CHARITIES IN COURT:

THE ADVOCACY EFFORTS OF CHARITABLE NONPROFIT ORGANIZATIONS

IN THE JUDICIAL VENUE - WHEN? HOW? AND HOW MUCH?

by

NANCY WINEMILLER BASINGER

(Under the Direction of Susan B. Haire and Scott H. Ainsworth)

ABSTRACT

This dissertation examines the court-based advocacy activities of charitable nonprofit organizations during the decade of the 1990s. The study seeks to add to our understanding of the effect that internal organizational characteristics and external environmental factors can have on an organization's choice to become involved in the policy process through the courts. The study uses a three-part analysis to understand the court-based advocacy of these groups, using three research questions for the study: (1) Over a period of ten years, what factors affect the choice of charitable nonprofit advocacy groups to participate in the courts? (2) What factors explain the annual frequency of the court-based advocacy of charitable nonprofit advocacy groups? (3) Of the charitable nonprofit advocacy groups that choose to participate in the courts, what factors affect the legal strategy choices they make on individual cases? To examine these questions, I collected court involvement data and organizational characteristic data on all charities in the United States that claimed to be involved in advocacy activities and whose annual income exceeded approximately three million dollars. The study finds that when considered from a cumulative perspective, over a period of ten years, internal organizational characteristics, including the presence of dues-paying members, are important in explaining the differences between charities that chose to advocate in court in the 1990s and those that did not. However, when considering court-based advocacy from an annual or case-level perspective, external environmental factors, including the regulatory and political environments, have a greater influence on charities.

INDEX WORDS: Nonprofit Advocacy, Interest Groups in Court, Charities and Public Policy.

CHARITIES IN COURT:

THE ADVOCACY EFFORTS OF CHARITABLE NONPROFIT ORGANIZATIONS

IN THE JUDICIAL VENUE - WHEN? HOW? AND HOW MUCH?

by

NANCY WINEMILLER BASINGER

B.S., Indiana University, 1991

M.P.A., Indiana University, 1997

A Dissertation Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment of the Requirements for the Degree

DOCTOR OF PHILOSOPHY

ATHENS, GEORGIA

2003

CHARITIES IN COURT:

THE ADVOCACY EFFORTS OF CHARITABLE NONPROFIT ORGANIZATIONS

IN THE JUDICIAL VENUE - WHEN? HOW? AND HOW MUCH?

by

NANCY WINEMILLER BASINGER

Major Professors:	Susan B. Haire and Scott H. Ainsworth
Committee:	Jeffery L. Brudney Audrey A. Haynes Stefanie A. Lindquist Hal G. Rainey

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
The University of Georgia
May 2003

DEDICATION

To Floyd Maurice and Doris Marie Winemiller, my grandparents, who taught me by word and deed to value both education and philanthropy - lessons that led me to where I am today. And to James D and Nancy Kay Winemiller and D. Michael and Alexander James Basinger for the many sacrifices you each made along the way and for believing I could do it, even when I was not sure. Dad, Mom, Mike, and Alex - your love and support have been an unending source of strength for me throughout this endeavor.

ACKNOWLEDGEMENTS

Undertaking and completing a project of this magnitude must always lead to many debts, and in this case a great many of them are debts of gratitude. So many people have helped me along the way that I am humbled simply to recall the contributions and sacrifices of others that have made my dream of earning a Ph.D. into a reality.

I would like to thank my family, to whom this work is dedicated. Thanks to Mike, who sacrificed a great deal, and consoled a distraught woman often, with much love and no complaints. And to Alex, whose presence brought a light to my life and whose smile carried me through much of the stress of graduate school. Thanks too, to my Dad and Mom. Not only did they lend emotional and financial support throughout this long journey, but my parents even helped with editing, verifying coding, and data entry. No daughter could ask for more.

I must also extend my sincere thanks to my friends. To Melissa, who was a spark of inspiration at the beginning and provided many words of encouragement along the way. To Christi, who listened, agreed, and edited every time that I asked! To the fabulous ladies of the "Dissertation Dinner Gang": Sandi, Pat, and Keesha - I am not sure if there are three people in the world that I have shared more tears, gossip, screams, Logan's peanuts, e-mail rants, OTB's chips and margaritas, frustrations, and desserts from the Grit, with - but all I can say is - here's to sharing that and more all the way to tenure. To Alex's all-time favorite babysitters - Laura Jane and Chris, we could not have gotten through the first couple of years without you guys.

Finally, I would like to express my thanks to the chairs of my dissertation committee, Susan Haire and Scott Ainsworth. Under their tutelage I have learned a great deal, not only about Political Science, but also about independent research, grammar, and perseverance. I also would like to thank my entire committee, including Jeff Brudney, Audrey Haynes, Stefanie Lindquist, and Hal Rainey, for sharing their knowledge and experience with me to improve both this project and my preparation to enter the academy.

TABLE OF CONTENTS

LIST OF TABLES

CHAPTER 1: INTRODUCTION

Charitable nonprofit organizations are all around us. There are approximately 1.4 million nonprofit organizations in the U.S. today (Salamon, 1999). The Internal Revenue Service has classified nearly half of all nonprofits as charitable nonprofit corporations, or organizations that exist to serve the common good. Charities, like the Boys and Girls Clubs, the YMCA, and the Girl Scouts of America, provide recreation for our children. Other charitable groups are most visible in response to extreme crises, as displayed by the tremendous amount of aid provided in New York City and Washington, D.C. by the Salvation Army and the Red Cross in late September of 2001. The American Heart Association and the American Lung Association are just two examples of charities working to improve our understanding of a myriad of personal and societal health issues. In addition, the ARC (formerly the Association for Retarded Citizens) and many local organizations are working in communities across the country to provide direct services, assistance, and support to individuals with developmental disabilities and their families. The list of societal contributions by these groups is nearly endless; charities provide a variety of services to society.

While we perhaps best know charities for the direct services they provide to members of society, we often overlook another important role of the nonprofit sector, that of advocacy. According to Salamon, nonprofit organizations have been at the heart of most of the 20th century's social movements. These movements, including women's suffrage, civil rights, environmental, women's rights, and gay rights, have shaped American life through their influence on public policy (Salamon, 2002). "The nonprofit sector has thus operated as a critical social safety valve, permitting aggrieved groups to bring their concerns to broader public attention and to rally support to improve their circumstances. This advocacy role may, in fact, be more important to the nation's social health than the service functions the sector also performs," (Salamon, 2002).

Advocacy is defined as any effort to influence public policy through the protection of rights and promotion of public interests (Jenkins, 1987; Boris and Mosher-Williams, 1998). Charities are able legally to advocate for specific public policies speaking for the group and its constituents in a variety of ways (Aarons, 1999; Smucker, 1999; Reid, 1999). Although nonprofit groups most often attempt to influence public policy through the legislative branch (Jenkins, 1987), charities are limited in a variety of ways in the amount of political involvement they can have in this venue (Reid, 1999) However, no such limitations apply to advocacy activities that may occur in the courts, or court-based advocacy. Although the results of court-based advocacy in several social movements, including the civil rights movement and the environmental movement, are well documented (Vose, 1959; Morris, 1984; Dunlap and Mertig, 1992), we know relatively little about the influences on individual charities that may lead to court-based advocacy decisions.

The theoretical basis of this study is drawn from findings reported in studies of the activities of interest groups once they were involved in the courts, and the influences of these groups on the behavior of the judges and Justices in the courts (Caldeira and Wright, 1990; O'Connor and Epstein, 1983; Kobylka, 1991; Scheppele and Walker, 1991). This study attempts to build on this foundation and to contribute to the literature in several important ways: by focusing on charitable nonprofit groups to understand nuances better that we may relate to a group's charitable nonprofit status, by distinguishing between participants and nonparticipants from both a cumulative and an annual perspective, and by examining the legal strategies of charities in court. To accomplish this, the study that follows narrows the focus from interest groups to only those groups that have incorporated as nonprofits in their state and have also been recognized as a charitable organization under section 501(c)(3) of the IRS code. This is an important distinction that merits analysis because, as stated previously, the government constrains the political participation of these groups because of their nonprofit corporate status. In addition, I assume that charitable nonprofits that classify themselves as advocacy groups are interested in pursuing policy influences that are at the top (5%) of the income spectrum for the years 1990 through 1999. I then collected court-based advocacy data and organizational characteristic data on these 856 charitable nonprofits.[1]

Although a great deal of existing research focuses on the filing of amicus curiae briefs as the sole form of group participation (e.g., Caldeira and Wright, 1990), this study follows the recommendation of scholars who study all attempts by a group to advocate for a policy goal through the courts (Scheppele and Walker, 1991). Therefore, beyond considering amici, this study also analyzes the behavior of groups that serve as named

---

[1] The data collection process is explained in more detail in the text of the chapters that follow as well as in great depth in Appendix F.

litigants and those that supply counsel to other litigants and amici. However, I only included participation in these various forms if the organization in question could decide whether to advocate in the courts. Attempts to influence policy through court-based advocacy were limited to those groups that were choosing to be involved on the case. Therefore, included in the study are plaintiffs, amici, groups named suppliers of counsel to plaintiffs or appellants or appellees, plaintiff-appellants, plaintiff-appellees, defendant-appellants, and defendant-appellees. This broad basis represents all charitable nonprofits who made a choice formally to attempt to influence public policy in the courts. Using this as the definition of court-based advocacy, I argue that both internal elements, such as the presence of members, and external factors, such as the political climate in Congress, will influence a group's decision to advocate in the courts. The study uses a three-part analysis to understand the court-based advocacy of these groups, using three research questions for the study: (1) What factors affect the choice of charitable nonprofit advocacy groups to participate in the courts? (2) What factors explain the frequency of the court-based advocacy of charitable nonprofit advocacy groups? (3) Of the charitable nonprofit advocacy groups that choose to participate in the courts, what factors affect their legal strategy choices? I examine the effects of both internal and external factors on each of these three questions.

Several internal factors are considered throughout the levels of analysis in the study including members, financial capacity, and group purpose. First, I examine the impact of members. Court scholars have contrasting views as to the effect of members on court participation (O'Connor, 1980; Spill, 1997). This study finds that the presence of dues-paying members is an internal characteristic that increases the likelihood that a group will, at least once within a period of ten years, decide to advocate in the courts. However, the presence of members does not influence the annual frequency with which an advocacy charity engages in court-based advocacy.

In addition, the financial resources of the group have been found to influence the proclivity of court participation (O'Connor, 1980). In this study, I find that financial resources are an important factor in distinguishing between participants and nonparticipants. As annual income increases, so too does the likelihood that an advocacy charity will choose to file as a litigant rather than participate by filing an amicus brief or by supplying counsel. However, the financial capacity of the group has no impact on the likelihood that the annual participation rate will increase.

Furthermore, I consider the effect of the group's purpose on court-based advocacy decisions. The purpose of the group has been found to influence the group's court participation (Kobylka, 1991; Boris and Mosher-Williams, 1998). Within this study, I divide a group's purpose into two categories: civic participation or rights-oriented. As expected, rights-oriented groups are more likely court participants, but group orientation did not affect the annual rate of court participation.

I also examine the effects of several external factors throughout the study. First, I consider the impact of receiving government funds. Research has shown that nonprofit groups that receive governmental funding often act differently than those that operate without public funds (Smith and Lipsky, 1993). Furthermore, the limitations that are often part of government grants may also influence the political participation decisions of grantees. I find that, despite the additional restrictions on the political activities of grantees, often included in government grants and contracts, the presence of government funding does not dissuade the group from court-based advocacy. On the contrary, groups that receive government funding are actually more frequent court-based advocates, when considered from an annual perspective, than charities that receive no government funding.

I also expect the political environment in which advocacy decisions are made to be influential. During the period considered in the study, 1990-1999, regulation and threat of legislation constricted other avenues of advocacy. For example, proposals made by Representative Ernest Istook (R-OK) charged that nonprofits were misusing the public benefits bestowed on them by virtue of their charitable organization status. Istook and his colleagues argued that charities representing specialized interests were attempting to influence public policies to their own benefit using public tax dollars (Bunker, 1995). I assert that these groups, as they faced an increasingly hostile Congressional environment, were more likely to turn to the courts to influence the opinions of the judicial branch. In examining the court-based advocacy activities of charities before 1994 and after 1994, a consistent pattern of behavior emerges. After the proposal of the first version of the Istook amendment, advocacy charities were more likely to file as litigants in the courts. Further, in the post-1994 political climate charities were more frequent participants (from an annual perspective) and more likely court participants (from a cumulative 1990-1999 perspective).

Organization of the Study

In the next chapter I review the literature on interest groups in the courts, plus research that looks specifically at the nature of charitable nonprofit organizations and the factors that constrain their political voice. These important insights help to lay the foundation for the differences between this subset of interest groups and the more general conclusions found in the broader literature review. Chapter 2 also lays the theoretical foundation for the analysis, giving the reader a clear picture of the court-based advocacy decisions of nonprofit organizations.

Chapter 3 presents the first analysis of a group's court-based advocacy participation decisions over the ten-year period. I analyze internal group characteristics and external environmental characteristics to reveal the importance of each in leading a group toward the courts. Chapter 4 provides an in-depth analysis of the frequency of court participation, revealing which factors affect the repetitive participation decisions of charities involved in the courts as they pursue their policy goals each year. Chapter 5 follows this with a quantitative analysis of the legal strategy choices charities may make after the participation decision. This chapter also examines internal group characteristics and external environmental factors to explain the legal strategy choices of charities. The legal strategy choices considered in the analysis include filing as a litigant, filing amicus curiae briefs, and supplying counsel to other parties filing as either litigants or amici. Finally, Chapter 6 summarizes the findings of the various analyses and discusses the implications of the study.

