An Approach to
Interest Group Litigation Research

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Introduction*

There have been numerous studies of interest group litigation (Yale Law Journal, 1949, 1964; Harper and Etherington, 1952; Vose, 1955, 1957, 1958, 1959, 1966, 1972, 1981; Mamwaring, 1962; Ginger, 1963; Cortner 1964, 1968, 1970\(^a\), 1970\(^b\), 1975, 1980; Birkby and Murphy, 1964; Hakman, 1966, 1969, 1971; Miller, 1966; Barker, 1967; Katz, 1967; Wood, 1967; Morgan, 1968; Puro, 1971; Meltsner, 1972; Hahn, 1973; Greenberg, 1974, 1977; Greenwald, 1975; Kluger, 1976; Sorauf, 1976; Rabin, 1976; Cowan, 1976; Council for Public Interest Law, 1976; Weisbrod, 1978; Handler, 1978; Belton, 1978; Shattuck and Norgren, 1979; Berger, 1979, Tenofsky, 1980; Burke, 1980; O'Connor, 1983; Tushnet, 1981; Waiby, 1981; O'Connor and Epstein, 1981). Generally, these fall into two categories: (1) the study of a specific group or (2) the examination of the extent of interest group involvement in a particular issue area. Several problems exist with both of these related approaches. First, in examining either specific groups or the nature of interest group involvement in litigation across certain issue areas, researchers have taken highly descriptive approaches. While these have produced very useful information about particular groups or their involvement in specific areas of the law, often this knowledge has not been applicable to other groups or issue areas. Even those who have suggested that certain factors were critical to interest group success base their evaluations upon personal observations of the groups under study rather than on empirical evidence. Thus, Clement E. Vose, in describing the status of interest group litigation thirty years after his pioneering efforts concluded that:

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On many aspects of studying litigation as a form of interest group activity there is a need for better theory, for attention of the theorist to empirical work and better models for the empirical studies to proceed under (1981:i).

A second problem proceeds from the one noted above. Studies analyzing interest group activity have focused upon the litigation activities of only a few groups and examined this activity in but a limited number of highly salient issue areas. Thus, interest group involvement in a large number of areas has gone unnoticed.

This paper is an account of our efforts to combine the descriptive mode of interest group analysis with the quantitative tools of judicial research. Section One provides an overview of the two types of studies of interest group litigation as well as their varying theoretical contributions. In Section Two we present the several questions left unanswered by the case study approach and describe the model we have formulated to answer some of those questions. In Section Three we review our approach to the study of interest group litigation in the United States Supreme Court. Because scholarly interest in this area is increasing, we also discuss the tools of research available to undertake this kind of analysis, as well as some of the methodological problems encountered in researching interest group involvement in the Supreme Court.

Section One

Researchers pursuing the first approach—examinations of specific interest groups' litigation strategies—generally have looked at only one organization. The National Association for the Advancement of Colored People (NAACP) and its independent Legal Defense Fund (LDF) have been the most frequently studied (Yale Comment, 1949; Vose, 1959, 1965; Osbourne,
1963; Birkby and Murphy, 1964; Barker and Barker, 1965; Casper, 1972; Hahn, 1973; Meltsner, 1973; Rabin, 1976; Kluger, 1976; Greenberg, 1977; Belton, 1978; Wasby, 1981; Tushnet, 1981). While "scattered" accounts of other organizations' litigation activities exist including the ACLU (Katz, 1967; Halpern, 1976; Cowan, 1976); the National Consumers' League (Vose, 1957, 1972); and the American Jewish Congress (Tenofsky, 1980), most of these groups have been the focus of only one or two investigations.

Interestingly, while all analysts have concluded that the LDF is a highly successful litigator, they have found different reasons for its success. For example, Vose (1959) in his in-depth study of the NAACP's involvement in restrictive covenant litigation, concluded that its effectiveness was the product of selecting good test cases, hiring skilled attorneys, and its longevity.

