The Rise of Conservative Interest Group Litigation

Karen O'Connor; Lee Epstein

The Journal of Politics, Vol. 45, No. 2 (May, 1983), 479-489.

Stable URL:
http://links.jstor.org/sici?sici=0022-3816%28198305%2945%3A2%3C479%3ATROCIG%3E2.0.CO%3B2-G

The Journal of Politics is currently published by Southern Political Science Association.

The Rise of Conservative Interest Group Litigation

Karen O'Connor
Emory University

Lee Epstein
Emory University

Research on interest group litigation long has focused almost exclusively on liberal groups. This examination undertakes an analysis of conservative group use of the courts during the Burger Court era. Contrary to widespread expectation, conservative groups litigate in a strategic fashion but do so through the more limited form of participation – the amicus curiae brief – which they view as an effective lobbying device. In fact, conservative groups have used the amicus curiae brief with increasing frequency since the mid-1970s.

Scholars long have been aware that business and mainstream farm interests pursue their own generally conservative goals through litigation, just as unions and farm organizations try to advance parochial but liberal concerns (Bonnett, 1922; Truman, 1951; Cortner, 1968; Galanter, 1974). But for understandable reasons, most research has concentrated on broad-spectrum "liberal" litigating groups (Vose, 1959; Manwaring, 1962; Barker, 1967; Cortner, 1968; O'Connor, 1980).

These primarily ideological issue-oriented groups litigate in broad areas of constitutional law (Meltsner, 1973; Cowan, 1976; Sorauf, 1976; Vose, 1981), often engage in strategies to develop doctrine (Krislov, 1963; Puro, 1971; Greenberg, 1977; O'Connor, 1980), participate in as many cases within their domain as they can (Cowan, 1976; Sorauf, 1976; Stewart and Heck, 1982), and are highly successful (Vose, 1959; O'Connor and Ep-

* We would like to thank William Dixon, Thomas Walker, Stephen Wasby, and Steven Puro for their comments and suggestions. We also would like to thank the anonymous reviewers of *The Journal of Politics* for their very useful suggestions for revisions. This article is a revised version of a paper presented at the 1982 Annual Meeting of the Midwest Political Science Association.

stein, forthcoming). Arguably, scholars have been concerned too much with these highly visible efforts, but mundane pursuit of immediate self-interest in the legal field may not have the cumulative impact of strategic pursuit of long-term goals (see Cortner, 1968; Galanter, 1974).

In any event, this has changed in recent years in a dramatic fashion. Conservatives have proven that they can play the game of litigation as well. This new climate has not yet been studied adequately. It raises questions about the currency of the conclusions of some researchers (Cortner, 1968; Hakman, 1969) who have found little conservative participation in the courts. Further, as we shall show, conservative organizations have developed different approaches to litigation and are not merely mirror images of liberal organizations.

To develop this evidence systematically we explore three questions:

1. To what extent do conservative groups litigate before the United States Supreme Court?
2. Do such conservative groups have a litigating style and do they develop strategies for doctrinal development?
3. Are particular areas of the law of special concern to broad-spectrum conservative litigating groups?

Definitions and Methods

Data for this study were obtained from the records of the United States Supreme Court. All of the 1,370 full opinion cases decided by the Burger Court (1969 to 1980 terms) were included. Each case was categorized into one of five areas: (1) criminal; (2) economic liberalism; (3) civil liberties; (4) taxes; and (5) court authority.[1]

The briefs of both the direct sponsors and of the amicus curiae (if any) were read to identify participating groups. These groups were classified either as liberal or as conservative based on the socio-political status of their clientele group as well as on their professed ideological stance. For example, liberal groups were those that regularly represented the interests of minorities, criminal defendants, or consumers. Groups that represented those who claimed civil liberties or civil rights abridgments also were included in this category. In contrast, conservative groups were those that, for example, represented the interests of employers and business. Groups that espoused socially conservative or law-and-order causes also were included in this category. Only groups that revealed a consistent ideological pattern were included. Thus, for example, the

[1] These categories closely parallel those earlier formulated by Schubert (1962, pp. 90-107). Our economic liberalism measure, however, also includes cases that would fall into his F scale (monetary conflicts). And, our judicial activism category includes all the cases included in Schubert's A, N, and J scales.

