

**A Systematic Evaluation of Interest Group
Efficacy in U.S. Federal Courts***

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Whether interest groups affect the governmental process is one of the most enduring and important questions with which political scientists deal. Indeed, early efforts aimed at addressing it helped transform political science from a discipline concerned primarily with institutions *qua* institutions to a science intrigued with explaining and predicting the products of those institutions (see Bentley, 1908; Truman, 1951).

Until recently, however, scholars investigated group influence in rather descriptive or impressionistic ways. Some, working within the pluralist paradigm, focused on broad, macro-political patterns of group influence (e.g. Lowi, 1969). Others conducted case studies of the relative influence of groups on legislative, executive, and judicial decisions (e.g. Fritschler, 1975; Bakal, 1966; Chase, 1972; Berry, 1984; Freeman, 1975; Vose, 1959). Still others sought to assess "influence" through "agreement scores" designed to indicate the relative support institutions and their members gave to different organizations (e.g. Frensdreis and Waterman, 1985; O'Connor and Epstein, 1983).

That such studies generated a motherlode of information is indisputable. They told us a great deal about the depth of interest group participation in the governmental process. Yet, as many recognize, they have generally failed to hurdle the largest obstacle of analyzing group efficacy in applied, non-experimental settings: separating group influence from others, including environmental constraints and decision makers' propensities to act in certain ways. Hence, they could not say with any degree of certainty that policy makers would or would not have reached decisions regardless of group involvement. Nor could they specify the causes or consequences of group influence.

Many recent efforts have been aimed specifically at overcoming these problems. Those attempting to assess the effect of PAC contributions on Congressional voting now regularly control for ideology, constituency, and "the likelihood that PACs contribute heavily to members who support them anyway..." (Evan, 1987, p.115; see also, Welch, 1982). Students of executive

decision-making, though less prolific, have been equally sensitive to such issues, examining them from diverse perspectives (Feder, 1977; Gais, et al., 1984; Peterson and Walker, 1986; Browne, 1986).

Conspicuously missing from this new wave of research are studies aimed at assessing systematically group efficacy in the judicial arena.¹ In general, those studying group litigation have, unlike their counterparts, had difficulty developing viable analytic schemes capable of addressing two fundamental issues. Are groups more successful in court than non-group litigants? And, are groups more successful in influencing the "law" beyond the decision in their immediate dispute? That is, do decisions rendered in response to group-sponsored litigation make a greater contribution to the *corpus juris* and, ultimately, to judicial allocation of value and privilege? Given growing interest in group use of the courts to achieve policy goals (for recent reviews of this literature, see Caldeira and Wright, 1988; Bruer, 1988) and a tremendous body of existing, albeit impressionistic, literature suggesting that groups are highly successful players in the litigation game (see Epstein, 1985), these questions loom large. It is, thus, our purpose to examine group influence on decisions of the federal judiciary and on the development and evolution of the *corpus juris*.

The results of this effort are reported in three sections. First, we assemble and assess critically existing studies of group influence on judicial decisions to create several expectations about their ability to "win" in court and to use litigation as a vehicle to influence the evolution of legal policy. Second, we suggest an analytic strategy by which to test those expectations, a strategy which controls for the propensity of judges to act in a certain way, thereby allowing us to focus on the relative influence of groups. Finally, we report the results of these tests and discuss their implications.

The "Success" of Litigants in the Judicial Arena

"Winning" Disputes

The literature on group litigation is replete with success stories; indeed, a mere perusal of a

range of work (e.g. Vose, 1955, 1959, 1972; Greenberg, 1974, 1977; O'Connor and Epstein, 1982, 1983; Cortner, 1975, 1978; Stewart and Sheffield, 1987) would easily lead to the conclusion that groups rarely lose in court. Of course, this greatly exaggerates the actual picture, but we do possess numerous reasons to suspect that groups outperform their non-organized counterparts. Most of these explanations, though, revolve around two concepts: the disparate goals of group and private attorneys and the tactics they use to achieve them.

