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# BRIDGING THE GAP BETWEEN CONGRESS AND THE SUPREME COURT: INTEREST GROUPS AND THE EROSION OF THE AMERICAN RULE GOVERNING AWARDS OF ATTORNEYS' FEES

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**E**ROSION of the American rule governing awards of attorneys' fees is an important legal-political development. For more than 170 years, Congress and the Supreme Court clung to the view that prevailing parties were not entitled to recover their costs or attorneys' fees when they successfully advanced their claims on the merits. In 1964 this situation changed dramatically; passage of Title II of the Civil Rights Act coupled with a subsequent expansive Supreme Court interpretation of that provision, quickly led to erosion of the rule.

In this paper we attempt to examine the demise of this longstanding public policy and the consequences of this change. The importance of such an analysis lies in the fact that (1) it is an issue that never has been studied by political scientists, and (2) it is an issue of paramount interest to all of the parties involved in this controversy: interest groups, Congress, and the courts. Interest groups litigating in the public interest depend on attorneys' fees awards for a substantial proportion of their operating expenses. Congress was especially concerned with implementation of civil rights laws and with appeasing affected "friendly" groups, and the Supreme Court, which was inundated with public interest lawsuits, quickly came to view attorneys' fees provisions as impediments to the orderly administration of justice.

To facilitate an examination of this issue our paper is divided into two sections. In the first, we trace the evolution of the American rule. In the second, we demonstrate how the issue of attorneys' fees supports elements contained in various theories of pressure group politics. Seen in this light, fee shifting provides one issue by which to bridge several accepted notions of interest group activity.

## THE EVOLUTION OF THE AMERICAN RULE

Either by statute or in equity, English courts traditionally have awarded litigation costs to prevailing parties. American courts and legislatures, however, did not follow suit. In fact, in the United States, "the litigant, win, lose, or draw, [paid] his own lawyer" (Derfner 1980: 15). Rejection of this tradition stands in sharp contrast to the colonists' adop-

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tion of most other English common law traditions (Newberg 1980: 15-17). Yet, many theories have been offered to explain rejection of "attorney subsidies." Some, for example, have pointed to the prevalent distrust of lawyers noting that attorneys symbolized the worst facets of British rule (Falcon 1973: 379-81; *Yale Law Journal* 1940: 699-701). Thus, it was not surprising that the colonies and subsequently the states, drafted laws that severely limited fee awards. According to Charles Warren,

In every one of the Colonies, practically throughout the Seventeenth Century, a lawyer or attorney was a character of disrepute and of suspicion, of whose standing of power in the community the ruling class, whether it was the clergy as in New England, or the merchants as in New York, Maryland and Virginia, or the Quakers as in Pennsylvania, was extremely jealous. In many of the Colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the courts; in all, they were subjected to the most rigid restrictions as to fees and procedures. (Quoted in Falcon 1973: 379.)

While this is the most widely accepted explanation for the rejection of the English rule, others have posited that colonists believed that the rule was "undemocratic" because it limited the poor's access to the courts as they could not risk liability for attorneys' fees (*Hastings Law Journal* 1973: 733). Still, another reason offered was that early fee legislation specified the exact dollar amount of awards that soon became meaningless as a result of inflation (Ehrenzweig 1966: 792; McCormick 1931: 619).

Regardless of the reasons why the English rule was not adopted, the "American rule" as it has come to be known generally has stood as a bar to recovery of plaintiffs' costs in litigation. Thus, as historically applied, the American rule prohibits the recovery of attorneys' fees unless there is a specific statute empowering the courts to make such an award.<sup>1</sup>

Since 1796 when the Supreme Court first examined the attorneys' fees issue in *Arcambel v. Wiseman*, it consistently has enforced the view that in the absence of specific statutory provisions, the federal courts would not award attorneys' fees to prevailing plaintiffs. In response to this judicial interpretation, Congress periodically has provided for awards of attorneys' fees in specific pieces of legislation. Until the 1960s, however, the vast majority of these allowed for recovery to the prevailing party in only highly technical areas of economic relations. These provisions varied; some required the courts to award attorneys' fees while others left awards to the discretion of the presiding judge.

