

PART III

EXPLAINING AND IMPROVING THE JUDICIAL PROCESS

A THEORY OF INTEREST GROUPS AND LITIGATION

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Over the past few decades scholarly interest in group mobilization of the law (i.e., “interest group litigation”) has escalated at an overwhelming pace. Since the 1950s analysts have produced more than 70 books, articles, and papers on the subject. Still more impressive is the fact that this field crosses traditional boundaries of political science: Students of the American legal system (Vose, 1959, Caldeira and Wright, 1988) and of group processes (Berry, 1977; Salisbury, 1983) have examined linkages between organizations and courts.

That this line of inquiry engages several subfields is not surprising; “interest group litigation” is steeped in the pluralist tradition, a tradition that also bridges fields, providing a framework from which to view the governmental process. Indeed, contemporary interest in this phenomenon dates from David Truman’s (1951, 1971) elaboration on Bentley (1908). His seminal chapter, “Interest Groups and the Judiciary,” which argued that the courts are part of an all-encompassing pluralist system, directed scholarly attention to this avenue

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of organizational action. The counter-intuitive nature of this kind of influence—courts are supposedly apolitical bodies, immune from the ordinary external pressures placed on legislative and executive branches—invited empirical treatment.

Subsequent studies examining the behavior of groups in judicial forums shattered the myth of a legal process detached from group pressures. We now know, for example, that more than 50 percent of the Supreme Court's plenary docket attracts group involvement (O'Connor and Epstein, 1982) and that nearly 80 percent of all groups view litigation as a viable political weapon (Schlozman and Tierney, 1986). Additionally, we have chronicles demonstrating that many significant legal developments have their genesis in group pressure. These studies have created a new conventional wisdom: the external environment under which the judiciary operates is, in important respects, similar to that of other governmental institutions.

On the surface, then, the study of group litigation is quite robust: it examines a genuinely intriguing topic, is grounded in an established school of thought, and has engendered a substantial body of work. Even so, those working in the area have become increasingly disillusioned. Two scholars recently compared students of group litigation to blind men feeling an elephant: each touches "a different part of the great beast and mistakes the part for the whole" (Walker and Scheppele, 1986; see also, Wasby, 1986). Some simply have given up pursuit of a generalized explanation for group litigation decisions, claiming the whole area to be a hodgepodge of ideas and stories with little chance of more coherent development.

Why has this area of inquiry failed to generate generalizable explanations for group litigation? Several reasons could be offered, but they all stem from a common source: we have yet to develop an overarching framework to unite the information we have collected and the various perspectives that have been brought to bear on it. Instead, scholars of the group and judicial processes have been more concerned with examining specific substantive issues—the number and nature of groups that use litigation, the contexts in which such litigation occurs, the goals pursued, and the strategies and tactics used. This research has unearthed a motherlode of information, but that information is overly compartmentalized. It fails to deal consciously with the theoretical question at the heart of the inquiry: Why do some interest groups use litigation rather than other forms of political influence?

Hence, the study of group litigation is at a crossroads: there are those who continue to find the subject intriguing and worthy of systematic attention, but they face a major obstacle—the lack of a theoretical framework, however formulative, to inform and guide them. Without such a framework, as the story of the blind men and the elephant suggests, our understanding of organizational use of the courts will increasingly fragment. Only with the development of a

unifying perspective will we be able to place group litigation where it makes the most sense—within the larger context of group politics.

This paper suggests the beginning of such a framework, a heuristic device to organize and integrate the factors and processes that condition group use of the judiciary. In organizing what we know about the subject, our argument draws both from the group and judicial literatures. We first discuss the literature treating group litigation to depict the direction in which it has moved and to isolate the obstacles scholars have faced in developing an integrated explanation for the phenomenon. We then place the findings of prior works into analytically distinct categories and suggest the outlines of a framework that provides a more theoretically conscious point of departure for further study and elaboration.

THE STATE OF THE LITERATURE

Why do we know so much, yet so little about group litigation? For one thing, confusion exists over its "proper" academic classification. Is it so unique that it is best examined by students of the legal process or is it sufficiently general to be treated with profit by interest group analysts? This confusion is symptomatic of a larger problem: because scholars have failed to reach consensus on a proper perspective, they have studied group use of the courts in relative isolation. Thus, although they have collected a great deal of information, it tends to be fragmented.

This is particularly ironic given the explicitly theoretical concerns of pluralist pioneers: they placed litigation and other techniques of influence into a broader context. Bentley explicated the ubiquitousness of group activity in public policy formation, while Truman developed the concept of a "dynamic equilibrium" and postulated governmental institutions as ongoing mediators of competing group claims. Yet, subsequent scholars, while moved by these insights, divided into two camps. One set, consisting primarily of students of the judicial process and public law, adopted an institutional perspective. Beginning with Vose, they based their studies on pluralist assumptions about the politicized nature of governmental institutions. From here, however, their work veered away from the theoretical focus of Bentley and Truman.