That groups and private counsel possess varying goal structures is undoubtedly true. Simply, group attorneys are policy-oriented, looking toward the creation of national legal precedent; private counsel-- client-oriented, looking toward an immediate court victory. We only have to consider the litigation campaign leading to the NAACP LDF's legendary victory in *Brown v. Board of Education* (1954) to illustrate this point. When that organization formed in 1909, its main objective was to eradicate the "separate but equal" doctrine created in *Plessy v. Ferguson* (1896). It recognized, however, that it could ultimately obtain this goal only if it exercised patience, gradually chipping away at doctrine through test cases (Kluger, 1976). Without belaboring the point, suffice it to say that private counsel cannot operate in a similar fashion-- they must act in the best interest of their client, and not for some "greater" policy objective.

It does not necessarily follow, though, that the mere possession of policy-oriented objectives would lead to greater litigation success for groups. Rather, we must consider those in tandem with the ways group litigants have gone about achieving them. Put simply, the literature suggests that groups have developed various tactics designed to maximize their litigation success, tactics which may be unfeasible for, or even irrelevant to, the efforts of private counsel.

One such tactic, "prioritizing," begins even before groups agree to handle a suit. As Kobylka (1987) demonstrates, because organizational litigants have limited coffers from which to draw, they cannot involve themselves in the vast majority of cases that come their way; they must select those best reflecting their immediate policy objectives, areas of expertise, and their ability to prevail (see O'Connor and Epstein, 1989). Such a tactic, while implausible for most private counsel, clearly

enhances the probability of victory: attorneys looking for "winners" are bound to find them. Second, groups recognize the importance of coalition building in court litigation. They often request like-minded interests and/or the U.S. Solicitor General's office to file reinforcing amicus curiae briefs.² The former may help the Court to see the greater policy implications of a case (see Vose, 1959; Barker, 1967; Sorauf, 1976); the latter is a prime "repeat player," a most successful Court litigator (see Krislov, 1963; Puro, 1971; Scigliano, 1971). A third tactic organizations use is longevity--sustaining their use of the courts over as long a period as possible (Epstein, 1985; O'Connor, 1982). Indeed, it is through sustained and continuous use of the legal system that groups can amass numerous advantages, such as "advance intelligence," "credibility," and expertise (Galanter, 1974). As some suggest, these, in turn, make groups "repeat players" in the judicial system, while most private counsel are merely "one-shotters." Finally, organizations always have recognized the importance of priming the Court even before they enter its corridors. Sometimes they inundate law reviews with articles "presenting constitutional justification for their cause," which they later cite in legal briefs (Epstein, 1985, p.13; Newland, 1959). Also, following the long-standing tradition established by the National Consumers' League's "Brandeis Brief," they make use of social scientific evidence (see Vose, 1958).

Developing Legal Precedent

For the same reasons we would expect to find groups "winning" in Court-- goal structures and tactics-- we also expect their cases to exert a greater influence on the *corpus juris*, to transform the law, creating desired social and legal change. Again, it is undoubtedly true that groups are far more concerned with building (or eradicating) precedent, particularly in the judiciary's apex, than private counsel. Indeed, the cornerstone of their litigation strategy-- sponsorship of test cases-- virtually depends on their ability to build precedent, however slowly. *Brown* would have been difficult to achieve without the forerunner cases of *Sweatt v. Painter* (1950), *McLaurin v.*

Oklahoma State Regents (1950), and others.

To that end, groups also have developed a number of tactics. For one, they recognize the importance of building solid trial court records for later appeals. Such often involves "loading" a lower court with as much arsenal as they can muster: expert testimony, statistical evidence, and so forth. For another, many groups bring similar litigation into diverse districts (geographically and ideologically) where they know cases will evoke varying opinions, just to increase the possibility of a "split." This, in turn, increases the probability of U.S. Supreme Court review (see Ulmer, 1984).

These and other group tactics are, of course, aimed at getting their policy preferences etched into law. Small, but favorable, precedent can often lay foundation for the achievement of ultimate policy objectives, as it did for the NAACP in *Brown*. Yet, they are impractical, and perhaps even distasteful, for the client-oriented private counsel. Hence, the literature gives us every reason to suspect that group-sponsored litigation will engender more significant precedent, exerting a greater influence on the *corpus juris*.