AFL-CIO and other unions were excluded from this study because they did not consistently advocate a liberal or a conservative position.[2]

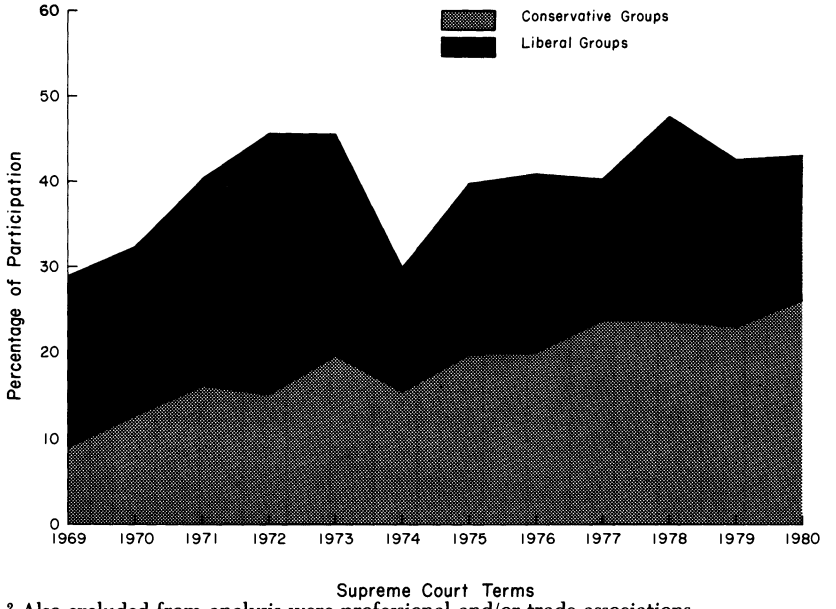
FINDINGS

Participation Rates

Either a liberal and/or a conservative interest group participated in 49.3 percent (N = 676) of the 1,370 cases decided by the Burger Court during its 1969 to 1980 terms. At least one liberal interest group participated either as a direct sponsor or as an amicus curiae in 40.3 percent (N = 552) of the cases, whereas at least one conservative group appeared in 19 percent (N = 261).[3] Thus, over the twelve-year period, liberal interest groups participated to a significantly greater extent than did conservative interest groups. However, as indicated by figure 1 below, the overall percentage rate obscures the increase in conservative interest group participation over time. Whereas liberal interest group participa-

FIGURE 1

OVERALL CONSERVATIVE AND LIBERAL PARTICIPATION IN SUPREME COURT CASES 1969-80 TERMS



[2] Also excluded from analysis were professional and/or trade associations.

[3] The total of these percentages exceeds 49.3 because in many cases both a conservative and liberal group appeared.

tion reveals no trend over time, conservative groups' appearances before the Court have increased. During the Court's 1969 term conservative interest groups participated in only 9 percent (N = 7) of the total cases. By the 1980 term their participation rate tripled and, in fact, conservative groups appeared in over 50 percent of the cases in which a liberal or a conservative interest group was present.

Low participation rates during the 1969 term substantiate political scientists' assumptions concerning conservative groups' use of the courts. By the 1980 term, however, conservative interest groups appeared before the Court on a regular basis. And while there still is some disparity between the participation rates of liberal and conservative groups, conservative interest groups no longer can be ignored as participants in the judicial process. Thus, these findings parallel those of other studies concluding that conservative interest group activity is increasing in other forums. For example, just as conservative groups have formed political action committees to finance the campaigns of their preferred candidates, and have conducted direct-mail fund solicitation, they have also used litigation to support their preferred cases.