CHAPTER 2: CHARITIES, ADVOCACY AND THE COURTS

Organized Interests and Democracy

Organized interests play a vital role in democracies by helping to strengthen fundamental freedoms of association and expression while allowing organized interests to advocate directly with government officials for policies that support their preferences (Berry, 1989). The American government's receptivity to outside pressures, raises the possibility of broad public control while paradoxically raising the possibility of shifting disproportionate political control to well-organized minorities, thus frustrating broad public control (Salamon and Siegfried, 1977). This paradox is inevitable because the negative feedback role performed by America's voluntary sector is essential to society (Smith, 1990). Since the time of Madison, it has been argued that to preserve our fundamental freedoms, we must allow factions to arise and conflict with each other. Further, in the study of American politics, pluralists claim that we have expected groups to balance the interests of a varied citizenry (Galbraith, 1952). Social movements and interest groups have been important sources of "countervailing power." They benefit society by providing a balance among groups making direct appeals to the government (McFarland, 1998). Advocacy efforts of interest groups create several positive by-products for democracy, including educating the citizenry on policy proposals and solutions, enhancing opportunities for participation in democracy, and contributing to the public agenda.

De Tocqueville both admired and feared the level of association in early America. He saw the voluntary spirit as productive and supportive of democracy. The constitutional foundation of government in the United States often allows for the debate of complex legal questions in a political setting, especially in contentious policy areas (De Toqueville, 1830).

> Whenever a group of people believes that they are adversely affected by national policies, or are about to be, they generally have extensive opportunities for presenting their case and for negotiations that may produce a more acceptable alternative. In some cases, they may have enough power to delay, to obstruct, and even to veto the attempt to impose policies on them. (Dahl, 1967, 23).

These opportunities to "present a case" are not limited to a single branch of government. Organized interests may attempt to influence public policies directly through any institution of the government - legislative, judicial, or executive. Yet traditional interest group research has focused primarily on group interactions with the legislative branch of government in attempting to influence policies (e.g., Baumgartner and Leech, 1998). More recently, scholars have recognized that, due to the unpredictability of advocacy efforts, groups may also seek to exert influence in a variety of venues to maximize favorable policy outcomes (Spill, 1997). Groups advocate in different forums as the nature of their activities, and their environment, changes (Cigler and Loomis, 1986). In their attempts to influence political institutions, groups are likely to use a multi-tactic approach (Waltenberg, 1994; Epstein, 1991; Walker, 1991). Kobylka asserts that the linkage between law and politics makes courts a natural forum for organizational action (1991).

Political Interest Groups

The purpose of an interest group is to serve the members through making claims on the government (Ainsworth and Sened, 1993). This motivation for the existence of an interest group leads to their common perception as "political animals." Therefore, when considered broadly, we often regard interest groups negatively in the public sphere. Interest groups do not exist, however, simply to press for public policies. Organized interests must provide many types of benefits to their members in order to overcome the problems of collective action and competition (Olson, 1965). We expect an interest group to act in the self-interest of the group and its members. In order to maintain their political strength and financial resources, a group must take the preferences of members into consideration. If the mission of the charity encompasses a purposive benefit for members via a stated public policy stance, the organization may benefit from any public policy activities. Members expect this purposive benefit, therefore they are likely to continue their support of the organization only when the group engages in advocacy that members will see as the voicing of their concerns in the public policy arena. Although a charities' members may not always be accurately represented by the policy actions taken by the organization (Salisbury, 1984), the organizational maintenance concerns of the group are served by attempting to provide this member benefit through its work in the policy arena.

Organized Interests in Court

Research has examined the presence and effect of interest groups in the courts (Scheppele and Walker, 1991; Caldeira and Wright, 1990; Kobylka, 1991; Epstein and Kobylka, 1992; O'Connor, 1980). The first scholar to examine a group's use of the courts was Clement Vose in 1959. Following the changes in restrictive housing covenants, Vose documented the importance of the interaction between the NAACP Legal Defense Fund and the judicial branch. "A number of the most important rights developments in this [20th] century are the result of litigation campaigns by organized interest groups" (Farole, 1998; xi). Nevertheless, early research showed groups seldom used litigation to further their policy goals based on their infrequent appearances before the Supreme Court from 1958-1964 (Hakman, 1969). Reviews of court records show significant interest group involvement at various levels of the courts, demonstrating the important role played by organized interests in the American judicial process today (O'Connor and Epstein, 1983; Schlozman and Tierney, 1986; Caldeira and Wright, 1988; Scheppele and Walker, 1991; Gais and Walker, 1991).

Groups may seek to influence policies in the courts for a variety of reasons. Groups that are disadvantaged in terms of political and financial resources are more likely to advocate for their policy preferences in the courts (Cortner, 1968; Olson, 1990). Groups with a narrow public policy agenda often lack the broad public membership necessary to garner the support of legislators with reelection goals. Interest groups are also likely to turn to the courts if they seek a change that lacks the public support perceived to be necessary to sway Congress (Berry, 1989). Finally, interest groups will often seek remedy from the courts following a defeat in one of the political branches. For example, a group may shift the focus away from Congress and toward the courts after they have been unable to advance their policy agenda in the legislative branch (O'Connor, 1980).

Marginalized groups will often use the courts to highlight the rights of their group members, while they simultaneously nurture political mobilization on other fronts (Scheingold, 1974). Scholars who promote this theory believe securing rights for constituents of the group is a long-term goal. Groups that see themselves and their constituents as having rights not properly protected under the law are willing to use the courts despite the potential for a long-term commitment. Since courts, through both constitutional interpretation and case precedence, provide a more lasting solution, using this venue is important for such groups. Many organizations are founded to promote and protect the rights of their constituents, for example: GLAD, NAACP, or the Lighthouse Organization for the Blind. These specific groups are founded around shared interests and the shared life experiences of those they represent: homosexuals, African Americans, and people with blindness respectively. Groups will also advocate in court to highlight implicit contradictions between laws and between law and implementation practices (Epstein and Kobylka, 1992). As groups begin to assert newly recognized rights, members gain a sense of efficacy and are increasingly likely to advocate (Pivin and Cloward, 1979; Schneider, 1986).

In addition, for individual groups and entire social movements seeking to draw public attention to their cause, the indirect symbolic effects of legal participation may be more important than the outcomes of particular cases (McFarland, 1998). Clear and consistent victories in court may not be necessary. By achieving standing and earning small victories, groups are often able to generate enough attention among members of the public. In doing so, these groups are better able to achieve their organizational maintenance goals (Scheppele and Walker, 1991; O'Connor, 1980).

Particular organizational characteristics, including group longevity, staff resources, focused issues, financial resources, technical capacity, publicity aptitude, and, for umbrella organizations, and coordination with affiliates, increase the likelihood a group will choose to engage in court-based advocacy (O'Connor, 1980). At times some characteristics may also act as constraints, as those groups that lack sufficient human or financial resources may not choose to enter the courts as advocates. Costs rise as the internal capacity of the organization decreases. Groups without the ability to generate technical data internally, or who do not employ an in-house legal staff, will expend much more of their financial resources if they choose to engage in any type of court-based advocacy.

The institutional compatibility between group advocates and the courts is not only dependent on characteristics of the groups but also those of the courts (Scheppele and Walker, 1991). This "institutional compatibility" argument is made up of several components. Scheppele and Walker assert that the group's agenda may not be as important as the rules of the venue and the structure of the conflict. Second, groups embroiled in intense conflicts with a clear set of opponents are most likely to participate in the courts. Third, a group will have greater success when working in a policy area where the courts have already established their jurisdiction. For example, a group whose purpose falls in the policy arena of social welfare or domestic economics, may find greater receptivity in the courts. Existing statutes make legal rights and remedies more likely in these policy areas, as remedies are legislatively specified in cases where harm occurs as a result of governmental actions. This match, or institutional compatibility, between the court's rules and the group's agenda will make some groups more likely than others to use the courts to attempt to further their policy goals (Scheppele and Walker, 1991).

Finally, the courts may also be used as part of an overall public policy strategy because the group sees greater potential benefit in the judicial branch. Groups that want to maximize their advocacy influence must be willing to use litigation as one of its lobbying tactics (Berry, 1989). Groups also benefit from using legal strategies in conjunction with other tactics such as generating media attention and engaging in both legislative and grassroots lobbying (McFarland, 1998). Due to *stare decisis*, the decisions of the courts are difficult to change and therefore tend to be more long-lasting than policy gains made in the legislative or executive branches. This is especially true in constitutional law, where, Caldeira and Zorn (1999) argue, the court offers a "bulwark of relative stability."

When seeking to take advantage of this "policy stability" through the courts, groups may use a number of strategies. The variety of reasons which lead groups to advocate in the courts, may lead to employment of several different strategies once a group has entered the system. Each time a group chooses to engage in court-based advocacy, they must decide how, when, and to what degree they will participate based on their goals and characteristics (Wasby, 1983). In a survey of 560 interest groups 31% reported that litigation is an important part of their lobbying activities (Gais and Walker, 1991). Legal strategies include not only filing a lawsuit, but also threatening litigation, petitioning to participate as an amicus curiae, and providing counsel or financial assistance. Most interest groups surveyed advocate in the courts (Gais and Walker, 1991). The legal strategies available to court-based advocates will vary as to the amount of control over the case and costs incurred by the group. However, all legal strategy choices available to advocacy groups allow the organization to exert some level of influence on the policies that come out of the court via the court's opinion.

Even before actually filing as litigants, the first advocacy strategy to be employed is legal leveraging. Some groups may be able to stop short of the courthouse door by attempting to influence policy development and implementation by threatening to take legal action. This strategy may provide several tactical advantages for organized interests: (1) opposing groups may not be willing to face the long-term litigation or the accompanying financial burden, (2) the opposition may fear losing control of the decision-making authority and may not be willing to give it up to the courts and, (3) the rights claims themselves have strong normative and symbolic powers (McFarland, 1998). These tactics may help a group or social movement gain attention and improve the likelihood they will be able to influence policies that are in flux. Legal threats may also help a movement get on the public agenda. For example, the animal rights movement turned to the public to force its opponents to settle out of court (Silverstein, 1996). It publicized the abuses animals were suffering by threatening suits and thus embarrassed the institutional actors involved, causing changes in their behavior. The movement did not win policy changes in court, but its legal leveraging strategies were successful nonetheless.

To maximize control of advocacy efforts in a policy area, a group may choose to participate directly in individual cases as a named litigant (Vose, 1959, 1972; Sorauf, 1976; Wasby, 1988). Litigants are able to establish the factual context and issue configuration, as well as choose the court environment, thus exerting the highest level of control over the case (Kobylka, 1991). In situations where the controversy is highly correlated with the mission of the organization, the group is most likely to file as a litigant. Primarily, organized interests will choose to file as litigants to safeguard the interests of their members and to defend or enforce their successful advocacy efforts in other venues (Scheppele and Walker, 1991; Epstein, 1985). A group that chooses to file as a litigant, however, will face certain constraints. This form of participation is the most costly legal strategy choice a group can make. Filing as a litigant will draw not only financial, but also human resources away from other group priorities. In addition, it is often difficult for groups that want to file as litigants to satisfy court regulations, including the "case or controversy" and standing limitations, in specific advocacy cases.

Groups face fewer hurdles to participation in the courts when they petition to file *amicus curiae* or "friend of the court" briefs. Although generally groups must petition courts for permission to submit amicus briefs, acceptance of these briefs is commonplace. For example, between 1969 and 1981, the U.S. Supreme Court denied only 11% of the 832 petitions seeking amicus status (O'Connor and Epstein, 1983). In addition, the percentage of cases at the Supreme Court in which amicus briefs were filed rose from 20% in the 1960s to more than 80% in the 1980s, while more than 90% of the cases decided on the merits in recent terms had at least one amicus brief submitted (O'Connor and Epstein, 1983; Caldeira and Zorn, 1999). In 1982 alone, the Court received amicus petitions from more than 1400 separate organizations (Caldeira and Wright, 1990).

Interest groups may widely use this tactic because, although the group does not have control of the case, it can communicate their preferences to the court in a comparatively low-cost approach (Kobylka, 1991). Research has shown amicus briefs to influence the Court in its certiorari decisions (Caldeira and Wright, 1988, 1990). Furthermore, interest groups use these briefs to attempt to frame the legal reasoning of the court on important cases and this gives the court a better understanding of the social environment surrounding the case (Kobylka, 1991; Caldeira and Wright, 1988). Groups acting as amici on both sides will try to demonstrate, in their briefs, that their arguments reflect public opinion as well as relevant legal precedent (Mishler and Sheehan, 1993).

Groups may also choose to participate in the courts by providing generalized support to the litigation efforts of other organizations or individuals. This may take the form of supplying legal advice or counsel for the case, providing testimony or data support, assisting with funding or publicity, or even petitioning to become an intervenor on the case (Kobylka, 1991). Although these approaches tends to be less expensive for the group than acting as the named litigant, it is also less influential. In some cases, the group will not have any control over the direction of the case.

What Are Charitable Nonprofits?

In contrast to interest groups, social movements and charities are more commonly viewed in a positive light and as complementary actors in a democratic regime (Candler, 1999). Charities and interest groups may operate under different labels, with equally different connotations, but acting alone and in concert with others groups often express the goal of serving their members and other stakeholders through public policy involvement. Verba et al. have shown nonprofit organizations promote citizen involvement in democracy (Verba et al., 1995; Putnam, 1994). Nonprofits offer additional avenues of access to government while developing the skills needed for political participation among members. Volunteers are thought to gain skills that develop their ability to join the political process as individuals (Verba et al., 1995). In addition, members can encourage political participation by their group. The relationship between nonprofits and the government is one of reciprocal oversight.