Weaknesses in the Literature's Portrayal of Interest Group Litigators

That the literature speaks with one voice about the ability of groups to win in court and to add to the *corpus juris* is true enough. These, however, are extremely general conclusions, conclusions based primarily, though not fully, on the litigation activities of NAACP LDF-type groups, groups possessing substantial resources and commitment to shaping public policy through adjudication. Moreover, they are propositions that have been developed around but one side of the litigation equation-- the interest group-- without contemplating the fact that other parties challenge their claims. Finally, the literature has considered group activity in but one forum, the U.S. Supreme Court, and thus, neglects the possibility that groups' success may be less than monolithic. All these factors deserve some consideration prior to any analytic testing of the litigation literature's propositions.

The LDF-Type Model of Group Litigation

Conceptually speaking, it is possible that the model on which we base our wisdom about

group litigation-- the "LDF" model of group litigation-- may be wholly inapplicable to most interest group litigators. For one, the LDF model assumes a highly specified set of group characteristics: sufficient, if not abundant, funds; a pool of attorneys extremely well-versed in particular legal areas; an easily mobilized network of volunteers; and a well-established set of allies, willing to provide legal support. Recent research (O'Connor and Epstein, 1989) leads us to conclude that very, very few groups, indeed, possess all or even most of these attributes.

The LDF model also assumes that groups are committed to litigation as "the" vehicle for achieving long-term goals. This may hold for organizations like the ACLU and the NAACP LDF, but other groups, must divide resources among litigation, legislative lobbying, and executive pressure tactics. Such allocation decisions may create intra-organizational struggles for resources (Johnson, 1988). These, in turn, may force proponents of litigation to seek the immediate gratification supplied by short-term tactics rather than the delayed gratification of a long-term "LDF-type" strategy. If so, many groups may lack the strategic patience assumed by the LDF model.

Finally, the LDF model assumes that groups bring constitutional issues into the judicial arena, thereby acting as "private attorneys general." In fact, many organizations do engage in such litigation, but so too do they bring cases of administrative and regulatory law into the federal judiciary. This is true of national litigators akin to the LDF and of ad hoc, local groups, as well. Yet, since most of the literature is based on constitutional litigation, we have no way of knowing whether groups perform equally well in other legal areas.

The Challengers of Interest Group Litigators

With but few exceptions (see Kobylka, 1987), the litigation literature tends to conceptualize cases as involving dichotomous litigants: interest groups and private counsel. Some scholars base this distinction on Galanter's (1974) concept of litigants as repeat-players or one-shotters. To do so, though, is to mistreat Galanter. As he wrote in 1974 (pp.97-98): "we ought to think of OS-RP (one-shotters/repeat players) as a continuum rather than as a dichotomous pair." The fact is that his

concept of repeat players, those "engaged in many similar litigations over time," contemplated many more litigants than interest groups: governments, corporation, and interest groups were all included. Indeed, he considered one-shotters to encompass only those "who rarely" utilized the legal system.

A great deal of research (see Vose, 1972) clearly indicates that most group-sponsored cases involve repeat players versus repeat players. Consider employment discrimination litigation. In virtually every case in which the NAACP LDF (or other group) defends the aggrieved party, they face another repeat player, be it a government or a corporation. The same can be said of abortion litigation in which the ACLU or other pro-choice participants challenge the practices of the federal or a state government.

This has at least one major implication for the study of group litigation. Interest group litigants will usually find themselves in adversarial relationships with other litigants who have long-term policy goals, substantial resources, and so forth. When interest groups face these participants in court, their advantages at any level of the judiciary may be vitiated. Or, at the very least, it would be almost nonsensical to claim that the status accrued to interest groups as repeat players would be any greater than that of others, particularly the federal government (Puro, 1971). Indeed, looked at through this perspective, groups and the litigants they most often face are, more or less, analogous entities. Thus, unless we are willing to assume that something about interest groups *qua* interest groups distinguishes them from other large-scale interests, the notion that they bring some unique advantage to court may be misplaced.

The Forums of Group Litigation

With but few exceptions (see Olson, 1984), the literature focuses exclusively on group litigation in the U.S. Supreme Court, suggesting that disparities between goals, foci and resources of the private bar and organizational counsel generally work to the advantage of pressure politics. But for various reasons those advantages may disappear at lower court levels, particularly at trial.