Strategies

Examinations of disadvantaged interest groups' activities reveal that many of these groups adopt one of two tactics. Whereas groups like the National Association for the Advancement of Colored People Legal Defense and Education Fund (NAACP LDF) prefer to sponsor cases (Vose, 1959; Westin, 1975), others including the American Civil Liberties Union (ACLU) rely heavily on amicus curiae briefs to lobby the Court (Yale, 1949).[4]

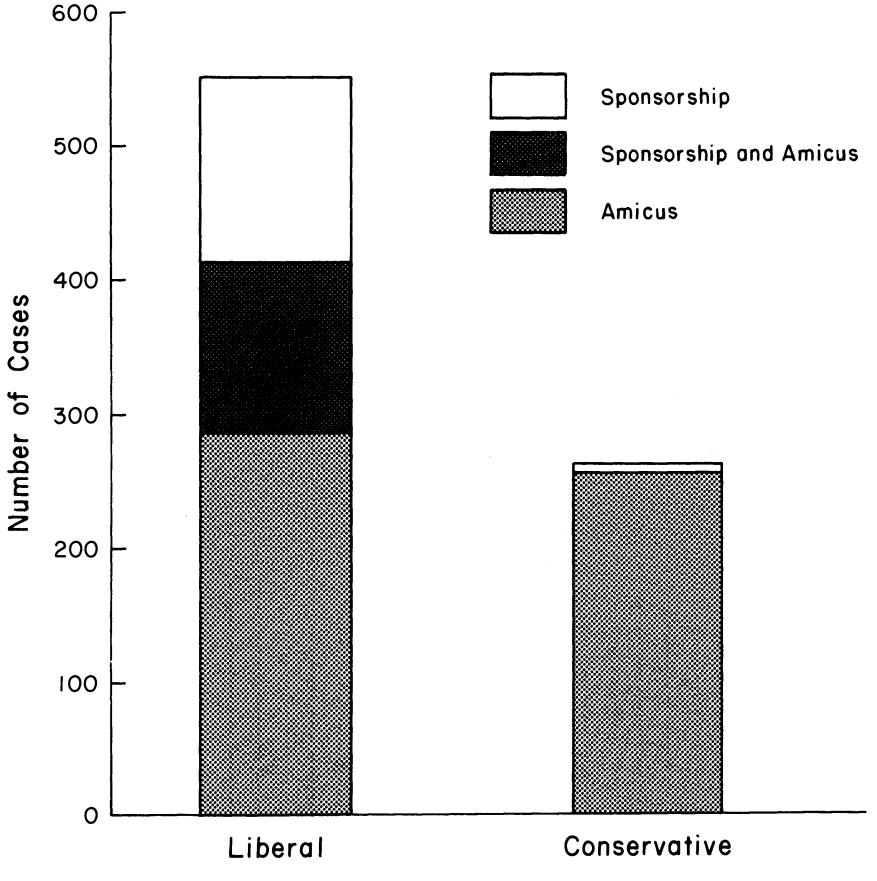
As indicated by figure 2 below, conservative and liberal groups generally adopt different forms of participation. Conservative interest groups' preference for participation as amicus curiae is clearly evident. Of the 261 cases in which they participated, conservative groups sponsored only 2 percent (N = 7). In contrast, liberal groups sponsored 39 percent (N = 265) of the 679 cases in which they appeared.

Conservative interest group reliance on participation as amicus curiae has several implications. First, although it is difficult to assess the relative merits of direct sponsorship versus amicus curiae participation, control over the course of litigation inherent in direct sponsorship generally is assumed to have a positive impact on the outcome of litigation (Belton, 1978). Thus, conservative group use of amicus curiae briefs may have some adverse consequences, but these groups believe that the benefits of

[4] There are, however, growing indications that the ACLU prefers to sponsor cases (see, generally, Cowan, 1976; O'Connor and Epstein, forthcoming).