> The state plays a central role in defining the parameters and regulating associational activity. . . . Voluntary associations in turn monitor the activities of the state, the market, and other voluntary organizations (Boris, 1997).

Based on the data gathered for this study we now know that more than 35,000 of the charities in America today are attempting to exert influence on public policies that they believe affect their group and its members in some way. The managers and board members of many of America's charities clearly see it as a duty of their charity to engage in advocacy. These charities are clearly operating, at least in part, as political interest groups.

Legislators often give an economic benefit to a favored class (Yarmolinsky, 2000). Early in American history, Congress determined organizations providing a public benefit to society were eligible to receive a favored tax status (Silber, 2001).

> Congress is not "giving" such organization[s] any "benefits"; the exemption is not a "loophole," a "preference," or a "subsidy" - it certainly is not an "indirect appropriation." Rather, the various Internal Revenue Code provisions comprising the tax exemption system exist basically as a reflection of the affirmative policy of

> American government not to inhibit the beneficial activities of qualified exempt organizations acting in community and other public interests (Hopkins, 1987, 13).

Congress has included assistance and protection for the nonprofit sector overall, in the form of an income tax exemption in the tax code, in every revenue code passed by Congress. Both the tax exemption and the tax deduction are benefits to charitable nonprofits. However, many believe that the benefits received by the charitable sector are in fact government subsidies (Istook, 1995). Furthermore because the benefits are categorized as subsidies, the government is permitted to attach conditions to these benefits that qualify the rights of these organizations to engage in political activities. Whatever the nature of the benefits going to nonprofit organizations, and the rationale behind them, it is certain that current governmental policies provide indirect economic support to organizations that incorporate as nonprofits.

Today, nonprofits are referred to as "not-for-profit" corporations among those working in accounting and finance. Although the term "nonprofit" is more commonly used in the rest of society, it is perhaps not the most descriptive term. The term not-for-profit clarifies that no one prohibits such organizations from earning a profit while emphasizing the fact that earning profit is not the primary purpose of the organization. By law the government requires nonprofit corporations to retain all profit for the future benefit of the organization. Profit is not to be distributed to any individuals or organizations whether members or not; this is known as the non-distribution constraint. In addition, we distinguish nonprofits from other organized interests in their governance structure. The government requires these organizations to have a voluntary board of directors. No one compensates this group of individuals, as happens with for-profit corporate boards.

Nonprofit organizations can incorporate under state law and may qualify for federal tax exemption under many different sections of Title 26 of the US code. Section 501(c) lists twenty-six types of organizations that may serve as the basis for federal tax exemption of a nonprofit corporation. There are more than 1.6 million organizations in the United States that the Internal Revenue Service has granted this tax-exempt status (Salamon, 1999). The two most common types of nonprofit corporations in the U.S. are granted exemption under section 501(c)(4) and 501(c)(3). Groups granted 501(c)(3), or public charity, status operate for a purpose classified as charitable by the Internal Revenue Code. A 501(c)(4) organization is one that is "operated for the *promotion of* social welfare . . . the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes" (see Table 2.1 and Appendix C).

Charities and Social Welfare organizations may serve a similar purpose in society, but may choose to prioritize different goals through their operations. For example, we might consider two organizations that formed to protect animals. One organization chooses to provide education on the conservation of animal habitats and rescuing wild animals that have lost their homes. This organization would meet the exemption criteria of a 501(c)(3) public charity. On the other hand, the second organization might choose to push for legislation protecting wild animals from hunters and to have more wild forests declared animal preserves. This second organization would not qualify as a public charity, but would be granted exemption under section 501(c)(4) as a social welfare organization.

Approximately half of all nonprofits are organized exclusively for charitable purposes and have been recognized by the IRS as 501(c)(3) exempt organizations. To qualify as a charity, the corporation must serve the "public good" in some capacity as defined in the tax code.[2] Organizations classified as public charities receive the additional benefit of tax-deductible donations. Charities receive approximately 15% of their revenues from the contributions of individuals (Fishman and Schwarz, 2000). Individual donors may deduct their charitable donations from their federal income taxes [Form 1040] as itemized deductions.

Charitable nonprofit organizations gain their favored tax status by claiming to provide a benefit to the public. Society is sustaining these groups in order for them to provide the societal benefits they claim to produce through maintaining the status quo tax policy and by becoming members and donors. Nonprofit organizations can take on three important roles in society (see Appendix D, Figure 1): the direct provision of services, the promotion of citizen involvement in democracy, and the representation of the group and its constituents in the policy process (Laws, 1997).

Charitable nonprofit organizations often provide a service to their members or clients that neither government nor the private sector delivers. Thus, the nonprofit benefits both clients and society by eliminating some societal burdens (Weisbrod, 1988). These services may come, for example, as food for the poor at a soup kitchen, housing for

[2] Section 501(c)(3) of the code appears in Appendix C.

people with disabilities at a group home, or blankets and water for victims following a natural disaster. Many social services in our country previously considered the responsibility of government are now provided by charitable nonprofit organizations. Although government grants finance a significant portion of these services, individual, corporate, and foundation donations have also supported services.

The Advocacy Role of Charitable Nonprofits

Advocacy commonly refers to two primary activities: group communications with the government and public education (Jenkins, 1987). Advocacy is defined as any effort to influence public policy through the protection of rights and promotion of public interests (Boris and Mosher-Williams, 1998). Organizations may use a variety of tactics in order to access the government in their attempts to educate and influence policy makers. Their primary purpose in this endeavor is to participate in the policy making process to gain more favorable outcomes for their sector, their group, their programs, and the members of the public they serve. This leads to a broad view of a nonprofit organization's advocacy responsibilities. As shown in Figure 1 (see Appendix D), charities have a variety of stakeholders, and internal and external factors, that they must consider before deciding to participate in the policy process.

Table 2.1:

Relevant Lobbying Restrictions on Public Charities and Social Welfare Organizations

	501(c)(3) - Public Charities	501(c)(3) - Private Foundations	501(c)(4) - Social Welfare Organizations
Purpose	Charitable, Religious, Scientific, Literary, Protection of animals and children, Educational, Amateur Sports	Provide funding to charities	Promotion of social welfare
Organizational Income	Exempt from federal taxation	Generally exempt from federal taxation	Exempt from federal taxation
Contributions to organization	Generally tax deductible	Generally tax deductible	Not generally tax deductible
Electioneering permitted	No	No	No
Lobbying Permitted	No "substantial" lobbying; permitted with a portion of private contributions	None permitted - subject to excise taxes if lobby at all; can fund organizations that engage in some lobbying.	Permitted if no federal funds received

** adapted from Table 1 and Table 2 in "Lobbying and Advocacy for the Public's Health: What Are the Limits for Nonprofit Organizations?" in American Journal of Public Health, September 1999, Vol. 89 Issue 9, p.1425-1430.

Some see advocacy as the responsibility of groups outside the political system, such as nonprofit organizations, to cause disruptions and make claims upon the government, thereby improving society (McCormick, 1993). In contrast, others see no advocacy role for nonprofit organizations. Many in Congress have held the latter view, and since 1994 Congress has exhibited a hostile orientation toward nonprofit advocacy (Cox and McClosky, 1996). Within the nonprofit sector there is dissension over the proper types and amounts of advocacy. However, there is general agreement that advocacy is an appropriate responsibility of many nonprofits (Rees, 1998; Reid, 1999). Legislators have not placed stringent lobbying restrictions on all social welfare and professional associations, suggesting these may be the only types of nonprofits that lawmakers believe should be involved in lobbying. In addition, advocacy nonprofits with 501(c)(4) or a 501(c)(6) status may be developed in conjunction with a 501(c)(3)charity, sometimes known as a "dual organization." In this way the lobbying organization can engage in advocacy with few limitations and the 501(c)(3) can help to finance a small portion of its affiliate without losing its charitable status. This configuration of a charity and an associated lobbying group seems to be more prevalent among large national nonprofit groups. A 1997 survey of congressional office staffers found that they repeatedly cited twelve national nonprofit organizations as influential in six separate policy areas. Of these twelve groups, three are 501(c)(3) charitable nonprofit corporations and an additional eight operate as "dual organizations"(Rees, 1998).

According to state and federal laws, nonprofit organizations must follow their mission statement in order to protect their tax-exempt status.[3] Despite the availability of a "dual organization" structure, the mission of many charitable nonprofits includes both a service and an advocacy component. According to the 1999 informational returns filed by

---

[3] The federal code appears in 26 U.S.C. Section 501. State codes vary, but are most often based on this federal code.

charities [Form 990] with the IRS, more than 35,000 501(c)(3) organizations specified that advocacy was one of the three most prominent activities of the group. The constituencies of charitable organizations may include members, clients, and the public. Depending on the purposes and goals of the organization, a charity may take on advocacy responsibilities for their constituents, the organization itself, the nonprofit sector, and at times for specific programs within the organization. Often the group knows that it wants to engage in advocacy, and it plans to move certain policies its own preferences. These advocacy efforts tend to be planned, campaign-like efforts. In other instances a group faces a crisis because of a pending policy change and its response is not planned, but reactionary. Groups that consider advocacy a responsibility or goal are likely to be involved in both planned and reactionary advocacy activities. For example, the American Association of Retired Persons (AARP) is well known as a strong organization with the inclination to participate in the policy process whenever proposed legislation might affect older Americans. It is easy to see how this type of group would be regularly involved in issues dealing with Social Security cost of living allowances, prescription coverage for Medicare recipients, and capital gains tax cuts. These planned interactions with the government are intended to protect the seniors who are AARP constituents. The group might also act to protect the organization by fighting in court against adverse interpretations of a will in which the group was left a significant amount of money. Losing such a case could create negative precedents that might adversely affect planned giving fund-raising efforts by the group for years to come.

Advocacy efforts may also occur as an unplanned response to changes from external actors. For example, a nonprofit organization providing residential services to persons with developmental disabilities might find themselves in the position to advocate if changes in Medicaid regulations threaten their programs. Without adequate reimbursements, the group might be forced to shut down group homes it operates. They design this response to protect the clients in the program, the staff working in the homes, and the revenue source of the organization.

Government Constraints on Nonprofit Advocacy

Generally, although interest groups must disclose that they are engaged in lobbying, they are not restricted from engaging in any form or amount of political speech. Although federal tax law is only one of several bodies of law that regulate the activities of nonprofit organizations, its impact is "particularly pervasive in terms of both positive encouragement and extensive regulation and oversight" (Atkinson, 1989, 3). Constraints at the federal level come from the Internal Revenue Code (IRC), and restrict the type and amount of advocacy a charitable nonprofit may undertake. These regulations are extensive and complex. In addition, the IRC does not provide any "intermediate sanctions," so if an organization violates the limitations on political activities and the IRS or the court rules that the organization has violated these provisions of the code, the organization will lose its charitable status. One of the most significant hindrances to nonprofit advocacy is the complexity of these regulations.

Lobbying by public charities was first limited in 1919 when a Treasury regulation stated that associations formed to distribute propaganda did not qualify as educational organizations (Fishman and Schwarz, 2000). The government enhanced this position through the courts in *Slee v Commissioner* (42 F. 2d 184; 2d Cir. , 1930). In *Slee*, the court ruled that the American Birth Control League no longer qualified as an exempt organization because they distributed pamphlets supporting the repeal of laws against birth control. The court held that the organization did not operate exclusively for charitable purposes. Judge Learned Hand stated that:

> Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it "propaganda," a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them. (42 F 2d at 185) (see Fishman and Schwarz, 2000, 522).

In 1934, Congress added the qualification that "no substantial part" of the activities of an organization could involve lobbying (Fishman and Schwarz, 2000). Although the IRC does define the prohibitions and limitations on political activities, the service has never specified the maximum amount of permissible lobbying. Court interpretations have varied and led many to believe that the acceptable limit is somewhere between five and 20 percent of an organization's total expenditures (Reid, 1999). The tax code limits lobbying by public charities in both direct and indirect (or grass roots) forms (see Appendix C).

Generally, the IRS code defines lobbying as communications with lawmakers (direct) or members of the general public (grassroots) that are designed to persuade them to take a specified action regarding a particular piece of legislation (Vernick, 1999). Communications on legislation, whether that legislation has been formally introduced or not, are limited. However, no one restricts general conversations with legislators about particular policy problems and their possible solutions. Grassroots lobbying refers both to a communication on specific legislation and a general “call to action” (Fishman and Schwarz, 2000).

Public policy also limits the source of funds used to finance nonprofit lobbying. Lobbying is only permissible with funds derived from private donations, public funds cannot be used for any type of lobbying. As discussed above, Congress has limited the total amount that a nonprofit may spend on lobbying; thus, the use of tax-deductible donations for lobbying is also limited.

The IRS clarified the lobbying expenditure guidelines for charities electing the “expenditure test” (26 U.S.C. Section 501(h)(1976)). The revisions to the IRC, passed in 1976 and further clarified in an IRS circular in 1990 (A-122), provide specific limits for lobbying. The “h election” is available to charities that notify the IRS of their intent to operate under the special provisions of the section. Electing charities are then governed under a sliding fee scale specifying the amount of permissible lobbying. An organization may spend up to $100,000 of the first $500,000 in total expenditures on all lobbying efforts; no more than 5% or $25,000 of this may be spent on grassroots lobbying. Thereafter, the “ceiling amounts” of the “expenditure test” are based on a percentage of lobbying expenses to total expenses. The amount that may be spent on lobbying decreases as total expenses increase up to total lobbying expenses of $1 million. The IRS affords charities that occasionally violate the “ceiling amount” the intermediate sanction of paying an excise tax on the excess lobbying amount. If the charity exceeds the limits repeatedly, however, the IRS will revoke their charitable status.

