THE JOURNAL OF
Law &
Politics

Vol. IX, No. 4 Summer 1993

Interest Group Litigation During the Rehnquist Court Era

Lee Epstein

Published at the University of Virginia

© Copyright September 1993 by *The Journal of Law & Politics, Inc.*

Interest Group Litigation During the Rehnquist Court Era

*Lee Epstein**

I. INTRODUCTION

To most Americans, the term "interest groups" conjures up images of political action committees contributing to congressional campaigns, powerful interests testifying at agency hearings, or lobbyists lining the halls of legislatures. In short, the majority of citizens, not to mention social scientists and legal scholars, tend to associate interest groups with the activities of the "political" branches of government: the executive and legislative branches.

It should come as no surprise, however, that organized interests often resort to the third branch of government, the judiciary, to achieve their objectives. While some analysts continue to view the judicial decision-making process as insulated from the political pressures experienced in elected institutions, this is no longer an apt description.[1] Five decades of research indicate that political pressure from public opinion,[2] partisan affiliation,[3] and interest groups,[4] can affect the environment in which courts operate. It may even affect the decisions promulgated by judicial bodies.[5]

---

* Professor of Political Science, Washington University, St. Louis

[1] See C. Herman Pritchett, The Roosevelt Court (1948); David W. Rhode & Harold J. Spaeth, Supreme Court Decision Making (1976); Glendon Schubert, The Judicial Mind (1965); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993); Tracey E. George & Lee Epstein, On the Nature of Supreme Court Decision Making, 86 Am. Pol. Sci. Rev. 323 (1992) (containing a review of this literature).

[2] See Gregory A. Caldeira, Courts and Public Opinion, *in* The American Courts 303 (John B. Gates & Charles A. Johnson eds., 1991); Thomas R. Marshall, Public Opinion and the Supreme Court (1989).

[3] See George & Epstein, supra note 1; C. Neal Tate, Personal Attribute Models of Voting Behavior of U.S. Supreme Court Justices, 75 Am. Pol. Sci. Rev. 355 (1981).

[4] See Clement E. Vose, Caucasians Only (1959); Gregory A. Caldeira & John R. Wright, Interest Groups and Agenda-Setting in the Supreme Court of the United States, 82 Am. Pol. Sci. Rev. 1109 (1988).

[5] For introductory discussions of the Court as a political body, see Lawrence Baum, The Supreme Court (1992); David M. O'Brien, Storm Center (1990); Segal & Spaeth, supra note 1;

The central purpose of this article is to examine interest group litigation during the 1986 - 1990 Terms of the Rehnquist Court. More specifically, this article considers five dimensions of organizational involvement in the Court's decision-making process: (1) the frequency of interest group participation; (2) the goals of organizations resorting to the courts; (3) the kinds of interest groups litigating; (4) the paramount issues articulated; and (5) the efficacy of group litigation efforts. To fully appreciate the patterns demonstrated during the Rehnquist Court era, it is critical to trace the evolution of interest group involvement with the Court. To this end, the article has seven parts. Part II outlines the development of the field of study now known as "interest group litigation." Parts III through VII consider the five dimensions of participation; in particular, I present the findings of past research and update the analysis with data focusing on the Rehnquist Court, which has received limited scholarly attention.[6] The final section summarizes the results of the analysis and discusses their implications.

II. LITERATURE DISCUSSING INTEREST GROUP LITIGATION

In *Federalist* #78, Alexander Hamilton posited that the Supreme Court was "to declare the sense of the law" through "inflexible and uniform adherence to the rights of the constitution and individuals."[7] Despite his expectations, Supreme Court litigation has become increasingly political over time.[8] Manifestations of this phenomenon are demonstrated in virtually all dimensions of the Court's work, from the confirmation proceedings of Supreme Court nominees[9] to the factors that influence decisions of Justices.[10] But it is the latter, the incursion of organized interests into the judicial process, that provides the most striking example of this politicization. The arguments groups present to the Court can shape the way the Court resolves issues and can set the context in which the Court interprets the law.[11] Thus, the presence of organized interests before the bench forms an important part of the political environment in which the Supreme Court works, an environment not contemplated by the founders of the institution.

The systematic study of interest group litigation is of relatively recent scholarly interest.[12] A fundamental tenet of traditional legal models[13] is that *individuals* bring cases to courts, and courts decide these cases by applying the *law* to *fact*. Consequently, these models are unable to provide an analytical framework for the study of interest group litigation. Moreover, early behavioral approaches[14] leave little room for considering the effect of external factors on the resolution of judicial questions because internal factors are thought to be more important. Court decisions are assumed to be "driven by single-minded seekers of legal policy, Justices who wish to etch into law their personal views."[15] With the advent of the pluralist paradigm,[16] however, the impact of interest groups acting on the judiciary was gradually unearthed and investigated.[17]

The pluralist perspective provides a mechanism for examining organizational involvement in the courts; it focuses on groups as the unit of analysis. More importantly, the pluralist perspective demonstrates that group activity, which animates much of American politics,

---

Thomas G. Walker & Lee Epstein, The Supreme Court of the United States (1993); Stephen L. Wasby, The Supreme Court in the Federal Judicial System (1993).

[6] See Lee Epstein, Courts and Interest Groups, in The American Courts 335 (John B. Gates & Charles A. Johnson eds., 1991); Lee Epstein & Joseph F. Kobylka, The Supreme Court and Legal Change (1992); Karen O'Connor & Bryan Scott McFall, Conservative Interest Group Litigation in the Reagan Era and Beyond, *in* The Politics of Interests 263 (Mark P. Petracca ed., 1992); Susan Behuniak-Long, Friendly Fire, 74 Judicature 261 (1991).

[7] The Federalist No. 78, at 358, 360 (Alexander Hamilton) (Masters, Smith & Co. eds., 1852).

[8] For a more thorough analysis of the issues discussed in this section, see generally Epstein & Kobylka, supra note 6, at 1-3.

[9] See Jeffery A. Segal, Senate Confirmation of Supreme Court Justices, 49 J. Pol. 998 (1987).

[10] See Segal & Spaeth, supra note 1.

[11] Epstein & Kobylka, supra note 6; Susan E. Lawrence, The Poor in Court (1990) (arguing that several factors account for the success of the Legal Services Program, including the way it framed its claims).

[12] Even early on, however, analysts noted that interest groups use courts to achieve policy objectives. See Arthur Bentley, The Process of Government (1908); David B. Truman, The Governmental Process (1951).

[13] Here I speak of models that view legal precedent as the primary determinant of judicial decisions. See Fred Kort, Predicting Supreme Court Cases Mathematically, 51 Am. Pol. Sci. Rev. 1 (1957).

[14] These models view "the law" as "smoke screens," which the Justices use to mask their preferences. See Jerome Frank, Law and the Modern Mind (1930).

[15] George and Epstein, supra note 1, at 325.

[16] Here I refer to pluralism's "countervailing theory of pressure politics," which suggests that "competition among major interest groups tends to balance power against power, with the result that none is able to dominate the American political system." Jack C. Plano & Milton Greenberg, The American Political Dictionary 83 (1989). Thus, policy results from the push and pull of competing interests. See Bentley, supra note 12; Truman, supra note 12; and infra part III B (containing a discussion of pluralism).

[17] Bentley contended that there were "numerous instances of the same group pressures which operate through executives and legislatures, operating through supreme courts." Bentley, supra note 12, at 338. This insight was ignored during an extended period of scholarly dormancy until it was resurrected by Truman in 1951. Truman, supra note 12.

also extends into the judiciary. As David Truman, the founder of modern-day pluralism, wrote in 1951:

> Relations between interest groups and judges are not identical with those between groups and legislators or executive officials, but the difference is rather one of degree than of kind. For various reasons organized groups are not so continuously concerned with courts and court decisions as they are with the functions of the other branches of government, but the impact of diverse interests upon judicial behavior is no less marked.[18]

Although there were a few exceptions,[19] Truman's call to undertake closer examination of the linkages between groups and the courts went largely unheeded until the 1970s. Several factors account for this void.[20] Perhaps the most important was research conducted by Nathan Hakman.[21] After examining group involvement in U.S. Supreme Court cases from 1928-1966, Hakman concluded that organizational presence in the legal system was virtually nonexistent.[22] His works went so far as to call the entire line of inquiry scholarly "folklore" and to suggest those few studies that had found significant group involvement in courts represented the exceptions, not the rule.[23]

During the decades of the 1970s and 1980s, there was a renewed interest in this area of inquiry. Scholars began to accumulate a good deal of evidence indicating that outside influences, such as interest groups and public opinion, influenced the Court. As a result, commentators began to question whether Hakman's research continued to provide a realistic portrayal of the impact of interest groups on the Court.[24] After the publication of Frank Sorauf's investigation of religious establishment suits[25] and Karen O'Connor's analysis of sex

[18] Truman, supra note 12, at 479.

[19] Two important exceptions are Vose, supra note 4; and Richard C. Cortner, Strategies and Tactics of Litigants in Constitutional Cases, 17 J. Pub. L. 287 (1968).

[20] See Epstein, supra note 6.

[21] Nathan Hakman, The Supreme Court's Political Environment, *in* Frontiers of Judicial Research 199 (Joel B. Grossman & Joseph Tanenhaus eds., 1969) [hereinafter Hakman, Political Environment]; Nathan Hakman, Lobbying the Supreme Court, 35 Fordham L. Review 15 (1966) [hereinafter Hakman, Lobbying].

[22] Hakman, Political Environment, supra note 21, at 245.

[23] Hakman, Lobbying, supra note 21, at 15.

[24] See generally, Karen O'Connor & Lee Epstein, Amicus Curiae Participation in U.S. Supreme Court Litigation, 16 Law & Soc'y Rev. 311 (1981-82).

[25] Frank J. Sorauf, The Wall of Separation (1976).

discrimination cases,[26] both of which provided ample evidence of interest group involvement with the judiciary, some suggested that Hakman's analysis only pertained to past Court eras. Moreover, pluralism in the judicial process was on the rise, as more systematic assessment confirmed. Between 1970 and 1980, interest group involvement, in the form of amicus curiae briefs, was found in about 50 percent of noncommercial cases decided by the Court.[27]

This initial debunking of the myth of the Court as an apolitical body, immune to the pressures of organized interests, led a second wave of analysts to pursue related research. Between 1980 and 1992, legal scholars and social scientists have written nearly twenty-five books and published more than fifty articles on the subjects of interest group litigation or public interest law activities.[28] Also significant is that textbooks on interest groups[29] and the Supreme Court[30] devote full sections, if not chapters, to the subject of interest group litigation, when just a decade ago a paragraph would have sufficed.

From this research, we have accumulated a substantial amount of knowledge about interest group litigation activity. In subsequent parts of this article, I review the major findings on the frequency of group participation, the motivations for resorting to the courts, the kinds of groups participating in Court cases, the paramount issues articulated by interest groups, and the efficacy of litigation efforts.[31] Throughout this discussion, I incorporate findings from the 1986-1990 terms of the Rehnquist Court.

[26] Karen O'Connor, Women's Organizations' Use of the Courts (1980).

[27] O'Connor & Epstein, supra note 24, at 316.

[28] See Lee Epstein et al., Public Interest Law (1992).

[29] See, e.g., H.R. Mahood, Interest Group Politics in America (1990); Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy (1986).

[30] See Baum, supra note 5; Wasby, supra note 5; Walker & Epstein, supra note 5.

[31] In the interest of space, I limit the discussion to U.S. Supreme Court litigation. In general, there have been very few studies of group litigation in other judicial arenas, although there have been some. These include Lee Epstein & C.K. Rowland, Debunking the Myth of Interest Group Invincibility in the Courts, 85 Am. Pol. Sci. Rev. 205 (1991) (studying the success of groups and non-groups in U.S. district court litigation); Lee Epstein, Exploring the Participation of Organized Interests in State Court Litigation, 47 W. Pol. Q. (forthcoming June 1994) (examining the frequency of amicus curiae participation in state courts of last resort); and Wayne V. McIntosh & Paul Parker, Amici Curiae in the Courts of Appeals (1986) (considering the frequency of amicus curiae participation in U.S. Courts of Appeal) (paper presented at the annual meeting of the Law & Society Association, on file with the author).

III. FREQUENCY OF PARTICIPATION

If recent research indicates anything about interest group litigation it is this: the vast majority of U.S. Supreme Court cases attract the participation of interest groups as direct sponsors, when groups provide attorneys and resources to bring suit, or as amici curiae, when groups file third party, "friend of the court" briefs.[32] No longer is there even a scintilla of support for the view that groups do not lobby the Supreme Court of the United States.

This section considers the research that has explored the amount of interest group involvement in the Court and the growth of pluralism in the legal system. To discern the evolution of participation patterns, I supplement existing data (mostly from the start of the Warren Court) with that from the first four Terms of the Rehnquist Court.[33]

A. Amount of Group Activity

Figure 1 provides one way to consider the increasing participation of interest groups. It depicts the percentage of full opinion cases decided between the 1953[34] and 1990 Terms containing one or more amicus curiae briefs. Based on this data, it is easy to see why Hakman, writing in 1969, concluded that a view of Supreme Court litigation as "a form of political action" or "pressure group activity" was mere "scholarly folklore."[35] But that view is clearly outmoded: amicus curiae participation has experienced a steady increase over the last four decades. In fact, the estimates obtained by regressing the percentage of cases per term tell us that with each passing term, the percentage of cases with one or more amicus curiae briefs grew nearly two points.[36]

[32] Another form of participation is intervention, when interest groups "voluntarily interpose" in suits. See Emma C. Jones, Litigation Without Representation, 14 Harv. C.R.-C.L. L. Rev. 31 (1979); Emma C. Jones, Problems and Prospects of Participation in Affirmative Action Litigation, 13 U. C. Davis L. Rev. 221 (1980).

[33] Interest group data collected for this article come from the microfiche records of briefs filed with the U.S. Supreme Court.

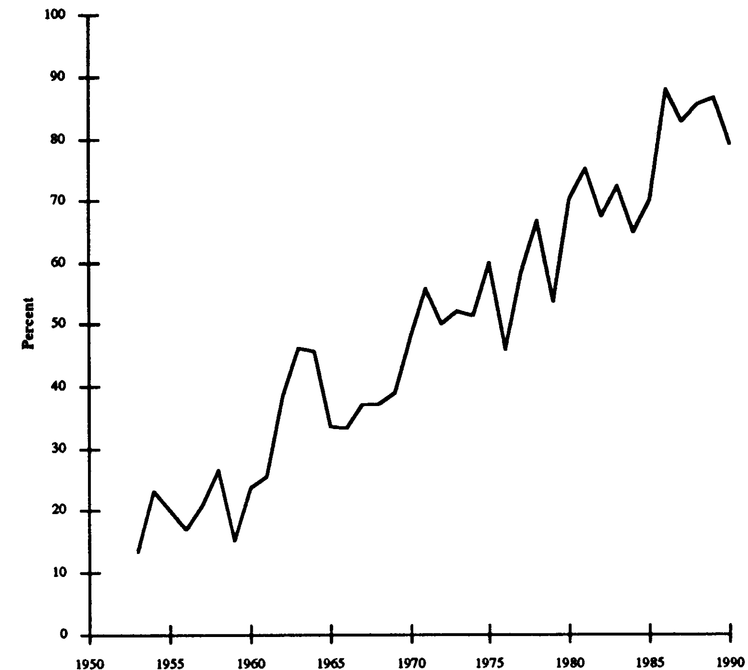
[34] I begin with 1953 because the most complete Supreme Court data began to be available at this time.

[35] Hakman, Political Environment, supra note 21, at 199.

[36] More formally Y = a + 1.9X, where Y = the percentage of cases with one or more amicus curiae briefs and X = term. The slope estimate was significant at the .01 level.

FIGURE 1

PERCENTAGE OF THE U.S. SUPREME COURT'S FULL OPINION CASES CONTAINING AT LEAST ONE AMICUS CURIAE BRIEF, 1953-1990 TERMS[37]



Particularly relevant here is participation during the Rehnquist Court era. Simply stated, organized interests broke all previous participation records. On average, 84.4 percent of all full opinion cases decided between 1986 and 1991 contained at least one amicus curiae brief, compared with 28.6 percent during the Warren Court era. What is more, the typical amicus case (a case with one or more amicus curiae briefs) contained not one but 4.4 briefs. Finally, consider that during the 1990 term more than 4.5 amici cosigned the average amicus curiae brief, making for a total of about 1,800 organized participants.

A few of the Rehnquist Court cases in which group participation was particularly high serve to highlight the intensity and depth of current pressure group activities. Along these lines, the clear winner

[37] Sources: 1953-1985: National Science Foundation, Codebook for Phase II of the Supreme Court Database (1993; on file with the author); 1986-1990: collected by the author.

is *Webster v. Reproductive Health Services*,[38] in which the Justices considered a Missouri law regulating abortion services. While I shall have more to say about *Webster* in the coming pages, it is interesting to note here that the number of pro-choice and pro-life briefs totalled seventy-eight, breaking the record of fifty-seven filed in the affirmative action case, *Regents of University of California v. Bakke*.[39] Another privacy-related case, *Cruzan v. Director, Missouri Department of Health*,[40] generated nearly as much participation: the Justices received almost sixty briefs signed by eighty distinct groups or corporations, forty-two of which were filed by organized interests. Two sex discrimination cases decided during the 1986 term, *Board of Directors of Rotary International v. Rotary Club of Duarte*,[41] and *California Federal Savings and Loan Ass'n v. Guerra*,[42] also received significant attention from the pressure group community. Participants in *Rotary Club* were unusually diverse, ranging from state governments and religious groups to recreational clubs and women's rights organizations.

Civil liberties and civil rights cases, though, were not the only ones to generate massive submissions. Groups, individuals, associations, and governments filed ten briefs in *South Dakota v. Dole*,[43] in which the Court considered the constitutionality of a federal law "conditioning" state highway funds on state adoption of a minimum drinking age requirement of twenty-one; fourteen briefs were also submitted in *California v. Federal Energy Regulatory Commission*,[44] involving a FERC decision to grant the federal government exclusive power to set hydroelectric power water flow rates.

These cases, and the data depicted in Figure 1, underscore the increasing involvement of organized interests in Supreme Court litigation. What accounts for the dramatic increase in group participation most vividly seen in the 1970s and 1980s? Scholars have provided several explanations. First, more organizations than ever were formed for the purpose of conducting litigation. Inevitably, more or-

[38] 492 U.S. 490 (1989).

[39] 438 U.S. 265 (1978). See Dennis S. Ippolito & Thomas G. Walker, Political Parties, Interest Groups and Public Policy: Group Influence in American Politics 405-06 (1980), for a list of the participating groups.

[40] 497 U.S. 261 (1990).

[41] 481 U.S. 537 (1987).

[42] 479 U.S. 272 (1987).

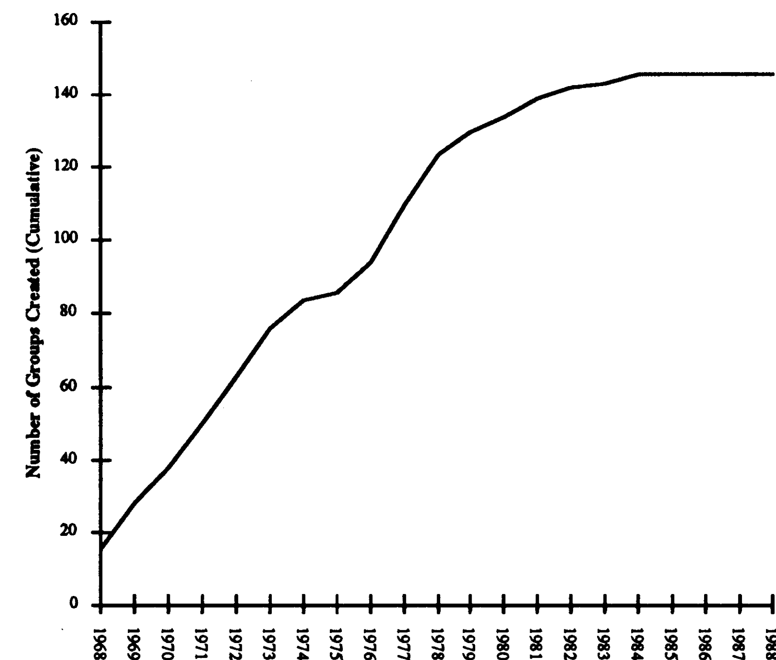
[43] 483 U.S. 203 (1987).