Case studies such as Vose's (1959) *Caucasians Only* and Cortner's (1964) *The Wagner Act Cases* demonstrated substantial group penetration of the judiciary and generated a wealth of data. They kept research on group litigation alive by uncovering important linkages between groups and courts. Yet, these descriptive case studies also narrowed our compass of analysis. Rather than develop explanations of litigation as a component of group behavior, this generation of scholars studied litigation per se. Their preferred methodology was relating "war" stories of the legal victories won by groups in important

Supreme Court cases. As a result, we often become so enmeshed in minutia (e.g., a specific group's campaign in a specific issue area) that we lost sight of the larger concerns that moved Bentley and Truman.

On the other hand, the explosion of work-on-groups qua groups following publication of Truman's (1951) *The Governmental Process* moved in the opposite direction. These studies painted broad pictures of group strategies and tactics or focused on why people join groups. Initially, they devalued or ignored litigation, concentrating instead on legislative and executive lobbying and internal organizational characteristics. Over time, however, scholars of the group process became increasingly interested in litigation as a pressure group strategy. Two leaders in the field, Berry (1977) and Salisbury (1983) have urged closer examination of this phenomenon, with the latter listing "litigation strategies" as one of "three developments in group tactics and strategy [that] provide interesting glimpses of the underlying dynamics of interest group activity, thereby contributing to the 'new understanding' we are trying to build."

Although many heeded Salisbury's advice, few have focused exclusively on litigation. Rather, like Schlozman and Tierney (1986), Bruer (1990) and Walker and Scheppele (1986) they now explore litigation within the broader context of group strategies and tactics; indeed, their surveys regularly include "litigation" as an available strategic option. Despite the shortcomings of such a broad-based approach, it has generated much information. For one thing, it showed that groups do view litigation as a viable political weapon. For another, it relayed a great deal of data about the internal characteristics of groups that use the courts. And, finally, it underscored the fact that most groups do not rely solely on litigation to achieve policy ends; rather, groups move in and out of the various arenas of government in pursuit of their goals.

Ultimately students of the judicial and group processes—despite the different perspectives from which they approach the subject—find common ground in focusing on the political use of litigation by groups. This fascination with strategies and tactics, though, comes at a high cost. It leads the former set of analysts to become too descriptive and contextual, the other too generalized. This presents a dilemma: As students of the judicial process and public law, we do not want to view the political system solely from a policy perspective, seeing litigation as but one tool used by groups and probably a minor one at that (Schlozman and Tierney, 1986); but, as students of social phenomena and not mere chroniclers, we want to move beyond description of group involvement in "interesting" cases. This suggests that studies of organizational litigation must move from a focus on groups per se to one that savors their idiosyncrasies; yet, one that examines them against the larger social, political, and institutional context in which they operate.

A simplified rendering of group-governmental relations would juxtapose organizations and institutions as in Figure 1. The three arenas of government

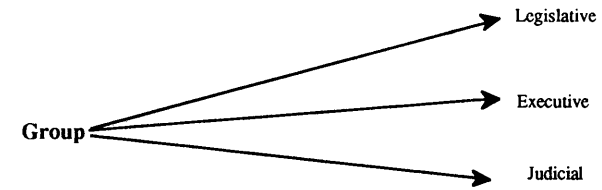


Figure 1. Preliminary View of the Groups Process

comprise the constants of this configuration; the movement of groups in and out of these arenas, the variables. The literature shows that groups often move along different paths: one may go to the judiciary, then to the legislature; another may start with litigation, then turn to the executive branch; a third may choose litigation only after first trying other institutions. Yet, what conditions these variations? The policy area of interest to the group? Their mode of organization? The present posture of governmental institutions? In short, what explains the different patterns of group litigation we observe?

The model noted in Figure 1 is far too simple to suggest answers to these questions. Groups relate to governmental perceptually, not abstractly: they see their environment in a particular way and make strategic choices (e.g., the appropriate paths for their activities) accordingly. In fact, based on our evaluation of the extant literatures, we argue that the strategic decision to use litigation is a function of characteristics that (1) are internal to the group, (2) influence its perception of its external environment, and (3) condition the choice to enter the political realm. In what follows we consider each of these elements separately and suggest an incorporating framework. This approach combines an emphasis on litigation with an explicit awareness that it fits within a broader scheme, that is, the way groups operate in the entire political system. In this way, the study can be placed where it belongs—in the larger context of group theory.

CONCEPTUALIZING GROUP LITIGATION DECISIONS: TOWARD A HEURISTIC FRAMEWORK

Internal Characteristics and Strategic Choices

Our survey of the literature identifies four group-specific factors that condition group actions by expanding and constraining strategic choices—

organizational mode, resources, maintenance, and focus. The last, focus, gives rise to and helps explain the goals a group pursues.

Mode

Organizational mode describes the relationship between a group's members and leaders. It takes one of three forms: mass-, sector-, or elite-based. Mass-based organizations are those that "are open to all citizens regardless of their qualifications" (Walker, 1983, p. 392). This encompasses groups such as the American Civil Liberties Union, the National Association for the Advancement of Colored People, and Citizens for Decency through Law. Sector-based organizations "require members to possess certain professional or occupational credentials." Such groups include trade and professional associations and unions. A final organizational mode is elite-based: non-membership organizations formed by like-minded individuals, usually attorneys, such as public interest law firms and national support centers of the Legal Service Cooperation (Lawrence, 1989).