FIGURE 2

CONSERVATIVE AND LIBERAL STRATEGIES



participation in already docketed cases far outweigh the risks. For example, the Equal Employment Advisory Council (EEAC) was founded in 1976 by several large business interests specifically to file amicus curiae briefs in precedent-setting cases (EEAC, 1982). In fact, it has stated that it will not sponsor cases. The EEAC leadership believes that selective participation in cases already docketed is a more effective strategy than bringing test cases to the Court.

Second, control may not be critical because conservative interest groups often have access to other political forums. For example, anti-abortion groups, after their losses in 1973, were able to persuade several state legislatures to enact laws restricting abortion rights. Consequently,

these and other conservative interest groups' stake in the outcome of litigation may not be as great as for those who rely more heavily on the judicial forum.

Third, amicus curiae briefs may be the only way that conservative interest groups can present their views to the Court. Governments often are parties to suits of interest to conservatives. Thus, the only tactic generally available to them is the amicus curiae. For example, because the state is responsible for prosecuting all criminal cases, Americans for Effective Law Enforcement (AELE) was founded in 1966 as "an 'organized voice' for the law-abiding citizens regarding this country's crime problem and to lend support to professional law enforcement" (AELE, n.d.-a). The AELE has established an Amicus Curiae Brief Program. To further its goals through this program the AELE selects cases in which to file amicus briefs. Its belief in the utility of this form of participation is reflected in a statement by its founder:

> (We) can't choose what cases to take to the high court: the Justices do. We can only hope appropriate cases get up there. We can only select our cases from those the Court has agreed to consider. We can't continually repeat a "I told you so" response and file a rubber stamp brief. We seek to retain the Court's interest and hope to systematically lead a majority of Justices to the point where the cumulative body of case law favors our positions (AELE, n.d.-b).

Finally, Richard C. Cortner noted that although disadvantaged groups were important because they sponsored test cases, conservative groups did not "reveal any peculiar characteristics which (were) helpful in classifying them as particular kinds of participants in the judicial process" (1968, p. 288). *However, this is no longer the case. Today conservative interest groups can be characterized by their nearly exclusive participation as amicus curiae.* These groups, in fact, view this form of participation as a strategy just as the NAACP LDF views direct sponsorship as the best strategy to pursue its goals.

Issue Concentration

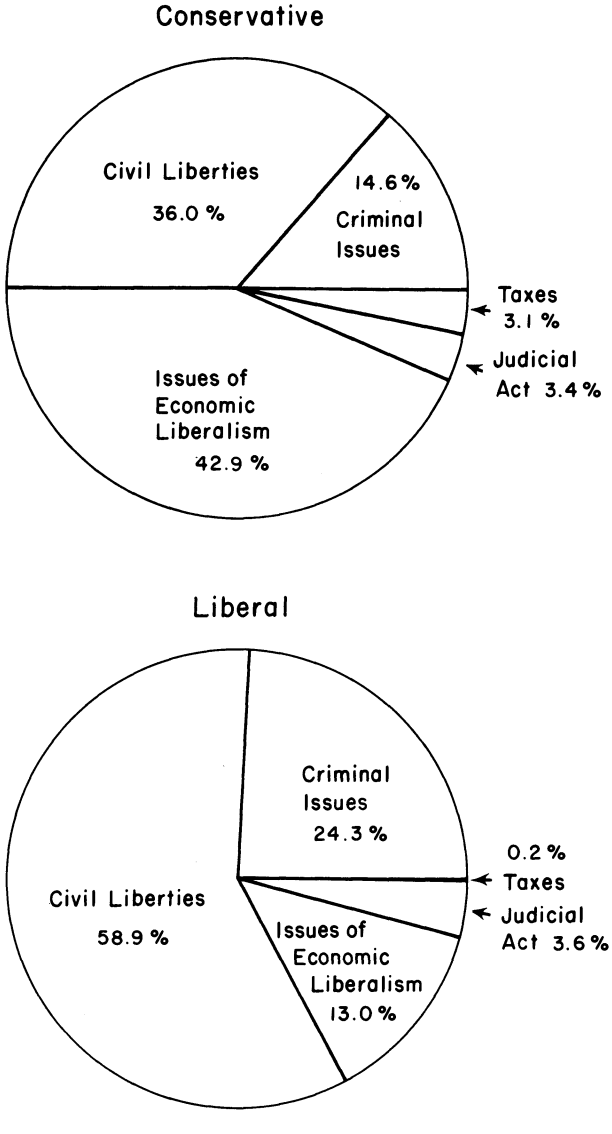
Scholars who have examined liberal groups conclude that those groups litigate to expand constitutional guarantees. Areas such as race- and gender-based discrimination have attracted significant liberal interest group activity.