In the 1960s, a major change occurred in congressional policy toward attorneys' fees. Recognition of the fact that the resources of the federal government would be inadequate to enforce fully the provisions contained in sections of the Civil Rights Act of 1964, Congress, at the urgings of the NAACP, the ACLU, the National Lawyers Guild, and other organi-

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<sup>1</sup>Three equitable, albeit narrow, exceptions exist to the American rule. The first, the "common fund" exception, was created in *Trustees v. Greenough* (1882). The "bad faith" exception was articulated by the Court in *Vaughan v. Atkinson* (1962). And, the "common benefit" exception was carved out in *Mills v. Electric Auto-Life Co.* (1970).

zations, voted to include specific authorizations for awards of attorneys' fees. Specifically, Title II of the Act stated that: "In any action pursuant to this title, the court, in its discretion may allow the prevailing party other than the United States a reasonable attorney's fee as part of the costs. . . ." Congress' inclusion of that attorneys' fees provision thus institutionalized the notion that private enforcement of civil rights laws was necessary because the U.S. government lacked the resources to pursue the problem adequately. This is known as the private attorney general concept.

The full import of the private attorney general concept was realized in *Newman v. Piggie Park Enterprises, Inc.* in 1968. *Newman* was a lawsuit filed under Title II of the Civil Rights Act of 1964 by the NAACP Legal Defense Fund (LDF) to enjoin the actions of five drive-in restaurants and a sandwich shop that refused to serve black patrons. After a U.S. Court of Appeals enjoined the practice, the LDF sought a writ of certiorari to the U.S. Supreme Court on the question of the proper construction of Title II's attorneys' fees authorization. In a per curiam opinion, the Court, following the lead of Congress, endorsed the private attorney general concept. The Court stressed that:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.

When a plaintiff brings an action under that Title [II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority (390 U.S. at 401-402).

Thus, according to the Court, those who sued on behalf of others and not simply as individuals could recover the cost of their attorneys fees' from the private party found guilty of discrimination prohibited by the act.

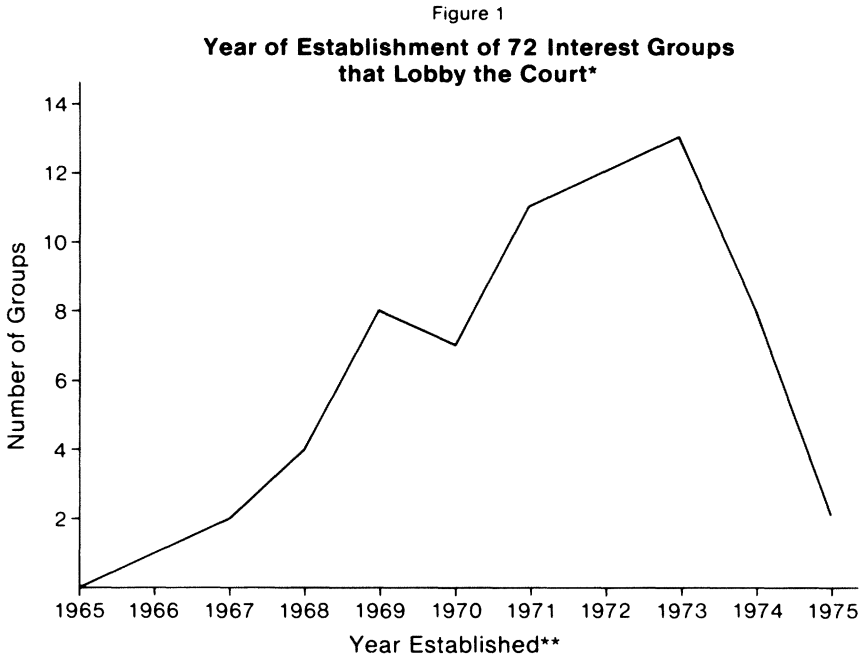
This ruling immediately was hailed by civil rights leaders as a major victory and viewed as one that would facilitate litigation brought in the public interest. According to Roy Wilkins, then Executive Director of the NAACP, *Newman* would make "it possible for poor persons denied services to file suit without fear of having to pay legal fees beyond their means" (*New York Times* 1968: 30).

Even more important, perhaps, was that *Newman* was partially responsible for the proliferation of liberal interest groups dedicated to securing policy change through litigation. The Ford Foundation, for example, recognizing the potential of *Newman*, began to provide seed money for the establishment of diverse kinds of interest groups dedicated to using the courts as well as for the creation of litigating arms within "traditional" interest groups (McKay 1977) with the expectation that they would contribute to and increase their own budgets through recovery of attorneys' fees. According to the Ford Foundation,

(f)oundations tend to provide "seed money" for projects for a few years at most, but then expect the recipients to make it on their own . . . a possible way . . . by which public interest law can become a self-supporting com-

plement to private-interest and government litigation . . . is to collect fees from a defendant when a public interest law firm wins a case. . . . (Ford Foundation 1973: 36.)