Organizational mode is a critical component of any model of interest group politics because, as Walker and others note, it affects many subsequent behavioral choices and thereby influences the environment in which groups make decisions. Consider two groups active in the same area but organized differently, one (NAACP) mass-based, the other (NAACP LDF) elite-run. The NAACP's current participation in litigation (particularly in the area of criminal justice) has been largely "reactive" to outside events, membership demands, and especially affiliated branches: "If branches, particularly the larger and more politically active ones, want litigation on a particular topic, they 'can get it done'" (Wasby, 1986, p. 150). Because it is a non-membership firm, the leaders of the LDF do not face similar direct public pressures (Wasby, 1986, p. 150). Hence, although the NAACP and LDF have common objectives, the structure of their decision-making environments differs and these differences are reflected in their litigation choices. Thus, the relative autonomy of group leaders—which varies with organizational mode—is relevant to an analysis of their litigation behavior.

Resources

Organizational resources—money, time, staff, and contacts—affect the decision-making environment of group leaders by constraining or expanding their array of choices (Council for Public Interest Law, 1976; Weisbrod, 1978). Money, "the mother's milk of politics," also sustains litigation and is a central factor conditioning both its use and the areas of its use. Illustrations of this are plentiful. During the early years, the NAACP was forced to concentrate

on fund raising—although this drew resources away from the political pursuit of its other goals—because it could not properly undertake complex and costly litigation without sufficient funding. Today, the LDF places less emphasis on welfare litigation—once an area of substantial group concern—in part because of funding considerations (Wasby, 1986). Similarly, after the ACLU's membership dwindled as a result of its legal defense of the Chicago Nazis in 1977-78, it was forced to opt out of certain legal areas until it could rebuild its financial base (Neier, 1979).

Time also is a critical commodity for organizations. Simply stated, all groups have just so much time they can devote to any one issue; if another comes to their attention, then they must ignore it, deemphasize others, or find new resources. This is particularly a problem for groups concerned with a broad range of issues. During the early 1970s, for example, the ACLU reached all-time membership and budgetary highs. But, as the issue of abortion moved to the forefront of its agenda—in part because of the concerted efforts of pro-life groups to counter *Roe v. Wade* (1973)—it gave others less attention. Even sector-based groups with confined political interests cannot escape time constraints. The Motion Picture Association of America, for example, left Media Coalition—a group it helped found after the *Miller v. California* decision (1973)—when it was faced with issues of greater immediate importance to its interests than obscenity (Kobylka, 1987). Time constraints require all organizations, even those rich in resources, to give higher priority to some issues in the calculus that governs their political decisions.

Staff also helps orient the political strategy of groups. As Schlozman and Tierney (1986, p. 95) observe, "Money may be the preeminent political resource, but it is surely not the only one. In a technological age, several types of political, technical, and organizational skills are critical for effective political action." The National Consumer's League well illustrates this observation. It put together a diverse group of researchers with "expertise in the areas of medicine, health, and labor" to gather information later used in the "Brandeis Brief" (O'Connor, 1980). Without the assistance of these experienced individuals, the legal and strategic options available to its attorney, Louis Brandeis, would have been limited. Staff can also dictate the method of a group's participation in litigation. The presence of former prosecutors on the staff of Citizens for Decency through Law led it to adopt a trial-level approach to obscenity litigation (Kobylka, 1987). This "fine tuning" by expertise is an important factor in channeling a group's strategic political vision.

Contacts within government comprise a fourth resource upon which organizations can draw. If a group has connections to a particular agency of government—perhaps the President has appointed a member or supporter to a Commission—then that institution may move to the forefront of the group's strategic agenda. This is precisely why the Nader groups turned their attention

to administrative lobbying in the late 1970s: President Jimmy Carter had appointed several "Nader's Raiders" to important positions within the bureaucracy (O'Connor and Epstein, 1984). Similarly, the judicial appointments of a President sympathetic to group concerns may lead organizations to court. Such pre-existing linkages between groups and institutions can work to dispose groups to a specific strategy of influence.

Although analytically distinguishable, these resources interact to condition the internal decision-making environment of any group, be it mass-, sector-, or elite-based. Money, for example, can buy more staff and time. Likewise, a staff change can influence time commitment, revenue raising, and contact sources. The specific configuration of these resources defines a group's load capacity—what, how, and how much, it can do at a specific time.

Maintenance

Organizational maintenance, an ongoing process, constitutes a third factor relevant to a group's decision-making environment. Before groups can do anything they must survive; few organizations have amassed sufficient resources to ignore this consideration.¹ As Walker notes (1983) all three modal groups have to attract and hold members, patrons, foundations and/or wealthy individuals to cover costs; they offer a variety of "incentives" to this end (Clark and Wilson, 1961; Salisbury, 1969; Wilson, 1973; Moe, 1980, 1981). To the extent that political actions become incentive to organizational support, group leaders have to calculate the effect of their political decisions on the maintenance of their organizations.

The need to tend to the continuing health of an organization guides and constrains the choices made by its leaders. Americans United for the Separation of Church and State (AU) pursued religious establishment clause litigation in large measure to maintain the group: it could fill its coffers by portraying itself to its members as a bastion against Catholic domination of American life. Indeed, Sorauf argues that this led them to be viewed by other "separationist" litigators as something of an impediment to favorable legal development (Sorauf, 1976). While its maintenance needs led AU to church-state litigation, those of the ACLU help to account for its retreat from obscenity issues. This shift can be marked from the *Miller* decision, but some within the group believe that the rise of feminist concerns on its agenda, and a fear of alienating that constituency within the group, were an important force leading it to downgrade its involvement there (Kobylka, 1987).