As indicated in figure 3 below, conservative and liberal groups have concentrated their litigation activities on different areas of the law. Conservative interest groups appeared most frequently in cases involving economic liberalism claims, whereas liberal groups participated most regularly in cases involving civil liberties. Liberal groups devoted 58.9 percent (N = 325) of their efforts to cases involving civil liberties whereas

these claims represented 36 percent (N = 94) of conservative groups' activities. This relatively high conservative involvement in civil liberties can be attributed to increasing conservative participation in this area over

FIGURE 3

AREAS OF CONCENTRATION



time as revealed in figure 4 below. Within the civil liberties category, areas including abortion, obscenity, and employment discrimination have attracted considerable conservative interest group activity. And, in those areas, conservative interests have been primarily represented by single-issue groups including Americans United for Life, Citizens for Decency Through Law, and the Equal Employment Advisory Council, respectively.

Cases involving issues of economic liberalism represented only 13 percent (N = 72) of liberal groups' total participation. In contrast, this area of the law attracted 42.9 percent (N = 112) of conservative interest groups' involvement. The Chamber of Commerce and several business-oriented legal foundations regularly represented the conservative viewpoint.

Interestingly, criminal issues were of lesser importance both to conservative and to liberal groups. This area represented only 14.6 percent (N = 38) and 24.3 percent (N = 134) of conservative and liberal interest groups' respective caseloads. Of the thirty-eight cases with conservative interest group participation, Americans for Effective Law Enforcement participated in 72.8 percent (N = 25).

FIGURE 4

CONSERVATIVE PARTICIPATION IN CIVIL LIBERTIES INTEREST GROUP CASES

Thus, conservative and liberal groups clearly concentrated in different issue areas. Over the past twelve years, liberal groups have consistently focused their energies on civil liberties cases. In contrast, cases involving economic liberalism attracted the greatest attention of conservative interest groups. Their involvement in civil liberties issues, however, has increased since 1976.

Conclusion

In this analysis, we addressed several questions concerning conservative interest group participation in United States Supreme Court litigation. First, we found that conservative groups not only participated but that their involvement has increased over time. This increase may be due to several factors. With the addition of conservative Justices Rehnquist and Powell, conservative interest groups saw the Court as a more receptive forum than it had been during the Warren Court era. In fact, the EEAC and several conservative, business-oriented legal foundations were formed shortly after these justices were appointed to the Court. Additionally, conservative interest groups, learning from their liberal counterparts, saw litigation as a means of furthering their policy interests. Also, during the 1970s and early 1980s, the increasing awareness and acceptance of conservativism in the United States have given added life to these groups. The Reagan Administration, in fact, numbers among its cabinet members a former head of a conservative legal foundation, James Watt.

It is clear that the judicial process now witnesses competitive articulation of points of view and to an increasing degree. The initial advantage gained by liberal groups when they invented such litigation is being narrowed. Conservative as well as liberal groups now aspire to be "private attorneys-general."