At least two factors suggest the viability of such a conclusion. First, the localism inherent in trial court decision making might work to the advantage of the attorney most schooled in the

particular mores and procedures of those courts. In many instances, that attorney will be the private counsel, who not only lives in the community, but probably has appeared many times in that same courtroom-- obviously not characteristics shared by the Washington, D.C.- or New York-based interest group representative. Second, the goal structures of trial courts may be more congruent with those of private counsel than with those of interest groups (Posner, 1985; Priest, 1980). Simply stated, most trial judges view themselves as adjudicators of law, not interpreters or policy makers (Carp and Wheeler, 1972). That is, their job is to mediate disputes between two competing parties, making decisions that create "winners" and "losers," but not policy. Private attorneys maintain similar objectives; unlike groups, they have little interest in evoking precedent-setting rulings. Rather, they want to act in the best interest of their client. How these considerations may affect litigation success, though, is unknown since, once again, the litigation literature has focused almost exclusively on the U.S. Supreme Court.

Establishing Expectation about Group Litigation

Our consideration of group litigation, thus far, makes at least one point abundantly clear: it is a far more complicated phenomenon than it seems, at first blush. Any propositions created from the literature must, therefore, be sensitive to this complexity.

Contemplation of all these considerations leads us to form a hierarchy of expectations about the ability of groups to win in court and to add to the *corpus juris*. We begin with the general view conveyed by the literature:

1. Groups will be more likely than private litigants to prevail in federal courts.

- 1a. Groups will be more likely than private litigants to exert an influence on the *corpus juris*.

Given our concerns about the overall applicability of the literature, we also consider three alternative expectations.

2. National LDF-type groups will be more likely than local groups or private litigants to prevail in federal courts.

- 2b. National groups litigating constitutional claims will be more likely than all other participants litigating non-constitutional claims to prevail in federal courts.

3. National groups facing one-shotter opponents will be more likely than all other participants to prevail in federal courts.

4. National groups litigating in the Supreme Court will be more likely than all others to prevail. These also should apply to the ability of groups to exert influence on the *corpus juris*.

Analyzing Group Influence on Judicial Decision Makers: A Research Strategy

The Research Design and the Independent Variables

Testing these expectations requires us to operationalize a number of concepts. First, and foremost, though, we need to develop a scheme by which to compare the relative success of groups and non-groups in the trial and appellate courts and the relative impact of sponsored and unsponsored litigation on the *corpus juris*. This forms the core of all our expectations. Yet, exploring the relationship between pressure group politics and ultimate policy outcomes in any political forum is a difficult and complex task. Some have tried to use aggregated support scores for groups versus non-groups; others simply analyze already successful campaigns. What these approaches ignore, of course, is a well-established fact of decision making: Politicos, be they judges, members of Congress, or bureaucrats, have pre-established and -developed cognitive systems, which influence the way they frame and evaluate disputes. Thus, to assess accurately the impact groups may have on decision-making, we must control for the schematic predilections of individual judges.

Such a task may seem impossible to achieve. After all, we cannot place judges in a laboratory and subject them to various stimuli, while controlling for others. What we can do, however, is take a lesson from other social scientists who have faced a similar dilemma. Consider psychologists attempting to reconcile the nature-nurture debate (i.e. Are we more or less products of genetics or socialization processes?): they brought together identical twins, separated from birth, to observe similarities and differences in behavior, hypothesizing that the more similar, the greater the role genetics; the more differences, the greater role of socialization. The ingenuity of this design, of course, lies with the subjects themselves: because twins possess identical genetic structures, psychologists can control for as much variation in "nature" or "propensity" as possible. By the same token, consider scholars studying a subject closer at hand: judicial voting. Their primary *modus*

operandi, the Guttman scale, performs virtually the same function (see Spaeth, 1979).