This attitude led to the phenomenal growth of these kinds of interest groups. As revealed in Figure 1 below, following *Newman* through 1974, more than 50 new groups were created to litigate on behalf of the public interest.



\* Data derived from Handler (1978:50).

\*\* Prior to 1965, only 4 groups existed.

Not only did the number of these groups increase, but as Ford expected, so did the proportion of their annual operating budgets derived from attorneys' fees awards. Between 1972 and 1975, attorneys' fees as a source of funding increased almost fourfold. By 1975, the NAACP LDF, for example, received \$550,000 of its 3 million dollar operating budget from attorneys' fees (Settle and Weisbrod 1978: 534-36).

The proliferation of these firms and the expectation that they could recover their operating expenses subsequently led to a dramatic increase in litigation being initiated by "private attorneys general." And, even though *Newman* involved fee recovery for race discrimination litigation, most interpreted the decision to apply to all areas of public interest law. Buttrussing this assumption was the fact that Congress was beginning to include specific authorizations providing for attorneys' fees recovery in most major pieces of legislation of interest to existing groups. For exam-

ple, most environmental laws passed since 1970 included provisions allowing the court to award reasonable attorneys' fees to prevailing parties. Thus, in the period after *Newman*, it appeared that the vitality of the American rule was seriously in doubt; Congress, the Court, and various interest groups accepted the private attorney general interpretation.

In 1975, the Supreme Court, however, severed this alliance and dealt litigating groups, whose coffers by this time were extremely dependent on fee awards (Witt 1975), a severe blow in *Alyeska Pipeline Service Co. v. Wilderness Society*. In *Alyeska*, the Wilderness Society, the Environmental Defense Fund (EDF), and the Friends of the Earth, represented by the Center for Law and Social Policy (CLSP), a D.C. based public interest law firm, had successfully sued to stop the Secretary of the Interior from issuing permits necessary for the construction of the trans-Alaska pipeline. Litigation on the merits, however, was terminated after Congress amended the Mineral Leasing Act to allow issuance of the permit. After passage of that amendment, the CLSP attempted to recoup its attorneys' fees from the Pipeline Company. Its lawyers argued that they had acted as private attorneys general, litigating on behalf of the public interest. The Court of Appeals accepted this argument and allowed the CLSP to recover one-half of the fees to which it was entitled, over \$100,000 for more than 4,000 hours of legal work.<sup>2</sup> In its opinion, the Court of Appeals held that:

... respondents had acted to vindicate "important statutory rights of all citizens . . .," had ensured that the governmental system functioned properly, and were entitled to attorneys' fees lest the great cost of litigation of this kind, particularly against well-financed defendants such as Alyeska, deter private parties desiring to see the laws protecting the environment properly enforced (495 F.2d 1029).

The Court further noted that:

It may well be that counsel serve organizations like [respondents] for compensation below that obtainable in the market because they believe the organizations further a public interest. Litigation of this sort should not have to rely on the charity of counsel any more than it should rely on the charity of parties volunteering to serve as private attorneys general. The attorneys who worked on this case should be reimbursed the reasonable value of their services, despite the absence of any obligations on the part of [respondents] to pay attorneys' fees (495 F.2d 1037).

In a 5 to 2 decision, the U.S. Supreme Court rejected this reasoning. Writing for the Court, Justice Byron White presented a lengthy history of the relations between Congress and the courts on the issue of attorneys' fees provisions. On the basis of that analysis, Justice White concluded that attorneys' fees were not recoverable absent specific statutory authorization. Thus, since Congress had not included specific provisions allowing

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<sup>2</sup> The remaining one half of those fees was not recoverable against the federal government or Alaska, which had intervened in the suit.

for recovery in any of the statutes relied on by CLSP, the Court of Appeals award was reversed.

In *Alyeska*, Justice White recognized, however, that prevailing sentiment favored erosion of the American rule. Not only did he note numerous law review articles, lower court decisions, and congressional hearings concerning the advisability of abandoning the American rule, he also claimed that:

It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy. . . .

Yet, writing for his brethren, Justice White reiterated the Court's unwillingness "to invade the legislature's province by redistributing legislative costs" (95 S.Ct. at 1628).