Focus

A final internal factor orienting groups toward their external environment is focus. By focus we mean the nature of the interests, either purposive (public)

or material (private), that groups pursue and defend through the political process. Traditionally, scholars have looked at groups whose very existence depends upon public motives and goals. Organizations such as the NAACP, the ACLU, and the American Jewish Congress enter the political realm to further this end and create "good" public policy. James Q. Wilson (1973) describes these as *purposive groups*, those that "work explicitly for the benefit of some larger public or society as a whole and not... chiefly for the benefit of members, except insofar as members derive a sense of fulfilled commitment or enhanced personal worth from the effort." *Material groups*, those which owe their existence to selective and tangible benefits (and not to the political positions they may adopt or pursue), also go to court to advance positions of interest to their leaders (Olson, 1965). Their focus is political in the sense that they pursue some organizational concerns through governmental channels, but it is conceptually different from that focus which characterizes purposive groups. This difference turns on the *nature of the interests* that move groups to political action. Purposive groups try to influence public policy to promote a public, inclusive good. They premise their actions on what they perceive to be societal interests and not just those of their members. The political actions of a material group, though they may affect a broader population, are undertaken to advance the private interests of leaders and/or members.

This difference in focus has behavioral ramifications, affecting group litigation in two ways. First, it shapes a group's orientation toward the political system (frequency of use) and the range of issues on which it may act. In conjunction with organizational mode, resources, and maintenance, focus creates the internal decision-making environment in which groups operate. Second, it informs the goals a group will pursue. These goals are of two types: political (societal) or private (narrow).

That groups pursue political goals through litigation is well documented. Those concerned with various types of discrimination—racial (Heck and Stewart, 1982), gender (Cowan, 1976; O'Connor, 1980), ethnicity (O'Connor and Epstein, 1983) and handicapped status (Olson, 1984)—have frequently gone to court to pursue or defend their understanding of equal protection of the law. Similarly, groups also attempt to advance their conception of political rights and liberties. The American Jewish Congress, Americans United for the Separation of Church and State, and the ACLU have gone to court to bolster the First Amendment's wall of separation between church and state (Sorauf, 1976; Pfeffer, 1981). Indeed, the ACLU has gained fame as "the" organization willing to defend even the most unpopular group's right to express political ideas (Neier, 1979; Walker, 1990).

Two other political goals deal with governmental operations: good government and federalism. Common Cause has gone to court as part of a

coordinated strategy to structure debate over campaign finance reform (Greenwald, 1975) and a variety of other "good government" issues (McFarland, 1984). Groups supported or inspired by Ralph Nader have litigated to provide a "citizens' voice" on various issues and to serve as watchdogs over bureaucratic pursuit of the "public interest" (Handler, 1978). Additionally, the National Institute of Municipal Law Officers has been litigating since 1939 to assist cities in a variety of areas of municipal law (Vose, 1966). In short, a wide range of groups, moved to political action by broad, societal concerns and representative of a wide variety of views, have used the courts to pursue or defend their policy goals (Cortner, 1968).

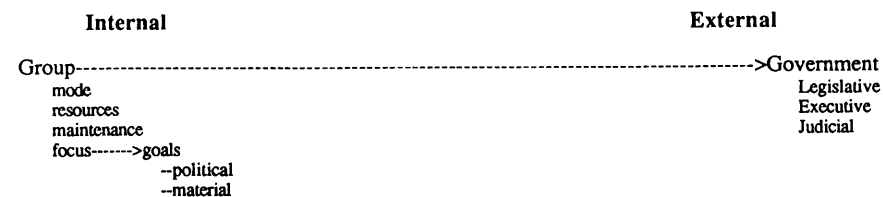
The focus of material groups—commercial and professional interests—is private and narrow (Kobylka, 1987, 1991).² This occasionally leads them to enter the political system, albeit with more confined interests and goals than their purposive counterparts. This constrained vision, however, should not obscure the significance of their political actions. Consider *commercial* organizations, such as trade associations. Their concerns are functionally exclusive—protection or enhancement of the economic viability of a specific occupational strata—but, to secure them, they occasionally resort to political action. For example, the groups comprising Media Coalition entered the obscenity politics because their members stood to suffer economically from unfavorable court decisions;³ the Southern Cotton Manufacturers went to court on behalf of member textile mill owners to challenge laws regulating child labor (Wood, 1968); and, the U.S. Brewers' Association launched lawsuits to challenge prohibition (Vose, 1972). Commercial groups, then, mobilize politically to protect the sacred economic interests of their members.