In the ideal world, we would, of course, apply a pure version of this design to judges: surely, as two scholars noted, "the most accurate way of examining a group's effectiveness and ability to influence a judge's decision is to determine whether a group litigant is more successful than other litigants presenting the same case to the same judge. [But, of course] the same judge does not hear identical cases under control for group participation" (Epstein and Rowland, 1987, p.25). What we can do, however, is "pair" or "match" cases presenting "analogous facts and law" to the same judge during the same year. Indeed, the "twin" cases could be "identical" in all but one respect: one case would be sponsored by an interest group; the other-- by private counsel. Such a strategy would allow us to control for all relevant differences among cases and judges (i.e., stimuli and responses) and thus, we could focus specifically on potential attorney effect.³

To implement this plan, we followed a multi-staged data collection strategy. First, we selected several areas of the law on which to focus: employment discrimination, the environment, religion, and the death penalty. These represent issues identified by researchers as containing participation by a range of litigants: classic one-shotters, governmental and corporate repeat players, and interest groups (see O'Connor and Epstein, 1982). Such cases also can be divided easily into the two categories of interest to us: constitutional law and all others. We then identified all cases involving those issues decided by federal district court judges between 1976 and 1980.⁴ Next we sorted cases of the same general legal issue (*e.g.* employment discrimination) by year (*e.g.* 1976), by particular issue (*e.g.* age discrimination, race discrimination, and so forth), and then by judge. Such a procedure resulted in an initial list of "pairs," cases of analogous stimuli, decided by the same judge, the same year. Finally, to determine whether each of our pairs actually contained one group case and one non-group case, we wrote to all participating attorneys. This was necessary since the district court reporter system (*Federal Supplement*) rarely lists the affiliation of participating attorneys. In the end we were left with 48 acceptable cases (24 pairs), distributed across four case categories and equally divided between group and non-group litigants.

Next, we had to categorize our group litigators either as national organizations with long-term goals accomplished largely through litigation (i.e., NAACP-type litigators) or as largely community-based, ad hoc litigators. As it turned out, seventeen of the group litigants were national organizations (e.g. the ACLU, LDF); seven were self-described local ad hoc groups.

Finally, we had to make some assessment about the opponents of group and non-group litigators: were they one shotters or repeat players? Using Galanter's strategy, we coded governmental litigators as repeat players; all others as one shotters.

Measuring Group Influence: The Dependent Variables

To measure the first dependent variable represented in the hypotheses, "success," we simply determined whether the group or non-group prevailed at the various levels of the federal judiciary. We then compared the success scores of groups and non-groups.

Devising a strategy by which to explore the second dependent variable, concerning the influence of groups on precedent and legal policy, proved more difficult. As our literature review indicated, groups are not exclusively concerned with the outcomes of their instant disputes. They also wish to shape the law, to move it in the direction of their overall policy goals. They can achieve this objective when litigation culminates in a Supreme Court decision that overturns negative precedent and channels their goals into public policy. This pinnacle of group influence is epitomized by landmark cases, such as *Brown*, in which group goals become part of the "law." For such cases the influence of group litigation on the law is as obvious as it is significant, but, only a handful attain such lofty status. What about the interstitial, incremental contribution of "lesser" cases? Although they may be individually less important, their aggregate contribution may be quite significant.

Unfortunately, such contributions also are less obvious and much more difficult to identify and measure. Because the norms of precedent mean that codified decisions become part of "law," however, we can estimate second-order influence by the relative contribution of sponsored and unsponsored litigation to the *corpus juris*. We do so by comparing the quality and quantity of

citations engendered by a group and private litigation in *Shepard's Citation* classification system.

Shepard's is widely used in legal scholarship to evaluate the status of existing precedents (Johnson, 1979). For each published federal judicial opinion, it reports the ultimate resolution on appeal, the frequency of citation by other courts in subsequent cases, and often, "the quality of citation." In his study of lower court decisions Johnson (1979) aggregated these "qualities" into three categories: "compliant" (defined by *Shepard's* as "following" or "harmonizing"), "evasive" ("distinguished" or "limited"), or "discordant" (dissenting, vacating, or reversing). We adapt Johnson's schema to our studying, organizing the citations from group and non-group initiated cases into three categories: positive, negative, and indeterminant. We defined positive citations as those that are "compliant" plus neutral cites of a litigant's victory; negative cites as those that are "discordant" plus neutral cites of a litigant's loss. All other *Shepard's* categories were coded as indeterminant.⁵

Analysis

The Success of Groups in Court

Table 1 explores the view portrayed by the literature (Proposition #1) that groups, generally speaking, should prevail in litigation. As we can see, however, that view remains unsupported by our pairs. Of the 48 cases (24 pairs) groups and non-groups succeed at virtually equal rates. Simply stated, district court judges failed to distinguish between cases presenting analogous facts on the basis of litigant.