The Political Climate and Changes in Advocacy

Currently very few charities have chosen to file as "h electors" and enjoy the clarity afforded by these provisions for advocacy limitations under the tax code (Stengel et al., 1999). Most charitable nonprofits, therefore, advocate within an environment of legal uncertainty. Nonprofit scholars have published work aimed at reducing the fear of advocacy produced by this uncertainty (Smucker, 1999; Vernick, 1999; Aarons, 1999). The uncertainty in the nonprofit community heightened in the mid-1990s as politicians began to focus on the legalities of charitable advocacy.

Shortly after the Republican party gained a majority in Congress in 1994, legislators began to propose legislation to reduce the ability of charitable nonprofit organizations to use private funds to lobby Congress. Since no public funds can be used for lobbying, this legislation would have drastically reduced the political voice of nonprofit organizations at the federal level.

During the first session of the 104th Congress, two legislative proposals were introduced that sought to restrict the lobbying activities of nonprofit organizations further. In the Senate, the Simpson Amendment proposed to forbid lobbying by social welfare organizations that were also federal grant recipients. "The goal of the Simpson Amendment was to force section 501(c)(4) nonprofit organizations either to give up any federal funding they receive or to reorganize as a section 501(c)(3) corporation, which by law would severely limit their lobbying activities" (Moody, 1996,122). Subsequently, President Clinton signed the Lobbying Reform Act (2 U.S.C. Section 1611) including the Simpson Amendment, into law.

In 1995, Representatives Ernest Istook (R-OK), David McIntosh (R-IN) and Robert Erhlich (R-MD) proposed "Stop Taxpayer Funded Political Advocacy," in the House. Representative Istook charged that nonprofits were engaging in "taxpayer abuse." Istook and his colleagues argued that public tax dollars were "being used by special interest groups to lobby Congress for tax dollars" (Bunker, 1995). The sponsors succeeded in attaching a fully-developed version of the draft as an amendment to H.R. 2127, the Departments of Labor, Health, and Human Services, and Education and Related Agencies Appropriations Act of 1996, as Title VI, Section 601 (a)(1), and 601(c)(1) "Political Advocacy: Prohibition on the Use of Federal Funds for Political Advocacy." This amendment to the 1996 appropriations bill called for a halt to federal funds for nonprofit organizations that engaged in lobbying over the "political advocacy threshold."

As originally proposed, the Istook amendment would have limited the annual political advocacy spending of all federal grant recipient 501(c)(3) and 501(c)(4) organizations to 5% of the first \$20 million of the budget and 1% of its budget more than \$20 million (212 H.R. 2127, 104th Cong., 1st Session, sections 601-606, 1995). In addition, the Istook Amendment defined political advocacy much more broadly than the current "lobbying activities" limitations in the IRC. "Political advocacy" also included litigation work and involvement in agency proceedings at the federal, state, or local government levels. In addition the bill prohibited in-kind or financial donations to, and also the conduct of business with, any person or organization whose political advocacy expenditures accounted for more than 15% of its total current or prior fiscal year budget.

Finally, the Istook Amendment included strict compliance and reporting requirements, and would have subjected the affected organizations to random government audits where the burden of providing "clear and convincing" evidence of compliance would have fallen on any charity that was a government grantee.

When the Senate failed to include similar language in a Labor appropriations bill, Rep. Istook began to search for other pending legislation to which he could attach this political advocacy language (Cox and McClosky, 1996). Congress considered several versions of the Istook Amendment in the latter half of the 1990s. All versions of the Istook Amendment were ultimately, if narrowly, defeated. Opposition to nonprofit advocacy continues to be considered in Congress. For example, in 1997 further restrictions were considered when a bill entitled "Taxpayer Protection and Money Laundering Prevention Act" (H.R. 233) was debated by the 105th Congress (Vernick, 1999).

One nonprofit organization sought to challenge the constitutionality of restrictions on the political speech of tax-exempt organizations. In 1983, the Supreme Court heard *Regan v Taxation With Representation (TWR) of Washington* (1983). In a unanimous opinion authored by Justice Rehnquist, the Court subscribed to the "greater includes the lesser" philosophy. It noted that Congress was not required to provide a tax exemption to organizations, and thus the limitations on lobbying did not restrict the rights of those groups. In addition, the Court indicated that the ability of TWR to form a sister

501(c)(4) organization whose lobbying would not be restricted contributed to the constitutionality of the restrictions on the political speech of the 501(c)(3) in the tax code. Essentially the Court ruled that the "dual organization" provisions in the IRC allow organizations to circumnavigate the limitations on the political speech of charities, thus rendering them constitutional. In a concurring opinion, Justice Blackmun emphasized the importance of the "dual organization" system for First Amendment purposes:

> Any significant restriction on [the dual structure] would negate the saving effect of section 501(c)(4) . . . Should the IRS attempt to limit the control these organizations exercise over the lobbying of their section 501(c)(4) affiliates, the First Amendment problems would be insurmountable. [This would effectively] perpetuate section 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying. In my view, any such restriction would render the statutory scheme unconstitutional (*Regan*, 461 U.S. at 553-54).

Not all organizations choose (or are able) to use a 501(c)(4) organization to lobby for them (Fishman and Schwarz, 2000). In *Regan*, the Court ruled that advocacy by charities is not limited, simply because this "dual organization" relationship is available. However, the financial limitations of many nonprofits may preclude this possibility. Corporate laws and tax regulations dictate that the financial records of the sister organization must be kept separately. In addition, the "lobbying arm group" would have to file separate informational returns and, in several states, would also be subject to separate independent audits. Although the actual costs of these additional internal and external services would vary considerably, based on the accounting firm's rates and state regulations, they would be cost prohibitive for many groups.

Furthermore, the implementation of the Simpson Amendment regulations significantly reduces the benefits previously associated with the "dual organization" structure. Although charities are still able to associate with a social welfare nonprofit, the relationship is far more complex. The associated group, if it lobbies, may not receive any federal grant dollars. The associated charity's financial support of that social welfare organization would be subject to close scrutiny to ensure that they funneled no federal dollars from the charity to support the lobbying group. Therefore, this organizational arrangement is much less appealing for accomplishing advocacy for nonprofits today.

The missions of the nonprofits that want to engage in advocacy have not changed, but the political environment in which they operate has changed. Existing, new, and proposed regulations limiting lobbying behavior have left many nonprofits wondering how they can legally influence public policies. Restrictions on lobbying and litigation opportunities and advantages may lead some charities to advocate in the courts. This study seeks to understand court-based advocacy by charities.

A Model of Court-Based Advocacy by Charities

Collectively, this body of research suggests several areas that are ripe for additional inquiry. Research on group participation in the courts has not offered a systematic explanation for why groups choose to participate in the courts, including those choices concerning the form and frequency of court-based participation. Furthermore, nonprofit organization scholars have not specifically studied the use of the courts as an outlet for advocacy by charitable nonprofits. Finally, interest group scholars have not addressed potential effects of distinctions in corporate status. This study seeks to develop and test several prepositions that might account for court-based advocacy among charitable nonprofits.

The organizational decision to engage in advocacy is in some ways similar to models drawn from sociology to explain the impetus for social movements. One classic theory of social movements suggests that threats and opportunities predicate collective action (McAdam, 1999). According to this theory, the severity of the threat drives the collective action (Smelser, 1962). Certain tensions are endemic to society (Wilson, 1973). A perceived threat is generally not a sufficient impetus for advocacy; a group must also be able to take advantage of internal characteristics and various opportunities that will enable it to act. Individuals, despite the nature of the threat, probably cannot mobilize without the organizing capabilities of either formal or informal groups (Shorter and Tilly, 1974). Therefore, this model assumes that an organization in society that has a defined mission to advocate for the stated policy preferences of the group will not only react to perceived threats, but will also actively seek opportunities for policy influence.

Within the model, the opportunities and constraints are categorized as either internal to the organization or part of the external environment. The external environment may "condition both the objective possibilities for successful protest as well as the popular perception of insurgent prospects" (McAdam, 1999, 11). I assume that a charitable nonprofit organization will act on opportunities within the constraints of both its internal capacities and external environment (see Appendix D, Figure 2).

Internal constraints will come from the governing board, the governing documents of the organization, and the operational limitations present in all businesses. The governing board establishes parameters through the mission statement, bylaws, and strategic plan of the nonprofit. In addition, this body establishes the policy directives of the group. Together they set the organizational goals and a plan to achieve those goals. The goals of the organization influence the court participation decisions of interest groups (Wasby, 1983), and I assume that the same will hold true for charities. The organizational goals, coupled with the capacity of the group to engage in activities in accordance with these factors, form the internal factors considered in this model. Specifically these internal factors include group purpose, financial capacity, member preferences, and institutional history of political action.

The mission statement of the group will determine the group type. The mission typically indicates whether the group exists to promote the rights of a group of people, or to encourage the civic involvement of citizens. Due to the nature of their mission, those charities formed to secure and protect legal and civil rights for a minority group in society are more likely to turn to the courts for remedy than those formed to organize civic participation (Boris and Mosher-Williams, 1998).

In addition, the financial capacity of a group can determine whether a group can pursue court-based advocacy. Financial capacity of the organization will represent the group's ability to finance current efforts, and determine whether the group can maintain a long-term court engagement. Organizational resources have been found to influence the activities of other interest groups (O'Connor, 1980; Caldeira and Wright, 1990) and I expect that these resource considerations will be important for charities as well. A group can only realize an opportunity and react to a perceived threat if the group can finance the advocacy both in the short and long-term.

The bylaws establish the organizational structure (Smith Bucklin and Associates, 1991). For a charitable nonprofit, the organization's decision-making structure includes a voluntary board of directors and may also include dues-paying and voting members. Membership is a vague concept that is not well defined in the tax code. Unfortunately, the role of members in charitable court advocacy is also ambiguous. What seems more certain is that the group's leaders are likely to heed the preferences of those members who are financially supporting the organization. Therefore, for the purposes of this study, I will define a "membership organization" as those charities with dues-paying members. Dues-paying members may constrain the organization from advocating in the courts (Spill, 1997). Managers of the charity may perceive a resistance among members to participate as advocates in the courts. Members may resist because a controversial stance in court may tarnish the public reputation of the charity. However, the presence of dues-paying members may also encourage a charity to implement certain legal strategies in order to provide proof to its members that it is actively pursuing the stated policy goals of the group (O'Connor, 1980). For example, part of the motivation for a charity to join an amicus curiae brief may arise from the fact that management can report the activity in the group's next newsletter distributed to the membership. Therefore, the presence of members may at times constrain and at other times encourage court participation of charities.

An institutional history of prior decisions to engage in political action may be the most influential internal factor. If a group has never been politically active, then it faces greater uncertainty when engaging in court-based advocacy. Some of these uncertainties arise from the external constraints that will be discussed below. However, many of the institutional resources that are internal to the group are simply unknown if the group has never engaged in advocacy. If previous decisions have caused the group to act in a political way, then there is presumed to be institutional support for the notion. In addition, organizational advocacy experience is thought to build internal capacity in a way somewhat similar to the capacity-building found among voters that are active in civic organizations (Verba et al., 1995). Members of the staff may have an improved understanding of the lobbying regulations as well as the legal environment of the charity.

Finally, the model takes into consideration those external environmental factors that may impinge on the group's advocacy decisions (see Appendix D, Figure 2). For all of the groups in the study, the Internal Revenue Service has established parameters for group-related political activities. In addition to these government regulations, the court-based advocacy choices of charities are expected to be affected by the court rules (Kobylka, 1991). Rules control for variance between levels of the court. For example, one would expect to find amici only in intermediate appellate courts and courts of last resort. In addition, rules governing jurisdiction are relevant in understanding litigant choices for any party, with some disputes falling into state court, others in federal court.

The political environment is also an important external factor in the court-based advocacy decisions of nonprofits. As the political environment changes, incentives or disincentives may motivate the group to seek particular avenues for their advocacy. As discussed earlier, legislative proposals such as the Istook amendment may induce groups to seek additional or different venues for their advocacy. Interest groups, like charitable organizations, are influenced by the political activities of policy makers and the general political environment in which they operate (Scheppele and Walker, 1991). Finally, the external political environment includes interaction with other groups. The presence of a competing group on a case may encourage an organization also to participate. In contrast, the presence of cooperating groups may discourage the participation of an organization if the group feels less responsibility to “carry the banner” for a shared policy goal (Spill, 1997).

However, a cooperating group may also serve as a source of information for opportunities to advocate in the courts. The presence of other groups may therefore serve as constraint or an opportunity in the model.

Conclusion

Charitable organizations must weigh all these factors when deciding whether to advocate. Many charities will decide not to become involved in the policy process. As discussed earlier, however, some charities are formed to advance citizen participation in democracy and to protect the civil rights of minorities. These organizations, although charitable in nature, also seek to influence public policies whether drawn into the arena by threat, opportunity, or some combination thereof. Although lobbying the legislative branch is perhaps more commonly thought of as the appropriate forum for a group to exert influence on public policy, groups have also used the courts to accomplish this goal

(Vose, 1959; Caldeira and Wright, 1990; Epstein and Kobylka, 1992). While the courts are not often thought of as a forum for political influence, some types of groups may find this venue an appropriate forum for their advocacy efforts. Given the constraints on their advocacy in other branches, charities in particular, may want to consider court-based advocacy in their strategic plan of political involvement. The charity will consider three facets of court-based advocacy: (1) whether to pursue such a strategy at all, (2) which legal strategy to employ, and (3) how often the group will advocate in the courts each year. These decisions are considered by examining the participation of advocacy charities in court and the strategies and frequency of their participation.

CHAPTER 3: WHAT SORT OF CHARITY ADVOCATES IN COURT?