[44] 495 U.S. 490 (1990).

ganizations generated more group-backed litigation. A 1976 survey of public interest law, conducted by the Council for Public Interest Law, included but ninety-two groups.[45] A similar survey conducted in 1989[46] identified more than 250. What is more, as Figure 2 shows, the number of organizations dedicated to using litigation to

FIGURE 2

GROWTH (CUMULATIVE) OF INTEREST GROUPS USING LITIGATION[47]



achieve policy ends skyrocketed over recent years. Between 1970 and 1980, nearly 95 groups were created mainly to file law suits or to participate as amici curiae. By 1983 that growth had reached a plateau;

[45] Council for Public Interest Law, Balancing the Scales of Justice (1975).

[46] Karen O'Connor & Lee Epstein, Public Interest Law Groups (1989).

[47] Sources: 1968-1975: Council for Public Interest Law, Balancing the Scales of Justice (1976); 1976-1988: Karen O'Connor & Lee Epstein, Public Interest Law Groups (1989) and Foundation for Public Affairs, Public Interest Profiles (1988).

yet almost all of the organizations created in the 1970s are still in operation and presumably generating litigation.

Furthermore, as Kay Schlozman and John Tierney note, more pressure group activity exists "not simply [because] there are more organizations on the scene, but [because] these organizations are more active as well. . . . [There is a] remarkable increase in the volume of organized interest activity . . . ."[48] Overall, during the past decade, interest groups have moved into all arenas of government at record levels.[49]

Second, more than ever before, organizations view litigation as a viable political strategy. Surveys of a wide range of organizations located throughout the United States indicate that between 55 and 75 percent use the courts to achieve their policy objectives.[50] Interestingly, distinct categories of organizations differ in the degree to which they rely on litigation. In Part III, I discuss the kinds of groups that litigate. For now it suffices to say that, as Table 1 shows, the importance of litigation varies considerably: for public interest law firms and unions it is a strategy of great significance; for professional, business, and trade associations, far less so. But differences among organizational types do not negate a basic finding: groups of all types seem to be relying more heavily on litigation than ever before. When asked whether they use litigation more now than in the past, 38 percent of all surveyed groups responded affirmatively.[51]

[48] Schlozman & Tierney, supra note 29, at 388.

[49] See also Robert Bradley & Paul Gardner, Underdogs, Upperdogs and the Use of the Amicus Brief: Trends and Explanations, 10 Just. Sys. J. 78 (1985).

[50] See Schlozman & Tierney, supra note 29, at 431; Kim L. Scheppele & Jack L. Walker, The Litigation Strategies of Interest Groups, *in* Mobilizing Interest Groups in America 176 (Jack L. Walker ed., 1991); Patrick Bruer, Washington Organizations and Public Policy Litigation (1987) (paper presented at the annual meeting of the Midwest Political Science Association; on file with the author).

[51] Scholzman & Tierney, supra note 29, at 364. On the other hand, surveys indicate that litigation is among the least used of all interest group strategies. Id.

TABLE 1
IMPORTANCE OF LITIGATION BY GROUP TYPE[52]

Group Type	Importance of Litigation (Percent)				
	not used	least used	moderate use	great use	Total N
Business/Trade Associations	25.9	27.4	37.0	9.6	135
Citizens/Issue Groups	28.6	21.4	30.0	20.0	70
Professional Associations	40.9	25.8	27.3	6.1	66
Education/Research Groups	51.5	33.3	15.2	0.0	33
Labor Unions	0.0	17.6	52.9	29.4	17
Civil Rights/Social Welfare	7.7	30.8	23.1	38.5	13
Coalitions	41.7	33.3	25.0	0.0	12
Public Interest Law Firms	0.0	0.0	25.0	75.0	8
Intergovernmental Organizations	33.3	33.3	22.2	11.1	9
Mean	29.8	25.9	31.1	13.2	
N=	108	94	113	48	363

Finally, the Supreme Court itself has encouraged organized group litigants to take refuge in its corridors.[53] The Justices have freely acknowledged the special role "private attorneys general" (i.e. public interest law groups) can play in litigation. Writing in 1963, the Court proclaimed, "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . [U]nder the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances."[54] Fifteen years later, the Justices reinforced this view, acknowledging the role played by the ACLU "in the defense of unpopular causes."[55]

The Rehnquist Court has not backed away, at least not theoretically, from this position.[56] Additionally, the Court has taken few steps

[52] Source: P. Bruer, Washington Organizations and Public Policy Litigation (1987, Table 5) (paper presented at the annual meeting of the Midwest Political Science Association; on file with the author).

[53] See Karen Orren, Standing to Sue: Interest Group Conflict in the Federal Courts, 70 Am. Pol. Sci. Rev. 723 (1976).

[54] NAACP v. Button, 371 U.S. 415, 429-30 (1963).

[55] In re Primus, 436 U.S. 412, 427 (1978) (holding that state law cannot prohibit solicitation of prospective litigants by non-profit organizations that pursue political expression).

[56] That is, the Rehnquist Court has not overruled *Primus*, though the relative conservatism of the Rehnquist Court might mitigate its potential support for the positions of some conventionally liberal public interest groups. Part VII of this article assesses contentions relating to the efficacy of group litigation efforts.

to discourage groups from participating as amici curiae, even though Court rules impose limitations. That is, the Court can use discretion to reject motions to file third party briefs or reject them if the parties to the case refuse to give consent to their inclusion.[57] Between 1969 and 1981, however, the Court denied only 11 percent of the 832 motions for leave to file as amicus curiae.[58] And the Rehnquist Court has shown an even greater willingness to permit amici to file briefs: it denied only one of the 115 motions it received in 1990.[59]

Why the Court has allowed, even encouraged, interest group use of the judiciary has been the subject of a good deal of speculation. Some have suggested that the Justices, like members of Congress, view groups as sources of important information that otherwise would not have come to their attention. In a 1983 study, for example, Karen O'Connor and Lee Epstein found that the members of the Burger Court frequently cited amicus curiae briefs in their opinions. Table 2 expands this analysis to include all Justices serving between the 1953 and 1991 terms.[60]

Quite intriguingly, the proportion of written opinions citing at least one brief has grown appreciably over the past decades. The average citation rate for the Warren Court Justices was .417; that figure rose to .656 for those serving on the Burger Court; and to .676 for Rehnquist Court justices.[61] One explanation for the differences among the Courts is that the increase in the number of briefs has provided the Justices with more fodder for their opinions. Indeed, as noted, almost all Rehnquist Court Justices cite amicus curiae briefs at much higher rates than did their earlier counterparts (compare Justice Stewart with his replacement, Justice O'Connor). Even so, some of the current Justices are more likely to use these briefs than others. For example, although the vast majority of Justice

[57] 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 the case." 338 U.S. 959-60 (1949). For a concise history of the development of this rule, see Gregory A. Caldeira & John R. Wright, The Discuss List: Agenda Building in the Supreme Court, 24 Law & Soc'y Rev. 809 (1990).

[58] Karen O'Connor & Lee Epstein, Court Rules and Workload, 8 Just. Sys. J. 35, 41 (1983). See also Bradley & Gardner, supra note 48, at 91.

[59] The one it denied was filed by Alan Ernest for the Legal Defense for the Unborn in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). Ernest is a prolific pro-life advocate. He has personally moved to file numerous amicus briefs with the Court.

[60] O'Connor & Epstein, supra note 58, at 42.

[61] This figure excludes Justice Clarence Thomas and Justice David Souter because neither has written a sufficient number of opinions to permit a meaningful analysis.

O'Connor's opinions include a reference to one or more amicus curiae briefs, fewer such references are found in the opinions of the Chief Justice.

TABLE 2

JUSTICES' CITATIONS TO AMICUS CURIAE BRIEFS, 1953-1991 TERMS[62]

Justice	Number of Citations to Amicus Curiae Briefs	Number of Citations Divided By Total Opinions Written
Black	297	.53
Blackmun	531	.69
Brennan	755	.65
Burger	337	.68
Burton	17	.21
Clark	109	.36
Douglas	416	.45
Fortas	43	.44
Frankfurter	74	.29
Goldberg	87	.39
Harlan	252	.37
Jackson	10	.63
Kennedy	82	.65
Marshall	505	.71
Minton	8	.20
O'Connor	292	.77
Powell	458	.77
Reed	20	.33
Rehnquist	453	.53
Scalia	157	.62
Souter	10	.29
Stevens	607	.71
Stewart	363	.51
Thomas	7	.35
Warren	99	.40
White	660	.66
Whittaker	28	.25

[62] Note: Justices' opinions include opinions of the court, judgments, and dissenting and concurring opinions. Data for the justices cover the 1953 through 1991 terms. Thus, for those justices joining the Court prior to 1953, data are not completely descriptive of their careers.

Note on Number of Citations to Amici Curiae Divided by Total Opinions Written: While these are represented as proportions, readers should take care in interpreting them. It is possible, for example, that a justice cited more than one amicus curiae in a given opinion.

Source: Lee Epstein et al., The Supreme Court Compendium Table 7.21 (1993).

Along similar lines, scholars conducting studies of particular cases or interest groups argue that legal opinions and briefs often parallel each other. Susan Behuniak-Long's research on *Webster v. Reproductive Health Services*[63] found that amici may have had a significant impact on Justice O'Connor's key decision to write a concurrence rather than to join Chief Justice Rehnquist's opinion: "If . . . [Justice] O'Connor is retreating from her [previous stance on abortion], the appellees' amici may be responsible for planting the seed of doubt in her mind."[64] More generally, Lee Epstein and Joseph Kobylka demonstrate that arguments presented by attorneys explain major changes (or the lack thereof) in doctrine governing abortion and death penalty litigation.[65] As they note:

> [E]xplications of legal change cannot focus wholly on political factors without distorting the process they seek to explain. They must incorporate, as part of their analytical apparatus, the idea of law and the centrality of legal argument. They must look at the pluralism of legal arguments presented before the Court as well as the pluralism of interests bringing those arguments.[66]

Some analysts even suggest that members of the Court, particularly those who have held political office, view interest groups as a routine part of the legal process. Interviews with several Justices, in fact, reveal that they would be surprised if organizations did *not* try to influence their decisions.[67]

Regardless of the Court's motivation and the ability of groups to achieve their policy goals (a subject to which I return in Part VII), the increasing presence of organized interests in judicial proceedings has certainly transformed the environment in which the Court operates. Consider Hakman's conclusion about that environment in 1969: cases "are carried to the Supreme Court primarily to resolve the immediate disputes among private adversaries."[68] To be sure, the converse is true today; if anything, today's cases represent the struggle of interest groups to etch their broader policy views into law.

---

[63] 492 U.S. 490 (1989).

[64] Behuniak-Long, supra note 6, at 270.

[65] Epstein & Kobylka, supra note 6.

[66] Id. at 311.

[67] Lee Epstein, Interviewing U.S. Supreme Court Justices and Interest Group Attorneys, 73 Judicature 196, 196-97 (1989).

[68] Hakman, Political Environment, supra note 21, at 245.

Many examples from the Rehnquist Court era illustrate this last point but none are as compelling as *Webster*. As noted in Appendix I, pro-choice and pro-life briefs numbered seventy-eight (forty-six for the state; thirty-two for Reproductive Health Services). Collectively, 420 organizations participated as filers or co-signatories (eighty-five for the state; 335 for Reproductive Health Services) and thousands of individuals also participated (see Appendix I). Never before had the Court heard from so many voices in a single case.

Beyond this amicus curiae activity, *Webster* illuminates how groups involve themselves as sponsors of litigation.[69] Veteran abortion litigator Frank Susman[70] and B. J. Isaacson-Jones, the director of the Reproductive Health Services in Missouri, knew they would challenge the Missouri law as soon as they heard about it.[71] As Marian Faux tells it, though, they were not alone in wanting to challenge the Act: both Planned Parenthood (of Kansas City) and the ACLU's Reproductive Freedom Project (RFP) wanted to bring suits.[72] After some discussion, a compromise was reached. Susman would represent the Missouri chapter of the ACLU and Roger Evans of Planned Parenthood would act as co-counsel. The RFP would serve as a "back-up," but would have no formal role.[73]

By the same token, *Webster* shows how governmental interests sponsor and coordinate cases. Just two days after the 1988 presidential elections, outgoing U.S. Solicitor General Charles Fried filed an amicus curiae brief for the government urging the Justices to hear the Missouri case. In an obviously concerted effort, both Missouri and the United States asked the Court to reconsider *Roe v. Wade*.[74] Later on, state attorneys "worked closely" with their Justice

---

[69] For a more thorough analysis of the issues discussed in this section, see Epstein & Kobylka, supra note 6, at 265-73; and Marian Faux, The Crusaders (1990) (providing profiles of key participants in the abortion movement).

[70] By the time *Webster* was argued, Susman had argued four abortion cases before the Supreme Court: Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983); Poelker v. Doe, 432 U.S. 519 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); and Wulff v. Singleton, 428 U.S. 106 (1976).

[71] Faux, supra note 69, at 31-32.

[72] Id. at 31.

[73] Id.

[74] Epstein & Kolbyka, supra note 6, at 267. This move was designed to overcome what some saw as the "error" of Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), in which the Solicitor General, but not the State, asked for the overruling of Roe v. Wade, 410 U.S. 13 (1973). Epstein & Kolbyka, supra note 6, at 267. See Brief for Appellants, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605); Brief for the United States as Amicus Curiae Supporting Appellants, *Webster* (No. 88-495).

Department counterparts, doing more than helping with the briefs.[75] With the state's blessing, the Justice Department filed a successful request to participate in oral arguments.[76]

B. Pluralism in the Court

If pluralism in the judiciary means anything, it is this: not only will interest groups use the courts to achieve their objectives, but courts will find themselves the targets of increasing pressure group activity.[77] Clement Vose's account of *Shelley v. Kraemer*,[78] in which the Court struck down restrictive covenants as impermissible under the Fourteenth Amendment's Equal Protection Clause, provides an excellent explication of pluralism in action.

In its first incarnation, *Shelley* was a modest, seemingly private suit. A black couple, the Shelleys, wanted to live in a neighborhood in which the property owners had agreed not to sell their houses to non-whites. Fern Kraemer, joined by other white property owners, sought judicial enforcement of his restrictive covenant. After the state courts held for Kraemer, the battle escalated. The NAACP agreed to take on the Shelleys' case and organizations representing racial, religious, labor, and political interests submitted over fifteen amicus curiae briefs in their support. On the other side, numerous real estate and property owner associations from all over the country provided support for Kraemer's case.[79]

In this historical example, and in so many other stories of group involvement in the federal courts, the pluralist paradigm is at work.[80] As the case advanced on appeal, it evolved from a relatively private, small dispute to a momentous public one. The conflict itself expanded with friends and enemies entering the fray and bombarding the Supreme Court with competing claims.

[75] Tony Mauro, In the Eyes of the Abortion Storm, USA Today, April 26, 1989, at 2A.

[76] There was but one minor point of disagreement: the United States' brief rejected Justice O'Connor's "unduly burdensome" standard. In keeping with its jurisdictional statement, Missouri offered it as a plausible alternative. Brief for Appellants at 14-16, *Webster* (No. 88-605); Brief for United States at 8-24, *Webster* (No. 88-495).

[77] For theoretical overviews, see E. E. Schattschneider, The Semi-sovereign People (1975); Truman, supra note 12.

[78] 334 U.S. 1 (1948).

[79] Vose, supra note 4, at 197-98.

[80] See Richard Kluger, Simple Justice (1976); Joseph F. Kobylka, The Politics of Obscenity (1991); David R. Manwaring, Render Unto Caesar (1962).

Perhaps more than ever before, today's litigation scene demonstrates the rise of pluralism in the courts. Prior to the 1980s, most studies focused on groups seeking social change and/or protecting disadvantaged interests, such as those groups supporting the plaintiffs in *Shelley*. Scholars once assumed that only a specific set of groups—those representing liberal or underrepresented interests—lobbied the judiciary. They based this presumption largely on the disadvantaged thesis, best articulated by Richard Cortner:

> [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 institutions of government 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.[81]

As pluralist theory would predict, however, this is no longer the case.[82] Gregory Caldeira and John Wright and Lee Epstein report that a wide range of organizations, from corporations to charitable and community groups to professional associations, regularly use litigation to achieve policy ends.[83] Even more intriguing is that conservative groups, both single-issue groups as well as those with more broadly-defined agendas, have followed the lead of their liberal counterparts and now regularly resort to the courts.[84]

Why are businesses, trade associations, corporations and other presumably "advantaged" interests turning to litigation? Pluralist theory suggests one answer: "balancing."[85] Beginning in the 1970s, many so-called "upperdogs," or "advantaged" interests, such as corporations and business interests, were in adversarial relationships with "underdogs" or "disadvantaged" interests, like the ACLU and the

[81] Cortner, supra note 19, at 287.

[82] Indeed, some suggest that this may never have been the case. See Lee Epstein, Conservatives in Court (1985) (exploring the litigation activities of conservative interest groups in the early 1900s and later periods); Benjamin R. Twiss, Lawyers and the Constitution (1942); Clement E. Vose, Constitutional Change (1972).

[83] Gregory A. Caldeira & John R. Wright, Amici Before the Supreme Court, 52 J. Pol. 782 (1990); Epstein, supra note 6.

[84] Epstein, supra note 82; Karen O'Connor & Lee Epstein, Rebalancing the Scales of Justice, 7 Harv. J.L. & Pub. Pol'y 483 (1984) (describing the emergence of conservative public interest law).

[85] For example, see discussion of balancing considerations undertaken by conservative public interest groups in Epstein, supra note 82, at 118-46.

NAACP LDF. The advantaged groups found themselves out-gunned and out-matched. Disadvantaged interests had developed years of expertise in litigation and flooded the courts with the products of that learning process. Advantaged interests, who knew only of political battles in legislative and executive arenas, found themselves overpowered. Hence, they went into courts to win cases, but also to assert their arguments and counter their opponents' claims. In short, at least initially, they viewed the balancing of countervailing interests as a goal in and of itself.