(Table 1 about here)

Since the data do not support the conventional wisdom about group litigation, let us consider our three alternative propositions. First, as we suggested (Proposition #2), it may be true that "group" is not a monolithic concept, that the interest group litigation model applies only to LDF-type groups. Table 2 explores this proposition, dichotomizing litigants into national organizations and all others. Once again, though, differences fail to emerge: national litigators do not have a significantly higher success rate than other parties.

(Table 2 about here)

If we trichotomize our litigants into national, local, and non-group categories, however, we obtain some rather surprising results. As indicated at the bottom of Table 2, national groups and non-group litigants prevail at roughly equal rates; local, ad-hoc organizations, however, fall well below both sets. Indeed, they failed to win but one case included in our dataset.

Although a number of explanations seem plausible for this rather odd finding, one quickly manifests itself. Consider Table 3, which explores the success of national, local, and non-group litigants in cases involving constitutional and non-constitutional issues. As we expected, national organizations perform far better in cases involving constitutional questions. That local groups would attain greater success in such cases is probably true. But, all of their cases involved regulatory or administrative law, areas in which even national organizations fail to succeed.

(Table 3 about here)

Let us now consider Proposition #3, which suggests that national organizations will perform better against one-shotter opponents than repeat players. The data depicted in Table 4 provide some support for this expectation. As we can see national organizations perform far better (20 percent versus 42 percent) when they faced any party other than the federal government. Indeed, they won only one of the five suits in which the federal government opposed their efforts. As we also can observe, however, this does not necessarily mean that they performed better against all other parties. In fact, if we exclude state/local governments from the data (see the bottom of Table 4), national organizations fared no better against other litigants than they did against the United States; it was simply their suits against state/local governments that raised their overall success against "other" litigants. That is, they won 75 percent of the cases in which they opposed subnational governments compared with 20 percent against the federal government and 25 percent against one-shotters. Hence, our data only lend partial support to the proposition that national organizations fare better against one-shotter litigants.

(Table 4 about here)

Thus far, we have considered group success only in district courts. Let us now explore the applicability of Proposition #4, suggesting that national groups will fare best in the U.S. Supreme Court. Table 5 presents data relating to the success of group and non-group litigants in federal district courts, courts of appeals, and the U.S. Supreme Court.

(Table 5 about here)

Several findings are particularly noteworthy. First, once again the data fail to confirm our expectation: groups do not perform best in the U.S. Supreme Court. Rather, and most interestingly, both national and local litigators were most successful in lower appellate courts. Of the initial pool of 17 district court cases, national litigators appealed nine. They won five of those cases, increasing their success rate to 55.6 percent. Local litigators too performed better at the appellate stage: though they lost all seven cases at trial, they won one of the three they appealed. From the perspective of interest groups, then, these data suggest that groups should appeal their trial court losses, but, that they should refrain from entering the U.S. Supreme Court.

A second interesting finding is the extremely high rate of review national litigators receive from the U.S. Supreme Court. Of the 17 cases they initiated at the district court level, 23.5 resulted in full-dress Court treatment. This compares quite favorably with the Court's typical review rate of 5-10 percent. Thus, though national organizations lost all their Supreme Court litigation, they had a very high degree of success in obtaining Court review.

The Ability of Groups to Influence the *Corpus Juris*

We have learned that, on the whole, interest groups-- even those that approximate the LDF model-- are not significantly more successful than other litigants. In fact, local, ad hoc organizations are distinctly less successful than all other participants. One question remains, however: Are interest groups more successful than other litigants in shaping the *corpus juris* ?

To address this question, we compared the legal contributions of national and subnational groups and non-groups as listed in the *Shepard's Citation Index*. More specifically, we examined three estimators of legal contributions: total citations generated by each litigant category, number of

positive citations, and the percent of citations that were positive. These data, and controls for opposing party and legal area, are depicted in Table 6.