Introduction

Court participation has the potential to be an important advocacy technique for nonprofit organizations, but is often overlooked by scholars and underused by practitioners (Reid and Krehely, 2001). To explain why some charities choose to use the courts as a forum for advocacy efforts, while many others do not, this chapter examines the participation of advocacy charities in the courts throughout the decade of the 1990s. Focusing only on charities with sufficient revenues that indicate a desire to advocate,[4] I found that 23 percent of the 856 groups selected for this study participated in the courts during the last decade. This finding may reinforce the contention of Reid and Krehely that many charities may be overlooking the courts as an advocacy venue or it may be that some charities are not well-suited to use court advocacy strategies. If charities are to consider the courts a potential advocacy forum in the future, understanding the factors that currently influence their court-based advocacy choices is important.

Existing research offers substantial insights into the factors that may affect an interest group's decision to use the courts (O'Connor and Epstein, 1983; Caldeira and Wright, 1988; Spill, 1997). One line of research suggests that groups "turn to" the courts because they see a greater potential benefit in the unique opportunities afforded by the

[4] The range of 1999 revenue of the 856 groups included in the study was \$3.1 million to \$1.6 billion. This represents the 2.5% at the top income levels of the 35,000 advocacy groups in the U.S., and 6.5% of the 13,000 advocacy charities that face substantial government limitations on the dollars they spend on total advocacy because their annual budget exceeds \$500,000.

judicial branch (i.e., Caldeira and Zorn, 1999). For example, a group may choose to participate in the courts if groups with opposing policy preferences appear in the courts. Beyond incentives associated with legal policy goals, groups may participate to align themselves with a cause. Groups seeking to draw public attention to their cause may find the indirect symbolic effects of legal participation exceed the importance of the direct legal outcomes (Silverstein, 1996). Groups may also "turn to" the courts in order to reinforce the advocacy efforts they are making through both direct and grassroots lobbying (McFarland, 1998; Orren, 1976). Finally, a group could "turn to" the courts to assure implementation of a specific policy (Kobylka and Epstein, 1992).

In contrast, other scholars seem to view the courts as an advocacy venue of last resort, asserting that groups appearing in the courts do so only after they have "turned away" from the political branches of government. This view is represented even from within the courts, as evidenced by the comments of Justice Brennan, who wrote in the opinion for *NAACP v. Button* (1963):

> Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grievances (371 U.S. at 429-30).

Groups with a disadvantaged position in the political branches may seek to exert policy influence in the courts (Cortner, 1968; Olson, 1990). For example, some non-majoritarian groups have found it difficult to gain legislative support and have turned away from that venue to the courts, where they minimize majoritarian influences.

When Do Charities Go to Court?

These two lines of research are informative on this matter. One line of research suggests that groups "turn to" the courts, while other scholars suggest that groups in the courts have "turned away" from the political branches. At times, assuming groups will seek out the particular benefits of the courts for their advocacy efforts seem reasonable. However, at other times groups are likely to seek the intervention of the courts only after they have been unsuccessful in a political venue. This study assumes that as various environmental and organizational factors change, a group's propensity to advocate in the courts also changes. There exists among charities a latent propensity to go to court, but we are not able to observe this directly, only the resulting behavior. This behavior results in charities choosing to "turn to" courts or to "turn away" from the majoritarian legislative venues.

Traditionally, research on group activity in the courts has focused on the effects of groups as litigants or as amici. While this study finds these are the two most common strategy choices used by groups, it is important to note that charities advocating in the judicial venue make a variety of legal strategy choices. Legal strategy choices include not only bringing litigation and filing an *amicus curiae* or "friend of the court" brief, but also filing as an intervenor between the parties of an existing case or supplying counsel for litigants or amici. Therefore, this study takes a broad view of participation and defines court participation as: *any* legal strategy choice that allows a group to advocate for a particular policy outcome on a case.

Although a group's level of influence and control varies by strategy choice, all strategies represent a type of legal participation in which a group has an opportunity to influence the policies that arise from the decision of the court.

Studies of groups in the courts suggest many organizational characteristics and environmental factors that are likely to influence a group's participation decisions (Cortner, 1968; O'Connor, 1980; O'Connor and Epstein, 1983; Kobylka, 1991; Caldeira and Wright, 1990; Scheppele and Walker, 1991; Spill, 1997). This chapter draws heavily on those results to identify the influential factors in the court participation choices of advocacy charities. As specified in the court-based advocacy model in Chapter 2, both internal and external factors are expected to influence the group's decision to participate. Internal factors are those factors that relate to the purpose and resources of the group. Groups seeking to advocate in the courts are likely to be influenced by several internal factors including the group's financial capacity, purpose, level of involvement of members, institutional history of political participation, and geographic location. The discussion then turns to the external factors that relate primarily to the environment within which the organization operates. The only external factor considered in this level of the study is the regulatory constraint that prohibits the use of public funds for advocacy.

Internal Factors

Several studies have shown that particular organizational characteristics will make a group more likely to engage in court-based advocacy. O'Connor (1980) surveyed the literature and found an extensive list of organizational characteristics had been tested in this regard. Her survey suggested that many characteristics are positively correlated with a group's propensity to litigate: group longevity, staff resources, well-defined issues, financial resources, technical capacity, publicity aptitude, and for umbrella organizations - coordination with affiliates.

In addition to O'Connor's survey, several studies have pointed to the importance of financial resources to a group's court participation (Caldeira and Wright, 1990; Scheppele and Walker, 1991). Financial resources may be particularly important to understanding court participation decisions. This model takes into consideration the financial capacity of the organization to participate in the courts by controlling for gross income and fund balance. The fund balances represent the profits retained by the organization. This assessment of viability of the financial position of the organization can help managers and board members determine the ability of the organization to maintain the court-based advocacy over the long-term. I assume that organizations with lower levels of fund balances generally enjoy less financial stability and therefore will be less likely to engage in advocacy. In contrast, groups with higher fund balances can absorb losses that may accompany a long-term commitment in the courts. Although these are advocacy organizations, the assumption is that their priority would be to maintain the organization, before considering new projects. Gross income represents a control for the flow of cash into the organization. This is important because the managers and board members must know that they can meet the financial obligations of their normal operations, as well as any additional expenses arising from advocacy activities. Both the cash flow and the overall financial status of the organization will affect their ability to participate in advocacy activities of any kind.

H1: FINANCIAL CAPACITY - Groups with more gross income and higher fund balances will be more likely to participate in the courts.

Gross income and fund balance figures used in the analysis are those reported by each group on their Form 990 information returns filed from 1990 through 1999.

The purpose or mission of the group should determine the political focus, if any, adopted by the charity. Charitable advocacy groups may be classified into three categories: rights-oriented groups, civic participation groups, and others (Boris and Mosher-Williams, 1998). Groups focused on protecting the rights of minority groups may more readily accept a long-term, goal-oriented strategy (McCann, 1998). Groups that see themselves and their constituents as having rights that are not properly protected under the law are willing to use the courts despite the high cost of potential long-term commitment. Since the courts may provide a more lasting solution, a group focused on civil rights may be more likely to litigate. Boris and Mosher-Williams (1998) find that a rights-oriented nonprofit, such as NOW, is likely to engage in more advocacy than, for example the League of Women Voters, a civic participation group.

H2: GROUP PURPOSE - Rights-oriented groups, as opposed to civic participation groups, are more likely to advocate in the courts.

Groups are categorized as either "Rights-oriented" or "Civic Participation" according to the Boris and Mosher-Williams criteria, and "Rights-oriented" groups are coded as a "1" in the data set.

Although membership is often a vague notion that no one has adequately defined in government regulations studies on the topic, many scholars argue that the level of member involvement in the group is related to the level of the group's political involvement (Reid and Krehely, 2001B; Kobylka, 1991; Spill, 1997). If the bylaws of the organization establish membership requirements that include a dues structure, then members are also likely to be decision-makers at some level of the organization (Smith, Bucklin, 1991). However, the direction of the effect of membership on the political involvement of the group is not clear. Some members will not favor court participation if it does not fit their image of the organization. Managers often feel constrained by their members and this constraint may reduce the level or frequency of the group's court participation (Spill, 1997). Due to their additional status as significant financial donors, the opinions of select members, or patrons, may be given a great deal of consideration in advocacy decisions (Gais, 1996). Yet the group's managers are likely to defer to the lawyers in the legal context so that court-based advocacy gives patrons far less influence than legislative lobbying. Scheppele and Walker (1991) suggest that litigation is therefore likely to be less attractive to patrons than other forms of political activity.

In contrast, O'Connor's research shows that organizational maintenance concerns may actually cause groups to turn toward the courts (1980). Members expect the group to use their dues and donations to produce mission-based results. Managers may be more likely to participate in the courts to meet their dues-paying members' expectations of group activity. While one line of research suggests that the influence of dues-paying members will increase a group's likelihood to participate in the courts, other studies conclude that members lead groups away from the courts. Due to the contradictory claims in the literature, I test competing hypotheses regarding the effect of dues-paying members on the organization's court participation.

H3: EFFECT OF DUES-PAYING MEMBERS -

A: Groups with dues-paying members will be less likely to participate in the courts.

B: Groups with dues-paying members will be more likely to participate in the courts.

The decision to advocate may turn on the belief of nonprofits that they will be effective in that venue. Gais and Walker (1991) suggest that most groups choose a strategy of political action early in their organizational development. As groups gain expertise in a particular advocacy process in either the legislative or executive branch, they may be less motivated to turn to the courts to attempt to influence public policy. However, because we expect judges to follow prior court decisions due to the norm of *stare decisis,* we often think litigation to have a more long-lasting impact on public policy than those subject to changes in political preferences (Scheppele and Walker, 1991). For example, groups advocating for people with disabilities lobbied Congress and the President extensively before the passage of the Americans with Disabilities Act (ADA) in 1991. However, universal implementation of that legislation was not immediate. Therefore, many nonprofit organizations turned to the courts to preserve the legislative ADA victory (McCant, 1999). Following victories in other venues, groups may turn to the courts to preserve or enforce those victories. In addition, groups with a propensity for advocacy may be more aware of opportunities for all types of advocacy. Once a group has become involved in advocacy activities, other groups may seek their assistance on other projects, including litigation. This heightened level of activity would increase the likelihood of all types of court-based advocacy. I test competing hypotheses regarding the effect of a group expending resources on either grassroots or legislative lobbying on their participating in the courts.

H4: EFFECT OF ORGANIZATION'S POLITICAL ACTIVITY -

A: Groups that have either grassroots or legislative lobbying expenditures are less likely to participate in the courts.

B: Groups that have either grassroots or legislative lobbying expenditures are more likely to participate in the courts.

Finally, recent research on nonprofit organizations suggests that the geographic proximity of the organization to Congress may facilitate advocacy in that venue (Krehely and Golladay, 2001). Many presume proximity aids in legislative lobbying efforts. Direct contact between the organization and representatives or senators is a preferred method of advocacy (Smucker, 1999). Groups headquartered in Washington, D.C. will be in a better position to accomplish direct lobbying. Therefore, the presence of a group in the nation's capital may be an indicator of the group's desire to focus their advocacy efforts in Congress.

H5: Groups that are located in Washington, D.C. are less likely to participate in court-based advocacy.

External Factors

The United States government grants billions of dollars to a variety of organizations each year. In 1990, the government granted more than $39 billion in public funds to more than 40,000 organizations (Istook, 1995). More than 25% of the annual revenues of the nonprofit sector are from the government (Salamon, 1999). The extent to which a group's funding relies on governmental sources varies substantially. Many charities, especially in the social services, receive significant portions of their annual operating budget from federal, state, and local governments. Charitable nonprofit organizations depend upon government grants for financial solvency (Smith and Lipsky, 1993). Recognizing this financial need, the government has attached conditional constraints to grants to constrain the political conduct of the recipients (Moody, 1996). Groups reliant on government funding may be reluctant to engage in lobbying because they are risking not only their tax exempt status, but also a source of income. Groups receiving substantial government funding often concentrate on developing their expertise in the management of grants and contracts. Consequently, this concentration on government funds reduces how much attention the organization gives to fund development from private sources. For these reasons, as the level of government funds increases, the level of private funding may decrease (Smith and Lipsky, 1993), thus reducing the availability of private funds that could be used to advocate in the courts.

H6: GOVERNMENT RESTRICTIONS - Groups that receive public funds are less likely to participate in the courts.

Data and Methods

The "Core Files Database" for the years 1990 through1999, was obtained from the National Center for Charitable Statistics (NCCS) at the Urban Institute. This database records all information from the 990 information returns filed by charities with the IRS. These files include financial and activity data from all 501(c)(3) organizations with income exceeding $25,000. I began by focusing on the information reported in the 1999 tax year on the 990 forms of all reporting U.S. charities. From the 1999 files, I extracted information on all organizations with an interest in advocacy based on a combination of their NTEE and Activity Codes on each group's 990 form. The extraction yielded a list of approximately 35,000 charities. This list was then sorted by reported 1999 income level. I then extracted the top 2% of the groups, or those with the highest levels, above approximately $3 million, of income. This extraction yielded a list of 856 charitable nonprofits interested in advocacy. This list was used as the master group list for the study.

I used the master group list to research court involvement information. The data used for this stage of the research are based on the collection of cases from the Westlaw ALLCASES database.[5] For each of the 856 group names, I used the ALLCASES database to determine whether or not the group's name was mentioned in an opinion during the years 1990 - 1999. To collect data on the Dependent Variable (*Participation*), if the group participated on any case, I coded the dependent variable as 1 = participated.[6]

---

[5] The ALLCASES database includes all published and some unpublished opinions for courts at the federal and state levels.

[6] I explain the variable concepts and operationalization of each variable in Table 3.1.