Further analysis of Justice White's opinion also reveals that the Court did not wish to encourage additional lawsuits, which already were beginning to have a noticeable impact on its caseload. The Court noted that the attorneys' fees provisions recently enacted by Congress had quickly acted as incentives to litigation and that the Court would not add to that phenomenon without specific authorization.<sup>3</sup>

The reaction from interest groups was immediate; organizations throughout the country claimed that *Alyeska* had sounded the death knell for public interest law. As noted by Charles Halpern, a founder of CLSP, "Until *Alyeska* . . . I would have probably said that attorneys' fee awards were the number one factor in the future of public interest law financing" (Quoted in Witt 1975: 35). Similarly, Sid Wolinsky of Public Advocates in San Francisco noted:

It increases our burden about tenfold. The decision is an unmitigated disaster for the legal profession. It expressly and implicitly recognizes the law as a place for money-grubbers only.

If you can get an award, or if your client can afford to pay you a fat fee, then you are welcome in U.S. courts. But if you want to do something as lowly as advance the public interest, then you are clearly discouraged from coming into the courts. (Quoted in Witt 1975: 35.)

Thus, just as Justice White predicted, *Alyeska* was perceived by numerous groups as a severe deterrent to the initiation of litigation by "private attorneys general."

Other public interest lawyers were less pessimistic about the decision, realizing that there was still one institution potentially sympathetic to their cause — Congress. According to Bruce Terris, a D.C. based, public interest attorney:

Perhaps now the issue will be so squarely focused before Congress that it will act . . . I don't think this ruling was the most devastating thing in the

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<sup>3</sup> In *Alyeska* the Court noted that "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" (95 S.Ct. at 1624).

world. It did halt a trend, but it's best to go through Congress, not the courts, to establish attorneys' fee awards. I'm hopeful that since Congress has been challenged by the courts to make clear what it wants, that's what it will do. (Quoted in Witt 1975: 35-38.)

Unwilling to rely on Congress to accept the Court's cue, however, leaders of these organizations immediately went to Congress to ask for a more favorable policy proclamation. After hearings early in 1976, where numerous groups including the National Organization for Women, the Consumers Union of the United States, the Consumer Federation of America, the Center for National Policy Review, several Nader groups, the Mental Health Law Project, and the Southern Poverty Law Center testified or submitted statements, Congress passed the Civil Rights Attorneys' Fees Awards Act of 1976. The Act provided for awards of attorneys' fees at a court's discretion to participants bringing actions under all civil rights legislation passed since 1876. Under the terms of this Act, plaintiffs could recover fees from the states as well as from private parties. And, even though this Act failed to permit prevailing plaintiffs to recover their fees from the federal government, Congress still claimed that the purpose of the Act was "to remedy anomalous gaps in our civil rights laws created by the U.S. Supreme Court's recent decision in *Alyeska* and to achieve consistency in our civil rights laws."

While Congress passed the Attorneys' Fees Act at the urgings of several groups, taking their cue from Justice White in *Alyeska*,<sup>4</sup> these same groups perceived the gap in the 1976 law and began to pressure Congress for legislation that would allow them to recover attorneys' fees awards from the federal government. Yet, because of the potentially tremendous costs to the federal government,<sup>5</sup> passage of this type of blanket legislation required far longer pressure.

During the period from 1976 to 1980, however, interest groups and environmentalists in particular were able to convince Congress to add such provisions to legislation allowing for recovery from the U.S. government on a piecemeal basis. The 1976 Toxic Substance Control Act, for example, allows the party challenging the federal government to recover fees whether or not they actually win the entire suit. Finally in 1980,

<sup>4</sup> Writing in *Alyeska*, Justice White noted: "... one of the main functions of a private attorney general is to call public officials to account and to insist that they enforce the law, it would follow in such cases that attorneys' fees should be awarded against the Government or the officials themselves. Indeed, that very claim was asserted in this case. But [the provision] on its face, and in light of its legislative history, generally bars such awards, which if allowable at all, must be expressly provided for by statute . . ." (95 S.Ct. at 1626).

<sup>5</sup> The Congressional Budget Office estimated outlays for the Equal Access to Justice Act were:

<i>FY</i>	<i>Millions</i>
1982	69
1983	115
1984	126
1985	20

(House Report 96-1418).



Congress succumbed to the wishes of interest groups and passed the all encompassing Equal Access to Justice Act, which "authorizes the federal government to pay attorneys' fees for individual and small businesses that defend themselves against 'overreaching' government actions" (Jackson 1982: 680).