(Table 6 about here)

Before we turn to the relative contributions of each group type, it is instructive to consider the total citations generated for all cases and for each case category. Most obvious is that cases involving constitutional issues generated more cites than those in all other categories. This is not particularly surprising, given that constitutional questions have a higher probability of obtaining appellate review and, thus, of generating more citations. We also should note the high degree of skewness within the reported data. This indicates that a few cases added significantly to the number of citations and, as such, inflated the means across the board.

Let us now consider the ability of national groups to exert influence on the *corpus juris*. As we can see, their cases generated more total citations and more in constitutional cases than all other participants. Compare, for example, the average number of cites produced by group-sponsored constitutional cases (70) with those of non-groups (21.8). Yet, this finding does not hold for cases involving non-constitutional issues or for those in which the United States government is involved. In those instances, group cases failed to generate significantly more citations than non-group cases.

Also of some interest is the number and percentage of positive citations generated by group and non-group litigation. As we can see in Table 6, groups do not fare particularly well on this score: Though their cases generate the highest quantity of citations, they are not of the highest quality, at least from the perspective of the group. Only 34 percent of their total citations were used by judges in a positive way; this compares rather unfavorably with the 83 percent score obtained by non-group litigants. Indeed, as we might suspect, constitutional litigation was the only category, producing a high percentage of favorable group cites (60 percent). But, once again, non-group litigants also performed well here, attaining an 85 percent score.

Finally, we also should note that the distribution of positive (and total) citations are as skewed for groups as they are for non groups. This indicates that most group cases are not "policy

makers" designed from their inception to enhance the quantity and quality of the *corpus juris*. Rather, the contribution of group and non-group litigants to "the law" is skewed by a relatively few cases that generated an extraordinary number of cites.

Discussion

This paper explored conventional wisdom concerning the efficacy of groups in court. Using an experimental design in which we paired cases sponsored by groups with those brought by other litigants, we attempted to assess the literature's portrayal of group litigation.

Several major findings emerge, most of which challenge conventional wisdom concerning the efficacy of groups. First, differences in efficacy between and among our pairs are negligible. Simply stated, groups are no more likely than non-groups to win or to contribute positively to the law. To that extent, the literature's monolithic treatment of groups is incorrect.

Second, some distinctions do emerge when we begin to control for the other factors of groups type and issue, opposition, and forum. Perhaps most significant were the results concerning local, ad hoc group litigation in non-constitutional areas. These groups fail to win at trial, but perform somewhat better on appeal.

What conclusions can we reach about the overall study of group litigation and the direction into which further research might move? Most important is this: for years, scholars have focused exclusively on successful litigation campaigns. This focus is somewhat problematic as it inevitably leads to the conclusion that groups are, in fact, successful. That this research found otherwise leads to the suggestion that we must begin to explore litigation losses. Why do groups lose? Under what conditions do they win, do they lose? Are those conditions related to the groups themselves, to the courts, or to the political environment? If we are to understand fully the phenomenon of group litigation, then we can no longer avoid these important questions.

Notes

¹To assess the influence amicus curiae briefs may have on the Court's decision to grant certiorari, Caldeira and Wright (1988) developed a model designed to control for Justices' decisional propensities. Stewart and Sheffield (1987) considered assumptions of group litigation "by examining the impact of litigation by civil rights groups and other concurrent civil rights activity upon the political mobilization of black citizens of Mississippi..." (p.780).

²After years of debate, recent research suggests that this may be a highly effective tactic, particularly at the review stage (see Caldeira and Wright, 1988).

³We adapted this from Walker and Barrow's (1985) study of federal district court judges. They paired black/white and male/female Carter appointees to determine whether race and gender affected decision making.

⁴We obtained these cases through *WESTLAW*, a legal information retrieval system containing all opinions published in the *Federal Supplement*.

⁵The *Shepard's Citation Index* recently has come under some criticism (Songer, 1988). The gist of this criticism is that *Shepard's* does not necessarily provide a complete record of citations to a given case. We do not assume, then, that *Shepard's* is a perfectly reliable record of citations; rather, we use it because it is, at this time, the best available source.