I reviewed each case to ensure that the name of the group appeared in the published opinion because they were voluntary participants in the case. Participation was defined as appearing in the opinion as a litigant, amicus, named counsel for a party, named counsel for an amicus, intervenor, or movant. I did not include as participation any case in which the organization was sued at the trial level, or cases in which the group had no choice in appearing in an appellate court. Legitimate advocacy participation was deemed to be only those cases in which the charity *chose* to participate in a case being heard by a court. I omitted all other cases in which the group's name appeared in the opinion. If the search of cases did not reveal legitimate choice for participation by the group, I coded the dependent variable as zero.

I collected the internal organizational data from the NCCS Core Files database. I extracted the annual data on gross income and fund balance for 1990 - 1999 for all of the 856 advocacy groups included in the study. I then computed 10-year averages for each of the financial variables for each group and divided this average by $1 million in order to calculate the values of *Average Gross Income/$1 Mil.* and *Average Fund Balance/$1 Mil.*

The NCCS data were also used to find out whether the group is involved in either grassroots or legislative lobbying. *Participate in Legislative or Grassroots Lobbying* is coded "1 or YES" if the group reported expenses in any study year for each of the following categories: tax exempt grassroots lobbying, tax-exempt legislative lobbying, or excess lobbying.

A dichotomous variable, *Dues-Paying Members*, is derived from 990 financial data as well. The variable is coded as a "1 or YES" if the group reported dues received as revenue in any year during the study period. In contrast, if they had received no dues during the period, the variable was coded "0 or NO."

The *Rights or Civic Orientation of Group* variable represents the purpose of the group. This dichotomous variable is coded according to the advocacy group universe suggested by Boris and Mosher-Williams (1998). Categorized as Civic Participation or Rights-Oriented groups, their typology is based on the National Taxonomy of Exempt Entities (NTEE) classification and the Activity Codes reported on the 990 information return of the organization in 1999. Groups with NTEE and Activity Codes that indicated a "rights" orientation were coded "1 or RIGHTS" while groups with a "civic-participation" orientation were coded "0 or CIVIC."

The geographic location of the organization is controlled for in the *Based in D.C.* variable. I have coded this variable "1 or YES" if the organization's address reported on the 990 information return is in Washington, D.C. and "0 or NO" if it is not.

The government grants received by groups are not recorded independently in the NCCS Core Files data set, so [7]searching the Guidestar website determined the recipients of public support for the 1999 financial data reported on the 990 information returns. Constructed as a dichotomous variable, *Public Funds*, represents the presence, or absence, of government grants. The presence of government grants are recorded only for one year at the end of the period. Government grants, however, are frequently long-term and renewable and tend to remain a constant source of funding for grantees. Therefore, I

[7] Guidestar (www.guidestar.org.) is an independent charitable nonprofit organization whose mission is to increase the transparency of charitable nonprofit reporting for the public. Their database is, like NCCS Core Files, based on 990 informational return data. The Guidestar database is constructed using a double-entry verification system.

believe this indicator to be a sufficient proxy to represent government restrictions throughout the period. This variable is coded "1 or YES" if government funds were reported in 1999 and "0 or NO" if no government funds were reported in the 1999 tax year. Since the dependent variable, *Participation*, is dichotomous I used logistic regression estimate the model. In addition, I examined the interactions of several dichotomous independent variables to discern more about their impact on the dependent variable.

Table 3.1: Variable Measurement

Variable Name	Concept Measured	Operationalization
Dependent Variable		
PARTICIPATION	Did the group participate in the courts in any way between 1990-1999	The dependent variable is a dichotomous variable coded yes(1) if the group participated in the 1990s. The data were collected from searches of the ALLCASES Westlaw database.
Internal Independent Variables		
AVERAGE GROSS INCOME /$1 MIL.	Does the group have sufficient cash flow to participate in court-based advocacy?	This independent variable is drawn from the National Center on Charitable Statistics [NCCS] Core Files database. It measures the average gross income in the period 1990-1999 reported by the group on their Form 990 in millions of dollars.
AVERAGE FUND BALANCE / $1 MIL.	Is the group profitable enough to be able to add an advocacy campaign to their activities and sustain it long term?	This independent variable is drawn from the NCCS Core Files database. It measures the average fund balance for the period 1990-1999 (in millions of dollars).
RIGHTS OR CIVIC ORIENTATION OF GROUP	Is the group a rights-oriented or a civic participation group?	Information about the group's National Taxonomy of Exempt Entities code and their self-reported activity code comes from the NCCS database. This information is then matched to the group type list provided by Boris and Mosher-Williams (1998) and is coded (1) if the group is rights-oriented.
DUES PAYING MEMBERS	Does the group have dues paying members?	This dichotomous independent variable is a measured yes (1) if membership dues are reported on the group's Form 990. The variable is taken from an examination of the NCCS database Core Files for 1990-1999.
BASED IN D.C.	Is the group headquartered in Washington D.C. with easy access to legislature?	This dichotomous independent variable is based on information on location drawn from the NCCS Core Files database. It is coded 1 if the group is based in D.C.
PARTICIPATE IN LEGISLATIVE OR GRASSROOTS LOBBYING	Does the group engage in legislative and/or grassroots lobbying ?	This dichotomous independent variable is drawn from the NCCS Core Files database. It is coded (1) if the group reported grassroots, and/or legislative exempt and excess lobbying expenditures reported on Form 990 between 1990 and 1999.
External Independent Variables		
PUBLIC FUNDS	Does the group receive any government grants?	This dichotomous independent variable is drawn from the Guidestar website database. It measures whether or not the group reported revenues from government grants in 1999 on their Form 990.

Results

A summary of the descriptive statistics of the data is presented in Table 3.2. After omitting the missing cases from the analysis, 659 groups remain; of these, 146 participated in court-based advocacy during the 1990s. Approximately 60% of the advocacy charities in the study report receiving government funds, while approximately 22% of the groups have dues-paying members (see Table 3.2).

Table 3.2: Summary Statistics of Variables

Variable Name	Frequency	Mean	Std. Dev.
Participation	**Y= 146, N=513**	**.22**	**.42**
Average Income*	**--**	**3.24**	**17.08**
Average Fund Balance*	**--**	**5.46**	**23.84**
Group Type	**Rights=128, Civic=531**	**.19**	**.40**
Dues-paying Members	**Y=144, N=515**	**.22**	**.41**
Based in D.C.	**Y=46, N=613**	**.07**	**.26**
Participate in Lobbying	**Y=124, N=535**	**.19**	**.39**
Government Grants Received	**Y=389, N=270**	**.59**	**.49**

N=659 groups; * indicated millions of dollars

The results of the model, illustrated in Table 3.3, reveal several interesting, and in part unexpected, findings. Overall the model helps to explain approximately 9% of the variation in court-based advocacy among advocacy charities (Pseudo R-square = .092). In addition, knowledge of the independent variables, compared to basing the predictions only on the marginal distribution, reduces the error in prediction by 10% (See Table 3.3). The results of this study suggest that the external constraints put on these groups by the government do not influence their court-based advocacy participation decisions. However, several internal group characteristics considered in the study are influential in the group's decision to go to court. Specifically, the analysis in this chapter finds that rights-oriented groups, and also those with involved members, and groups with an institutional history of political involvement are the most likely court-based advocates.

Internal Factors

In hypothesis H1: FINANCIAL CAPACITY, I suggested that both the *Average Gross Income* and the *Average Fund Balance* of charities should have a positive relationship with the group's court-based advocacy participation. The results of the model concerning financial capacity are therefore somewhat surprising. The *Average Fund Balance* variable is not significant in the model (p=.292 for a one-tailed test), suggesting that financial stability is not a consideration in the group's court-based advocacy decision-making process. The group's cash flow however, as represented by *Average Gross Income*, does seem to influence the propensity of court participation. Holding all other variables constant, a standard deviation increase in average income increases the odds of court participation by 2.35 times (see Table 3.4), and the variable is statistically significant (p=.022 for a one-tailed test). Further, when holding all other variables at their means, as noted in Table 3.5, a standard deviation increase in income, when centered around the mean, will increase the probability of court participation by .14.

Table 3.3:

Participation of Charitable Nonprofit Advocacy Groups in the Courts[8]

DV= Participation	B	S.E.	Sig.
INTERNAL			
Average Gross Income /$1 mil.	.05	.024	.022 (1)
Average Fund Balance /$1 mil	-.005	.01	.292(1)
Rights vs. Civic Orientation of Group	.67	.233	.002 (1)
Dues Paying Members	.404	.228	.076(2)
Involved in Legislative or Grassroots Lobbying	1.23	.225	.000(2)
Based in DC	-.045	.370	.451(1)
EXTERNAL			
Government Grants Received	-.028	.204	.445(1)
Constant	-1.89	.198	.000

Logistic regression analysis; N=659 ;Pseudo R Square = .09

The lack of significance in fund balance when we hold all other variables constant, suggests collinearity with average income. Although fund balance alone may not be related to court participation, a likelihood-ratio test on the combined impact of fund balance and gross income on court participation reveals that the joint impact is considerable.[9] The joint effect of these two financial capacity variables suggests that the

[8] One group was dropped from the analysis because the Cook statistic = 2.53 for this case. The remaining 196 groups not included in the analysis were omitted due to missing data for these cases.

[9] The probability >chi-square of the likelihood ratio test is .0005, thus allowing for rejection of the null hypothesis that the financial capacity variables have no effect on court participation.

groups consider court-based advocacy part of their core mission and therefore ensure that these advocacy efforts are included in the financial plan of the organization.

Following the delineation suggested by Boris and Mosher-Williams (1998), I divided the groups in this study into two group types according to the group's purpose: rights-oriented groups and civic participation groups. Existing research has illustrated that group type may be an important factor as groups choose the venues in which to pursue their public policy goals (Kobylka, 1991). Further, rights-oriented groups are more likely advocates than civic participation groups (Boris and Mosher-Williams, 1998) and may be more likely to turn than civic participation groups to seek a legal venue for their advocacy (McCann, 1998).[10] This model estimate supports the contention that Group Type is an important factor in court-based advocacy (see hypothesis H2). The relationship of *Group Type* to the dependent variable, *Court Participation,* in the model is statistically significant (p=.002 one tailed). No matter the values of the other independent variables, being a rights-oriented group makes the odds of going to court 1.95 times greater, holding all other variables constant (see Table 3.4).

10

Rights-oriented advocacy groups are defined as those groups whose primary purpose is to protect and promote the broad civil rights and civil liberties of specific groups, such as children, non-smokers, and seniors. Civic Participation advocacy groups are those groups that undertake activities such as providing a public voice to citizens, educating the public, and promoting community building activities. The civic participation groups engage in advocacy activities as secondary but complementary activities to their organization's primary purpose (Boris and Mosher-WIlliams, 1998).

Table 3.4: Factor Change in Odds

DV = Participation Variable Name	Factor Change in Odds for Unit Increase	Factor Change in Odds for Standard Deviation Increase
Average Income	1.05	2.35
Average Fund Balance	.99	.87
Group Type	1.95	1.30
Dues-paying Members	1.50	1.18
Based in D.C.	3.41	1.62
Participate in Lobbying	.96	.99
Government Grants Received	.97	.99

Taking the values of the other independent variables into consideration, a group that is a typical advocacy charity[11] and also a rights-oriented group has an overall predicted probability of .31 of going to court (see Table 3.6) and is .12 times more likely to engage in court-based advocacy than a civic participation group (see Table 3.5).

The presence of *Dues-paying Members* in a charity also appears to have some influence on court participation. The relationship with the dependent variable is nearly statistically significant (p=.076 two-tailed) and tends to increase the likelihood of participation (B=.404) in the model, providing tentative support for hypothesis H3-B. As reflected in Table 4, the presence of *Dues-paying Members* makes the odds of going to court 1.5 times greater, whatever the values of the other independent variables. For the typical advocacy charity, having *Dues-paying Members* increases the probability of court-based advocacy by 7% (see Table 3.5) bringing the overall probability of going to court to

[11] A typical advocacy charity is defined as a group for which the values of the dichotomous independent variables are set at the mode for the groups in the study and the values of the interval level independent variables are set at the mean for the groups in the study.

.27 (see Table 3.6). Spill (1997) found that CEOs often felt members acted as a constraint on group participation in the courts. This study, however, supports the work of O'Connor (1980) who found that groups are concerned with organizational maintenance, and therefore groups with members are more likely to turn to the courts.

Table 3.5: Changes in Predicted Probabilities for Court Participation

Variable Name	Change in Pred. Prob. As variable changes from 0 to 1	Change in Pred. Prob. As variable changes from ½ SD below base to ½ SD above	Partial Derivative of the Pred. Prob. Rate of the variable
Average Income	**.007**	**.141**	**.008**
Average Fund Balance	**-.0009**	**-.022**	**-.0009**
Group Type	**.124**	**..044**	**.111**
Dues-paying Members	**.071**	**.028**	**.067**
Based in D.C.	**-.008**	**-.002**	**-.008**
Participate in Lobbying	**.244**	**.079**	**.203**
Government Grants Received	**-.005**	**-.002**	**-.005**

Predicted Change in Participation = (0) .79 (1) .21

Participation in Lobbying appears to be strongly related to participation in the courts. In the study, approximately 20% of the groups examined report some type of lobbying expense on their 990 information return (see Table 3.2). For those groups, the impact of political participation experience affects the dependent variable (Std. B = 1.23) and the relationship is statistically significant (p= .000 for a two-tailed test) (see Table 3.3), providing support for hypothesis H4B. However, the odds of court participation are

.96 times smaller for groups that *Participate in Lobbying*, than for those than do not. This result suggests that political experience alone will not lead a group to choose to participate as court-based advocates. However, when we hold the other independent variables at their means, and the group lobbies elsewhere, its probability of court participation is .24 times greater than a group that does not lobby (see Table 3.5). This finding suggests that groups that are active advocates seek opportunities for participation in all venues (see hypothesis H4-B). Typical advocacy charities that had an institutional history of political involvement, as indicated by their expenditures on legislative or grassroots lobbying during 1990-1999, were more likely to be court-based advocates. These results suggest that once charities have decided to engage in political activity, continued advocacy is more likely. Groups may in fact develop expertise as advocates and begin to seek out opportunities across venues. The alternative hypothesis (H4-A), that groups develop an expertise and lobby only in one venue after that, is not supported by these results.