Subsequent studies of the LDF have found additional factors to be critical to its success in other areas of civil rights litigation. Michael Meltsner (1973), an LDF attorney, found that the LDF's "cunning staff" was the key to its victory in the death penalty cases that culminated in Furman v. Georgia, 408 U.S. 238 (1972). Writing five years after Meltsner, Robert Belton (1978), also an LDF staff attorney, concluded that case control was the critical factor in the LDF's success in racially-based employment discrimination cases.

The different conclusion of each scholar concerning factors important to the LDF's success may be the result of its varied activities in a range of issues involving race discrimination. However, use of the descriptive approach, i.e., researchers' reliance on their own perceptions or those of others, may be an alternative explanation for these differences. Given that
the importance of these factors appear to vary across areas of LDF litigation, it is likely that they will not be of equal importance to the success of other litigating groups.

Just as the studies of individual interest groups have concentrated on those organizations litigating for expanded civil rights and liberties, examinations of interest group involvement in particular issue areas also have focused on these kinds of claims. For example, Richard E. Morgan (1968) detailed the role of interest group coalitions in the religious establishment controversy. Later, Frank Sorauf (1976) examined these coalitions from the perspective of their involvement in sixty-seven cases handled in the federal courts. Similarly, O'Connor's (1980) analysis of several women's groups' efforts to expand women's rights through litigation provides another example of extensive organizational involvement in a single issue area.

While O'Connor and Sorauf also have noted the importance of certain factors in their respective areas of study, without further investigation it is impossible to determine whether or not these "success" factors apply to other interest groups' use of the courts. Just as the problems specific to the issue and group approaches are numerous, several others exist concerning the general study of interest group litigation.

One problem lies in the absence of precise terminology. We believe that in studying interest group litigation, the term "interest group" takes on a somewhat different meaning than that generally used by social scientists (Truman, 1951:33-39; Ziegler and Peak, 1972:1-4; Vose, 1972:xxxvii; Greenwald, 1977:14-19). For example, Vose questioned whether or not it was "helpful" to classify the Mental
Health Law Project, which like the LDF has no members, as an interest group (1981:9). We define an interest group as any interest related collective that purports to represent the interests of a group, generally for a larger purpose than is at stake in the immediate litigation. Thus, we consider the Mental Health Law Project, which purports to litigate for the rights of the mentally or developmentally disabled as an interest group.

The kind of representation required in our definition of interest groups who litigate can take several forms. The most commonly studied is what Sorauf (1976) has termed "direct representation". We define this as actual sponsorship of a case before the court under study. Direct representation occurs when an attorney from an interest group actually argues the case or is listed as assisting in the preparation of the brief submitted on behalf of a party plaintiff or defendant.

Another form of participation occurs when an interest group files an amicus brief (Krislov, 1963; Puro, 1971). Participation as amicus curiae can take many forms. First, interest groups may submit amicus briefs alone or in conjunction with one or more groups. Second, interest group(s) may draft an amicus curiae brief and request others to "sign on" in a show of support. Third, a group may contact another it knows to be filing an amicus brief and offer its name, assistance, and/or financial support.

Because of the complex nature of amicus participation, particularly in terms of assessing the impact of the various kinds of amicus curiae briefs submitted, their use has been neglected by most researchers (See contra, Krislov, 1963; Hakman, 1969; Puro, 1971). For our purposes,
we consider amicus appearance as a form of interest group participation, but distinguish this from direct sponsorship.

Success is another term that has been defined by interest group litigation researchers in a number of ways (Sorauf, 1976:95; O'Connor, 1980:3-5). For purposes of quantifying interest group impact on the Supreme Court, we define success as the court's adoption of the position advocated by the interest group. However, in some cases, an interest group may appear as an amicus curiae because it fears that the direct sponsor may lose. It does so to present the Court with a "fall back" position to reduce the potential magnitude of the loss. Thus, should the Court decide against the direct sponsor but adopt the position advocated in the amicus brief, we count that as success for the amicus, but not for the direct sponsor even though both parties have participated on the same side of the case.²

Another problem in the study of interest group litigation concerns the atheoretical nature of the case study approach. While Vose and most other interest group researchers have noted Bentley (1908) and Truman's (1951) initial suggestion that pressure groups lobby not only the executive and legislative branches, but also the judiciary, the case studies have not built upon interest group theory in any systematic way.