Since passage of the Civil Rights Attorneys' Fees Awards and Equal Access to Justice Acts, interest groups have taken full advantage of their provisions. Some groups claim to derive up to 50 percent of their operating budgets from these awards. In fact, in some instances, groups that have lost most of the major issues in a case on the merits have been able to recoup their costs in later attorneys' fees proceedings. Groups that have been able to do so, even though they lost the case in principle, have considered these "wins" in the final analysis because no money was lost (Sherwood 1981).

Yet, the success of these groups in translating adverse judicial decisions into favorable congressional legislation has prompted some members of the Reagan administration to seek to limit recovery of fees against the federal government. Specifically, Michael Horowitz, legal advisor to the Office of Management and Budget, has proposed legislation that would limit the hourly dollar amounts that attorneys and interest groups could recover for their services (Horowitz 1983). Horowitz believes that such legislation is necessary because "liberal groups have come to rely on attorneys fees awards as a 'permanent financing mechanism'" (Jackson 1982: 680).

While liberal interest groups plan to lobby against the Horowitz plan, conservative interest groups wholeheartedly endorse proposals for limits on fee awards. Groups such as the Washington and Pacific Legal Foundations believe that they should not accept fee awards because their financial "support must come from the public" (Popeo 1982; Momboisse 1982).

Even if liberal interest groups are able to fight off challenges from the Reagan administration and conservative groups, they may still face erosion of their congressional victories from the Court — the institution that thus far has most often limited those victories. During its 1982 term, for example, the Supreme Court decided two cases that revealed the justices' disinclination to construe specific statutory fee awards provisions liberally. In the first, *Hensley v. Eckerhart*, the Court rejected claims made by Legal Services of Eastern Missouri, the NAACP Legal Defense Fund, the Lawyers Committee for Civil Rights Under Law, and the ACLU concerning construction of the Civil Rights Attorneys' Fees Awards Act. The Court held that the Act's authorization of attorneys' fees to prevailing parties meant that fees were recoverable only for the time spent on successful portions of the suit. Later, in July 1983, the Supreme Court further limited the application of an attorneys' fees authorization contained in the Clean Air Act. *Ruckelshaus v. Sierra Club, et al.* arose out of litigation in which the Sierra Club and the Environmental Defense Fund (EDF) questioned air pollution control standards promulgated by the Environmental Protection Agency (EPA). While the EDF and the Sierra Club lost the case on the merits, they petitioned the Court of Appeals of

the District of Columbia to recover their attorneys' fees. Even though neither group prevailed on the merits of the case, the Court of Appeals awarded \$45,000 to the Sierra Club and \$46,000 to the EDF. The EPA then asked the Supreme Court to review this decision to determine whether the award was appropriate given that neither group had won any part of the challenge.

Although the Clean Air Act stated that a court could award attorneys' fees "whenever it determined that such an award is appropriate," the Supreme Court chose to construe that provision narrowly. Writing for the Court, Justice Rehnquist stated that, "absent some degree of success on the merits by the claimants it is not appropriate for a federal court to award attorneys' fees" (51 U.S.L.W. at 5136).

Justices Stevens, Brennan, Marshall, and Blackmun strongly dissented from this interpretation of the Act. Writing for the dissenters, Justice Stevens noted that:

If one reads that statute and its legislative history without any strong predisposition in favor or against the "American Rule" endorsed by the Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, and repeatedly rejected by Congress thereafter, the answer is really quite plain — and it is not the one the Court engrafts on the statute. (51 U.S.L.W. at 5136.)

Thus, once again, interest groups may be forced back to Congress to overcome these adverse judicial decisions.

#### ANALYSIS

As the foregoing discussion suggested, the demise of the American rule was hard fought for in the courts and in the Congress by affected groups. Having pursued a major alteration in such a longstanding public policy, interest groups now feel that they have a reasonable chance of recouping their litigation costs.

There is no question that the demise of the American rule has acted as an incentive for groups to deepen their involvement in the judicial process. Even several justices of the U.S. Supreme Court have noted this trend.<sup>6</sup> One justice, in particular, noted that the Court is literally "swamped" by these kinds of suits and that there is a "ceiling on how much time [the Court] can give to these issues."