Table 3.6: Predicted Value of Participation for both values of Dichotomous Independent Variables

(all other variables held at their means)

Variable Name	Prediction for Participation when variable = 0	Prediction for Participation when variable =1	Difference
Group Type	**.69**	**.31**	**.38**
Dues-paying Members	**.73**	**.27**	**.46**
Involved in Lobbying	**.58**	**.42**	**.16**
Government Grants Received	**.79**	**.21**	**.58**

Based on preliminary research on the political involvement of charities, I expected to find that groups *Based in D.C.* would advocate in the courts less frequently (see hypothesis H5). However, a D.C. location does not appear to be related to the decision to engage in court-based advocacy. This finding is contrary to other preliminary research that suggests proximity to both Congress and other groups engaged in lobbying will increase the likelihood that a group will specialize in legislative lobbying (Arons, 2001). Thus, the proximity of the headquarters of the organization to the federal government does not seem to influence the likelihood that an advocacy charity will participate in court-based advocacy.

Ceteris paribus, civic participation charities that do not have dues-paying members and are not experienced advocates have a predicted probability of .14 of court participation, while rights-oriented charities with members and lobbying experience have a predicted probability of court participation of .61. Therefore, the combination of these three internal factors increases the likelihood a group will advocate in the courts by nearly fifty percent (.47).

External Factors

In this chapter, the only external factor considered at the group level of the study was *Public Funds*. This variable denotes those charities that received government grants in the last year of the study, 1999. I expected to find that recipients of federal grant dollars were less frequent advocates in the courts due to the increased levels of restriction on political activities often associated with government grants (see hypothesis H6). Government regulations, as represented by *Public Funds*, does not constrain groups in their court-based advocacy participation to a statistically significant degree ($p=.445$ for a one-tailed test). Therefore, I accept a test of the null hypothesis that the presence of government funds has no significant impact on court participation.[12]

This result is somewhat surprising when one considers that stringent restrictions are placed on government grantees regarding advocacy. Grant provisions often prohibit grantees from using government funds in any attempt to influence government policies. Smith and Lipsky (1993) assert those government funds often crowd-out private funding sources. Therefore, I expected the constraints on the advocacy activities of government grantees to decrease the likelihood of group participation. These results suggest that the current government regulations set up through grants and contracts are not relevant to the court-based advocacy decisions made by these groups.

Discussion

This chapter presents the first step in the detailed analysis of the internal and external factors that influence a group's participation in the judicial system. This analysis offers some interesting findings on the participation decisions of charities. No support was found for the contention that nearly all charities that want to lobby are headquartered in Washington, D.C. In addition the results of the study do not show support for the effectiveness of current government regulations seeking to constrain the political activity of charities.

However, several other internal group characteristics, such as the financial capacity variables (when considered together), experiences with political activity, the presence of members, and group type, are found to be important factors in predicting which groups

---

[12] The likelihood- ratio test resulted in a probability > chi-square = .89.

will choose to participate in the courts. Boris and Mosher-Williams (1998) suggest that rights-oriented groups are more active in all types of lobbying activities. This study supports their conclusion and shows that rights-oriented groups are more likely to engage in judicial lobbying than civic participation groups.

Perhaps the most important finding of the study relates to the lobbying activities of the group. Charities engaging in grassroots or legislative lobbying are more likely to participate in court-based advocacy as well. These results highlight the importance of an institutional history of political activity within a charity. The public view of charities as apolitical groups seems to reinforce the importance of advocacy experience. The public perception that charities should not be involved in politics may produce resistance among the managers, board members, and dues-paying members if the participation choice is the group's initial foray into politics. However, among charities that have experience in advocacy activities, dictated at majoritarian branches of government, the decision-makers of the group are more likely to perpetuate their advocacy behavior in the judicial branch as well.

Managers of some membership groups suggest they feel constrained by member preferences (Spill, 1997). However, this study finds support for the opposite viewpoint that charities with dues-paying members are more likely to participate in court-based advocacy than other groups. A group's involvement in the courts helps to satisfy its organizational maintenance requirements (O'Connor, 1980). In addition, the presence of dues-paying members in a charitable organization may represent a higher level of organizational sophistication than would be present in a group with less involved members. Groups that have internal mechanisms in place to secure, collect, and track dues from members, may also have the internal organizational supports necessary to become involved in politics and to maintain advocacy efforts in various branches.

Finally, this study presents the first analysis to find that government funding does not affect the judicial activities of charitable nonprofit groups. Advocacy charities receiving federal government grants are not less likely to engage in court-based advocacy than charities that do not face the advocacy limitations associated with these grants. The spirit of the government regulations prohibiting lobbying with federal funds, and among social welfare organizations that are grant recipients, would suggest a desire to eliminate the advocacy activities of many nonprofits. Despite government conditional constraints attached to grants, the government has not been successful in limiting this form of advocacy.

The study now turns to an analysis of the legal strategy choices of charitable nonprofits that have decided to participate in the courts. To further assess the impact of internal and external factors, I examine the annual frequency of case involvement among advocacy charities in Chapter 4.

CHAPTER 4: THE PARTICIPATION OF ADVOCACY CHARITIES IN COURT: AN EVENT COUNT ANALYSIS

Introduction

A great deal of existing literature focuses on the decisions organizations make regarding when and where to lobby (Walker, 1991; Baumgartner and Leech, 1998; Hojnacki and Kimball, 1998; Hansford, 2001; Spill, 1997). Scholars have also addressed this important question, as discussed in previous chapters, in studies explaining the activities of organized interests in the courts (e.g., Caldiera and Wright, 1990; Kobylka, 1991; Scheppele and Walker, 1991). Most scholars assume that the reason groups turn to courts is to "etch their policy objectives into law" (Epstein and Kobylka, 1992). Research has shown that the tendency of the courts to favor incremental changes over radical departures from precedent, favors groups who turn to the courts repeatedly to address their policy goals (Kobylka, 1991; O'Connor, 1980; Galanter, 1974). However, beyond supplying evidence that a repeat player strategy may increase success rates, these lines of research have not developed a systematic explanation for the variation in the annual participation rates among groups.

The groups included in this study vary dramatically in their annual rates of court participation. For each of the 856 groups included in the study, I calculated the rate of annual participation, for a total of 8560 group-years. While most groups do not engage in court-based advocacy in most years, 6376 had group-years where the group had no participation, some groups engage in court-based advocacy regularly. For example, in

224 group-years, a group participated in one case and in fourteen group-years, a group participated in six cases within one year. Further, one group advocated in the courts sixteen different times within one year.[13] In this analysis, as in Chapters 3 and 5, all legal strategies are considered to constitute participation, including filing as a litigant, filing an amicus curiae brief, supplying counsel, and appearing as an intervenor or movant on a case. Also, as in the previous chapters, I begin with the assumption that charities are acting to influence public policies, and will participate in the courts whenever opportunities for court-based advocacy match their organizational goals. This analysis seeks to supplement our knowledge of when and where groups lobby by identifying systematic factors that explain variation in the frequency of annual court-based advocacy participation. Why do some groups choose to advocate in the courts often during one year, while most charities ignore the courts as a venue for advocacy altogether?

A Theory of Annual Court-Based Advocacy Participation Rates

Judges hear many cases that have policy implications each year in the trial, intermediate appellate, and last resort levels of the state and federal courts each year. Charities that have public policy goals may become aware of many opportunities for court-based advocacy throughout the year. The decision-makers within the charitable organization must make a choice whether or not to participate in the courts each time an opportunity is presented. As discussed in Chapter 2, there are many reasons that a charity may engage in court-based advocacy. The cumulative participation analysis in Chapter 3 suggests that members of the organization may encourage groups to participate in the

---

[13] See Table 4.2 for more information on variation in levels of participation.

courts. The results of the strategy analysis in Chapter 5 show that the presence of other organizations may also increase the likelihood that a group will participate as an amicus. The charity may also actively seek to participate in the courts to preserve or protest policy changes made in the political arena (Olson, 1990). Finally, a group may participate on behalf of a specific member or group of constituents harmed in some way. Whatever the impetus for participation, a given charity may have many opportunities for court-based advocacy activities and must select which opportunities that it will pursue. The measure of court participation mirrors that used in Chapter 3. The dependent variable in this analysis is the number of cases the group participated on within the year. To explain the variation in court participation levels, I again employ variables that correspond to the internal and external categories of influence. First, I consider those factors that the group has determined itself, including organizational characteristics.

Internal Factors

Previous research has shown that organizational resources affect court participation (Scheppele and Walker, 1991; Olson, 1990; O'Connor, 1980). As in the two previous chapters, the financial capacity of the group is considered a potentially important determinant of court participation. The analysis of participants versus nonparticipants presented in Chapter 3, showed that the financial capacity variables affect participation when considered jointly.[14] Further, in the examination of the legal strategy variation among groups that chose to participate in the courts, when comparing the "file as litigant"

[14] In the logistic regression model only the annual income portion of the financial capacity variables was statistically significant, but a likelihood-ratio test of the financial variables showed that their joint impact was also relevant to participation.

strategy with the "file amicus brief" strategy, the financial capacity variables were statistically significant. The method employed here combines elements of both previous analyses, in that it examines both nonparticipants and frequent participants in the courts. On that basis, I expect the financial capacity variables to influence the rate of court participation.

The ability of the organization to meet the cash flow obligations of repeated court involvement is controlled through the variable *Gross Income*. This measure, presented in millions of dollars, is the amount of revenue reported by the organization on their 990 informational return in the year the case was filed.[15] I assume that a charity will not choose to participate in the courts frequently if the cash flow of the organization will not support these activities. In addition, the financial stability of the organization is thought to be relevant to organizational decision makers. The *Fund Balance* represents the financial position of the charity, presented in millions of dollars, for the year in which the case was filed.

H1: FINANCIAL CAPACITY - As gross income and fund balance increase, the expected number of court cases a group is involved in within a year also increases.

Research has shown the type and structure of groups to be influential factors in their court participation decisions (Kobylka, 1991). The orientation of a group, either to

---

[15] The financial data reported on the 990 forms has limitations (Lampkin and Boris, 2002). Although the information has been shown to be reliable at the aggregate level, reliability at the individual level has been questioned. In order to address this concern, I verified all of the 1999 financial data using data that appears on the Guidestar web site and also eliminated any group that reported negative fund balances for the year. This data has been verified by two separate coders working for Guidestar. In addition, recent studies suggest that the information on the 990 forms is highly correlated with audited financial statements (Froelich et al., 2000) and with the IRS Statistics of Income files (Gordon, Greenlee and Nitterhouse, 1999).

civic participation or to civil rights efforts, is also expected to influence the frequency of their court-based advocacy. Charities whose missions provide for the protection of the rights of a minority group in society may seek to influence the decisions of the court to secure long-term protections for these individuals (McCann, 1998). I expect rights-oriented groups to advocate more often in all venues (Boris and Mosher-Williams, 1998). *Group Type* was a significant influence on the likelihood of participation in Chapter 3. I also expect it to have a positive and significant influence on the frequency of participation.

H2: GROUP PURPOSE - Rights-oriented groups, as opposed to civic participation groups, are expected to advocate more frequently in the courts.

Charities with *Dues-paying Members* will consider the consequence of their participation decisions on the organization's ability to attract and retain members (Hansford 2001). The effect of an involved membership base within an organization, on court-based advocacy, seems positive. Although previous research presented contrasting views regarding the effects of membership on a group's court participation (Spill, 1997;O'Connor, 1980), this study explained the importance of membership in the both the participation (Chapter 3) and legal strategy (Chapter 5) choices among charities. Jointly, these results suggest that the presence of dues-paying members in a group may influence the group's decision to turn to the courts and also the choices made inside that venue. As this analysis examines the choice to participate in the courts at all, as well as the decision to participate repeatedly in the venue, I assume that the presence of dues-paying members will affect this decision.

The variable *Dues-paying Members* is a binary variable indicating the presence or absence of membership due revenues in the year of the case, as reported on the 990 information return.

H3: EFFECT OF INVOLVED MEMBERS - The presence of dues-paying members will increase the expected frequency of group participation in the courts.

An organizational history of advocacy participation is seen as evidence of the group's willingness to participate in the political process. In addition, the experience gained through lobbying efforts in other venues also may increase the skill level of those in the group needed to engage in advocacy. Further, groups whose policy goals cause them to be more sensitive to political changes are expected to turn to the courts more often (Scheppele and Walker, 1991). The results of Chapters 3 and 5 support this view. The analysis in Chapter 3 showed that charities that lobby elsewhere are more frequent court participants. Further, the results of the analysis in Chapter 5 suggest that groups engaged in either *Grassroots or Legislative Lobbying* may pro-actively seek opportunities for participation as amici as an alternative lobbying strategy. Therefore, I expect to find that groups devoting financial resources to direct and grassroots advocacy are more frequent court-based advocates.

H4: EFFECT OF ORGANIZATION'S POLITICAL ACTIVITY - An organization's history of political involvement will increase the expected frequency of a group's participation in the courts.

Advocacy groups *Located in the District of Columbia* are expected to be more frequent advocates due to their proximity to both the government and other nonprofits.