Further analysis must attempt to construct testable hypotheses derived from the findings of the case study approach in conjunction with Bentley and Truman's theoretical contributions concerning the nature of the role of interest groups in a democratic society. Even Sorauf, in concluding his case study claimed that it is not "easy to compare the role of litigating groups in church-state litigation with the role of other groups in other sets of cases." He further noted that "direct
comparison is difficult in the absence of data on entire constellations of constitutional litigation" (1976:348).

The only scholar who attempted to examine the entire "constellation" of Supreme Court cases considered only amicus curiae activity and concluded that interest group involvement in non-commercial cases was minimal (Hakman, 1966, 1969). Thus for some time thereafter, few researchers undertook studies of interest group litigation, possibly because of Hakman's conclusions that such studies simply perpetuated "folklore". However, the few studies done in the 1970's found extensive group involvement in particular areas of the law (Meltsner, 1972; Hahn, 1973; Greenberg, 1974, 1977; Kluger, 1976; Sorauf, 1976; Belton, 1978; Shatuck & Wogrei, 1979). Similarly an "update" of Hakman's work that examined interest group participation as amicus curiae in non-commercial cases from 1970 to 1980, found extensive interest group involvement in all issue areas on the Court's docket (O'Connor and Epstein, 1982).

This finding of extensive interest group participation as amicus curiae complements studies that have revealed interest group participation on both sides of a particular issue. For example, Sorauf (1976) found significant interest group conflict in his study of competing coalitions litigating in the religious establishment area. Additionally, an analysis of race and gender-based employment discrimination cases found that groups participated on both sides of the controversy in 64 percent of the cases (n=50) (O'Connor and Epstein, 1981). Both these and other studies (Vose, 1972; Morgan, 1969; Epstein, 1981) conclude that conflict in particular areas of the law affect interest group strategy and success.

Given high rates of participation across issue areas, and increasing appearances of group conflict in the courts, studies of the nature called
for by Vose and Sorauf are imperative. Writing in 1968, David Danelski noted that:

The further importance of (the group process) approach turns on whether it is able to offer sophisticated explanations based on verifiable theory (1968:179).

Thus, we have attempted to create a model of interest group participation that utilizes both the descriptive and quantitative approaches to meet this objective.

Section Two

Our review of the literature in this area reveals several factors frequently noted as important to success. But, as Sorauf noted, it is unclear whether the importance of these factors holds true for groups across the full range of Supreme Court litigation. Other questions arise that can be attributed to the nature of the case study approach. These include: (1) What factors are generally important to interest group success? (2) Are different factors important to the success of different types of interest groups? (3) Does the importance of these factors vary by the kind or extent of an interest group's involvement in litigation? (4) Is an interest group's success affected by the presence of opposing interest groups? To examine these questions, we have taken the factors traditionally noted by social scientists as important to success and operationalized them into quantitative measures.

As indicated by Table One, we have chosen to operationalize seven factors. The first indicator of success, resource allocation, is operationalized as the dollar amount each organization spends on its litigation (Table One about here)
activities. The amount of money an organization allots to litigation can affect the nature of its participation (amicus or direct sponsorship), the kinds of issues it is able to pursue, as well as its success (Belton, 1978:915; O'Connor, 1980:23-24; Cortner, 1968:291; Vose, 1959:42, Sorauf, 1976:42; Ginger, 1963:463; Wasby, 1981). For example, the LDF, unlike many other groups, has salaried staff members whose sole job it is to analyze statistical information to be used in employment discrimination litigation (Westin, 1975:112-113). The LDF's success in this area may be attributable to its ability to hire these kinds of experts, which often is beyond the financial capabilities of most other organizations. Thus, many interest groups have chosen to channel their resources into less expensive forms of litigation (O'Connor and Epstein, 1981:12) or have forged ahead in other expensive areas of the law (see Wasby, 1978:130) at times without sufficient resources to succeed.