Balancing, though, is just one explanation. Research by Robert Bradley and Paul Gardner suggests two other possibilities.[86] First, between 1960 and 1980, Congress passed numerous pieces of legislation of great importance to advantaged *and* disadvantaged interests, including the Federal Coal Mine Health and Safety Act, the National Environmental Policy Act, and the Equal Employment Opportunity Act. Accordingly, advantaged interest groups used the nation's courts to convince jurists to adopt their version of the "appropriate" interpretation of the laws. Second, advantaged interests perceived that the "Burger Court would be more receptive to their interests than the Warren Court and, perhaps more importantly . . . that they had suffered a series of legislative losses in Congress [e.g., the Equal Employment Opportunity Act] and needed to influence the Court to limit these losses."[87]

Whatever the reason for the growth of pluralism, Figure 3 provides ample evidence of its existence from 1954 to the present. The first series of data for the 1954-1980 Terms show the total number of requests to participate as amicus curiae made by upperdogs (i.e., advantaged interests) and by underdogs (i.e., disadvantaged groups). As noted, a rather large gap existed until the mid-1960s; before then the "upperdogs" made more requests than their "underdog" counterparts.[88] Not surprisingly, that situation changed during the liberal Warren Court when increasing numbers of disadvantaged groups wanted to participate as amicus curiae. But, as the 1978-1980 data indicate, both kinds of groups submitted participation motions at

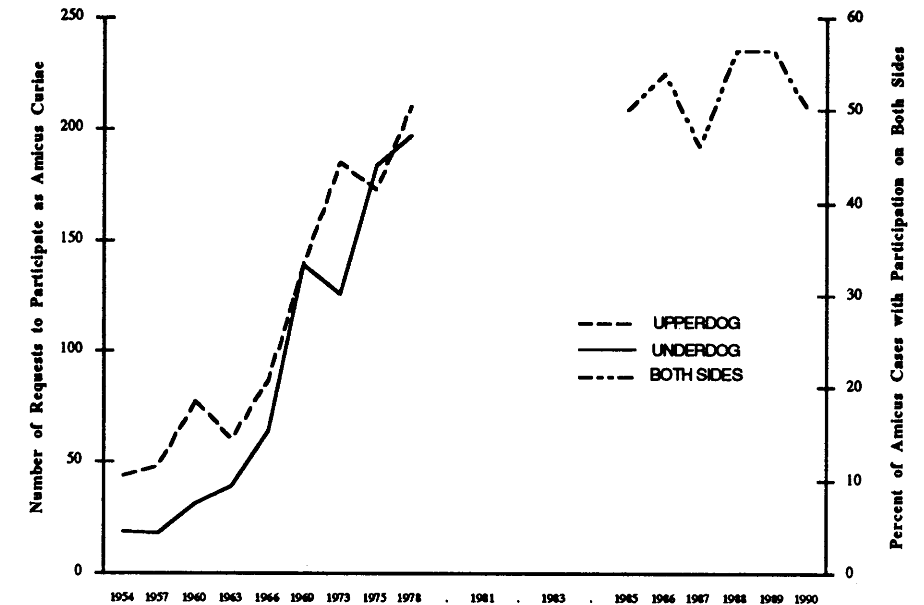
[86] Bradley & Gardner, supra note 48, at 92.

[87] Id. As they note, 25 major laws passed between 1965 and 1975 were "contrary to the interests of business." Id.

[88] This finding seems to run counter to the "disadvantaged" thesis. But since these data represent only amicus curiae "requests," and not actual participations, we cannot assess their compatibility with that thesis.

FIGURE 3

THE GROWTH OF PLURALISM IN THE U.S. SUPREME COURT, 1954-1990 TERMS[89]



record levels and at near parity. The second series of data, for the 1981-1990 Terms, confirm that this trend continued during the later Burger Court years, even through the time of the Rehnquist Court. These data show growth in the percentage of cases in which interest groups are represented on both sides of a dispute. Thus far during the Rehnquist Court, that figure has remained above 50 percent; in other words, in about half of all cases before the Court, competing arguments were submitted from amici curiae for both parties.[90]

Several cases decided during the Rehnquist Court era are particularly illustrative of the "new" pluralism. Once again, *Webster* is the most intriguing. The outpouring of support (see Appendix I) was by no means a coincidence, for the abortion movements coordinated

[89] Sources: 1969-1980: Id.; 1986-1990: Collected by author.

[90] Bradley & Gardner, supra note 48, at 92.

their respective amicus curiae activities. Planned Parenthood and the American Civil Liberties Union's Reproductive Freedom Project handled the pro-choice side, overseeing the filing of thirty-two separate amicus curiae briefs and representing, as Appendix I depicts, a diverse range of interests. They wanted the briefs to "show the broad base of support for *Roe* from mainstream America, and [to] show the mainstream of legal thought."[91] Attracting amici as diverse in goals and constituencies as the Sierra Club, the American Library Association, and the National Education Association, was a way of driving home "universal" support for abortion rights.[92] According to an Americans United for Life director, the goals of the pro-life side were the same.[93] As noted in Appendix I, they succeeded to the extent that they matched nearly every constituency represented in a pro-choice brief. To put it succinctly, amici in *Webster* provided the ultimate display of pluralism in action.

IV. THE GOALS OF ORGANIZATIONAL LITIGATORS

It is not enough to recognize that interest groups are now regular players in Supreme Court litigation. Another important issue concerns the motivations of these interest groups. That is, why do they turn to the Court to achieve their policy objectives? Four decades ago, that question would have been easy to answer. In the days when Vose published his account of the NAACP's quest to end restrictive covenants in *Shelley v. Kraemer*, many scholars conceptualized the goals of organizations in essentially monolithic terms, as did he.[94] They suggested that the sole objective of most groups was to see their policy objectives etched into law. This was, undoubtedly, adequate and accurate: the few groups that litigated prior to the 1960s generally went to court to win favorable policy.[95]

With ever increasing numbers of groups entering the judicial fray, however, the motivations for litigation have broadened. Survey research conducted by Caldeira and Wright serves to highlight this point. In a 1988 questionnaire mailed to all organized interests par-

[91] W. John Moore, Lobbying the Court, Nat'l J., April 15, 1989, at 908.
[92] Id.
[93] Id.
[94] See generally Vose, supra note 4.
[95] Id.

ticipating in paid cases during the 1982 Term, Caldeira and Wright sought to assess the considerations that led groups to participate as amici curiae on certiorari and on the merits of cases.[96] Table 3, which depicts the results of their survey, indicates that four sets of factors, to varying degrees, explain why groups participate in litigation: case characteristics, expected outcome, cues, and organizational maintenance. Hence, while winning ("expected outcome") is still an important consideration for most groups, other factors also move them to litigate. In what follows, I consider each of these factors and their implications for litigation during the Rehnquist Court era.

A. Characteristics of the Case

As noted in Table 3, the characteristics of a case—its economic, political, and social importance to interest group members and its quality as a legal vehicle—constitute the two most important considerations for filers of amicus curiae briefs. The reasons are readily explainable. First, organizations may be responding to the concerns of the Justices. As Caldeira and Wright point out:

> [L]ike most other political actors, [the Justices] are interested in exercising influence over legal, economic, political, and social policy. . . . [J]ustices aspire to the Supreme Court not only because of the status, prestige, and intellectual challenge a position on the high court offers, but also because they wish to make a positive and significant impact on society. To do so, they must identify and decide those cases with the greatest potential impact on society.[97]

It only makes sense, then, that groups would provide the Justices with information "otherwise not readily available, about the true legal, economic, political, or social ramifications of cases on [their] docket."[98]

[96] Gregory A. Caldeira & John R. Wright, Why Organized Interests Participate as Amici Curiae in the U.S. Supreme Court 14-15 (1989) (paper presented at the annual meeting of the Law & Society Association, on file with the author). The survey was sent to 1150 amici; 42.4% (n = 477) responded. Id.
[97] Id. at 3.
[98] Id. at 4.

TABLE 3

CONSIDERATION IN FILING AMICUS CURIAE BRIEFS ON CERTIORARI OR APPEAL[99]

	Percent of Organization Rating Consideration as:		
	Very Important	Somewhat or Very Important	N =
Characteristics of the Case			
Economic, Political, or Social Importance to Members	85.3	95.6	387
Quality as a Legal Vehicle	45.2	85.4	383
Expected Outcome			
Likelihood of Getting Four Votes for Certiorari	10.3	49.6	387
Likelihood of Winning on the Merits	25.6	71.8	383
Cues			
Conflict among Courts	17.0	58.8	383
United States as a Party or Amicus	1.3	14.7	380
Organization Maintenance			
Keeping Members Satisfied	18.4	53.1	245
Avoiding Controversy within Organization	17.0	52.7	381

Similarly, a great many amici are "repeat players,"[100] meaning that they appear before the Court regularly; any given amicus submission is probably not their first, nor will it be their last. Accordingly, if organized interests are to win the trust of the Justices, they cannot afford to bombard them with briefs in relatively inconsequential disputes.[101] Again, as Caldeira and Wright suggest, "A group's legal credibility and reputation depend considerably on the kinds of cases in which it chooses to participate. Once an organization establishes a reputation for participating in cases of good legal quality, its presence as an amicus may receive greater attention from the clerks and Justices."[102]

99 Source: Id. at 28.

100 See Mark Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95, 98-103 (1974).

101 Id. at 99.

102 Caldeira & Wright, supra note 91, at 15. See also Stephen Shapiro, Amicus Briefs in the Supreme Court, 10 Litigation 21 (1984).

Finally, amicus curiae briefs (not to mention case sponsorship) can be quite expensive, with the average submission costing about eight thousand dollars.[103] Caldeira and Wright estimated that a single amicus brief prepared by a reputable law firm costs anywhere from fifteen to twenty thousand dollars, with one firm suggesting it had paid as much as sixty thousand dollars.[104] However, most groups have small litigation budgets and, given that they assert some level of interest in about sixteen cases per year, they must select them carefully: "to file a brief on each important case would cost the average organization in excess of $128,000 per year. This amount, however, exceeds the entire litigation budget of more than one-half of the organizations."[105] Therefore, interest groups can afford to participate only in the cases they consider to be of true legal, social, and political significance.

Empirical research reinforces the finding that case characteristics are critical considerations for amici curiae and for organizational sponsors. In a study of 306 "important constitutional cases" decided by the Supreme Court between 1870 and 1970, researchers found that organized interests had sponsored 53 percent of the 306 cases and had filed amicus curiae briefs in 31 percent of the cases.[106] Although these figures pale in comparison to the average participation rates in the 1980s and 1990s (see Figure 1), they are truly extraordinary from an historical perspective. For the years between 1928 and 1966, Hakman found group participation in only 18.6 percent of all cases.[107] In addition, the number of amicus curiae briefs dramatically increased in each decade studied.

Cases supported by organized interests during the Rehnquist Court years examined also follow this trend. Appendix II depicts the most important cases decided between the 1986 and 1991 Terms and provides summary information concerning group participation. As noted, about half were sponsored by organized interests, all but two contained amicus curiae briefs submitted on the merits, over a third generated participation at the certiorari stage, and about 50 percent

103 Caldiera & Wright, supra note 96, at 13.

104 Id. at 12.

105 Id. at 13.

106 Karen O'Connor & Lee Epstein, The Role of Interest Groups in Supreme Court Policy Formation, *in* Public Policy Formation 63 (Robert Eyestone ed., 1984).

107 Hakman, Political Environment, supra note 21, at 213.

attracted the participation of the U.S. Solicitor General. The average Rehnquist Court case with one or more briefs contained 4.4 amicus curiae briefs; for those cases listed in Appendix II, that figure is 14.4. And during the 1990 term, 4.5 interest groups cosigned a brief filed in the ordinary cases; an average of 20 signed on to the important ones.

B. Expected Outcomes

Caldeira and Wright's research also points to the importance of expected outcomes (see Table 4), or "success", as a motivating factor for group litigation. For those groups surveyed, "success" can come in two ways: the Court can grant certiorari, and/or the Court can rule in their favor. Since these represent distinct, albeit related, motivations, I will consider them separately.

1. "Getting Four Votes": Interest Groups as Agenda Setters

Where do policy issues come from? How are issues created and why do some controversies come to command the attention and concern of the formal centers of decision-making, while others fail?[108] Scholars give a variety of answers to these questions. One of the more predominant answers is that issues "arise from group conflict."[109] Under this view, organizations expand the "scope, intensity, and visibility" of particular issues in order to attract the attention of policy makers, who may in turn place the issue on the governmental agenda. The reasons groups wish to do this is plain—they desire to change the status quo.[110] If they favored the existing state of public policy, there would be little reason for them to disturb it.

How groups accomplish this varies from institution to institution. As previous research explains, each branch of government possesses unique rules and norms of access to its corridors. Gaining admission to the Supreme Court and helping set its agenda depends substantially on persuading the Justices to take a case for argument. This is a monumental task since the Justices receive over 5,000 petitions each

[108] For a more thorough analysis of this issue, see Epstein & Kobylka, supra note 6, at 29.

[109] Roger W. Cobb & Charles D. Elder, Participation in American Politics: The Dynamics of Agenda Building 160 (1983).

[110] See Truman, supra note 12.

Term, and grant review only to about 120.

The hurdle of obtaining plenary review is precisely why the organizations surveyed by Caldeira and Wright list "getting four votes" as one of their most important motivating factors (see Table 4). Organizations know that according to Court rules, at least four Justices must agree to take a case before certiorari is granted. Yet this is a hurdle clever groups have learned to overcome. Because amicus curiae briefs filed on certiorari act as "cues," alerting the Justices to the importance of a particular dispute, they significantly increase the likelihood that the Court will grant review.

> 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.[111]

"Important" litigation brought during the first several years of the Rehnquist Court serves to highlight this point. Of those cases depicted in Appendix II, 35 percent were accompanied by amicus curiae briefs at the certiorari or jurisdictional stage. In some instances, briefs were filed on both sides. In others, as many as two to seven briefs came even before the Court granted plenary review. Overall, during the 1990 Term, organized interests filed briefs on certiorari in 22 percent of all cases decided with full opinions.

Given their ability to help the Court set its agenda, it is not surprising that groups take this agenda-setting role quite seriously. Almost 50 percent of all amici respondents view "getting four votes" as an important or somewhat important consideration in deciding whether to participate in a case.[112] What is particularly interesting, though, is that some groups are more likely to file amicus curiae briefs on certiorari than are others. Consider Table 4, which displays the number of amici filing on certiorari by the type of organization involved. One obvious finding is that state governments file, in percentage terms, more briefs on certiorari than any other type of amicus. Clearly, then, "[w]hat the Supreme Court does is of interest to the states.

[111] Caldeira & Wright, supra note 4, at 1122.

[112] See supra Table 3.

TABLE 4
AMICUS CURIAE PARTICIPATION ON CERTIORARI IN THE U.S. SUPREME COURT BY ORGANIZATIONAL TYPE[113]

	total number of amici filing on certiorari		*number of distinct organizations*		*participation rate*
	n=	%	n=	%	
Individual	40	4.0	39	8.6	1.03
Corporation	118	11.8	100	21.9	1.18
Government					
United States	59	5.9	1	.2	—
State	381	38.2	39	8.6	9.77
County	45	4.5	40	8.8	1.13
Municipality	29	2.9	25	5.5	1.16
Other (govt.)	14	1.4	13	2.9	1.08
Charitable/Community Group	28	2.8	20	4.6	1.40
Public Interest Law Firm	20	2.0	12	2.6	1.67
Citizen/Public Interest/Advocacy Group	52	5.2	26	5.7	2.00
Business/Trade/Professional Association	129	12.9	88	19.3	1.47
Union	23	2.3	17	3.7	1.35
Peak Association	26	2.6	8	1.8	3.25
Other	34	3.4	27	5.9	1.26
Totals	998		455		

This heavy rate of participation among the American states illuminates the importance of intergovernmental lobbying of the Supreme Court and mirrors the trend among the states of maintaining offices in Washington for lobbying purposes."[114] Their participation also reflects the growing recognition among states for the need to put

[113] Note: The participation rate is equal to the number of amici filing on certiorari divided by the number of distinct organizations.
See P. Bruer, Amicus Curiae and Supreme Court Litigation (1988) (paper presented at the annual meeting of the Law & Society Meeting; on file with the author).
Source: Caldeira & Wright, Amici Before the Supreme Court, 52 J. Pol. 793 (1990).

[114] Caldeira & Wright, supra note 83, at 794 (citations omitted).

greater and more professional emphasis on the Supreme Court as a policy making body.[115] Also interesting is that business interests, such as corporations and businesses, and trade and professional associations, were responsible for almost 25 percent of amici briefs on certiorari. This is compared to public interest groups, like charitable or community groups, public interest law firms, or citizen advocacy groups, which filed only 10 percent of such submissions.

These findings lead to a rather interesting conclusion. Since we know that the presence of an amicus curiae brief significantly increases the probability that the Court will hear a particular case, it is largely the states rather than local governments, and businesses rather than public interest groups, that are shaping the Court's agenda. Why public interest groups, in particular, have filed few amicus curiae briefs on certiorari is a question data gathered by other reserachers answers. Since most public interest groups are liberal in ideological orientation,[116] they may not want a relatively conservative Court to review favorable lower court decisions. States, on the other hand, are probably quite anxious to have the Rehnquist Court review litigation of interest to them. The present Justices have been very supportive of states' litigation efforts, particularly in cases involving criminal procedure, the area constituting most state activity before the Court.[117] It is hardly surprising, then, to see states play an active role in setting the agenda of a supportive Supreme Court.

2. Winning Cases on the Merits

Among the most widely accepted reasons that groups sponsor litigation and file amicus curiae briefs on the merits (see Table 3) is to see their policy objectives etched into law—a goal most readily accomplished when the Court rules in their favor. This objective requires little explication. When an organization spends hundreds of

[115] See Stewart A. Baker & James R. Asperger, Forward: Toward a Center for State and Local Legal Advocacy, 31 Cath. U. L. Rev. 367 (1982).

[116] See generally O'Connor & Epstein, supra note 46.

[117] Between 1953 and 1970 state and local governments won 39.3 percent (N=328) of their criminal procedure cases. That figure jumped to 65.7 percent (N=382) between 1971 and 1980 and to 73.3 percent (N=360) between 1981 and 1989. See Richard C. Kearney & Reginald S. Sheehan, Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation, 54 J. Pol. 1008, 1015 (1992). During the 1990 and 1991 Terms, state governments won 64 percent (N=69) of all their cases. See Epstein et al., supra note 61 (providing data and other information on the Court's docket, support for various parties, and voting behavior).

thousands of dollars and other organizational resources to get a case before the Supreme Court, it is only common sense that it would like to achieve legal victory. A favorable ruling can mean the fulfillment of years of dreams and struggles, as was the case when the NAACP LDF won *Brown v. Board of Education*.[118] Likewise, an adverse holding can spell disaster for organizations, which occurred when the National Consumers' League failed to convince the Court to uphold minimum wage legislation.[119] The important question, then, is not necessarily whether groups want to achieve legal victories.[120] Obviously they do. Rather, analysts have spent considerable time assessing whether groups are successful in court. This is a subject I take up in Part V of the article. For now, though, let us consider a second task scholars have undertaken—discerning how groups maximize their quests to win cases.

Most research on maximizing success has coalesced around a deceptively simple vision of the ideal litigation campaign, based on the way the NAACP LDF used the legal system to integrate school systems[121] and to end restrictive covenants.[122] This model posits that the surest way groups can achieve legal success is to bring test cases that gradually chip away at existing adverse precedent and forge new principles for future litigation. Hence, when the NAACP LDF sought to eradicate the "separate but equal" doctrine,[123] it did not race into the Nation's courtrooms asking jurists to overrule the doctrine. Rather, the LDF brought a series of cases, each designed to incrementally erase the vestiges of "separate but equal" to the point where it no longer existed.[124] The gradual erosion and replacement of precedent plays to the Court's natural inclination to avoid radical departures from any given policy. Yet, a test-case strategy of this sort can involve a good deal more than merely sponsoring "ideal" suits.

118 347 U.S. 483 (1954).

119 Adkins v. Children's Hospital, 261 U.S. 525 (1923); see Vose, supra note 79, at 190-96.

120 For additional treatment of this issue, see Epstein & Kobylka, supra note 6, at 27-28.

121 See Brown v. Board of Education, 347 U.S. 483.

122 See Shelley v. Kraemer, 334 U.S. 1 (1948).

123 See Plessy v. Ferguson, 163 U.S. 537 (1896).

124 There is, however, a growing body of literature which questions whether any group actually adopts this ideal model. See Mark Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925-1950 (1987); Stephen L. Wasby, Civil Rights Litigation By Organizations: Constraints and Choices, 68 Judicature 337 (1985); Stephen L. Wasby, How Planned is "Planned Litigation?", 1984 Am. B. Found. Res. J. 83 (1984).