Unlike their commercial counterparts, *professional groups* do not exist primarily to promote the profitability of their members. Their major concern is maintenance of a particular vocation's integrity. Groups of this type, including the American Bar Association and the American Medical Association, often enter the political arena to gain authority as "certifiers" and governors of those involved in a particular occupation. Other professional groups engage in politics when it is necessary to protect a perceived dimension of organizational concern. Consider the involvement of the American Association of Publishers, the American Library Association, and the Authors League of America in obscenity litigation (Kobylka, 1987). Their immediate concern is to protect the vocational interests of their members, interests that often involve the "political" issue of free expression. On the one hand, they work to protect the material interests of their members (e.g., defending librarians charged with disseminating obscenity); on the other, they argue on principled, political grounds for broad tolerance in the area of expression. Hence, they become politically active to protect member professionals from a perceived debasement by public policy. This motivation, although clearly

material, is not strictly speaking "commercial." To summarize the argument of this section, a group's internal characteristics—because they orient it to the context in which it exists and condition it to the goals it pursues—help to explain its political activities. The interplay among these characteristics is a central element in the overall framework of a group's decision-making. That is, whether groups intervene in a particular issue depends, in part, on their mode of organization (member pressure and leader preferences), their available pool of resources (their presence, accessibility, and the organizational costs of their reallocation), the relation of the issue to organizational maintenance (enhance or harm), and their focus (the relationship of the issue and its perceived ramifications to the interests the group was established to protect and advance). A coherent and generalized explanation of why groups engage in political activity, particularly litigation, must incorporate these group-specific factors. Figure 2 depicts this elaboration on our initial model and its concept of departure, "the group," by including the internal characteristics that shape a group's internal decision-making environment.

The Perceptual Filter

To this point, our discussion has focused on group-specific factors. This is too simple. The literature tells us that the relationship between these factors and group behavior is not as direct as that portrayed in Figure 2. These internal variables do not exist in a void but intersect with the environment in which the group operates. It is at this juncture—what we term the "perceptual filter"—that groups confront linkages between their internal configurations and external factors. Here, based on their internal needs and constraints, groups filter perceptions of their surrounding social/political context—a context defined by the posture of governmental institutions and organizations with related concerns. These perceptions, in turn, further condition the decision about the relevance or appropriateness of political action.



These contextual dimensions can take on one of three values: favorable, unfavorable, or malleable. An unfavorable/favorable governmental context implies that groups perceive any or all of the institutions of government or public opinion as inhospitable or conducive to their claims. Groups possessing certain traits or goals, for example, will view the Rehnquist Court or the "Reorganized" lower courts as more favorable political environments than others. Malleable contexts occur when governmental institutions have yet to proclaim definitive policy, or when issues relevant to the group have not been placed on the political agenda. Relevant to these assessments is the potential influence and comportment of other organized pressures; groups must decide whether "enemies" or "allies" populate the existing external environment. If an issue has yet to reach institutional agendas, the group might find an opportunity to fill a void within group representation and structure debate and policy.

Perceptions of the existing socio/political context obviously affect group decisions. One would, for example, expect groups disadvantaged in one forum to turn to others. This is the dominant explanation for the early desegregation litigation (Vose, 1959; Cortner, 1968; Barker, 1967; Kluger, 1976). However, this "disadvantaged thesis" does not always hold. Consider two examples: the litigation of Americans for Effective Law Enforcement (AELE) in the late 1960s and that of the ACLU in the 1940s. AELE was formed in 1966 for two reasons: to convey a "law and order" perspective to the Supreme Court and to counterbalance the claims of organizations such as the ACLU and NAACP. The leaders of the AELE perceived both the institutional context (the Warren Court) and the array of other groups (highly organized opposition) as unfavorable, yet this did not dissuade them from pursuing their objectives through litigation (Epstein, 1985). In contrast, the ACLU, which had defended members of the Communist Party since the early 1920s, temporarily ceased its radical speech litigation because of an increasingly unsupportive political climate (Lamont, 1968). Thus, similar contextual settings produced different organizational responses.

What explains the varying behavior of these two groups? Certainly, one important factor is the difference between their internal "make-ups." During the early 1940s the ACLU was short on funds and members; pursuing its protection of radical speech would have cost it resources—both in terms of the expense of the litigation and the loss of member-derived revenue—with little chance for legal gain. In contrast, in the 1960s (and since) the AELE was an elite-based group, possessing no members to appease. If anything, the perceived crisis of the Warren Court's expansion of the rights of the accused (a negative context) *helped* the AELE generate funding for its work. Hence, even though these groups were faced

with similar unfavorable situations, their internal characteristics led them to perceive the external environment very differently.

The perceptual filter, then, is critical to a systematic explication of the political activities of groups. It is the point where group-specific factors initially intersect and interact with the external environment;⁴ it also defines the juncture at which political options *must* be considered, giving specific content to the world-view of a group.⁵ To neglect this link in the group-government chain is to pretend that politics are objective and mechanical when they are actually the child of competing and changing perceptions. Figure 3 includes this refinement of our model.

Political Choices: Why Go to the Courts?

Based on their internal characteristics and perceptions of the external environment, groups make decisions about the efficacy of pursuing their goals through political channels. But why do they select a particular institutional strategy at any given point in time? The literature suggests that two sets of factors are relevant to this choice: institutional and organizational.