The second factor, cooperation with the United States government is operationalized as the proportion of cases in which the U.S. Solicitor General and an interest group participate on the same side. Several scholars have noted that the United States government, whether it participates as a direct sponsor or as an amicus curiae, is exceptionally successful (Vose, 1959:168-174; Tanenhaus, 1963:122; Krislov, 1963:704-705; Scigliano, 1971:182; Puro, 1971; Orfield, 1969; O'Connor, 1980:27-28; 1981; Ulmer, 1978; Wasby, 1981:17-18). Given this, it seems a useful tactic for interest groups to seek out the Solicitor General's support. The NAACP, for example, claims to do this regularly as well as confer with the government prior to Supreme Court appeal.3 Direct evidence of such cooperation, however, is difficult, if not impossible to obtain from either the groups themselves or the government. Some organizations appear reluctant to discuss the existence of this
kind of relationship (if any). Similarly, the Solicitor General's Office will not divulge the reasons for its involvement in any case even though government documents reveal that cooperation with the interest groups is encouraged to assure that the government participates in important cases (Days, 1980:2). Thus, we feel our measure of this factor is perhaps the best way to obtain a systematic indicator of this relationship.

Our third factor, longevity is operationalized as the number of years that an organization has been engaged in litigation. Several scholars have noted that long term use of the courts allows an organization to pursue a true test case strategy and build up favorable precedent over time (Vose, 1959:22; Yale Comment, 1948:577-598; O'Connor, 1980:18-19; Wasby, 1981:0)

Our fourth factor, cooperation with other organizations is operationalized as the number of times a group appears with another particular group on a joint brief (amicus or direct sponsor) and/or they participate on the same side of the case. A clear example of the utility of cooperation can be seen in Sorauf's study of the religious establishment cases. He determined that cooperation among organizations in the separationist coalition (the ACLU, the American Jewish Congress and Protestants and Other Americans United for Separation of Church and State) was a key factor in the Court's adoption of their arguments. While members of some organizations have noted the problems associated with cooperating with other interest groups (Westin, 1975:116-117), this is still a common practice and one that many scholars have attributed to group success (Vose, 1959:58; Kluger, 1976:293-294; Sorauf, 1976:93; Orfield, 1978:373; Handler, 1978:199; Burke, 1980:18; O'Connor, 1980:122; Wasby, 1981:17).

Our fifth factor, sharp issue focus is operationalized as the proportion of times an interest group appears in a defined area.4 Concentra-
tion in one or a few issues allows an organization to build up expertise and credibility with the court as an advocate for certain interests (Yale Comment, 1948:579; Vose, 1959; O'Connor, 1980:22-23).

Our sixth factor, control is operationalized as the number of cases sponsored by an interest group. Sponsoring a case from the trial court level allows an interest group to control the course of litigation and make certain that critical facts are introduced at that level to facilitate successful appeals. Through sponsorship, an interest group may be able to avoid appeals of cases that may lead to adverse precedent (Belton, 1978; Wasby, 1981:10; O'Connor, 1980:144-145; Westin, 1975:117; Vose, 1959:151-155).

Our last factor, conflict with other groups is operationalized as the proportion of cases in which an interest group's position is opposed by another interest group. Low rates of opposition in court are not normally considered to be important to success. It is possible, however, that the presence of a competing interest may lead the court to opt out of deciding a particular case or cue the court that an area is exceptionally controversial (O'Connor and Epstein, 1981; Sorauf, 1978; Vose, 1972; Shields and Spector, 1971; Cortner, 1975).