In fact, scholars have suggested[125] that groups using such a strategy could be more successful by becoming "repeat players," that is, continuously and repeatedly turning to the judicial process to achieve policy ends.[126] In addition, it has been suggested that groups coordinate with other organizations, which would include seeking out other groups to assist with legal strategy, providing supplemental funds, and filing support amicus curiae briefs.[127]

Most of these factors were developed to explain the strategies used by liberal groups in litigation campaigns occurring well before the Rehnquist Court. An interesting question, therefore, is whether these factors have any applicability to interest group litigation, conducted by a range of litigants, during the past five Terms. Consider first the repeat player issue. Given the perceived conservatism of the Rehnquist Court, might it be the case that some of the usual "liberal" litigants, like the ACLU and the NAACP LDF, have failed to participate at their typical levels? Figure 4 addresses this question by tracking the involvement of these two groups in race and sex employment discrimination cases decided between the 1970 and 1990 Terms. As noted, they have continued to participate despite the Rehnquist Court's relative conservatism in these areas. Both the LDF and the ACLU sponsored or filed amicus curiae briefs in more than half the cases decided during the 1980s—a figure that approximates their participation during the earlier period.

125 Given page constraints, the narrative that follows in the text considers only two factors. Others include:

Hiring Expert Staff Attorneys: employing attorneys committed to organizational goals who are also well-versed in areas of interest to the group. See generally Epstein, supra note 82; Manwaring, supra note 80; Michael Meltsner, Cruel and Unusual (1973); Sorauf, supra note 25.

Developing a Sharp Issue Focus: concentration on but a handful of legal issues. See generally Ruth B. Cowan, Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976, 8 Colum. Hum. Rts. L. Rev. 373 (1976); O'Connor, supra note 26.

Obtaining and Retaining Financial Resources: possessing and allocating the funds necessary to carry out litigation strategy. See generally Robert Belton, A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964, 31 Vand. L. Rev. 905 (1978); Sorauf, supra note 25.

Amassing Technical Data: presenting social scientific proofs of legal arguments. See generally O'Connor, supra note 26; Clement E. Vose, National Consumers' League and the Brandeis Brief, 1 Midwest J. Pol. Sci. 267 (1957).

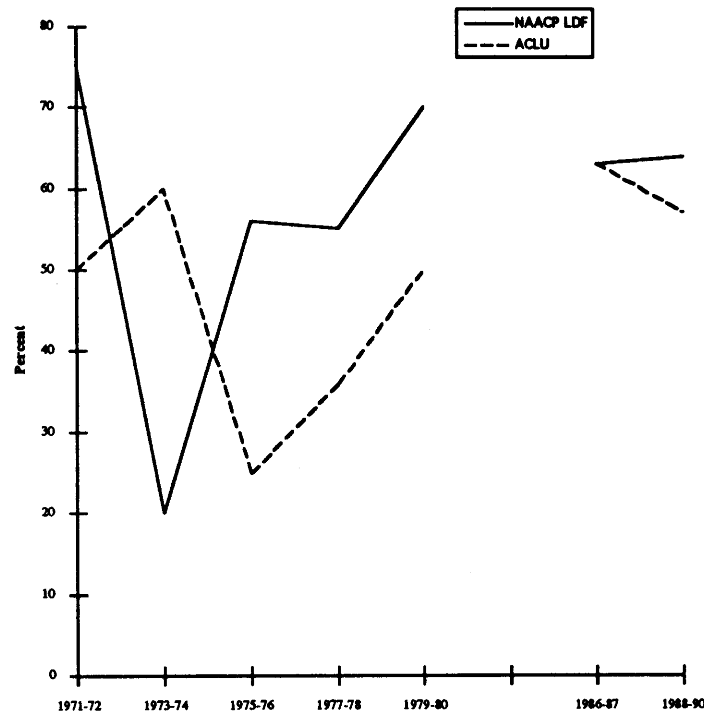
Generating Legal Publicity: writing law review articles supportive of arguments. See generally Jack Greenberg, Judicial Process and Social Change (1977); Vose, supra note 4.

For full reviews, see O'Connor, supra note 26, at 13-28; Epstein & Kobylka, supra note 6, at 26-27.

126 See generally Galanter, supra note 100; Greenberg, supra note 125; Kluger, supra note 80; Kobylka, supra note 80.

127 See generally Baker & Asperger, supra note 114; Joel F. Handler, Social Movements and the Legal System (1978); Kluger, supra note 80; Sorauf, supra note 25.

FIGURE 4.
SPONSORSHIP AND AMICUS CURIAE PARTICIPATION BY SELECTED GROUPS IN SEX AND RACIALLY-BASED EMPLOYMENT DISCRIMINATION CASES DECIDED BY THE U.S. SUPREME COURT, 1971-1990[128]



Have groups continued to coordinate their efforts in front of the Rehnquist Court? Anecdotal evidence suggests that organized interests, particularly liberal ones, continue to cooperate in litigation. In *Webster*, for example, pro-choice interests coordinated the filing of amicus curiae briefs. In contrast, some literature suggests that conservative interests have not endeavored to present the Court with a

128 Note: The Percent indicates the percent of full opinion cases in which the group participated as a sponsor or amicus curiae.
Sources: 1971-80: Adapted from Karen O'Connor & Lee Epstein, The Importance of Interest Group Involvement in Employment Discrimination Litigation, 25 How. L. J. 709 (1982); 1986-90: Collected by author.

unified front.[129] O'Connor and McFall found that two or more conservative groups filed briefs in the same case about 37 percent of the time and that "[m]ost of this participation was in the form of individually filed briefs."[130] Based on that figure, they conclude that "[i]n the 1980s . . . conservatives rarely acted in concert,"[131] whereas the "amicus briefs liberal groups file are frequently 'love fests.'"[132]

Their research, though, has two weaknesses. First, it tends to focus only on one kind of litigator, conservative public interest law firms such as the Washington and Pacific Legal Foundations.[133] Because these groups have had their share of troubles over the past half a decade or so,[134] and because they comprise only a fraction of conservative interest groups that use the legal system, they may not be particularly representative.[135] Second, because O'Connor and McFall provide no data on liberal groups, we cannot necessarily say whether this 37 percent figure is relatively high or low.

Hence, to evaluate the degree of cooperation among liberal groups and their conservative counterparts, we need to consider a more systematic indicator. Table 5 accomplishes this by depicting the degree of support among liberal ("separationist") and conservative ("accommodationist") interests involved in church-state litigation from 1986 to 1990. Quite clearly, there is no appreciable difference in the cooperation rates of liberal and conservative interests in this particular area of the law. Just as the ACLU and the American Jewish Congress supported each other in most of the cases they entered, so too did the Christian Legal Society and the Catholic League.

Beyond church-state litigation, state and local governments and their affiliated organizations have made great strides to coordinate their litigation efforts since the 1980s. In response to the comments of analysts suggesting that "state and local governments did not enjoy a reputation for effective representation of their constituents,"[136] the National Association of Attorneys General (NAAG) created a

129 O'Connor & McFall, supra note 6, at 273.
130 Id.
131 Id. at 276.
132 Id. at 273.
133 For more on these groups, see Epstein, supra note 82; O'Connor & Epstein, supra note 46.
134 See O'Connor & McFall, supra note 6, at 276-79.
135 See Epstein, supra note 82; O'Connor & Epstein, supra note 46.
136 Douglas Ross & Michael W. Catalano, How State and Local Government Fared in the United States Supreme Court for the Past Five Terms, 20 Urb. Law 341, 342 (1988).

TABLE 5

INTER-GROUP COOPERATION: A COMPARISON OF ACCOMODATIONIST AND SEPARATIONIST GROUPS IN RELIGIOUS CASES DECIDED BY THE U.S. SUPREME COURT, 1986-1990[137]

	Support for... ACLU	American Jewish Conmmittee	American Jewish Congress
Group			
ACLU	—	.529	.882
AJ Comm.	1.00	—	.889
AJ Congress	.833	.444	—

	Support for... Catholic League for Religious and Civil Rights	Christian Legal Society	Rutherford Institute
Group			
Catholic L	—	.600	.600
Christian L	.857	—	.429
Rutherford	.857	.429	—

committee "to make recommendations on improving the effectiveness of state representation in the Supreme Court."[138] Among the committee's final proposals was one concerning coordination: "Develop in-depth moot court and brief writing programs and efforts to coordinate amicus curiae activity of states."[139] Around the same time, seven organizations, the Council of State Governments, the International City Management Association, the National Association of Counties, the National Conference of State Legislators, the National Governors' Association, the National League of Cities, and the U.S. Conference of Mayors, created the State and Local Legal Center "to advance and defend the interests of state and local gov-

[137] Note: Inter-group support equals the number of cases in which both groups were present divided by the number of cases the first group entered. Thus, support equals the number of supportive cases divided by the total number of cases entered.
Source: Data collected by the author.

[138] Id. at 343.

[139] Id. at 342. Another recommendation also dealt with issues of coordination: "[I]mprove communication among the offices of attorneys general regarding Supreme Court practice by designation of each attorney general as a primary contact with respect to all Supreme Court matters." Id.

ernment within the federal system."[140]

A major result of these efforts is that state attorneys general and organizations representing state and local governments are united in their litigation efforts before the U.S. Supreme Court. During the 1990 Term, for example, in cases in which at least one state filed a friend-of-the-court brief, the average number of other states participating was 15.7. In only three cases did a state participate as amicus curiae without the support of others. By the same token, the State and Local Legal Center submitted eight briefs on behalf of organizations such as the National League of Cities, the National Governors' Association, and the National Conference of State Legislatures.

In short, it may be that conservative public interest law firms, such as the Washington and Pacific Legal Foundations, have not coordinated their litigation efforts during the first five terms of the Rehnquist Court, although many other kinds of interest groups continue to view this as an important tactic. The efforts of state and local governments and their constituent organizations to present the Court with a unified front highlight this phenomena during the past five Terms.

C. Cues: Conflict among Courts and the United States as a Party or an Amicus

As Table 3 shows, conflict among the circuits and the participation of the U.S. Government are important considerations for interest groups contemplating whether or not to file amicus curiae briefs. The first is easy to understand. Section 1(b) of Supreme Court Rule 19 explains that the Court is more likely to grant review upon petition "[w]here a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter."[141] Research shows that the Court is more likely to grant review to a case when clear evidence of a conflict among the circuits exists.[142] Recognizing this trend, interest groups cite disagreement among

[140] Id.; see also Baker & Asperger, supra note 114.

[141] Sup. Ct. R. 19 sec. 1(b). See also Robert L. Stern & Eugene Gressman, Supreme Court Practice 264 (1978) ("[A] well-established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court or some lower court whose judgment is final in the absence of Supreme Court review.").

[142] See Caldeira and Wright, supra note 4, at 1118; see also Samuel S. Estreicher & John Sexton, Redefining the Supreme Court's Role 53-59 (1986); Sidney Ulmer, The Supreme Court's Certiorari Decisions, 78 Am. Pol. Sci. Rev. 901 (1984).

lower courts as a factor which guides their participation decisions.[143]

Groups have often used these strategies in cases before the Rehnquist Court. In *Cruzan v. Director, Missouri Health Department*,[144] for example, appellant's attorney alleged that disagreement was a major reason for granting review: "[T]he decision below conflicts with decisions of other state supreme courts."[145] Appellants asserted that courts in Arizona and Massachusetts had reached decisions in "direct conflict" with the Missouri Supreme Court.[146] Even more interesting is that when no direct disagreement exists among the lower courts, groups find some way to inject "controversy" into their briefs. In *U.A.W. v. Johnson Controls*,[147] appellants noted that "[w]hile all [courts of appeal] agree that an employer policy of this kind substantially disadvantages women . . . those courts disagree entirely upon the critical issues."[148] Using the reverse logic, appellee's attorneys in *Texas v. Johnson*[149] specifically claimed that no real conflict existed. They had won the case at the lower court level, and perhaps they believed (incorrectly, as it turned out) that the Rehnquist Court would upset that ruling.

Survey data (see Table 3) also indicate that the presence of the U.S. Government, as an amicus curiae or as a party to a suit, motivates groups to participate in litigation. Two reasons account for this. First, the Court is significantly more likely to grant certiorari to cases in which the United States is involved as a petitioner or amicus curiae.[150] Second, as vividly portrayed in Table 6,[151] regardless of the

[143] By the same token, groups can manipulate the review process by generating conflict among the circuits. Similarly, they can bombard federal and state courts with litigation of a similar ilk. In pursuing such an "impact" strategy, groups may be less concerned about forcing splits among various judicial entities than about generating so many like cases that they inevitably garner the attention of the Court. See generally Epstein & Kobylka, supra note 6, at 30.

[144] 497 U.S. 261 (1990).

[145] Petition of Writ of Certiorari to the Missouri Supreme Court at 11, Cruzan v. Director, Missouri Dept. of Health (No. 88-1503).

[146] Id. at 13.

[147] 111 U.S. 1196 (1991).

[148] Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit at 14, U.A.W. v. Johnson Controls (No. 89-1215).

[149] 491 U.S. 397 (1989).

[150] H.W. Perry, Agenda Setting and Case Selection, *in* The American Courts 235, 238 (John B. Gates & Charles A. Johnson eds., 1991) (stating that the Solicitor General's requests for review are accepted at rates approaching 80 percent).

[151] Table 6 depicts these rates for Solicitor Generals serving after the Eisenhower Administration. The Solicitor General was equally successful during earlier periods. As an amicus curiae, the Solicitor General won 74 percent of his cases decided between 1920 and 1973. Steven Puro, The Role of Amicus Curiae in the United States Supreme Court (1971) (unpublished Ph.D. dissertation, State University of New York (Buffalo)); see also Jeffrey A. Segal, Courts, Executives, and Legislatures, *in* The American Courts 373 (John B. Gates & Charles A. Johnson eds., 1991) for a review of this literature.

political or ideological orientation of the administration under which they served or the particular predisposition of the sitting Justices, Solicitors General have inordinately high success rates in litigation.[152]

TABLE 6

SUCCESS RATE OF THE SOLICITOR GENERAL AS AN AMICUS CURIAE IN THE U.S. SUPREME COURT BY PRESIDENT, 1952-1990 TERMS[153]

Record	Eisen-hower	Ken-nedy	Johnson	Nixon	Ford	Carter	Reagan	Bush
% lost	16.7	12.5	17.1	29.1	28.9	34.9	32.5	24.2
% won	83.3	87.5	82.9	70.9	71.1	65.1	67.5	75.8
# of cases	42	48	41	79	38	86	123	99

Not surprisingly, interest groups view the Solicitor General's participation as a critical factor in their decision-making calculus. They recognize that with the Solicitor General on their side, the chances of success increase dramatically. Interestingly, though, it has been argued that this was not the case during the Reagan, and by implication the Bush, years. Most prominently, in a 1987 book Caplan claimed that Reagan's Solicitors General were not as influential as their predecessors because they "politicized" the office in a conservative direction.[154] Segal provides some evidence to support Caplan's contention of politicization. He found that the correlation (.46) between the ideology of presidential administrations, from Eisenhower through

[152] Why solicitors general have had such high success rates is readily explicable. Factors include their legal expertise and their utility as a pre-conference screening device. See generally Samuel Krislov, The Amicus Curiae Brief: From Friendship to Advocacy, 72 Yale L.J. 694, 714-16 (1963) (looking at the historical role of the solicitor general in permitting amicus curiae briefs when the government is a party); Robert Scigliano, The Supreme Court and the Presidency 182-96 (1971) (noting the Court's respect for the expertise of the solicitor general). In addition, the Court recognizes that although solicitors general serve a partisan master, they presumably embody the interests of the Nation. After all, they are the sole representative of the United States in Court. As Caplan writes, "The Justices expect the substance of [the solicitor general's] remarks to be distinguished . . . . [T]hey count on him to look beyond the government's narrow interests. They rely on him to help guide them to the right result . . . and to pay close attention to the case's impact on the law. . . . In every case in which [the solicitor general] participates, the Justices expect him to take a long view." Lincoln Caplan, The Tenth Justice 3, 7 (1987).

[153] Note: The Reagan years cover the 1980-82 and 1986-87 Terms; the Bush years cover the 1988-90 Terms.

Sources: 1952-1982 Terms: Jeffrey A. Segal, Courts, Executives, and Legislatures, *in* The American Courts 373 (J.B. Gates & C.A. Johnson eds.1991); 1986-1990 Terms: Collected by the author.

[154] Caplan, supra note 152.

Reagan, and the ideological position taken in amicus curiae briefs submitted by the Solicitor General, virtually disappears when the Reagan years are excluded from analysis.[155] Likewise, scholars and legal analysts have produced numerous papers, articles, and books on the Reagan-Bush Solicitor Generals' forays into the abortion issue, affirmative action, free speech, and other controversial issues. These works tend to support an oft-cited quip made by one of Reagan's Solicitors General, Rex E. Lee:

> If I had done what was urged on me in a lot of cases, I would have lost those cases and the Justices wouldn't have taken me seriously in others. There has been this notion that my job is to press the Administration's policies at every turn and announce true conservative principles through the pages of my briefs. . . . I'm the Solicitor General, not the Pamphleteer General.[156]

To be sure, then, the Office of the Solicitor General may have been more politicized during the 1980s than in any previous decade. And although anecdotal evidence, such as the inability of the Reagan/Bush administration to convince the Justices to overrule *Roe v. Wade*,[157] seems to support Caplan's conclusion that the Reagan/Bush Solicitors General were less successful than their predecessors, the data indicate otherwise. Indeed, contrary to Caplan's suggestion, politicization did not necessarily translate into a loss of influence with the Justices. Parties supported by the Solicitor General's amicus curiae briefs during the 1986-1990 Terms of the Rehnquist court won sixty-nine percent of their cases; this figure is neither substantially higher nor lower than in earlier periods (see Table 6). What is more, this success cannot be attributed merely to ideology; that is, to the fact that the United States was presenting conservative arguments to a conservative Court. Work by Segal,[158] Segal and Reedy,[159] and George and Epstein[160] show that the Solicitor General is influential, even after controlling for the facts of a given case and

[155] Segal, supra note 151, at 381.

[156] Caplan, supra note 152, at 107.

[157] 410 U.S. 113 (1973).

[158] Jeffrey A. Segal, Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981, 78 Am. Pol. Sci. Rev. 891 (1984).

[159] Jeffrey A. Segal & Cheryl D. Reedy, The Supreme Court and Sex Discrimination: The Role of the Solicitor General, 41 W. Pol. Q. 553 (1988).

[160] George & Epstein, supra note 1.

for the ideology of the Court.

In sum, several conclusions can be drawn about the relationship between the Solicitor General and interest group litigators. First, the perceptions of interest groups regarding the importance of the Solicitor General are founded in fact. If a group wishes to gain access to the Court or to win their cases on the merits, participation of the Solicitor General provides a reasonably good indicator of the direction in which the Court will head. Second, despite predictions to the contrary, the success of the Solicitor General is as high now as ever before. Given the ideological orientation of the Reagan/Bush administrations, the success of the Solicitor General worked mainly in favor of conservative causes. If the results of previous work indicating that the Solicitor General's influence transcends the ideological predisposition of the Court are an accurate guide to the future, however, liberal interests may have good cause for optimism as Clinton's Solicitor General plans his litigation strategy for the Rehnquist Court Justices.

D. Organizational Maintenance

The data displayed in Table 3 and the discussion above make it clear that groups pursue a variety of goals when they enter the judicial system.[161] While some groups participate solely to win cases, others participate because of the specific characteristics of a given case. It also should come as no surprise that maintenance concerns guide groups' decisions.[162] Indeed, the primary orientation of a group, be it political/purposive[163] or essentially material/economic[164], is relevant to the kinds of issues it will litigate and the ways it pursues such litigation.[165] Before a group can seek its specific goals in any arena, however, it must first ensure the survival of the organization.