Institutional Reasons

The predominant explanation of why groups litigate is that they lack influence in legislative and executive branches. This "disadvantaged thesis" holds that when groups are thwarted in other policy-making arenas (Cortner, 1968), they turn to the courts where majority-building is secondary to appealing effectively to statutory or constitutional principles. Yet, whatever truth the disadvantaged thesis captures, the picture is far more complex. For instance, some groups simply view the judiciary as an appropriate arena for their activity. Judicial action may be necessary to enforce, to implement, to reinforce, or

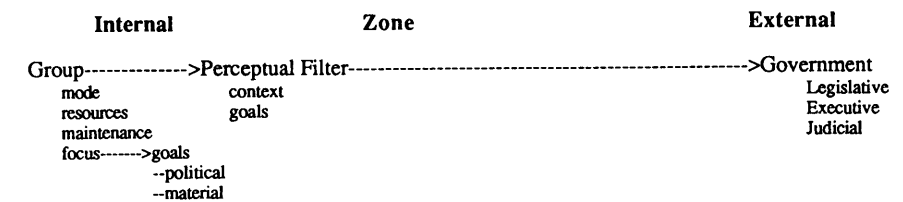


Figure 3. The Process of Group Interaction with Government (II)

to promote compliance with victories won either in the other branches of government or in the judiciary itself (Johnson and Canon, 1984). For example, the National Consumers' League found it advantageous to go to court to defend the validity of protective labor legislation which it helped to pass (Vose, 1958); and, Common Cause has litigated to ensure compliance with the Federal Election Campaign Act (Greenwald, 1975; McFarland, 1984).

Groups also use litigation to reinforce or "back-up" the efforts of other interests. The Lawyers Committee for Civil Rights Under Law provided basic legal assistance to blacks and civil rights workers in Mississippi to supplement their other political tactics (Heck and Stewart, 1982). Similarly, the National Institute of Municipal Law Officers has gone to court in support of city attorneys, the State and Local Legal Center regularly provides assistance to state attorneys general (Baker and Asperger, 1982), and Morality in Media's National Obscenity Law Center supports enforcement of federal, state, and local laws (Kobylka, 1987).

Additionally, group litigation may fill a void or serve as a counterbalance to other organized interests. This is particularly applicable to issues subjected to judicial resolution because the adversarial system can work to mitigate against consideration of a range of perspectives. In this sense, it is not surprising that the Southern Cotton Manufacturers went into the courts during the early 1900s to counter the child labor movement or that the Anti-Boycott Association used litigation between 1902 and 1919 to fight union activity. More recently the National Chamber Litigation Center of the U.S. Chamber of Commerce has gone to court to contest "liberal" forces and conservative public interest law firms have tried to counterbalance the claims of their liberal counterparts (Vose, 1972; Epstein, 1985).

Finally, groups have often found courts excellent vehicles for developing law and promoting organizational policy goals. Examples of this are legion. The NAACP LDF elicited from the courts new constitutional protections for blacks (Kluger, 1976; Tushnet, 1982) and, in the 1970s, new bail law. The Tennessee Committee of Constitutional Reapportionment instigated a major structural change in government through litigation (Cortner, 1968, 1970). A loose alliance of separationists—ACLU, Americans United for the Separation of Church and State, and the American Jewish Congress—helped erect the constitutional "wall of separation" (Sorauf, 1876; Pfeffer, 1981; Morgan, 1984). Successful litigation here pays huge benefits: Goals enshrined in constitutional doctrine prove difficult to alter over time.

In sum, a variety of institutional considerations can lead groups into the courts. Traditionally, the literature has pointed to the disadvantaged thesis to explain this phenomenon, but a resifting of the data from previous studies reveals other explanations. Although not mutually exclusive from the traditional thesis, these explanations—most of which stem from the

appropriateness of the courts, in a separated powers system, for certain policy gambits—add richness and detail to our understanding of the motive forces behind group litigation.

Organizational Reasons

Despite the difficulty of defining their precise relationship to motivations tied to institutional concerns, it is clear that organizational factors also affect group decisions to enter the political arena. Simply speaking, groups provide goods to members and work to maintain themselves. To accomplish these ends, purposive groups primarily "use" political positions and actions, while material organizations rely more heavily on selective benefits (Wilson, 1973; Moe, 1980, 1981). This does not mean, however, that political activities are necessarily irrelevant to the maintenance of material groups. Though the political choices of their leaders may be less constrained by membership or donor preferences than those of purposive groups, their political actions—insofar as they promote important material interests—may be added benefits, ones that hold marginal members and draw new ones. This suggests that organizational needs combine with institutional concerns to condition the decision of *any* group not only to enter the political system, but a particular arena as well. Three organizational factors seem particularly relevant to the litigation decision: availability of legal talent, publicity, and group maintenance.

The availability of legal talent conditions a group's decision to litigate to press its claims (Vose, 1981). If a group has ready access to such expertise, the judicial option is not nearly as imposing as it would be if it lacked this resource. One of the great advantages held by the NAACP/LDF as it entered its litigation to eliminate restrictive covenants and school segregation (Kluger, 1976) was its base of experienced attorneys. Institutional constraints did work against the use of other forums, but the presence of Thurgood Marshall and his team of advisors made the judicial choice easier. The availability of legal talent also facilitated the litigation choices of many other groups, including Citizens for Decency through Law (Kobylka, 1991), the American Liberty League (Wolfskill, 1962), the Nader groups (Handler, 1978) and, the Lawyers' Committee for Civil Rights Under Law (Heck and Stewart, 1982). Lawyers are, after all, trained in the use of the courts, and a group well-stocked with legal talent may be more inclined to use that forum than one without this resource.