Section Three

The data we used to measure empirically what factors are critical to interest group success came from three sources. First, we examined the records of the United States Supreme Court. Second, we contacted the groups themselves. Other facts were gathered from studies compiled by additional researchers.
United States Supreme Court Records

We initially consulted two tools of research traditionally relied upon by political scientists: The United States Reports and the Lawyer's Edition of the Supreme Court Reports. Both reporter systems list the names of attorneys who appear for the respective parties to the litigation, as well as those appearing as amicus.

After consulting each reporter, we noted the following information about each case decided by the Supreme Court from the 1969 term to the present: case name, type of issue involved (See Appendix A) and appearance of amicus curiae, if any. Because neither reporter regularly notes interest group sponsorship, we examined microfiche reproductions of the briefs submitted to the Court. Surprisingly, while examining the microfiche collections for indications of group sponsorship, we found that several cases had far greater amicus participation than recorded in either reporter. We also noted that the major reporter systems often fail to note all amicus briefs and the names of interest groups who jointly sponsor or support the amicus curiae brief of another interest group. It appears that the U.S. Reports and the Lawyer's Edition normally report only the first group appearing on an amicus brief and do not indicate when a brief is the result of joint or multiple sponsorship. (For a comparison of the microfiche and reporter systems see Appendix B).

There is another serious deficiency in the major reporter systems. While the reporter systems accurately list the lawyers who appear on behalf of the parties, they do not list the attorney affiliation, if any, with an interest group or organization. A review of the briefs available on microfiche provides a far more accurate description of group sponsorship. The briefs themselves generally list an attorney's affiliation.
with a group as well as attorneys and/or other groups who appeared of
counsel or assisted in preparation of a case.8

Groups

After compiling a list of organizational involvement in each case,
we identified groups that participate in Supreme Court litigation.
Initial letters of contact were then sent to 114 of these groups re-
questing information on the history of the group, and its involvement
in U.S. Supreme Court litigation from 1970 to the present. Responses
to this letter, which was sent in June of 1981, were encouraging. Several
organizations called to discuss the request, and over 57 percent responded
with very extensive supplemental answers, reports, and other information.

It is clear that many organizations view litigation, particularly
participation as amicus curiae, as an integral part of their activities.
For example, the Director of the National Center for Law and the Handicapped
noted that the "role of amicus curiae" is quite "effective" (Hull, 1978:29).

The nature of the information sent by some groups was quite infor-
mative. The National Federation of Business and Professional Women, for
example, sent copies of their correspondence leading up to Senator Birch
Bayh's representation of the group as an amicus curiae in Reed v. Reed
(404 U.S. 71, 1971) and Alexander v. Louisiana (405 U.S. 625, 1972), as
well as letters from lawyers soliciting BPW's endorsement of briefs in
some sex-discrimination cases. Responding organizations were receptive
and seemed genuinely pleased to be "studied". In fact, many offered
further assistance.

What was perhaps most surprising was that some organizations listed
as participating in Supreme Court litigation did not know that they had. For
example, the National Urban League, Inc., which we identified as having appeared as amicus curiae on at least nine occasions, responded that: "The NUL does not get involved in litigation or federal court cases."

In addition, groups not traditionally noted for their use of the courts not only litigate frequently but also keep careful records of their activities. The American Psychological Association, for example, sent a detailed summary of all the cases in which it has participated as an amicus curiae.

The kind of information provided by the groups themselves, while not always precise, is important in terms of operationalizing some of our factors (longevity) and verifying others (issue focus). Moreover, while reliance on this approach is inadequate for testing a model of interest group success, a model based either on descriptive or quantitative modes alone neglects many details critical to an understanding of interest group use of the courts.

Conclusion

In this paper, we have reviewed why the case study approach fails to provide a theoretical foundation for the study of interest group litigation. Studies utilizing this approach, while useful and generally well done, often have not attempted to build upon the findings of others in any systematic way. To correct these deficiencies, while not overlooking the importance of the descriptive mode, we have developed a method of examining the scope and success of interest group litigation.