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Table 1
The Success of Group and Non-Group Litigants in U.S. District Courts

<u>Litigant</u>	<u>Success</u>		<u>Success</u>	
	Won %	(n=)	Lost %	(n=)
All Groups	25	(6)	75	(18)
Non-Groups	37.5	(9)	62.5	(15)

Table 2
A Comparison of Litigants' Success in District Courts

<u>Litigant</u>	<u>Success</u>			
	Won		Lost	
	%	(n=)	%	(n=)
National Group	35.3	(6)	64.7	(11)
All Others	29	(9)	71	(22)

<u>Litigant</u>	<u>Success</u>			
	Won		Lost	
	%	(n=)	%	(n=)
National Group	35.3	(6)	64.7	(11)
Local/Ad Hoc	0	(0)	100	(7)
Non-Group	37.5	(9)	62.5	(15)

Table 3
A Comparison of Litigants' Success by Case Type

<u>Litigant</u>	<u>Issue Type</u>	
	Non-Constitutional % Success (N=)	Constitutional % Success (N=)
National Group	18.2 (11)	66.7 (6)
Local/Ad Hoc	0 (7)	-- --
Non-Group	38.9 (18)	33.3 (6)

Table 4
Success of Litigants by Opposition

<u>Litigant</u>	<u>U.S. Government</u>		<u>All Others</u>		<u>Totals</u>	
	% Success (N=)		%Success (N=)		%Success (N=)	
	National Group	20	(5)	41.7	(12)	35.3
Local/Ad Hoc	0	(5)	0	(2)	0	(7)
Non-Group	40	(10)	35.7	(14)	37.5	(24)

<u>Litigant</u>	<u>U.S. Government</u>		<u>State/Local</u>		<u>All Others</u>	
	% Success (N=)		% Success (N=)		% Success (N=)	
	National Group	20	(5)	75	(4)	25
Local/Ad Hoc	0	(5)	0	(2)	—	—
Non-Group	40	(10)	28.6	(7)	42.9	(7)

Table 5
Success of Litigants by Forum

<u>Litigant</u>	<u>Forum</u>		
	District Court % Success (N=)	Court of Appeals % Success (N=)	U.S. Supreme Court % Success (N=)
National Group	35.3 (17)	55.6 (9)	0 (4)
Local/Ad Hoc	0 (7)	33.3 (3)	0 (1)
Non-Group	37.5 (24)	60 (5)	66.7 (3)
Totals	31.3 (48)	52.9 (17)	25 (8)

Table 6
Distribution of *Shepard's Citations*

<u>Total Citations</u>	<u>All Cases</u>			<u>Non-Constitutional</u>			<u>Constitutional</u>		
	mean	st.dev.	skew	mean	st.dev.	skew	mean	st.dev.	skew
National Group	33.8	78.9	7.1	18.3	18.8	1.1	70.0	106.1	2.6
Local, Ad Hoc	18.0	23.6	3.4	18.0	23.0	1.9	—	—	—
Non-Group	24.3	78.9	6.0	24.7	85.0	7.0	21.8	34.4	1.6
U.S. as Opponent	16.3	20.8	2.7	17.6	22.9	2.1	10.6	6.4	.8
Totals	26.4	69.0	5.6	22.1	66.7	5.2	45.9	79.3	4.7
<u>Positive Citations</u>									
National Group	7.0	10.5	2.4	3.3	7.5	2.9	15.5	12.0	1.7
Local, Ad Hoc	7.9	22.3	3.9	7.9	22.3	3.3	—	—	—
Non-Group	22.4	71.3	6.1	10.4	24.7	2.6	28.3	16.9	.8
U.S. as Opponent	7.6	18.4	1.9	7.4	20.4	3.0	8.6	4.8	2.3
<u>Positive Citations as a Proportion of Total</u>									
National Group	.34	.45	1.7	.22	.42	2.1	.60	.45	.6
Local, Ad Hoc	.11	.31	3.1	.11	.31	3.3	—	—	—
Non-Group	.83	2.7	4.5	.82	2.9	3.3	.85	.14	.4
U.S. as Opponent	.34	.44	2.2	.21	.39	1.7	.85	.17	.4
Totals	.60	2.0	7.5	.57	2.3	7.3	.71	.36	1.0