A second organizational factor, the publicity a group gains from litigation, is important for two reasons. First, it helps a group foist its concerns onto the public agenda and gain legitimacy as an authority in its area of concern. The NAACP/LDF's legendary litigation campaigns in the areas of voting rights, housing access, school desegregation, and employment discrimination

are prime examples: they not only resulted in favorable policy decisions and moved civil rights issues to the forefront of the policy agenda, but they also established the NAACP as the foremost organizational litigator of these issues. The ACLU's litigation in the areas of church-state relations and obscenity had similar agenda-setting and organization-promoting value. In both instances the ACLU was able to draw a great deal of public attention and disseminate its message in a way that would have been impossible without litigation victories.

Taking issues to court also facilitates ideological posturing. Such litigation may not alter policy, but by challenging opponents on ideological grounds it can lessen their legitimacy by heightening public concerns about the dangers of their supposed extremism. The litigation of Americans United for a Separation of Church and State, a group composed largely of southern protestants, provides an example. A primary motive of its litigation was to attack the Catholic Church. Naturally AU wanted the issues resolved in its favor, but legal "success" was not its central motivation.

Maintenance constitutes a third factor governing the specific political choices of a group. As noted previously, the political positions groups assume can be seen as tools to draw attention, and perhaps allegiance, to them.⁶ One of the attractions of pursuing women's rights for the ACLU was the satisfaction of a constituency within the group and the potential attraction of latent members and their financial support (Cowan, 1976). The litigation of the NAACP/LDF helped that group to sustain itself as its political agenda unfurled (Vose, 1959; Kluger, 1976). These examples suggest that a group's decision to go to court may spring from organizational imperatives—for example, fund raising, membership appeasement—rather than from political or institutional concerns.

The groups noted above are all purposive, but material groups also occasionally use their political positions as a maintenance strategy. This is implicit, if undeveloped, in Olson's work: political actions, especially if closely tied to the material concerns of the group, can help to attract and hold members. Media Coalition, formed by commercial groups after the Supreme Court decision in *Miller v. California* (1973) well-demonstrates the utility of political incentives for material groups. Its goal is to protect the commercial interests of its member trade associations, and its legislative and litigious activities are narrowly tailored to this end. Its early litigation successes enabled it to hold old members and attract new ones because its narrowly defined strategy leads it to enter only that obscenity litigation of specific interest to its members. In short, to ensure enjoyment of the benefits of its legal expertise, a group must belong to the organization. In this way, group leaders used MC's litigation success as a membership incentive.⁷

In conjunction with group characteristics and a developed perceptual filter, institutional appropriateness and organizational needs help to explain further

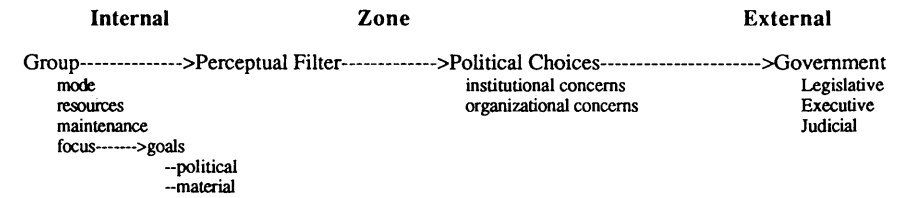


Figure 4. The Process of Group Interaction with Governments (III)

the political choices and strategies of groups. Integrating these considerations, we arrive at a fuller conceptual schema of the group litigation process. This extended framework is illustrated in Figure 4.

CONCLUSION

Like others who have examined the ways that interest groups use the judiciary to advance their policy goals, we bemoan the lack of a cumulative and comprehensive body of knowledge on group litigation. As it currently stands, the literature is highly idiosyncratic—a collection of interesting studies of specific actions by specific groups in specific areas of law. This provides a wealth of information, but little to tie it together and make general sense of the reasons behind the phenomenon. What we need is a framework to integrate the findings of these studies and facilitate development of theoretical generalizations to guide future work. Such a perspective would combine the insights of students of both the group and judicial processes to fix the phenomenon of interest group litigation in the broader context of political activity.

The framework we have begun to develop is consistent with this ambition. Drawing from the literature, it articulates three segments of the process of group politics: those internal to the group, those external to it, and that zone in which a group's perceptions of its external environment are shaped. We argue that a set of internal factors widely noted in group theory literature—mode, resources, maintenance, and focus—orients any given group to its external environment. The latter—the nature of the interests that prompted group organization, be they purposive or material—conditions the goals a group will seek to promote in the political process.

These internal factors frame the window through which a group views its external environment. This perceptual filter gives meaning to the sociopolitical environment—the configuration of organized actors and governmental institutions—that a group faces when it looks beyond itself. Given this understanding of its environment, a group makes its political choices—whether or not to go public, and, if the public route is chosen, the institution or institutions that are to be the locus of its activity. These choices are shaped by the interaction between a group's internal characteristics, beliefs sifted through its perceptual filter, and its understanding of the relative conduciveness of the various institutions to its political goals and maintenance requirements.