[161] I thank Joseph F. Kobylka for his help with this section.

[162] See Table 3, supra p. 660.

[163] Peter B. Clark & James Q. Wilson, Incentive Systems: A Theory of Organizations, 6 Admin. Sci. Q. 129 (1961); Terry M. Moe, The Organization of Interests (1980); James Q. Wilson, Political Organizations (1973).

[164] Mancur Olson, The Logic of Collective Action (1971); Robert H. Salisbury, An Exchange Theory of Interest Groups, 13 Midwest J. Pol. Sci. 1 (1969).

[165] See Joseph F. Kobylka, A Court-Created Context for Group Litigation: Libertarian Groups and Obscenity, 49 J. Pol. 1061 (1987) (using case study of obscenity legislation to suggest that orientation of interest groups leads to behavioral differences in litigation).

Litigation is one tool a group can use to promote or enhance its maintenance needs. This is especially true for political or purposive groups—those that seek to develop broad public policy—because the primary incentives they offer potential and actual members are quintessentially political. The growth of the ACLU in the late 1960s and early 1970s, and the subsequent exodus of members prompted by its defense of the "Skokie Nazis" in the late 1970s, is illustrative of the sensitivity of members to the political positions pursued by such organizations.[166] Given the importance of ideological preferences to the members of political groups, and given the expectations those preferences create, groups may use high profile litigation to enhance their capacity to survive.[167]

Have organizations, especially political/purposive ones, used litigation for maintenance purposes during the Rehnquist Court era? Both survey and anecdotal data indicate that the answer is yes. For example, before and after the *Webster* litigation, the Planned Parenthood Federation and other pro-choice groups took to the Nation's newspapers to advertise their cause, using the Rehnquist Court's conservatism as a weapon.[168] The results of their campaign, coupled with the Court's anti-choice ruling in *Webster*, undoubtedly helped Planned Parenthood to raise significant funds.[169]

V. THE TYPES OF GROUPS THAT PARTICIPATE IN LITIGATION

Are certain kinds of groups more likely than others to litigate and, if so, what explains the propensity of some interests to turn to the courts while others do not? Has the composition of the groups that litigate changed over the past decade or so? The following section summarizes the answers to these questions provided by scholarly literature and updates those answers to incorporate the Rehnquist Court era.

[166] See Douglas E. Kneeland, Nazi Defense by A.C.L.U. has lost 2,000 Members, N.Y. Times, Sept. 6, 1977, at A16; see also Wilson, supra note 163, at 9 (arguing that behavior of political organization and their leaders "can best be understood in terms of their efforts to maintain and enhance the organization . . .").

[167] See Id.

[168] See, e.g., Carol Matlack, Abortion Wars, 23 Nat'l J. 630 (1991).

[169] Private donations rose from 77.2 million in 1989 to about 90 million in 1990. See Felicity Barringer, Planned Parenthood: Quiet Cause to Focus of Fury, N.Y. Times, Oct. 30, 1990, at A16.

A. Who Litigates?

Are certain kinds of groups more likely than others to litigate in the U.S. Supreme Court? Survey research, using interest groups as the unit of study, suggests "no." One analysis found that nearly 75 percent of all organizations had litigated at least once;[170] more recent studies support this conclusion.[171] Even so, at the same time this research indicates that some groups do not use litigation at all, while others do so quite frequently. As Table 1, supra, indicates, many professional associations and educational/research groups rarely turn to the courts, while most public interest law firms and over a third of civil rights/social welfare groups make great use of the legal system.

More interesting is the degree to which organizations use litigation in comparison to other strategies. One study surveyed four types of organizations: corporations, trade associations, unions, and citizens groups to determine which of 27 distinct techniques they used to influence governmental decisions.[172] Of the 27 tactics, which included contacting government officials directly, testifying at hearings, and sending letters, "filing suit" ranked eighteenth overall. Thus, organizations are litigating far less often than, for example, testifying at hearings or contacting government officials directly.[173] But that general finding masks important distinctions among the types of groups answering the survey. For example, of the twenty-four unions responding to the survey, 95 percent said that they filed lawsuits, which makes litigation one of the most utilized tools of labor organizations.[174] Only 72 percent of the eighteen corporations responded affirmatively to the filing of law suits, whereas the vast majority had participated in some form of legislative lobbying, planning legislative strategy or alerting members of Congress to the effects of proposed litigation.[175]

In short, survey research indicates that most groups do litigate but that the use and intensity of litigation is not constant across group types. Obviously, this finding raises an intriguing question: what fac-

[170] Schlozman & Tierney, supra note 29, at 364.

[171] See Bruer, supra note 50, at 19; Scheppele & Walker, supra note 50, at 172.

[172] Schlozman & Tierney, supra note 29, at 155.

[173] Id. at 431.

[174] Id.

[175] Id.

tors explain why some groups litigate and others do not? Table 7 reports the results of two analyses directed at answering this question. The Walker and Scheppele study asked survey respondents to "assess the importance of legal assistance as a benefit to members" on a six-point scale ranging from "not engaged in" to "one of the most important benefits or activities."[176] In order to explain differences among the responses of organizations, they regressed the responses on the explanatory variables displayed in Table 7, which represent 6 categories of explanations. The Bruer study[177] also sought to

TABLE 7

FACTORS AFFECTING THE IMPORTANCE OF LITIGATION TO GROUPS[178]

Variable	regression coefficient from the Scheppele/Walker study (significant or not significant at .05 level)[179]	logit coefficient from the Bruer study (significant or not significant at .05 level)[180]
Organizational Resources		
Staff Size	significant	—
Budget	—	not significant
Age of Group	significant	—
Longevity	—	not significant
Support from Patrons	significant	—
Structure of Conflict		
Intensity of Disputes	significant	—
Policy Opposition	—	signficant
Faces Same Opponents	significant	—
Legal Uncertainty	—	significant
Political Sensitivity		
Change of Fortunes with Partisan Shifts	significant	—
Strategy of Influence		
Inside Strategies	significant	—
Outside Strategies	significant	—
Policymaking Interaction	—	not significant
Substance/Scope of Policy		
Human Services	not significant	—
Economic Growth	not significant	—
National Security	not significant	—
Scope of Interests	—	significant
Policy Focus	—	significant
Minority Representation	—	not significant
Group Type Intercepts[181]		
Profit	.70	
Mixed	-15.48	
Nonprofit	-6.59	
Citizen	-4.10	
Unions	8.46	

[176] Scheppele & Walker, supra note 50, at 175. They then scaled the 6 possible responses from 0 to 100. The mean was 28.8.

[177] Bruer, supra note 50.

[178] Note: The categories come from Scheppele and Walker; the specific factors come from both studies. The authors define each factor and explain how they measured them.

Sources: Scheppele & Walker, supra note 50, at 176 and Bruer, supra note 50, at Table 6.

[179] The dependent variable for the Scheppele & Walker study is scale ranging from 0 to 100, where 0 represents not engaged in litigation and 100 represents litigation is a most important activity.

[180] The dependent variable for the Bruer study is dichotomous with 0 representing non-litigation reliant and 1 representing litigation reliant.

explain organizational use of the Court but it employed a simple dichotomous dependent variable: groups were either litigation "reliant" or non-litigation reliant.[182] In important respects, the results of the two studies parallel each other. It is particularly intriguing that both find a highly significant relationship between the structure of conflicts and litigation. In other words, the more opposition a group has, the more likely it is to litigate. Such a finding comports well with classic pluralist notions of interest group activity.

B. Has the Composition Changed?

The studies discussed above considered all groups, both those that litigate and those that do not. If we focus only on those organizations that regularly resort to the courts, is it possible to detect differences in their participation over time? Table 8, which depicts the participa-

[181] The intercepts "represent the degree to which each type of group engages or does not engage in the activity under scrutiny, after all the other variables and all the other group types have been taken into account." So, for example, citizen groups engage in less litigation than would be expected, while unions engage in the most. See Scheppele & Walker, supra note 50, at 176.

[182] Id. Put differently, Bruer employed a dichotomous dependent variable (litigation or not), whereas Scheppele and Walker's study approximated an interval level variable. For technical reasons, ordinary least square regression (used by Scheppele and Walker) is inappropriate for discrete dependent variables. In recognition of this, Bruer used a logit model to explore the relationship between the use of litigation and several explanatory variables.

tion of five different kinds of interest groups as a percentage of all filers of amicus curiae briefs from the 1958 through 1990 terms, provides data to answer this. The data in Table 8 suggest a number of phenomena. First, despite research to the contrary,[183] conventional wisdom holds that public interest groups are the most litigious. On the one hand, Table 8 supports the interpretation that public interest groups are the dominant group category. Furthermore, their participation has increased fairly steadily over time. On the other hand, if we collapse the business and commercial categories (corporations and trade associations), we see that economic interests have moved almost to the forefront of those submitting amicus curiae briefs.

This finding raises a second point of interest. Many scholars tend to conceptualize court "lobbying" as entirely different from that occurring in 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 dissimilar from those employed elsewhere. Yet, the sorts of participants engaged in judicial, executive, and even legislative lobbying are monolithic. That is, contrary to conventional beliefs, the same sorts of interest groups that dominate other branches of government also dominate in the Supreme Court. Writing in 1966, Schattschneider[184] noted that groups representing *advantaged* interests were far more abundant and influential in the governmental process. More than three decades later, Schlozman and Tierney write that "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."[185] The same holds true of participants in Supreme Court litigation.[186]

A final point illustrated by Table 8 is the degree to which the composition of the pressure group environment has changed over the past five decades. While the participation of commercial interests has remained strong and that of citizen groups has increased, submissions by labor unions have steadily declined. In the late 1950s, they

[183] See Caldeira & Wright, supra note 83, at 793 (arguing that a diverse range of groups actively participate in the litigation process).
[184] Schattschneider, supra note 77, at 32.
[185] Schlozman & Tierney, supra note 29, at 68.
[186] See generally Epstein, supra note 6, at 335-71.

TABLE 8

PARTICIPATION AS AMICUS CURIAE ON THE MERITS OF U.S. SUPREME COURT CASES BY GROUP TYPE, 1958-1990 TERMS[187]

Briefs Submitted (as a Percent of all Briefs Submitted by these Group Types)

Group Type	1958-61	1978-81	1982	1984	1986-90
Corporations	18.3	9.2	9.2	17.7	11.1
Business, Trade and Professional Associations	46.8	36.2	37.5	30.2	32.7
Labor Unions	17.4	11.6	5.0	5.3	5.1
Citizen, Advocacy, Public Interest and Charitable Groups, and Public Interest Law Firms	17.4	43.0	48.3	46.8	51.1
Total Number of Briefs Submitted by Groups Falling Under these Categories	109	423	666	1298	1008

comprised 17 percent of the group universe, but by the Rehnquist Court era that figure fell to 5.1. Why labor unions are no longer major players in Supreme Court litigation is a subject ripe for scholarly investigation. The answer most likely lies in the way they perceive the Justices of the Rehnquist Court. In contrast to states, which have every reason to bring their cases before current Justices, labor unions may view the Court as inhospitable to their cause and thus seek to avoid it. Whether their perceptions may indeed be founded in fact is a subject taken up in Part VII.

Table 8 displays participants by their substantive interests. Another way to consider the changing composition of the interest

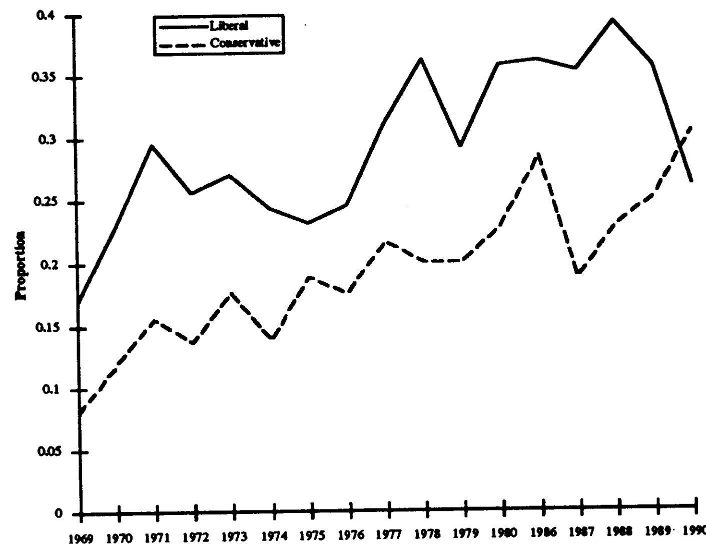
[187] Note: Only groups falling under these four categories were coded (for example, indian tribes, individuals, and state governments were excluded) and only the group listed first on the brief on the merits was counted.

The Business/Trade/Professional Category combines Schlozman and Tierney's (see source note) trade/business and professional association categories and Bruer's (see source note) trade/business and professional association categories. The Citizen, Advocacy, Public Interest, and Charitable Groups and Public Interest Law Firms combines Schlozman and Tierney's citizen, civil rights, social welfare and women/elderly/handicapped categories; Caldeira and Wright's (see source note) charitiable, citizen/public interest/advocacy and public interest law firm categories; and, Bruer's civil rights, public interest law firms, and educational/research categories.

Sources: 1958-61 and 1978-81: Schlozman & Tierney, supra note 29, at 383; 1982: Caldeira & Wright, supra note 83, at 793; 1984: Patrick Bruer, Amicus Curiae and Supreme Court Litigation Table 6 (1988) (unpublished paper, on file with the author); 1988-90: collected by the author.

FIGURE 5

PROPORTION OF U.S. SUPREME COURT CASES CONTAINING AMICUS CURIAE PARTICIPATION BY LIBERAL AND CONSERVATIVE INTEREST GROUPS, 1969-1990 TERMS[188]



group universe is through ideological schema. Accordingly, Figure 5 shows the proportion of cases decided between 1969 and 1990 in which liberal and conservative interest groups participated. Overall, interest groups of opposing ideologies have increased their participation over the past two decades. However, the rate of liberal group growth is not nearly as impressive as that of conservative interests. In the early 1970s, a minimum of one conservative group was present in only about 15 percent of all cases; that figure nearly doubled during the Rehnquist Court era. Even more extraordinary is that for the first time conservative interests are involved in more cases proportionately than their liberal counterparts.

Why have conservative groups accelerated their participation in Court litigation? Kobylka's work provides one explanation.[189] He

[188] Note: Data represent the number of cases in which at least one liberal group (or conservtive group) filed an amicus curiae brief divided by the number of full opinion cases decided that term.
Source: Data collected by the author.

[189] Kobylka, supra note 80.

suggests that the movement of groups in and out of particular issue areas corresponds to the types of interests they represent and to their perception of the Court sitting at that time. He further argues that groups can respond to Court decisions in one of three ways: they can "exit" out of the area, they can increase their efforts, or they can continue to seek redress through the legal system. From the data presented in Figure 5, we cannot precisely test Kobylka's theory; but, at the very least, the data seem to support his general conclusions. As the Court has grown more conservative, so have the participants seeking to influence its decisions. Put in Kobylka's terms, while liberal groups have not exactly "exited," conservative ones have certainly increased their activities.

The aggregated data displayed in Table 8 and Figure 5 suggest a number of important trends, yet they do not tell us much about the variety of groups participating in any given case. In the days of the Warren Court it would have been surprising to find, for instance, a corporation involved in a civil rights dispute or a public interest law firm engaged in a battle over cable television. Not so during the Rehnquist Court era. The array of organizations alleging interest in a gamut of law suits is staggering. *Webster* provides a handy illustration—as Appendix I notes, a wide range of groups participated, many of which had little or no direct connection to the abortion issue. But this general phenomenon reaches beyond abortion and civil liberties cases. In *Pacific Mutual Life Insurance Co. v. Haslip,*[190] for example, thirty-one briefs were filed by groups as disparate in focus as the Washington Legal Foundation, the National Council of Churches, the Society for Professional Journalists, the National School Boards Association, and the Trial Lawyers of America.

VI. ISSUES ATTRACTING INTEREST GROUP PARTICIPATION

What sorts of issues generate organizational participation? The discussion above suggests that organizations participate in disputes that, at least on their face, have little to do with their central purposes. But are certain issues more likely to attract the attention of interest group litigators and have these patterns changed over time? Case studies of group litigation would suggest an affirmative response

[190] 111 S. Ct. 1032 (1991).

to this question. Women's rights,[191] religious liberty,[192] free speech,[193] race discrimination,[194] and the environment[195] are the areas with the most interest group involvement. But does this research emphasis hold up under more systematic scrutiny? The answer is yes, with some caveats.

Table 9, which contains information concerning amicus curiae participation in 14 different types of cases, reveals the presence of an active pressure-group community that has penetrated deeply into the Court's plenary docket: virtually all areas currently exceed the 53 percent mark found for the 1970-1980 years. Given that nearly 88 percent of all Rehnquist Court cases contained at least one amicus brief, this is far from surprising. It is also not surprising that six of the seven issues with 100 percent participation rates during the Rehnquist Court era, federalism being the exception, represent topics of traditional concern to organizational litigants and scholars. By the same token, we should not be surprised to find substantial group interest in cases involving economic activity. After all, as Table 8

191 Cowan, supra note 125; O'Connor, supra note 26; Tracey E. George & Lee Epstein, Women's Rights Litigation in the 1980s, 74 Judicature 314 (1991); Karen O'Connor & Lee Epstein, Beyond Legislative Lobbying, 67 Judicature 134 (1983).

192 Manwaring, supra note 80 (focusing on the challenges brought by the Jehovah's Witnesses to compulsory flag salute laws); Sorauf, supra note 25 (providing a case study of pluralism in the area of religious establishment, with emphasis on two competing interest groups, separationists and accommodationists); Richard E. Morgan, The Politics of Religious Conflict (1968); Leo Pfeffer, Amici in Church-State Litigation, 44 Law & Contemp. Probs. 83 (Spring 1981) (analyzing the configuration of legal actors participating in church-state cases).

193 Robert H. Birkby & Walter F. Murphy, Interest Group Conflict in the Judicial Arena, 42 Tex. L. Rev 1018 (1964) (exploring post-*Brown* laws in Southern states inhibiting the NAACP's ability to conduct litigation); Richard C. Cortner, The Supreme Court and Civil Liberties Policy (1975) (providing intensive case studies of the litigation environment surrounding six important Supreme Court cases); Kobylka, supra note 80 (examining how the shift in the obscenity litigation influenced the decisions of libertarian and proscriptionist groups); Aryeh Neier, Defending My Enemy (1979) (explaining the ACLU's decision to represent a Nazi party that wanted to march in Skokie, Illinois).

194 Belton, supra note 125 (comparing governmental and private litigation in employment discrimination cases); Greenberg, supra note 125 (exploring the litigation activities of the NAACP, the LDF, and other organizations in several areas of the law, including school desegregation and public accommodations); Kluger, supra note 80 (providing an intensive investigation of the litigation campaign leading up to Brown v. Board of Education); Wasby, supra note 124 (challenging conventional wisdom about the nature of planned civil rights litigation).

195 Fredrick R. Anderson, NEPA in the Courts (1973) (examining the role of interest groups in NEPA litigation); Constance E. Cook, Nuclear Power and Legal Advocacy (1980) (considering the litigation strategy of interest groups in cases involving nuclear power); Richard A. Liroff, A National Policy for the Environment (1976) (providing a comprehensive political and legal account of NEPA); Joel F. Handler, Social Movements and the Legal System (1978) (examining the ability of social movements to generate change in several legal areas, including the environment); Lettie M. Wenner, The Environmental Decade in Court (1984) (exploring the role of the legal system in enforcing environmental policy, with emphasis on key litigation groups).