A second question addressed in this study was whether conservative groups developed strategies to lobby the Court. The data indicate that conservative interest groups rely heavily on participation as amicus curiae. Clement E. Vose has criticized reliance on amicus curiae activity as an indicator of interest group involvement in litigation (1981, p. 10). Development of easier access through class action suits and broader definition of standing and the right to intervene render the amicus brief just one tool of many. This study, however, reveals that particularly when examining conservative groups, amicus curiae activity cannot be ignored. In fact, many of the groups claim that submission of amicus curiae briefs is their preferred strategy to lobby the Court.

Based on these findings, we conclude that both liberal and conservative groups view the Court as a political forum. Each sees the importance of lobbying the judiciary to achieve its goals. Writing in 1968, Cortner saw

no pattern to conservative group litigation. Since 1968, however, the growth of conservative interest group litigation necessitates a reexamination of that conclusion and a recognition of the growing utilization of group participation as amicus curiae as a litigation strategy.

REFERENCES

AELE (n.d.-a). Untitled Pamphlet.

_____ (n.d.-b). *IMPACT.*

Barker, Lucius (1967). "Third Parties in Litigation: A Systematic View of the Judicial Function." *The Journal of Politics* 29: 41-69.

Belton, Robert (1978). "A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964." *Vanderbilt Law Review* 31: 905-61.

Bonnett, Clarence (1922). *Employers' Associations in the United States: A Study of Typical Associations.* New York: MacMillan.

Cortner, Richard C. (1968). "Strategies and Tactics of Litigants in Constitutional Cases." *Journal of Public Law* 17: 287-307.

Cowan, Ruth B. (1976). "Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976." *Columbia Human Rights Law Review* 8: 373-412.

EEAC (1982). *Annual Report.*

Galanter, Marc (1974). "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change." *Law & Society Review* 9: 95-160.

Greenberg, Jack (1977). *Judicial Process and Social Change: Constitutional Litigation.* St. Paul: West Publishing.

Hakman, Nathan (1969). "Lobbying the Supreme Court: An Appraisal of Political Science 'Folklore.' " In Joel B. Grossman and Joseph Tanenhaus (eds.), *Frontiers of Judicial Research.* New York: Wiley.

Krislov, Samuel (1963). "The Amicus Curiae Brief: From Friendship to Advocacy." *Yale Law Journal* 72: 694-721.

Manwaring, David (1962). *Render unto Caesar: The Flag Salute Controversy.* Chicago: University of Chicago Press.

Meltsner, Michael (1973). *Cruel and Unusual: The Supreme Court and Capital Punishment.* New York: Random House.

O'Connor, Karen (1980). *Women's Organizations' Use of the Courts.* Lexington, MA: Lexington Books.

_____, and Lee Epstein (forthcoming). "After the ERA: Is Litigation a Viable Alternative Strategy?" *Yale Law and Policy Review.*

Puro, Steven (1971). "The Role of Amicus Curiae in the United States Supreme Court: 1920-1966." Unpublished Ph.D. dissertation, State University of New York at Buffalo.

Schubert, Glendon (1962). "The 1960 Term of the Warren Court: A Psychological Analysis." *American Political Science Review* 56: 90-107.

Sorauf, Frank J. (1976). *The Wall of Separation: Constitutional Politics of Church and State.* Princeton: Princeton University Press.

Stewart, Joseph Jr., and Edward Heck (1982). "Ensuring Access to Justice: The Role of Interest Group Lawyers in the 60s Campaign for Civil Rights." *Judicature* 66: 84-95.

Truman, David B. (1951). *The Governmental Process.* New York: Alfred A. Knopf.

Vose, Clement E. (1959). *Caucasians Only.* Berkeley: University of California Press.

_____ (1981). "Interest Groups and Litigation." Paper presented at the 77th Annual Meeting of the American Political Science Association, New York City, New York.

Westin, Alan (1975). "Someone Has to Translate Rights into Realities." *Civil Liberties Review* 2: 104-28.

Yale Law Journal (1949). "Private attorneys-general: Action in the fight for civil liberties." 58: 574-98.