The approach to the study of group litigation described here is far from complete. The analytical framework we advance in Figure 4 is a first step toward synthesizing what we have learned from scholars of the group and legal processes. It articulates coherent segments of a group's approach to the political world. In so doing, it divides a dynamic process into analytical categories that help us examine and explain that process. This approach helps to integrate the data we currently possess; but it also reveals areas in need of closer treatment. More work, for example, needs to be done on what we call the perceptual filter. Clearly such a stage in a group's political life exists, but we know little about the factors that shape the specific conclusions reached within it—why similar groups perceive the same objective reality differently. Better understanding the factors shaping these perceptions will enable us to better explain the behavioral differences we observe.

In addition, more work needs to be done on the interactions between and within the framework's individual segments. For example, while the internal characteristics of a group are temporally prior to the setting of its perceptual filter and the formulation of its political choices, those characteristics directly influence the decisions it makes. Consider the conceptual overlap between resources (a group-specific characteristic) and organizational reasons (legal talent, publicity, and ideological posturing) for politicizing a group's concerns. Resources are gathered in light of a group's understanding of its role and function, and this ties into the organization's impetus for political activity—especially for the locus of that activity. These, and the other inter-segment relationships described in the framework, need further specification and elaboration.

The model's intrasegment relations also require more detailed study and definition. A prime example is the resource component of the internal characteristics segment. The factors we suggest as relevant—money, staff, time, and contacts—shape a group's "load capacity": its organizational ability to do the things it wishes. What we cannot make clear at this point is the relationship between specific configurations of these factors and specific behavioral outcomes. Clarifying this relationship is difficult because these elements not

only interact with group choices, but among themselves, as well. This latter interaction affects the former relationships and contributes to the dynamism of the group system both in terms of inter- and intra- group strategic adaptations. More work is needed to define these relationships, especially as they relate to the choice to carry battles into the courts.

Despite the difficult problems that remain, the model we have developed is an important first step in fusing group-centered and court-centered perspectives that have heretofore existed in relative isolation. The importance of such an analytical synthesis cannot be overstated. Application of the framework we suggest here, especially as further elaboration makes it a more elegant and rich conceptual model, can move the literature beyond the essentially descriptive and toward the theoretical and comprehensive, advancing and broadening our understanding of litigation as a component of the political strategy of groups. In short, such a synthesis will move the study of group litigation back to where it began and properly belongs—within the rubric of group theory. In so doing, it will work against the atomization that characterizes current explanations of this phenomenon and lead us to provide coherent and generalizable accounts of this aspect of political life. Thus, although the framework we present here is rudimentary, it provides a necessary and promising starting point for a more systematic and theoretically integrated analysis of group litigation behavior.

NOTES

1. In a sense, group concern with organizational maintenance parallels the concern of Members of Congress with their electoral security: even those holding "safe" seats fear that they could lose their next election. This concern is amply reflected in their behavior (see Fenno, 1978). The experience of the ACLU in the mid- and late-1970s well demonstrates the ill effects of poorly tended bases of organizational support (see Neier, 1979).

2. Although these categories are not mutually exclusive, they are sufficiently distinct to allow for coherent groupings and analysis of the political behavior of different types of groups.

3. Between 1947 and 1982, fourteen groups (ranging from the Adult Film Association of America and the Motion Picture Association of America to the Council for Periodical Distributors Association and the American Booksellers Association) went to court out of the fear that restrictive rulings on obscenity issues would cause their members' wares to come under prosecution and thus threaten economic losses both generally (circulation and distribution limitations) and specifically (individual legal actions to fight suppression attempts).

4. It is also within this perceptual filter where issues are defined in ways that are particularly relevant to the group. It must be remembered that while the objective nature of problems may remain the same over time, the social definition may change. For example, the Women's Christian Temperance Union, a group concerned consistently with "drunkenness," operated in a society in the nineteenth century that viewed such a phenomenon as a personal problem, in the twentieth century as a disease, and most recently as a particular problem when participants drive automobiles. Groups must be cognizant of these shifting social definitions as they make their strategic and tactical decisions.

5. By "universal juncture" we mean something of a least common denominator. For purposive groups, political actions will be considered much earlier in most instances because they were formed specifically to engage in such behavior. Material groups, organized for essential private purposes, may come to the decision to enter the public realm at a later point in the group process. This juncture is that at which their internal values are perceived to be externally threatened. Thus, the "universal juncture" to which we refer is actually the last—but not only—point at which groups can decide to take political action.

6. Effective organizational maintenance requires a sense of how issues are evolving in the larger, external environment. This we would call timing, (i.e. the need to act) as opposed to the availability of time. Timing clearly conditions the interaction of time and money as organizational resources, but specification of this relationship is not crucial at this stage in the model-building process. Also interesting, but beyond the scope of the present project, is the "chicken or egg" question. Does organizational maintenance require a search for useful political issues, or do issues promote the organization of interests?

7. MC's litigation success also demonstrates another possible result. One charter member, the Motion Picture Association of America (MPAA), left the group in 1977. MPAA joined MC for the political benefit it could provide—protection of the commercial interests of major motion picture producers. Its decision to leave the group was based on its resource constraints—money was needed in other areas of organizational interest—and the success of MC. The latter made the legal climate favorably disposed toward MPAA members' releases. With its specific commercial interest protected, MPAA lost interest in obscenity politics.

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