TABLE 9

AMICUS CURIAE PARTICIPATION BY ISSUE AREA, 1928-1991 TERMS[196]

	1928-40		1941-52		1953-66		1970-80		1986-92	
	%	N	%	N	%	N	%	N	%	N
Civil Liberties/ Due Process										
Church-State	14.3	7	21.4	42	44.4	18	62.9	35	100	21
Free Expression	0.0	4	33.3	6	59.1	22	54.7	53	100	41
Obscenity	NC		NC		NC		51.6	31	100	11
Due Process/ Other	1.7	59	19.8	116	28.8	243	51.9	129	76.6	47
Civil Rights/ Discrimination										
Race	0.0	15	46.7	45	26.5	102	67.7	62	100	28
Sex	NC		NC		NC		77.5	40	100	14
Other	NC		NC		NC		NC		92.3	39
Criminal	1.0	92	.7	139	9.4	224	36.8	326	76.8	181
Economic Activity	NC		NC		NC		55.0	20	86.2	167
Federal Taxation	NC		NC		NC		NC		45.5	22
Federalism	NC		NC		NC		NC		100	32
Labor Unions	0.0	4	55.5	20	41.2	17	87.2	86	90.5	42
Privacy	NC		NC		NC		NC		100	7
Other	NC		NC		NC		64.4	59	81.4	43
% With Amicus	1.7		18.2		23.8		53.4		87.7	

indicates, business interests are among the most active Supreme Court litigators.

Table 9 contains some surprises, the most important being the increasing participation of interest groups in criminal law and procedure cases. Between the 1920s and 1970s, this area of law was of little interest to organizational litigators; during the 1970s, for example, group participation in criminal cases was the lowest of any category considered in Table 9. But the 1980s revealed a new trend: at least one amicus curiae brief was filed in more than three quarters of all

196 Note: The percent indicates the percentage with amicus curiae briefs; the N indicates the total number of cases falling into the issue category; and NC indicates that the authors did not code cases in that issue.

Sources: 1928-66: Hakman, Political Environment, supra note 21, at 199; 1970-80: O'Connor & Epstein, supra note 24, at 316; 1986-1992: collected by author.

such litigation. Two factors seem to explain this. First, there are now several organizations, such as Americans for Effective Law Enforcement, that present a "law and order" philosophy to the Court. Second, some state groups have increased their submissions to the Court in the belief, presumably, that the Rehnquist Justices are more receptive to their claims.

VII. THE SUCCESS OF GROUP LITIGATION EFFORTS

The information detailed above—the frequency of participation, organizational goals, and the kinds of interest groups participating—reveals a great deal about past and present group litigation in the Supreme Court. The picture is less than complete, however, because it fails to provide any indication of whether groups, as litigation sponsors or as amici curiae, have any impact on judicial decision making. In other words, do interest groups make a difference in the decisions of the Supreme Court?

In large measure, the answer to this question depends on how we define and measure "difference," and which stage of the Supreme Court decision-making process we are considering. This section explores a variety of ways to assess the influence of interest groups at three distinct steps in the legal process: the beginning stage in which groups attempt to gain access to the Court, the intermediate stage in which decisions about cases are made on the merits, and the final stage which encompasses the broader impact of litigation on society.

A. Access to the Court

One way to assess the efficacy of interest group activities is to determine whether they influence the Court's decision to hear cases on the merits. That is, do group-backed cases have a better chance of receiving full consideration on the merits by the Court? As noted in Part IV, the answer is an unequivocal yes.[197]

A certiorari petition accompanied by one or more amicus curiae briefs appreciably increase the chances that the case will appear on the Court's "discuss list," which contains the 20-30 percent of all peti-

[197] Caldeira & Wright, supra note 4, at 1119.

tions that the Court actually considers for plenary review.[198] If a petition indicates the presence of conflict in the lower courts, involves a civil liberties issue, and receives a liberal ruling from the court below, it has a .39 probability of making the discuss list.[199] By including an amicus curiae brief, the probability of discussion is increased to .74.[200] In short, an amicus curiae brief filed with a petition for certiorari moves the case from the pile of denials to a place on the discuss list.

Once cases with amicus curiae briefs are placed on the discuss list, the likelihood of the Court granting plenary review is well above that of cases without amicus curiae support. In raw terms, the typical case placed on the discuss list has about a .15 chance of being briefed and argued before the Court; the presence of an amicus curiae brief more than doubles that probability.[201] This relationship continues even after we consider other factors such as conflict between lower courts or the participation of the Solicitor General. Based on the estimates obtained from a statistical model of certiorari,[202] the chances of attaining full review are about .33, if the Solicitor General is not the petitioner and two or more amicus curiae briefs have not been filed. It rises slightly to .37 if the Solicitor General is the petitioner, and it increases to a staggering .96 if the Solicitor General is the petitioner and two or more amicus curiae briefs have been filed.[203]

Little doubt exists, then, that organized interests can play a major role in the Court's agenda-setting process. In other words, "[t]he U.S. Supreme Court . . . is quite responsive to the demands and preferences of organized interests when choosing its plenary docket. In this regard, the current Supreme Court is very much a representative institution . . . ."[204]

[198] See Caldeira & Wright, supra note 57, at 810 (explaining the history of the discuss list).

[199] Id. at 831.

[200] Id.

[201] Id.

[202] Caldeira & Wright, supra note 4, at 1121. Caldeira and Wright developed a model of certiorari containing 10 variables designed to predict whether or not the Court would grant certiorari in particular cases. The model used probit, a statistical technique well suited to dichotomous dependent variables such as those involved in the decision to grant certiorari. Based on the estimates obtained through the probit analysis, Caldeira and Wright computed probabilities of obtaining certiorari. Id.

[203] Id.

[204] Id. at 1122.

B. Decisions on the Merits

Without a doubt, interest groups make a difference in the Court's decisions whether or not to grant certiorari. But do groups actually affect the Justices' opinions? The answer to that question depends on the kind of study used to detect influence. Below, I describe the results of four kinds of analyses conducted to assess the impact of groups: case studies, success ratings, control designs, and contextual approaches. I also consider their application to the Rehnquist Court.

1. Case Studies

Conventional wisdom about interest group litigation suggests that group participation does affect the Justices' opinions. In fact, some argue that groups are inordinately successful players in the litigation game.[205] The roots of this wisdom lie in a number of sources, but among the foremost are case studies. Clement Vose's exploration of restrictive covenant suits was the first in a long series of studies of successful litigation campaigns waged by interest groups, and it set the tone for later analyses.[206] Though the scope of their inquiries has broadened considerably, some scholars cling to Vose's basic proposition that group-sponsored litigation is more successful than non-group litigation; in short, that group litigants are likely to be winners.[207] Case studies of the Rehnquist Court reinforce this conclusion. In examining sex discrimination cases, for example, George and Epstein[208] point to the leadership role of the ACLU and the extraordinarily high degree of cooperation among women's rights groups as critical factors in the Rehnquist Court's high level of support for such claims.

Although case studies tend to confirm conventional wisdom, there are many problems with using this particular approach to study the success of groups. First and foremost, they do not allow us to reach generalizations. All we can fairly conclude from George and Epstein's study of sex discrimination litigation is that the ACLU was

205 For a more thorough treatment of these issues, see Epstein and Kobylka, supra note 6, at 27.

206 Vose, supra note 4.

207 See e.g., Cortner, supra note 19; Richard C. Cortner, A Mob Intent on Death (1988); Cowan, supra note 125; Kluger, supra note 80; Manwaring, supra note 80.

208 George & Epstein, supra note 191, at 317.

highly influential in this particularly series of cases. We cannot say that the ACLU will always be successful, much less that all groups are always influential.

Another challenge to the case study approach results from the disquieting fact that our expectations and notions about interest groups do not always accurately reflect our actual observations of such groups. It is expected, for example, that groups involved in litigation will be successful, but this is not always the case. Consider the ACLU's unsuccessful challenge to the Health and Human Service's decision to stop funding family planning clinics that provided clients with information on abortion services.[209] In this instance, the ACLU lost a case that was significant to its agenda, despite the fact that it is a well-known repeat player with substantial resources and great expertise in reproductive freedom litigation.[210] Is this the exception and not the rule? Perhaps. But we cannot address this question based solely on case studies of group participation.

A final challenge to case studies arises from the judicial environment in which groups litigate. Many groups regularly resorting to litigation characterize themselves as "liberal."[211] Yet the Burger Court and now the Rehnquist Court, at a minimum, sought to contain the expansion of rights and liberties. If those Courts were not expanding rights, how can groups such as the ACLU and LDF contemporaneously be achieving their objectives? Again, case studies are of limited utility in helping to address these issues.

2. Success Ratings

Case studies are not the only source of conventional wisdom concerning group success. Research using success scores or "ratings" approaches has also added to our knowledge. In general, these studies select a specific organization such as the ACLU or the NAACP LDF, or a set of organizations working in a similar area, like women's rights groups or environmental interests, for in-depth analysis. Using "success scores," the proportion of group wins relative to participation in litigation, they seek to reach conclusions about the efficacy of

209 Rust v. Sullivan, 111 S. Ct. 1759 (1991).

210 See, e.g., E. Rubin, Abortion, Politics, and the Courts (1987) (tracing the history of the politics surrounding abortion).

211 See O'Connor & Epstein, supra note 46.

organizational litigation. Typically, such studies find that interest groups have higher success scores than organized litigants. Exemplary of this approach is Lawrence's study of the Legal Services Program (LSP).[212] She examined the relative success of LSP attorneys in Supreme Court litigation involving a wide range of poverty law issues. Based on the finding that LSP attorneys won 62 percent of their cases, she concluded that "the LSP's appellate advocacy . . . gave the poor a voice in the Supreme Court's policy-making and doctrinal development."[213]

Table 10 depicts the findings of Lawrence's research, those of several other like studies, and the success rates of key groups during the Rehnquist Court. As we might suspect, more conservative groups like the Americans for Effective Law Enforcement and the Equal Employment Advisory Council[214] were relatively successful over the past five Terms. Indeed, of all organized litigators depicted in Table 10, the Washington Legal Foundation, a conservative public interest law firm, was the most victorious, winning a greater percentage of its cases than even the Solicitor General. Interestingly, despite the Rehnquist Court's relative conservatism, some traditionally liberal and libertarian interest groups were not disproportionately defeated. Women's rights litigators, for example, prevailed in 72 percent of the sex discrimination cases in which they participated. If we exclude the 1988 Term which was particularly disastrous for the NAACP LDF,[215] it was victorious in nearly 80 percent of its cases. Still, there were some interests that did not find the Rehnquist Court particularly receptive to their positions. Separationist groups, such as the American Jewish Congress and Americans United for Separation of Church and State, had great success in previous eras[216] but they have not fared particularly well with the Rehnquist Court. By the

[212] Susan E. Lawrence, Legal Services Before the Supreme Court, 72 Judicature 266, 270 (1989).

[213] Id. See also O'Connor and Epstein, supra note 191, at 143 (reporting that the Women's Rights Project of the ACLU won 66 percent of its cases and concluding that: "while women's rights groups' efforts often have been frustrated in legislative forums, the Supreme Court has served as a source of expanded rights. Women's rights groups have used this forum effectively . . . .").

[214] Note, however, that the Equal Employment Advisory Council actually lost more cases during the first years of the Rehnquist Court than it did between 1976 and 1981.

[215] In that Term it won only one of its nine cases.

[216] See Sorauf, supra note 25; Morgan, supra note 192.

TABLE 10

SUCCESS RATES OF SELECTED INTERESTS BEFORE THE U.S. SUPREME COURT[217]

Interest	Period	Cases Reviewed by Court (n)	Cases Won (n)	% Accepted Cases Won
American Civil Liberties Union, amicus	1986-90T	140	57	41%
Americans for Effective Law Enforcement, amicus	1967-81Y	37	23	62
	1986-90T	17	11	65
AFL-CIO, amicus	1986-90T	45	18	40
Americans United for Life, LDF, sponsorship and amicus	1975-81Y	7	4	57
Church-State Organizations, sponsorship (as petitoners)	1951-71Y	10	6	60
Separationists Groups, amicus	1986-90T	37	14	38
Citizens for Decency Through Law, sponsorship and amicus	1963-81Y	27	10	37
Equal Employment Advisory Council, amicus	1976-81Y	33	19	58
	1986-90T	33	15	46
NAACP LDF, sponsorship (as petitioner)	1930-56Y	42	37	88
amicus	1986-90T	28	16	57
Chamber of Commerce, sponsorhip and amicus	1920-81Y	26	11	42
amicus	1986-90T	30	14	47
OEO Legal Services Program	1966-74Y	119	73	62
U.S., Solicitor General, sponsorship	1961-67T	345	221	64
amicus	1986-90T	163	112	69

(Table continued)

[217] Note: Y=year; T=term.

Sources: For all data prior to 1986, except women's right organizations (1981-90): Lawrence, supra note 11, at Appendix C; Women's Rights Organizations (1981-90): George & Epstein, supra note 191; Data after 1986: collected by the author.

Interest	Period	Cases Reviewed by Court (n)	Cases Won (n)	% Accepted Cases Won
Washington Legal Foundation, amicus	1986-90T	30	22	73
Women's Rights Organizations, sponsorship and amicus	1969-80Y	46	29	63
	1981-90 Y	42	30	72

same token, the AFL-CIO's success rate of 40 percent pales in comparison to its scores in earlier years.[218]

Although these results are intriguing, problems abound with the use of success scores. First, social scientists now recognize that many factors determine judicial voting, including precedent, case facts, and ideology. Yet, the success score approach assumes that it is only interest groups which influence the outcomes of cases. Consider, for example, the Rehnquist Court case of *Michigan v. Chesternut*,[219] in which Americans for Effective Law Enforcement (AELE) and the National Association for Criminal Defense Attorneys (NACDA) filed briefs in support of opposing parties. The Court ruled in favor of Michigan, the litigant supported by the AELE. Hence the question emerges: Did AELE win because it presented such superb arguments that the Justices could hardly resist adopting them? Or, did other factors, such as the Court's general conservatism in this area of the law[220] and that the United States also had filed a brief in support of Michigan, influence the Justices? Conversely, did the NACDA lose because of an inadequate brief? Or can we devise other equally compelling explanations? Success scores would give all the credit, or the blame, to the participating interest group. But such a conclusion hardly makes sense in light of what we know about judicial decision making. Second, by focusing on the aggregate, success scores treat all cases as equal in importance when often this is not the case. For example, the ACLU's somewhat low success rate of forty percent

[218] See Puro, supra note 151; Karen O'Connor & Lee Epstein, The Importance of Interest Group Involvement in Employment Discrimination Litigation, 25 How. L.J. 709, 721 (1982).
[219] 486 U.S. 567 (1988).
[220] During that term, the Court supported the criminally accused in only 45 percent of the cases it decided with a full opinion. Epstein et al., supra note 117, Table 3-8.

masks several major wins including *Texas v. Johnson*.[221] The Washington Legal Foundation's high score, on the other hand, does not reveal significant losses, such as *U.A.W. v. Johnson Controls*.[222]

3. Control Designs

In light of criticisms leveled at the case study and success score approaches, scholars have used control designs to assess the influence of groups on Court decisions. These operate under the simple premise that we can purely assess the effect of interest groups only if we control for other factors that may be influencing the judicial decision, such as partisanship, legal facts and ideology. For example, in seeking to assess the impact of amicus curiae briefs on *all* written Court decisions from 1967 to 1987, Songer and Sheehan devised a statistical model that considered many variables that are relevant to decision making, including the Court's ideology and the parties to the litigation.[223] Ultimately, they found that briefs had a "differential impact":

> Briefs filed by state and local governments appear to have little effect on the outcome of cases heard by the Supreme Court. Briefs filed by other amicus parties have the potential for a moderate impact on the chances for litigant success as long as they are not opposed by the United States as either a direct party or as amicus curiae. In contrast briefs filed for the United States by the solicitor general were shown to have a major impact on Court decisions even after the effects of [other variables] were taken into account.[224]

Segal and Reedy's study of sex discrimination cases[225] reinforced Songer and Sheehan's research. After controlling for other important factors, they also found that the presence of the Solicitor General in a case had a substantial effect on the Court's decisions.[226]

Other "controlled" studies have revealed a more generalized group effect. George and Epstein developed an extensive model to

[221] 491 U.S. 397 (1989).
[222] 111 S. Ct. 1196 (1991).
[223] Donald R. Songer & Reginald S. Sheehan, The Impact of Amicus Briefs on Decisions on the Merits (1990) (unpublished paper, on file with the author).
[224] Id. at 12.
[225] Segal & Reedy, supra note 159.
[226] Id. at 563.

explain outcomes in death penalty cases decided since 1972.[227] The model included legal variables such as precedent, and extra-legal variables such as the political environment and the ideology of the Court.[228] Most relevant is that they considered three variables designed to represent the effect of organized litigants: whether or not 1) the Solicitor General had filed an amicus curiae brief, 2) the criminal defendant was represented by an interest group, and 3) the state was a "repeat player." All three of the variables produced significant coefficients, meaning that they had some impact on the Court's decision to affirm or reverse the lower court's ruling. Including a variable to account for the Rehnquist Court did not appreciably change these findings. At least in death penalty cases, interest groups have a distinct advantage with the Court.

In sum, control design studies have produced mixed results regarding the influence of groups on the Court's plenary decisions. Some suggest that groups have a differential effect, while others reveal a more pronounced impact. Part of this discrepancy may be due to the issue areas under analysis: Songer and Sheehan's study included all written opinions decided during odd years from 1967 to 1987, while George and Epstein considered only capital punishment cases decided during the Burger and Rehnquist Courts. Even so, the analyses do have at least one conclusion in common: the enormous influence of the Solicitor General as an amicus curiae.

4. Contextual Approaches

A final approach to the question of "effect" is to determine whether the Justices adopt the legal arguments advanced by interest groups in their briefs. As Table 2 indicates, the Justices regularly cite amicus curiae briefs in their opinions, and members of the Rehnquist Court have done so in record numbers.[229] Accordingly, these data reinforce the notion that members of the Court find some utility in arguments made by amici, despite their sheer number. But they fail to address a more critical question: Do legal arguments, presented by organized interests, actually influence the Justices? This is an important issue because many scholars and judges assert that friend-

[227] George & Epstein, supra note 1.
[228] Id.
[229] See supra note 61 and accompanying text.

of-the-court submissions merely mirror arguments made by the parties. Still, it is not an easy question to answer because researchers must invoke contextual approaches to distinguish the arguments made by amici from those raised by the parties.

A study by Ivers and O'Connor exemplifies the obstacles scholars face with this sort of analysis.[230] Their research focused on Burger Court cases of criminal law and procedure in which both the American Civil Liberties Union (ACLU) and the Americans for Effective Law Enforcement (AELE) participated on opposing sides. To assess the groups' impact on the Court's opinions, Ivers and O'Connor analyzed the contents of amicus curiae briefs and compared arguments presented therein with those in the majority and dissenting opinions. Their findings indicated that opinions of the Court, most of which were law-and-order oriented, adopted over 60 percent of the arguments presented by the AELE, but only 29 percent of the ACLU's arguments. Dissents, most of which favored the criminal defendant, almost uniformly mirrored the ACLU's submissions.[231] However, Ivers and O'Connor did not compare the arguments raised by the parties with those of amici, but instead stated that the "extent [amicus] briefs influenced the opinions we examined compared to the briefs of the other litigants is a question that must be left for later research."[232] Yet, herein lies the danger with this kind of study: we do not know whether the Court adopted AELE's arguments or those raised by the party it supported. Might it have been the case that the AELE only mirrored the parties' arguments and presented nothing unique to the Court? We cannot address this and related questions based on the Iver and O'Connor study.