Yet beyond the readily observable implications of the importance of the fee shifting issue, is that it provides support for key elements of several theories that have been offered to explain interest group behavior. E. E. Schattschneider (1935, 1960), for example, argued that pressure groups attempt to achieve their goals by expanding or contracting what he termed the scope of conflict. According to Schattschneider, different kinds of groups attempt to meet this challenge in different ways. "The most powerful special interests" (1960: 40) want to keep the scope of conflict private, that is, they know they will fare best, given their resources,

<sup>6</sup>Interviews were conducted by the authors with five Supreme Court justices during the 1983-84 academic year.

when government is excluded from the conflict. In contrast, "losers in the private conflict involve public authority in the struggle" (1960: 40). In Schattschneider's terms, these "weak" groups must "socialize conflict" before they can achieve their goals. To accomplish socialization, weak groups must enlarge the scope of the conflict by bringing other, like-minded groups into the fray so that they can alter the bias of the political system in their favor.

Schattschneider's theory, then, provides a powerful lens for viewing policy changes in the awards of attorneys' fees. Groups initially desiring such awards could be classified as "losers" because of their very nature: the ideas to which they adhere ("equality, consistency, equal protection of the laws, justice, liberty . . ." (1960: 7) — and their continual inability to convince the judiciary to award them these fees. Thus, to succeed, these weak groups were forced to socialize the issue of attorneys' fees by mobilizing to pressure Congress for change. There, they could take advantage of a bias in the political system, a bias that favors groups who retain lobbyists in Washington, D.C. (1935: 164-84). Those groups who early on fought for inclusion of an attorneys' fees provision in the Civil Rights Act of 1964 well fit this description in that they could call on their experienced lobbyists to attend congressional hearings, an activity that Schattschneider has noted as inherently biased toward groups with these resources.

Once the rule was initially altered, "weak" groups continued to socialize the conflict. This task was clearly facilitated by the fact that the alteration in the rule itself had led to the creation of more groups, which in turn further expanded the scope of the conflict. In fact, by the time Congress passed the Civil Rights Attorneys' Fees Awards Act of 1976, the scope of the conflict had been sufficiently enlarged so as to realter the "balance of forces." This, in turn, led to continued policy change.

While elements of Schattschneider's theory well explain how liberal groups expanded the scope of the conflict to create policy change, David Truman's (1951) "disturbance theory" provides a useful perspective for framing the current struggle in this area. Truman's theory suggests that groups will form to dissipate societal disturbances in order to restore equilibrium. Truman, for example, claimed that employer associations formed to restore the equilibrium that had been unbalanced after unions began to become a power force in society. Currently, a new set of organizations, formed to "restore" a balance in the field of public interest law, has vowed to support plans limiting fee awards. Many of these conservative firms are "frustrated," believing that liberals have benefited far too much from the legislation they so ably urged. Thus, just as Truman predicted, a new wave of organizations arose to fight what they view as a political inequity.

Our findings in this study also provide support for the notions enunciated by scholars examining issues of group maintenance. More specifically, as Jeffrey M. Berry (1977) and Jack Walker (1983) have both noted, public interest groups depend upon outside sources to maintain themselves. By seeking such support, public interest groups overcome the

“free rider” problem inherent in the economic groups discussed by Mancur Olson (1965). As Walker has noted, “during recent years group leaders learned how to cope with the public goods dilemma not by inducing large numbers of new members to join their groups through the manipulation of selective benefits, but by locating important new sources of funding outside the immediate membership” (1983: 397). Once again, our findings lend support to this idea. As liberal groups pushed for further alteration in the American rule, the Ford Foundation entered the conflict as the political patron of these groups: it began to provide seed money for public interest law firms with the expectation that they would contribute to their own maintenance through the recovery of attorneys’ fees.

In sum, the importance of the fee shifting issue goes beyond immediate appearances: it provides an interesting lens by which to view and then bridge existing theories of interest group behavior. Clearly, as Schattschneider predicted, policy change came about when affected groups sought to expand the scope of the conflict. Their ability to obtain their goals in such short order was largely determined by their success in socializing the conflict, e.g., an ever growing number of groups repeatedly pressured Congress. In other words, numbers count for something in the political process: the more groups that can be brought in on one side of a conflict, the greater the chances are for their success.

This task was facilitated by the fact that political patrons such as the Ford Foundation saw the utility in providing funding for organizations that could help to maintain themselves by pursuing the activity for which they were created in the first instance. Thus, a combination of theories help to explain how and why these groups succeeded.

Truman’s disturbance theory, however, would lead us to expect that these groups may not continue to enjoy further expansions of the rule. Conservatives, perceiving an imbalance in the process, are leading efforts to modify the rule. If these new forces can unite in numbers, as did their liberal counterparts, then they too may be able to force change. Any diminution in attorneys’ fee recovery provisions in turn would lead to reprivatization of the scope of the conflict, and the cycle would start anew.

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