Lack of scholarly research in this area is partially attributable to the atheoretical approach thus far taken by most researchers. Given the discovery of extensive interest group use of the courts, this is an area of political activity in need of further examination. We hope that
our attempts to devise a model for the study of group success will facilitate interest and research in this area.
Notes

1Sorauf includes "talent, money, involved personnel, skill and experience in litigation" (1976:349) as well as "control of information, cohesion of the group, its litigation resources, and skill in managing its various resources," as factors important to group success (1976:730). O'Connor includes longevity, full-time staff and attorneys, sharp issue focus, financial resources, technical data, ability to generate well-time publicity, coordination between national headquarters and local affiliates, coordination with other interest groups and presence of the government in support of a group's success as potentially important factors to group success (1980:17).

2For example, the Southern Poverty Law Center actually sponsored Dothard v. Rawlinson (233 U.S. 321, 1977), from the trial court level. On appeal to the U.S. Supreme Court, it urged the Justices to find that Alabama's height and weight requirements for prison guards and exclusion of female guards in state prisons a violation of Title VII of the Civil Rights Act of 1964. The Women's Rights Project of the ACLU, sensing that the Court might uphold the exclusion of female guards, filed an amicus brief urging the Court to construe the bfoq exception of Title VII very narrowly if it was to allow the exclusion. Thus, when the Court ruled as the WRP expected, it did follow the Project's suggestion to construe the bfoq very narrowly.

3According to the 1977 NAACP Annual Report, its General Counsel, prior to filing an amicus brief in Bakke "conferred several times with Solicitor General Wade H. McCree and Assistant Attorney General Drew Days 3rd to
ensure that the Justice Department's brief would strongly support the concept and the program" (1977:44).

4We consider "defined area" as one where a related set of issues are at stake. For example, busing, race or gender-based employment discrimination and Voting Rights Act cases are all "civil rights issues."

5A particularly helpful, although outdated source of information was Council for Public Interest Law (1975), Balancing the Scales of Justice: Financing Public Interest Law In America.

6We did not use The Supreme Court Reporter because that reporter does not list any amicus curiae participation.

7For general research purposes it should be noted that these reporter systems contain varying types of information. For example, The U.S. Reports notes when the Solicitor General orally argues a case as amicus curiae while the Lawyer's Edition contains the outline of sponsoring attorneys' briefs.

8Attorneys litigating for the LDF do not normally note affiliation with the LDF on briefs where they act as direct sponsors. They do list, however, the address of the LDF on the front cover of their briefs.
<table>
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<tr>
<th>FACTORS</th>
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<tr>
<td>Resource allocation</td>
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<tr>
<td>Cooperation with other organizations</td>
<td>the number of joint briefs (amicus or direct sponsor) or appearances on the same side of a case</td>
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<td>Sharp issue focus</td>
<td>proportion of cases in which an interest group appears in a defined area</td>
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<td>Control</td>
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<tr>
<td>Conflict</td>
<td>proportion of cases in which an interest group's position is opposed by another interest group</td>
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APPENDIX A* 
Coding Scheme for Case Type

Age Discrimination
Aliens
Anti-trust
Banks
Bankruptcy
Boundaries
Cable TV
Civil Procedure
Commerce
Conscientious Objectors
Consumerism
Contracts
Copyrights
Criminal
Drivers
Elections
Employee-Employer
Environment
Free Press
Press Speech
Freedom of Information Act
Illegitimate Children
Immigrants
Indians
Indigents
Insurance
Juvenile Delinquents
Maritime
Mental Health
Military
Patents
Professional Examining Boards
Race Discrimination
Religion
Schools
Sex Discrimination
Taxes
Torts
Unions
Utility Companies

*Cases were coded into these specific categories, which can be combined to analyze sharp issue focus.