To overcome this potential problem, Table 11 considers one case decided by the Rehnquist Court, *Texas v. Johnson*,[233] and compares the arguments raised by amici with those of the parties.[234] To what

[230] Gregg Ivers & Karen O'Connor, Friends as Foes, 9 Law & Pol'y 161 (1987).
[231] Id.
[232] Id. at 172.
[233] 491 U.S. 397 (1989). I thank Tracey E. George for her help with this portion of the article.
[234] There were several unusual aspects to those submitting briefs on behalf of Johnson. Most interesting is that the ACLU filed an amicus curiae brief when it had initially sponsored the case. This role change came because, after the Supreme Court granted certiorari, Johnson obtained other counsel: William Kunstler and David Cole of the Center for Constitutional Rights. He did so apparently out of the belief that Kunstler, a very well-known attorney, could

degree did amici curiae restructure the debate over flag burning? Did they add anything new to the debate? Consider Texas' argument that "the right of the state . . . to preserve the flag as a symbol of nationhood and national unity is a compelling state interest . . . ."[235]

TABLE 11

A COMPARISON OF LEGAL ARGUMENTS IN *TEXAS V. JOHNSON*[236]

For Texas:

Argument	Texas	WLF, et al.	Legal Affairs Council
I. First Amendment is not absolute: Expressive conduct, even if political, is subject to a balancing test.	Yes	Yes	Yes
II. The State has compelling interest in regulating flag desecration.	Yes	Yes	Yes
A. to prevent breach of the peace	Yes	Yes	Yes
B. to protect the flag as a symbol	Yes	No	Yes
III. The law is not overbroad.	Yes	No	No
IV. The law is content neutral.	No	No	Yes

(Raised By: Texas; WLF, et al.; Legal Affairs Council)

For Johnson:

Argument	Johnson	ACLU, et al.	Christic Institute, et al.	Jasper Johns, et al.
I. Law must satisfy strict scrutiny because it prohibits expressive conduct.	Yes	Yes	Yes	No

(Raised By: Johnson; ACLU, et al.; Christic Institute, et al.; Jasper Johns, et al.)

generate more national publicity for his cause than the Dallas Civil Liberties Union lawyers. Telephone Interview by Tracey E. George with Douglas Skemp, Cooperating Attorney with the Dallas Civil Liberties Union (July 24, 1991).

[235] Brief for Petitioner at 19, *Johnson* (No. 88-155).

[236] Note: **Texas**=attorneys for the State of Texas; **WLF, et al.**=amici Washington Legal Foundation, Veterans of Foreign Wars of the United States, National Flag Foundation, AMVETS, Air Force Association, Allied Educational Foundation; **Legal Affairs Council**=amicus Legal Affairs Council; **Johnson**=attorneys for Johnson; **ACLU, et al.**=amici American Civil Liberties Union and Texas Civil Liberties Union; **Christic Institute, et al.**= Christic Institute, Clergy and Laity Concerned, the Committee of Interns and Residents, the Community for Creative Non-Violence, the Fellowship of Reconciliation, La Raza Lawyers' Association of San Francisco, Lambda Legal Defense and Education Fund, the Lawyers' Committee on Nuclear Policy, the Massachusetts Chapter of the National Lawyers Guild, the Nation Institute of New York City, the National Conference of Black Lawyers, the National Emergency Civil Liberties Committee, the National Lawyers Guild, the National Organization for Women, the New York State Association of Criminal Defense Lawyers, People for the American Way, Toward a More Perfect Union, the United Electrical, Radio, and Machine Workers of America, Wabun-Inini, Anishinabe (a/k/a Vernon Bellecourt) as a representative of the American Indian Movement, the War Resisters league, the Writers Guild of America East, Inc.; and **Jasper Johns, et al.**= Jasper Johns, Robert Rauschenberg, Claes Oldenburg, Paul Conrad, Coosje Van Bruggen, Mark Disuvero, Hans Haacke, Irving Petlin, Faith Ringgold, Jenny Holzer, Michael Glier, Nancy Spero, Leon Golub, Sol Lewitt, Carl Andre, John Hendricks.

For Johnson:

Argument	Johnson	ACLU, et al.	Christic Institute, et al.	Jasper Johns, et al.
A. It punishes speech solely on the basis of view point; it is not content neutral.	Yes	Yes	Yes	Yes
II. Law is not backed by sufficient state interests	Yes	Yes	Yes	Yes
A. Preservation of the flag is an impermissible justification for regulation.	Yes	Yes	Yes	No
B. It is not narrowly tailored to meet state's interest in preventing breaches of the peace.	Yes	Yes	Yes	No
III. Law is overbroad and vague.	Yes	Yes	No	Yes
A. The law impinges on artistic expression.	No	No	No	Yes
IV. Law is unconstitutional as applied to Johnson.	Yes	Yes	Yes	No
A. Flag burning constitutes symbolic speech.	Yes	Yes	Yes	No
B. Johnson may have been convicted for his political affiliation.	Yes	No	No	No

(Raised By: Johnson; ACLU, et al.; Christic Institute, et al.; Jasper Johns, et al.)

The Washington Legal Foundation wrote, "the state has a compelling interest in preventing the desecration of our flag in order to preserve its physical integrity as a symbol of national unity."[237] The opposing side repeated arguments as well. Not surprisingly, for example, the amicus curiae brief submitted by the ACLU paralleled the brief filed by Johnson's attorneys.[238] Yet, despite such repetition, there were some distinct claims raised, with those of artist Jasper Johns being most illustrative.[239] Similar to the ACLU's amicus brief, Johns' brief argued that the Texas statute was vague, but it did so with a twist. His submission suggested that, given the law's wording, it could be used to censor works of art that "deface" or "mistreat" the flag.[240] In other words, if strictly interpreted, the statute would impinge on protected

[237] Amicus Curiae Brief of the Washington Legal Foundation, et al. at 6.

[238] Amicus Curiae Brief of the American Civil Liberties Union and the Texas Civil Liberties Union.

[239] Amicus Curiae Brief of Jasper Johns, et al.

[240] Id. at 13.

artistic expression. To demonstrate that point, the appendix contained photographs of art work that could come under the law's purview.

The more important issue, though, is whether the arguments raised by the parties and amicus curiae influenced the opinions of the Justices in *Texas v. Johnson*. In writing for a five-person majority, Justice William Brennan found in favor of Johnson and did, in fact, adopt much of the logic advanced by the briefs in support of Johnson. Like the Texas court below, he first sought to determine whether Johnson's activity met the basic First Amendment threshold requirement: Did it constitute expressive conduct?[241] The majority agreed with the positions of Johnson's attorneys and amici ACLU and the Christic Institute (see Table 11) that Johnson's conduct was expressive.[242] In his view, "the expressive, overtly political nature of [Johnson's flag burning] was both intentional and overwhelmingly apparent."[243]

Having reached that conclusion, Justice Brennan considered the interests that could potentially outweigh the First Amendment protections, thereby allowing the State to restrict Johnson's activity. He did not accept the arguments as presented by the State of Texas and amici Washington Legal Foundation and the Legal Affairs Council. Regarding the State's asserted interest in preventing breaches of the peace, he noted that the facts of Johnson's case did not support this claim: "no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag."[244] Justice Brennan next applied strict scrutiny to the argument of the State and the Legal Affairs Council that the statute furthered the goal of "preservation of the flag."[245] This highest level of scrutiny was used because the law was "content-based," not "content neutral."[246] That is, a flag desecration violation in Texas, in the words of the statute, depended on whether "the actor knows [that he or she] will seriously offend one or more persons likely to observe or discover his [or her] actions."[247] As such, "whether Johnson's treatment of the flag

[241] 491 U.S. at 403.
[242] Id. at 405-06.
[243] Id. at 406.
[244] Id. at 408.
[245] Id. at 410.
[246] Id. at 412.
[247] Tex. Penal Code Ann. § 42.09(b) (West 1989).

violated Texas law 'depended on the likely communicative impact of his expressive conduct.'"[248] This was a line of argument raised in nearly all of the briefs in support of Johnson's position.

In short, although *Texas v. Johnson* is but one case, it does show that amici curiae can add new issues and debates to litigation. So too, it indicates that Justices use at least some of that material in formulating their opinions. Whether this occurs on a more universal basis, though, is a question deserving far greater attention.

C. *Impact of Interest Groups*

Without a doubt, interest groups make a difference in the decision to hear cases, and with some caveats, they seem to have some influence on decisions on the merits. But do group-backed cases have a greater societal impact than non-organized ones? The responses of scholars have been quite mixed. For many years, most analysts asserted (and assumed) that group litigation could generate social change. But, more recently, that assumption has been questioned.

The idea that groups can generate social change through litigation seems to begin with *Brown v. Board of Education*[249] and the area of civil rights more generally. Based on work by Kluger,[250] Greenberg,[251] Vose[252] and many others, it seemed clear that the NAACP LDF not only won a major legal victory in *Brown* but an important social one as well. That decision, they argued, ended legal segregation in the United States; a broader societal impact necessarily followed. By the same token, the Court's decision in *Roe v. Wade*[253] is one to which many point as demonstrating the ability of groups and the Court to generate major social changes.

Some quantitative assessments of group impact support these contentions. Research conducted by Stewart and Sheffield examines whether group cases affected "black political mobilization in an environment most resistant to change"—counties in Mississippi.[254] Their

[248] Murray Dry, Flag Burning and the Constitution, 1990 Sup. Ct. Rev. 69, 82 (1991) (quoting *Johnson*, 491 U.S. at 411).
[249] 347 U.S. 483 (1954).
[250] Kluger, supra note 80.
[251] Greenberg, supra note 125.
[252] Vose, supra note 4.
[253] 410 U.S. 113 (1973).
[254] Joseph Stewart, Jr. & James F. Sheffield, Jr., Does Interest Group Litigation Matter? The

results indicated that litigation sponsored by civil rights organizations helped "boost black voter registration and black candidacies for public office."[255] Studies of the availability of abortion services reached similar conclusions:[256] *Roe v. Wade* substantially increased the opportunities for women to obtain safe, legal abortion in the United States.[257]

Despite these and other studies of the impact of litigation,[258] analysts recently have begun to question whether groups and, more generally, the Court itself, can promote societal change. In their opinion, groups have put too much stock in litigation and have neglected the paramount role of the more political branches of government in the policy-making process. This view has been expressed by both practitioners and academics. Aryeh Neier, the former national executive director of the American Civil Liberties Union, wrote in his aptly titled book, *Only Judgment: The Limits of Litigation in Social Change:*

> Despite successes in litigation, blacks are far from securing an equal share of the benefits of the society, and the same is true for many of those following in their footsteps. To the extent that government is capable of distributing benefits, the power lies in the hands of the executive and legislative branches. The authority of the judiciary is largely limited to helping previously ignored interest groups enter the competition.[259]

Throughout the book, Neier provides numerous examples, from abortion to capital punishment, to show that courts are not a panacea for those seeking expanded rights. Even so, in the final analysis he does not encourage groups to ignore the courts but only to consider alternatives. As he noted,

> [D]espite the present unhappy circumstances, it does not yet seem time to bring down the curtain on the litigation era that started with *Brown v. Board of Education* in 1954. Some of the private organizations that sponsor cause litigation, such as the American Civil Liberties Union, the NAACP Legal Defense Fund, and the environmental litiga-

Case of Black Political Mobilization in Mississippi, 49 J. Pol. 780, 781 (1987).

[255] Id. at 780.

[256] Charles A. Johnson and Bradley C. Canon, Judicial Policies 9 (1984).

[257] Rubin, supra note 210, at 186.

[258] See generally Bradley C. Canon, Courts and Policy: Compliance Implementation and Impact, *in* The American Courts 435 (J.B. Gates & C.A. Johnson eds., 1991).

[259] Aryeh Neier, Only Judgment: The Limits of Litigation in Social Change 13 (1982).

> tion groups, are in good health even though the causes they espouse are in difficulty. Organizationally, these groups thrive on adversity. Financial contributions to them increase because their supporters are alarmed. And the present weakness of the causes they espouse is more pronounced in the executive branch of government than in the courts. Litigation may not be an effective instrument for advancing such causes during the next few years, but it may be the most effective instrument for preserving what those causes have achieved up to now. Cause litigation has a future, its seems plain, though that future may never again include such heady victories as during its golden era, the two decades from *Brown* to the mid-1970s.[260]

Research by Gerald Rosenberg, a political scientist and attorney, presents a far gloomier picture. Rosenberg suggests that for most causes espoused by groups the Court is not in a position to generate the major societal alterations they desire.[261] Indeed, his book casts doubt on whether two of the most significant group victories, *Brown* and *Roe,* accomplished as much as most analysts, including Neier, assume they did.[262]

In general, Rosenberg bases his conclusion on a series of quantitative and qualitative indicators seeking to gauge what effect decisions like *Brown* and *Roe* should have had on society. For *Brown,* he considers the percentage of southern black school children attending school with whites before and after 1954, the composition of universities, public opinion, among other factors.[263] His conclusion is straightforward:

> The use of the courts in the civil rights movement is considered the paradigm of a successful strategy for social change. . . . Yet, a closer examination reveals that before Congress and the executive branch acted, courts had virtually *no direct effect* on ending discrimination in the key fields of education, voting, transportation, accommodations and public places, and housing. Courageous and praiseworthy decisions were rendered, and nothing changed.[264]

His examination of *Roe* yielded a similar conclusion.

[260] Id. at 235.

[261] Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991).

[262] Id.

[263] Id., chapters 3 & 4.

[264] Id. at 70-71 (emphasis in original).

Rosenberg's study is not without its share of problems. For example, he ignores evidence concerning the effect of *Roe* on public opinion,[265] he performs no systematic analyses to back up the more descriptive data, and he shows little interest in the role of the courts and interest groups as agenda setters. Even so, we should not dismiss his findings or those of Neier so lightly: they raise real questions about the impact of group-backed litigation on a societal level. What is the purpose of cases like *Brown* and *Roe* if they do not generate major changes in the way society thinks and acts?

These issues have major relevance to litigation conducted before the Rehnquist Court. In fact, in at least one area of the law, namely capital punishment, not only did group-backed litigation fail to have major societal impact, but it completely backfired.[266] Stories about the litigation campaigns of abolitionist groups, including the American Civil Liberties Union and the NAACP LDF, have been well told elsewhere[267] and need not be repeated in any detail here. Suffice it to say that after *Furman v. Georgia*[268] many abolitionists, not to mention legal analysts, thought the death penalty had come to an end in the United States.[269] Such a conclusion hardly seemed misplaced; after all, it appeared as if the Court's decisions in *McGautha v. California*[270] and *Furman* left virtually no room for state legislation. In *McGautha*, the Justices declared that it would be virtually impossible to impose sentencing standards on triers of capital cases;[271] in *Furman*, a plurality found that unbridled jury discretion led to the "freakish" imposition of death.[272] The tension between the two rulings appeared to leave legislators with little recourse. And the future of abolition seemed rather secure: no one had been executed

---

[265] See generally Charles H. Franklin & Liane C. Kosaki, Republican School-master: The U.S. Supreme Court, Public Opinion, and Abortion, 83 Am. Pol. Sci. Rev. 751 (1989) (arguing that the Supreme Court does influence public opinion).

[266] For a more thorough analysis of the issues discussed in this section, see generally Epstein & Kobylka, supra note 6, chapter 4.

[267] See Greenberg, supra note 125; Meltsner, supra note 125; see generally Franklin E. Zimring & Gordon Hawkins, Capital Punishment and the American Agenda (1986).

[268] 408 U.S. 238 (1972) (per curiam).

[269] For example, a University of Washington law professor wrote: "My hunch is that *Furman* spells the complete end of capital punishment in this country . . . ." John M. Junker, The Death Penalty Cases: A Preliminary Comment, 48 Wash. L. Rev. 95, 109 (1972).

[270] 402 U.S. 183 (1971).

[271] Id. at 206.

[272] 408 U.S. at 310 (Stewart, J., concurring). Most of the concurrences addressed the amount of jury discretion in the imposition of the death penalty as one of the key factors.

in the United States since 1967 and, based on *Furman*, future deaths appeared unlikely.

But the *Furman* victory was shattered in 1976 when, in *Gregg v. Georgia*,[273] the Court upheld a newly-devised capital punishment scheme, one designed to overcome the defects of those plans struck by *Furman*. After *Gregg*, attorneys from the NAACP LDF, the ACLU, public defenders' offices and other volunteers tried to keep death-row inmates alive by continuing to provide representation to as many as they possibly could. In Neier's words, "the major thing [we want] to try to do is block executions. If that means going to Court, to the legislatures, or making a lot of fuss, we'll do that."[274] Thus, abolitionist attorneys persisted, bringing hundreds of cases after *Gregg*. If they could not keep states from executing defendants, at least they could narrow the application of capital punishment.

Until the Rehnquist Court era, this strategy generally worked. During the 1970s, only three legal executions occurred in the United States. And, as Figure 6 indicates, despite the increasingly conservative propensity of the Justices in areas of criminal law generally,[275] the Burger Court took a relatively moderate stance on capital punishment. With very few exceptions, it was far more willing to take the "liberal" defendant's position in cases involving capital punishment than in non-capital criminal case. Thus, to some it seemed that abolitionist groups may have lost the battle in *Gregg* but they had won the larger fight over the imposition of capital punishment.

From the first critical death penalty case of the Rehnquist Court, *McCleskey v. Kemp*,[276] to date, the Court has taken a no holds barred approach to defendants in capital punishment cases. As Figure 6 shows, by the 1989 Term the Court favored the liberal position in less than 10 percent (1 of 11) of its capital cases. Worse still for abolitionists was the legal doctrines emanating from the Court. Rehnquist Court Justices have continuously chipped away at the legal remedies available to death row inmates and, in particular, have

---

[273] 428 U.S. 153 (1976).

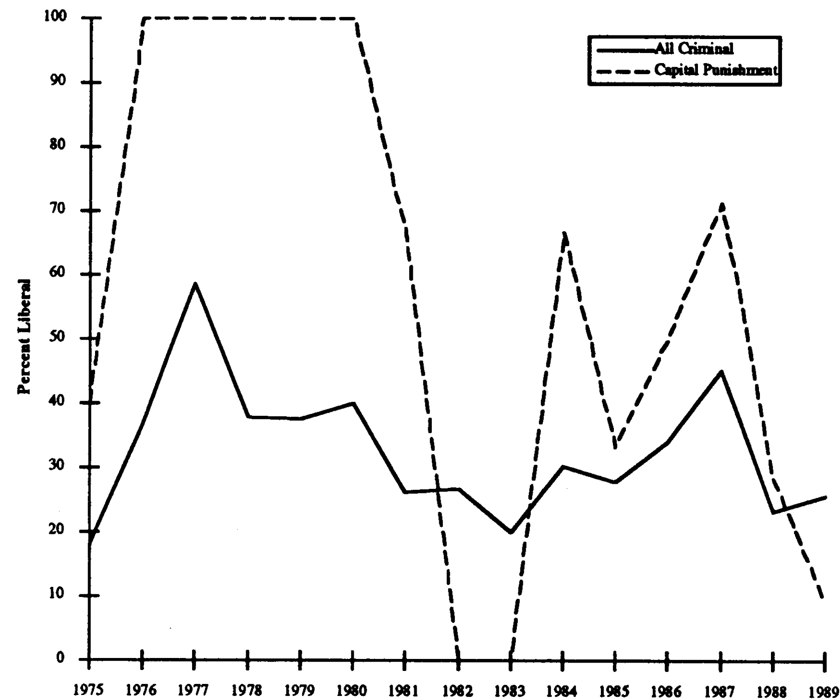
[274] The Death Penalty - Issue That Won't Go Away, U.S. News & World Rep., Jan. 31, 1977, at 47 (quoting Aryeh Neier); see also Roger Schwed, Abolition and Capital Punishment 154 (1983).

[275] See Lee Epstein, et al., The Supreme Court and Criminal Justice Disputes: A Neo-Institutional Perspective, 33 Am. J. Pol. Sci. 825 (1989).

[276] 483 U.S. 776 (1987) (rejecting a challenge to the death penalty based on a study indicating the presence of racial discrimination in the application of capital punishment).

