., a a past president of the American Bar Association and later a

director of the Voluntary Committee of Lawyers; James Beck, of the National Lawyers' Committee of the American Liberty League; and, William D. Guthrie, founder of the Maryland League for State Defense. In *Champion* v. *Ames,* 188 U.S. 321 (1932), for example, Guthrie put forth his classic argument that the due process clause of the Fifth and Fourteenth Amendments prohibited legislatures from regulating economic relationships, an argument which the Maryland League later advanced in many of its sponsored cases. When these kind of cases are included as group cases, 73 percent of those decided during this decade actually can be considered as the product of group activity.

Similarly, the decade of the 1950s also reveals exceptionally high group activity. Fifty-seven percent (n=17) of the 30 sponsored cases, however, can be directly attributed to the ACLU's, National Emergency Civil Liberties Union's or the legal arm of the Communist Party's defense of alleged party members. For example, in *Carlson* v. *Landon,* 342 U.S. 524 (1952), the Supreme Court refused to accept the arguments of the ACLU and numerous movement attorneys who challenged the government's denial of bail for alien Communists. Four years later, in *Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956) the National Emergency Civil Liberties Committee successfully urged the Court to find that Pennsylvania's attempts to limit sedition were preempted by Congress. Although the Communist Party cases ranged from employment rights to the authority of congressional committees, they highlight the intense conflict over communism in the United States during that decade.

Of course, sponsorship of the genre provided by the ACLU or other groups is not the only indication of group activity; as mentioned earlier, many consider amicus curiae briefs to be an important lobbying tactic of interest groups (Puro, 1971; Krislov, 1963; Pfeffer, 1981). Of the 306 important cases, at least one interest group amicus curiae brief was filed in 31 percent (n=95). Again, as was the case with sponsorship rates, there was a steady increase in amicus curiae participation as revealed in Figure 2. In the decade of the 1900s, only one of the 15 cases—the *Danbury Hatters*—attracted a group amicus curiae brief; in that instance the brief was filed by the AFL. During the 1960s, however, 56.8 percent of the 74 cases evidenced at least one amicus curiae brief. The ACLU, NAACP, and the American Jewish Congress, accounted for more than half of this total.

Interestingly, of the 143 cases that were not sponsored by a group, interest groups filed amicus curiae briefs in only 22.4 (n=32) percent, yet when one or more groups actually sponsored a case that percentage rose to 38.7 percent. This finding is interesting for two reasons: first, it

Figure 2. Amici Participation in Important Constitutional Cases

may indicate that groups prefer to file amicus curiae briefs to reinforce each other's arguments rather than to fill a void in unsponsored litigation. Thus, this finding supports others who have suggested the important role that group cooperation plays in litigation (Sorauf, 1976; O'Connor and Epstein, 1983). In an earlier study of women's rights litigation, for example, we found that women's groups regularly filed amicus curiae briefs in support of each other's litigation efforts. As indicated in Table 3, most women's rights litigators filed amicus curiae briefs in support of the ACLU, which has emerged as "the" major representative of the pro-women's rights stance in the Supreme Court. Second, when the major constitutional cases that were not sponsored but had some amicus participation are added to the overall interest group rate, groups participated in 64 percent (n=195) of all cases. Thus, our findings indicate that interest group use of the courts has been a common method of lobbying employed by interest groups to affect policy throughout the Court's history *and* not a phenomenon idiosyncratic to the decades of the 1970s.

*Table 3.** Intergroup Support[a]

Group	*Support for the ACLU*	*Directional Support*
NOW	.789	− − .421 − →
		NOW WEAL
		← − .727 − −
WEAL	.636	− − .578 − →
		NOW WLDF
		← − .846 − −
WLDF	.538	− − .210 − →
		NOW CCR
		← − .444 − −
CCR	.777	− − .545 − →
		WEAL WLDF
		← − .461 − −
		− − .090 − →
		WEAL CCR
		← − .111 − −
		− − .230 − →
		WLDF CCR
		← − .333 − −

[a]Support was conceptually defined either as a women's rights group filing an amicus curiae brief in support of another women's group or two or more women's groups submitting a joint amicus brief. Support was operationally defined as:

$$\text{support} = \frac{\text{n of supportive cases}}{\text{total cases entered}}$$

**Source:* O'Connor, Karen and Lee Epstein, 1983. Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court, *Judicature* 67 (September): 140. Reprinted with permission.

CONCLUSION

Since 1908 scholars have recognized that interest groups bring cases to court to affect the Court's policy-making processes. It was not until the 1950s, however, that these suppositions were supported with any empirical data. The majority of these studies focused on the efforts of the NAACP leading some to question the generalizability and importance of interest group litigation.

Thus, it was the purpose of this study to examine systematically the role interest groups historically have played in assisting the Supreme Court in its effort to formulate important public policies. Our results, in fact, indicate that the majority of cases resulting in important policy declarations were the product of organized interests.

The findings of this research are significant for several reasons: first, interest groups play a significant role in the Supreme Court's formulation of public policy. Second, far greater attention should be paid to group politics before the Court, if we are to understand the policies that result from this process.

NOTES

1. Truman, for example, noted that: "group interests are particularly close to the surface in suits challenging the constitutionality of legislation" (1951:494).
2. In 1906 NCL members realized that state attorneys general would be unreliable when a New York maximum hour law ruling was appealed. While an assistant New York attorney general argued and won the case in the Supreme Court of New York, he did not show up to represent the state in appellate court (see O'Connor, 1980:67-68).
3. This recognition, in fact, partially explains why the NAACP established an independent legal defense fund in 1939 solely to litigate on behalf of black interests (Vose, 1959).
4. To avoid reaching spurious conclusions about the extent to which interest groups are involved in important constitutional litigation, we also plan to sample "unimportant" Supreme Court cases between 1870 and 1969 (for an analysis of this problem in another area of political science see Most and Starr, 1982). Eventually we plan to compare interest group involvement in important versus unimportant cases to determine whether significant differences exist.
5. In some cases group representation could be discerned when use of LEXIS made it evident that a particular attorney consistently filed amicus curiae briefs on behalf of a particular group during a given time period.
6. At this time, we have completed our research and data analysis for all but 16 of the important cases. Although we have found indications that the majority of these 16 cases were sponsored by groups, the evidence is not sufficient to allow us to include them at this time in our analysis. A complete list of cases is available from the authors.

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