FIGURE 6

U.S. SUPREME COURT'S SUPPORT FOR THE CLAIMS OF THE CRIMINALLY ACCUSED IN ALL CRIMINAL CASES AND IN CAPITAL PUNISHMENT CASES, 1975-1989 TERMS[277]



restricted the use of habeas corpus petitions by state prisoners. Not surprisingly, states have put to death fifty people between 1990 and 1992 alone, nearly half the total executed in the entire decade of the 1980s.

The death penalty litigation campaign illustrates and amplifies points raised by Neier and Rosenberg: while the Court handed abolitionists a big victory in *Furman*, one that had the potential to generate major social change, its decision had no staying power. And, if *Furman* had an impact, it was a negative one in that it created a major public and legislative backlash. It appears that the abolitionists lost both the battle and the war in their efforts to end capital punishment in the United States.

From this explanation of the death penalty, as well those considered by Neier and Rosenberg, there is a more general lesson. Interest groups seeking to generate major social change cannot necessarily count on the Court, regardless of ideology, because the Court may not be well-suited to make important policy without the support of the public and other governmental institutions. For groups seeking to generate social change, it may be best to use tactics such as legislative lobbying and molding public opinion rather than relying exclusively on litigation. Even so, this does not mean that group-backed litigation can never generate social change. Between *Furman* and *Gregg*, few legal executions occurred in the United States; *Roe* legalized abortion; and perhaps *Brown* was necessary to set the public agenda and to force Congress to enact the Civil Rights Act of 1964.

277 Source: Collected by the author.

VIII. CONCLUSION

This article has considered five dimensions of organized involvement in the U.S. Supreme Court: the frequency of group participation, the goals of organizations, the kinds of groups litigating, the issues of paramount interest, and the success of their litigation efforts. While a primary objective was to analyze involvement during the Rehnquist Court, it was critical to trace the evolution of group involvement in the Court. By so doing, patterns uncovered during the Rehnquist Court era could be compared with those of an earlier vintage.

In general, what have we learned about present group use of the Court? A tempting way to answer this question is with the "more of the same" aphorism. For, in many ways, this is precisely what has been observed. Organized interests are filing more briefs, they are sponsoring more cases, and they are participating in more areas of the law. But this aphorism does not tell the whole story of the Rehnquist Court era; indeed, it ignores at least one important trend—the rise of pluralism in the Court. There may be more groups participating than ever before, but never in the Court's history has it been so bombarded with the competing claims of such varied interests. This is something *Webster* highlights but the more typical case exemplifies as well.

What effect, if any, has this "new pluralism" had on the Justices of the Rehnquist Court? This is an issue on which I can only speculate,

because, as the discussion above reveals, we do not know very much about the impact of groups, generally, much less about that produced by the presence of competing organizational interests. But the new pluralism does seem to have sensitized the Court to the relevance of its work to a wide and varied range of organized interests. At one time it may have been true that most Supreme Court cases were of little interest to outside parties. But, despite questions about the Court's ability to generate true social change, that is no longer the case. Whether this influences the Justices to rule in any particular direction, we cannot say; the importance of their opinions for so many constituencies, however, must give them pause for thought about the immensity of their task.

By the same token, it may be true that the presence of competing interests has had a modulating effect on the current Court. After the Reagan and Bush appointees were on the bench, many analysts suspected that the Court would swing to the far right. But, to date, that has not happened to the extent predicted by observers. The Rehnquist Court's support of civil liberties claims, for example, is not significantly less than that of its most immediate predecessor.[278] Nor, despite several opportunities, has it overruled *Roe v. Wade*[279] or returned prayer to public schools.[280] Of course, we cannot say with certainty that organized interests have prevented the Court from moving in a substantially more conservative direction. Yet, based on the results of this study, it does seem fair to conclude that the arguments of competing interests may have played some moderating role.

[278] During the 1991 Term, the Court supported civil liberties claims in 48.2 percent of its cases; in 1985, that figure was 37.8 percent. Epstein, et al., supra note 109, Table 3-8. See generally, Thomas Hensley & Chris Smith, The Rehnquist Court and Civil Liberties (1993) (unpublished paper, on file with the author).

[279] 410 U.S. 113 (1973). The Court has had several opportunities to reverse *Roe*, with Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) being the most recent.

[280] See Lee v. Weisman, 112 S. Ct. 2649 (1992) (holding that "nonsectarian" prayer at a public school graduation constituted impermissible establishment of religion under the Establishment Clause).

APPENDIX I

AMICI CURIAE IN *WEBSTER V. REPRODUCTIVE HEALTH SERVICES* BY GROUP TYPE[281]

Group Type	Pro-Choice Amicus	Pro-Life Amicus[282]
Religious	1. American Jewish Congress, Board of Homeland Ministries—United Church of Christ, National Jewish Community Advisory Council, Presbyterian Church USA, Religious Coalition for Abortion Rights, St. Louis Catholics for a Choice, Albuquerque Monthly Meeting of Religious Society Friends, American Friends Service Committee, American Humanist Association, American Jewish Committee, Americans for Religious Liberty, Anti-Defamation League, Commission on Social Action of Reformed Judaism, Episcopal Diocese of Massachusetts—Women in Crisis Committee, Episcopal Diocese of New York, Episcopal Women's Caucus, Federation of Reconstructionists, Congregations and Havurot, General Board of Church and Society—United Methodist Church, Health Instutute of Women Today, Jewish Labor Committee, NA'MAT, National Assembly of Religious Women, North American Federation of Temple Youth, Union of American Hebrew Congregations, Unitarian Universalists Women's Federation, United Church of Christ Coordinating Center	1. Agudeth Israel of America

[281] Note: These group types were derived by considering in which category the *majority* of groups signing on to the brief fell, not just the first filer.
Source: Adapted from Epstein & Kobylka, supra note 6, at Appendix 2 and Table 6-10. See also U.S. Supreme Court Records and Briefs, Congressional Information Service, no. 88-605.

[282] The Legal Defense Fund for Unborn Children filed a motion for leave to participate as *amicus curiae*. It was denied by the Court.

Group Type	Pro-Choice Amicus	Pro-Life Amicus
	for Women, Washington Ethical Center of the American Ethical Union, Women in Ministry—Garrett Evangelical Seminary, Women in Mission and Ministry—Episcopal Church USA, Women's League for Conservative Judiasm, 8 Episcopal Bishops	
	2. Americans United for Separation of Church and State	2. Catholics United for Life, National Organization of Episcopalians for Life, Baptists for Life, Lutherans for Life, Movarians for Life, United Church of Christ Friends for Life, Task Force of United Methodists on Abortion, Sexuality Christian Action Council
	3. Catholics for a Free Choice, Chicago Catholic Women, National Coalition of American Nuns, Women in Spirit of Colorado Task Force	3. Catholic Health Association
		4. Christian Advocates Serving Evangelism
		5. Covenant House, Good Council
		6. Holy Orthodox Church
		7. Lutheran Church—Missouri Synod, Christian Life Commission of the Southern Baptist Conference, National Association for Evangelicals
		8. Missouri Catholic Conference
		9. New England Christian Action Council
		10. Rutherford Institute and Rutherford Institutes in 18 states
		11. U.S. Catholic Conference
		12. New England Christian Action Council

Group Type	Pro-Choice Amicus	Pro-Life Amicus
Civil Liberties	4. ACLU, National Education Association, People for the American Way, Newspaper Guild, National Writers Union, Fresno Free Club Foundation	13. Free Speech Advocates
	5. American Library Association, Freedom to Read Foundation	
Academics/ Research	6. 281 American Historians	
	7. Group of American Law Professors	
	8. Bioethicists for Privacy	
Science/Medical/Hospital	9. American Medical Association, American Academy of Child and Adolescent Medicine, American Academy of Pediatrics, American College of Obstetricians and Gynecologists, American Fertility Society, American Medical Women's Association, American Psychiatric Association, American Society of Human Genetics	14. American Academy of Medical Ethics
		15. American Association of Pro-Life Ob-Gyns, American Association of Pro-Life Pediatricians
		16. Doctors for Life, Missouri Doctors
	10. American Public Health Association, Alan Guttmacher Institute, American College of Preventive Medicine, California Physicians for Choice, California Republicans for Choice, City of New York, Massachusetts Department of Public Health, Berkeley School of Public Health, National Abortion Federation, New York State Republican Family Committee, 3 deans/chairs	
	11. American Psychological Association	
	12. 167 Scientists and Physicians	
	13. National Association of Public Hospitals	

Group Type	Pro-Choice Amicus	Pro-Life Amicus
	14. American Nurses Association, Nurses Association of the ACOG	
Population/Family/Family Planning	15. International Women's Health Organizations[283]	17. American Family Association
	16. National Coalition Against Domestic Violence	
	17. National Family Planning and Reproductive Health Association	18. Focus on Family, Family Research Council of America
	18. Population-Environmental Balance, Population Communication, Sierra Club, World Population Society, Worldwatch Institute, Jessie Smith Noyes Foundation, Zero Population Growth	
	19. Association of Reproductive Health Professionals, National Society of Genetic Counselors, Association of American Sex Educators and Therapists, Sex Information Education Council of the United States, Ferre Institute, Cedar Rapids Clinic For Women, Fox Valley Reproductive Health Care Center, 6 medical school deans/chairs, 64 other individuals	
	20. Center for Population Options, Society for Adolescent Medicine, Juvenile Law Center, Judicial Consent for Minors Referral Panel	

[283] These were: Abortion Rights Coalition, DKT Memorial Fund, Family Planning Association of South Wales, International Fund for Health and Family Planning, International Projects Assistance Services, International Women's Health Coalition, Marie Stopes International, National Abortion Campaign of Britain, The Pathfinder Fund, Population Crisis Committee, Population Council, Population Planning Associates, Population Services International, PRETERM Foundation, Program for the Introduction of Contraceptive Technology, TOLERATION, Transnational Family Research Institute, Women's Abortion Action Campaign, Women's Economic Network, Women's Electoral Lobby Australia, Women's Global Network on Reproductive Rights and 14 individuals.

Group Type	Pro-Choice Amicus	Pro-Life Amicus
Labor	21. Americans for Democratic Action, Coalition of Labor Union Women, Committee for Interns and Residents, Federally Employed Women, Public Employee Department of AFL-CIO	
Women	22. California NOW, San Jose—South Bay Chapter of NOW, California Alliance Concerned with School Age Parents, 6 individuals	19. Feminists for Life of America, Women Exploited by Abortion of Greater Kansas City, National Association of Pro-Life Nurses, Let Me Live, Elliot Institute of Social Sciences Research
	23. Canadian Women's Organizations[284]	
	24. National Association of Women Lawyers, National Conference of Women's Bar Associates	
	25. NOW	
	26. 77 Organizations Committed to Equality[285]	

[284] These were: Canadian Abortion Rights Action League, Ontario Coalition for Abortion Clinics, National Action Committee on the Status of Women, National Association of Women and the Law.

[285] There were: NARAL, Women's Legal Defense Fund, League of Women Voters of the United States, National Federation of Business and Professional Women's Clubs, National Women's Law Center, NOW Legal Defense and Education Fund, Women's Law Project, American Association of University Women, National Association of Social Workers, Women's International League for Peace and Freedom, Ms. Foundation for Women, Women's Equity Action League, Northwest Women's Law Center, Equal Rights Advocates, Connecticut Women's Educational and Legal Fund, National Woman Abuse Prevention Project, Wider Opportunities for Women, American Veterans Committee, Voters for Choice/Friends of Family Planning, Lambda Legal Defense and Education Fund, Boston Women's Health Book Collective, Human Rights Campaign Fund, American Federation of State, County and Municipal Employees, Women Lawyers' Association of Los Angeles, Queen's Bench of the San Francisco Bay Area, Yale Journal of Law and Feminism, Abortion Rights Council, Center for Women Policy Studies, Women's Equal Rights Legal Defense and Educational Fund, Committee to Defend Reproductive Rights– CMRW, New York State Coalition on Women's Legal Issues, Abortion Rights Mobilization, Women's Bar Association of Massachusetts, California Women Lawyers. National Gay and Lesbian Task Force, New York Women in Criminal Justice, Harvard Women's Law Association, Buffalo Lawyers for Choice, 80% Majority Campaign, CHOICE, Women in Film, National Women's Conference Committee, Women's Law Association of Washington College of American University, Choice Network of Tarrant County– Texas, Lawyers for Reproductive Rights, Gay and Lesbian Democrats of America, Women's Medical Fund, Columbia-Greene Rape Crisis Center, Radical Women, D.C. Feminists Against Pornography, Women's Equity Affiliates, Feminist Health Center of Portsmouth, Toledo Women's Bar Association, Washington Women United, Fund for New Leadership, Women's Agenda, Missouri Women's Network, Hawaii Women Lawyers, National Women's Studies Association, Hawaii Women Lawyers Foundation, North Carolina Association of Women Lawyers, Women's City Club of New York, Illinois Women's Agenda, Feminist Institute, National Council for Research on Women, Tucson Women's Commission, League of Women Voters of Missouri, National Committee to Free Sharon Kowalski, Santa Barbara Women's Political Committee, Women Employed, National Gay Rights Advocates, Women's Center of the University of Connecticut, North Carolina Equity, Women's Rights Coalition, International Center for Research on

Group Type	Pro-Choice Amicus	Pro-Life Amicus
Government	27. Attorneys General of California, Colorado, Massachusetts, New York, Vermont, and Texas 28. 140 Members of Congress 29. 608 Legislators from 32 States	20. Attorneys General of Louisiana, Arizona, Idaho, Pennsylvania, Wisconsin 21. Center for Judicial Studies (for 56 22. 53 Members of Congress 23. 250 State Legislators 24. 69 Members of the Pennsylvania State Legislature 25. 127 Members of the Missouri General Assembly 26. United States
Lawyers/Other Legal/Civil Rights	30. Committees on Civil Rights, Medicine and Law, and Sex and Law of the Association of the Bar of the City of New York, Arizona Attorneys Action Council, Beverly Hills Bar Association, Committee on Women's Rights of the New York County Lawyers Association, Lawyers' Club of San Diego, Women's Bar Association of Illinois, Women's Bar Association of the State of New York 31. National Council of Negro Women, National Urban League, American Indian Health Care Association, Asian American Legal Defense Fund, Committee for Hispanic Children and Families, Mexican American Legal Defense and Education Fund, National Black Women's Health Project, National Institute of Women of Color, National Womne's Health Network, Organizacion Nacional de la Dalud de la Mujer Matina, Organization of	27. National Legal Foundation 28. Alabama Lawyers for Unborn Children 29. Southern Center for Law and Ethics

Women.

Group Type	Pro-Choice Amicus	Pro-Life Amicus
	Asian Women, Puerto Rican Legal Defense and Education Fund, Women of Color Partnership Program of the Religious Coalition for Abortion Rights, Women of All Red Nations—North Dakota, YWCA of the USA[286]	
Abortion	32. 2,887 Women Who Had Abortions and 627 Friends	30. American Collegians for Life, Catholic League for Religious and Civil Liberty 31. American Life League 32. Association for Public Justice, Value of Life Committee 33. Birthright, Inc. 34. Human Life International 35. International Right to Life Federation 36. National Right to Life 37. Right to Life Advocates 38. Right to Life League of Southern California 39. Southwest Life and Law Center 40. Crusade for Life
Other		41. Knights of Columbus 42. Edward Allen 43. Larry Joyce 44. James Joseph Lynch, Jr. 45. Paul Marx 46. Bernard Nathanson, M.D.

[286] This brief was written by attorneys from the National Conference of Black Lawyers, the CCR, and the National Lawyers Guild.

APPENDIX II

ORGANIZED PARTICIPATION IN THE MOST IMPORTANT CASES DECIDED BY THE REHNQUIST COURT, 1986-1991 TERMS[287]

Case Name	Citation	Spon-sored?	N Amicus	N Amici	U.S. parti-cipant	N Briefs (cert.)
Barnes v. Glen Theatre	115 L.Ed. 2d 5 (1991)	no	7	26	no	2
California v. Acevedo	114 L.Ed. 2d 619 (1991)	no	0	0	no	0
City of Richmond v. Croson Co.	102 L.Ed. 2d 845 (1989)	no	19	64	amicus	1
Cruzan v. Director, Missouri Health Dept.	111 L.Ed. 2d 224 (1990)	yes	56	150	amicus	7
DeShaney v. Winnebago County Department of Social Services	103 L.Ed. 2d 249 (1989)	yes	6	21	amicus	0
Edwards v. Aguillard	482 U.S. 578 (1987)	yes	16	42	no	0
Employment Division	108 L.Ed. 2d 876 (1990)	yes	4	12	no	0
Harmelin v. Michigan	115 L.Ed. 2d 836 (1991)	no	8	14	no	0
Hodgson v. Minnesota	111 L.Ed. 2d 344 (1990)	yes	19	91	amicus	0
Johnson v. Transportation Agency	480 U.S. 616 (1987)	yes	11	45	amicus	0
Lee v. Weisman	120 L.Ed. 2d 467 (1992)	yes	21	82	amicus	4
Maryland v. Craig	111 L.Ed. 2d 666 (1990)	no	13	22	no	1
McCleskey v. Kemp	481 U.S. 279 (1987)	yes	5	14	no	0
Metro Broadcasting, Inc. v. FCC	111 L.Ed. 2d 445 (1990)	no	19	44	amicus	0
Michigan Dept. of State Police v. Sitz	110 L.Ed. 2d 412 (1990)	yes	5	34	amicus	2

[287] Source for Landmark Decisions: Epstein et al.,supra note 61, at Table 2.9. All other data collected by the author.

Case Name	Citation	Spon-sored?	N Amicus	N Amici	U.S. parti-cipant	N Briefs (cert.)
Missouri v. Jenkins	109 L.Ed. 2d 31 (1990)	yes	5	13	no	1
Mistretta v. United States	109 S. Ct. 647 (1989)	yes	6	12	party	0
Morrison v. Olson	108 S. Ct. 2597 (1988)	no	12	16	amicus	1
Osbourne v. Ohio	109 L.Ed. 2d 98 (1990)	no	5	23	no	0
Pacific Mutual Life Insurance Co. v. Haslip	113 L.Ed. 2d 1 (1991)	no	31	90	no	1
Payne v. Tennessee	115 L.Ed. 2d 270 (1991)	no	9	49	amicus	0
Penry v. Lynaugh	106 L.Ed. 2d 256 (1989)	no	4	13	no	0
Planned Parenthood v. Casey	120 L.Ed. 2d 674 (1992)	yes	30	2,300	amicus	0
Puerto Rico v. Branstad	483 U.S. 219 (1987)	no	0	0	no	0
R.A.V. v. City of St. Paul	120 L.Ed. 2d 305 (1992)	no	14	46	no	1
Rutan v. Illnois Republican Party	111 L.Ed. 2d 52(1990)	no	3	3	no	0
St. Francis College v. Al-Khazraji	481 U.S. 604 (1987)	yes	4	13	no	0
Stanford v. Kentucky	106 L.Ed. 2d 306 (1989)	no	10	46	no	0
Texas v. Johnson	105 L.Ed. 2d 342 (1989)	yes	5	49	no	0
UAW v. Johnson Controls	113 L.Ed. 2d 158 (1991)	yes	18	116	amicus	1
United States v. Eichman	110 L.Ed. 2d 287 (1990)	yes	11	68	party	0
United States v. Salerno	481 U.S. 739 (1987)	no	6	12	none	0
United States v. Stanley	483 U.S. 669 (1987	no	0	0	party	0

Case Name	Citation	Spon-sored?	N Amicus	N Amici	U.S. parti-cipant	N Briefs (cert.)
Webster v. Reproductive Health Services	106 L.Ed. 2d 410 (1989)	yes	78	5,681	amicus	1