The proximity of the group to the Congress is thought to be especially important, as the financial limitations placed on nonprofits reduce their ability to participate in lobbying. The nonprofit's ability to lobby directly at a lower cost, by virtue of their proximity to the Congress, increases the likelihood that they will choose to do so. As discussed in Hypothesis 4, the organizational history of political involvement is expected to increase the frequency of court-based advocacy. In addition, many groups choose to locate in the District of Columbia. The proximity of these groups to each other may lead to the formation of coalitions that engage in advocacy activities. I expect the location of an organization's headquarters in the District of Columbia, therefore, to increase the frequency of participation in court-based advocacy.[16]

H5: DC PROXIMITY - The location of an organization's headquarters in the District of Columbia will increase the frequency of the group's participation in court-based advocacy.

External Factors

The political environment in Congress may also be an influential factor. For the years following the proposal of the Istook Amendment, I expect charities to look for alternative venues to assert their policy goals. Therefore, after 1994 I expect the frequency of group participation in court-based advocacy to increase, as groups "turn away" from Congress and to the courts to influence policies without restrictions. The participation analysis discussed in Chapter 3 did not examine the effects of Istook, due to

---

[16] Although the results of the analysis in Chapter 3 suggest that this factor is irrelevant in the participation decisions of charities, it is included here as an additional examination of this concept to assess whether it captures variation in the frequency of the rate of annual court participation.

constraints in the research design. However in Chapter 5, I concluded that the strategy chosen by case participants *After the Proposal of the Istook Amendment* was most likely that of litigant. The question that remains is whether or not there are any time-based effects on the frequency of annual court-based advocacy that arose from the negative environment for charitable advocacy in Congress.

H6: POLITICAL ENVIRONMENT - Following the proposal of the Istook Amendment charities that are also court-based advocates will "turn away" from Congress and to the courts more frequently.

Restrictive conditions associated with government grants prohibit the use of federal funds in any advocacy activities. Nonprofits receiving government grants have been less likely to raise additional private revenues than those organizations that are not grantees (Smith and Lipsky, 1993). Grantee charities risk not only their tax exempt status, but also part of their funding, if they engage in political activities that violate the above policies. Given these formal and informal constraints on grantees, charitable organizations that are also federal grant recipients are less likely than non-grantees to engage in advocacy, and therefore expected to do so with less frequency.

H7: GOVERNMENTAL CONSTRAINTS - Charities that receive federal government grants will engage in court-based advocacy less frequently than charities that do not.

Previous involvement in the courts is expected to affect the annual frequency of court participation.[17] In Chapter 5, the analysis shows that previous political experience decreased the likelihood that a group would choose the litigant strategy while it increased the propensity to participate as amici. I concluded that charities view litigation as a strategy requiring more specific legal expertise than the amicus strategy. Therefore, I expect to find that previous legal experience will increase the expected frequency of annual court participation as both litigants and amici. Decision makers will certainly weigh the intended consequences of the manager's advocacy decisions against any past consequences, positive as well as negative, of previous advocacy experiences of the manager and of the group. To detect the range of this impact, three periods are considered - the past two years, the past four years, and the past six years.[18] I expect that the annual frequency of participation will be higher in years where the group has recently been involved in the courts, but as the proximity of these court experiences wanes, I expect this effect to decrease.

H8: PREVIOUS COURT EXPERIENCE - Charities involved in the courts in the recent past will participate in the courts more frequently. The most recent court appearances are expected to have the greatest impact on frequency.

---

[17] This study does not control for the previous successes or failures that a group may have in court. Rather, it considers only previous court involvement. While I believe that for litigants success and failure in past cases are obvious considerations, it is not clear that the affect would be the same for all types of participation considered in the study.

[18] For example, whether or not the charity participated in cases in the year 1999, these variables would represent whether or not the group had also participated in any of the following years: 1998 and 1997 (*Past Two Years*); 1998, 1997, 1996, and 1995 (*Past Four Years*); and 1998, 1997, 1996, 1995, 1994, and 1993 (*Past Six Years*); respectively.

Modeling Court-Based Advocacy Over Time: Data and Methods

The data analyzed in this chapter mirror those used in Chapter 3. Case-level data were collected on the 856 groups considered in the study drawn from the National Center on Charitable Statistics Corefiles and IRS Masterfile databases. All of the 856 groups are charitable nonprofit organizations that claim on their 990 information returns to be engaged in some type of advocacy, as broadly defined by Boris and Mosher-Williams (1998). All advocacy cases that these groups participated in were coded for various case content, including the year the court decided the case.[19] For each group, I created a summary of their annual participation. This summary included the dependent variable, the number of cases the group participated in during each year of the study, an analysis of the recent history of their court participation[20], and financial and organizational information from the 990 information return filed in the year being considered. The specific coding and variable descriptions are available in Table 4.1, in addition, a summary of the descriptive information for the data appears in Table 4.2.

---

[19] The coding sheet used for the data collection in this project may be found in Appendix C.

[20] The independent variables related to recent previous court participation introduced additional missing data into the data set, as I only collected data on court participation in the ten year period ranging from 1990 to 1999. This effectively eliminated some of the data for the early period of analysis, as the prior activity could not be determined from available data. Only event counts without missing date were analyzed in the event count analysis.

Table 4.1: Variable Measurement

Variable Name	Concept Measured	Operationalization
Dependent Variable		
COUNT OF PARTICIPATION EVENTS PER YEAR	How often did the group participate in the courts in any way during the year?	The dependent variable is a count (non-negative integer) variable reflecting the number of times a group went to court in the given year. The data were collected from searches of the ALLCASES Westlaw database.
Internal Independent Variables		
GROSS INCOME /$1 MIL.	Is the group's cash flow sufficient to support frequent court-based advocacy activities?	This independent variable is drawn from the National Center on Charitable Statistics [NCCS] Core Files database. It measures the gross income for the year as reported by the group on their Form 990 in millions of dollars. These figures were verified using data from Guidestar for the end of the period to increase accuracy.
FUND BALANCE / $1 MIL.	Is the group profitable enough to be able to participate in court-based advocacy on a frequent basis?	This independent variable is drawn from the NCCS Core Files database. It measures the annual fund balance (in millions of dollars).
RIGHTS OR CIVIC ORIENTATION OF GROUP	Is the group a rights-oriented or a civic participation group?	Information about the group's National Taxonomy of Exempt Entities code and their self-reported activity code comes from the NCCS database. This information is then matched to the group type list provided by Boris and Mosher-Williams (1998) and is coded (1) if the group is rights-oriented.
DUES PAYING MEMBERS	Does the group have dues paying members?	This dichotomous independent variable is a measured yes (1) if membership dues are reported on the group's Form 990. The variable is taken from an examination of the NCCS database Core Files for the year in question and was verified using Guidestar.
BASED IN D.C.	Is the group headquartered in Washington D.C. with easy access to legislature?	This dichotomous independent variable is based on information on location drawn from the NCCS Core Files database. It is coded 1 if the group is based in D.C.

PARTICIPATE IN LEGISLATIVE OR GRASSROOTS LOBBYING	Does the group engage in legislative and/or grassroots lobbying ?	This dichotomous independent variable is drawn from the NCCS Core Files database. It is coded (1) if the group reported grassroots, and/or legislative exempt and excess lobbying expenditures reported on Form 990 for the year in question and was verified using information from Guidestar.
External Independent Variables		
ISTOOK	Did legislative attempts to limit lobbying in Congress cause groups to become more involved in court-based advocacy?	This independent variable is a dichotomous No (0) if the case took place before 1994 and Yes (1) if the case took place from 1994 through 1999.
GOVERNMENT GRANTEE	Does the group receive any government grants?	This dichotomous independent variable is drawn from the Guidestar website database. It measures whether or not the group reported revenues from government grants in 1999 on their Form 990.
COURT EXPERIENCE: X<= 2 YRS.	Does the group have court-based advocacy experience within the previous 2 years?	This dichotomous independent variable is coded (1) for Yes and (0) for No. The experience is calculated within the study time period only, and therefore could not be calculated for cases occurring in 1990 or 1991.
COURT EXPERIENCE: 2<X>4	Does the group have court-based advocacy experience between the last 2 to 4 years?	This dichotomous independent variable is coded (1) for Yes and (0) for No. The experience is calculated within the study time period only.
COURT EXPERIENCE: 4<X>6	Does the group have court-based advocacy experience between the last 4 to 6 years?	This dichotomous independent variable is coded (1) for Yes and (0) for No. The experience is calculated within the study time period only.

Table 4.2: Summary of Descriptive Statistics

Variable	Frequency	Mean	Standard Deviation
DV = Count of court participation	range = 0 (6376) to 16 (1)	.14	.78
GROSS INCOME /$1 MIL.	---	3.38	18.12
FUND BALANCE / $1 MIL.	---	5.63	25.97
RIGHTS OR CIVIC ORIENTATION OF GROUP	RIGHTS:1187, CIVIC:5610	.17	.38
DUES PAYING MEMBERS	YES:959, NO:5838	.14	.35
BASED IN D.C.	YES:427, NO:6370	.06	.24
PARTICIPATE IN LEGISLATIVE OR GRASSROOTS LOBBYING	YES:615, NO:6182	.09	.29
ISTOOK	<1994:2665, >= 1994:4132	.61	.49
GOVT GRANTEE	YES: 445, NO: 6352	.07	.25
COURT EXP < 2	YES:474, NO: 6050	.07	.26
COURT EXP < 4	YES:343, NO: 5902	.05	.23
COURT EXP < 6	YES:247, NO: 5860	.04	.20

The standard methodological approach to modeling the number of times an event occurs in one year is event count analysis. In this instance, I am modeling the frequency count per year that a charity chose to participate in court-based advocacy. Since my dependent variable counts the number of cases a group participates in for each year from 1990 through 1999, I utilize an event count model that corresponds to this process. The parameter estimates from a linear model are biased and inefficient when applied to an event count model (King, 1989; Long, 1997). These deficits do not apply to methods such as the Poisson regression model that explicitly models the data generating process.

However, the Poisson model also has limitations. A Poisson distribution occurs only when events repeat randomly and independently. In practice, however, assuming independence of count-related events is not always appropriate. In instances where one event occurring may influence the recurrence of that same event, this contagion may influence the event count. Contagion may be present in the data used in this study if the involvement of a group on one case increases the chance of participating in other cases that same year. In this instance, I argue that previous and recent court experience will influence future court experience, thereby introducing contagion into the event count.

In addition, the Poisson distribution is based on the assumption that the variance is equal to the mean. Violation of this assumption can lead to inefficient parameter estimates and inconsistent standard errors (King, 1989). As indicated in Table 4.2, the observed mean of the dependent variable is .14, while the observed variance is 1.56. Therefore, the data collected for this study do not fit well to the Poisson distribution because the variance is greater than the mean, a situation known as over dispersion. Unobserved heterogeneity or contagion can cause over dispersion within the data. Within the context of these data, heterogeneity would occur if not all groups in the study have the same probability of participating in the courts each year. In addition, much of the unobserved heterogeneity in the data occurs because some groups never consider court-based advocacy. As these theoretical processes are thought to be present in the data used in this analysis, the Poisson regression model would present inefficient estimates biased downward and is not appropriate. The Poisson regression model underestimates the amount of dispersion in the outcome, but the negative binomial regression model (NBRM) addresses over dispersion by adding a parameter that reflects unobserved heterogeneity in the observed data (Long and Freese, 2001). To compensate for the over dispersion in the data, the negative binomial regression model is used for the analysis (see Table 4.3). The NBRM, however, is based on the assumption that all groups had a positive probability of participating in court-based advocacy.

Zero-inflated count models are able to account for both “dispersion and excess zeros by changing the mean structure to allow zeros to be generated by two distinct processes” (Long and Freese, 2001). This model treats the process for zeros differently from that for the non-zeros (Cameron and Trivedi, 1998). The zero-inflated negative binomial model (ZINB) nests two equations and allows for separate consideration of the binary choice to participate and the event count choice of how many times to participate each year. It is likely that there are some groups in the sample for whom court-based advocacy was not an option. Not all groups find the courts an appropriate venue for their advocacy efforts. Some such groups may have internal constraints, such as a board of directors focused on grassroots lobbying, and thus would vote to restrict any efforts made by others in the group to engage in court-based advocacy. Such a group would be willing to expend resources into various types of public education, but might remain unwilling to turn to the courts to effect policy changes. It is also possible that structurally the group may not be able to become a court-based advocate due to limitations in the bylaws.

However, for some charities in the sample, I assume that the choice not to advocate in the courts is truly a matter of choice. The group's decision makers could have been court-based advocates but did not choose that route for their advocacy. The unobserved heterogeneity in this study is based on two types of charities: those that consider court-based advocacy but still do not participate in a given year, and groups that never consider court-based advocacy as an option, the observed distribution has zeros generated by two distinct processes. This is the basis of the zero inflated models. In addition, of the 6389 counts of per-year participation, only 253 are non-zero. Therefore, the data consists of substantially more zeros than one might expect in the Poisson or even in the NBRM. In such cases, the ZINB is also recommended to analyze the data (Long and Freese, 2001). This is an appropriate methodology to use for this analysis, because the zero-inflated model makes substantive sense and seems to be a better fit for the data.

Results

As discussed above, there is significant evidence of over dispersion (G^2=303.41, p<.000) in the observed data and therefore the NBRM is preferred to the Poisson regression model. The NBRM performs well, with a Pseudo R-square of .31, and the results of this model are presented for comparative value, in Table 4.3. However, as discussed in the data and methods section, zero-modified models change the mean structure to model the production of zeros. They allow for the assumption that zeros can be generated by a different process than positive counts, and that the probability differs across groups according to their characteristics (Long, 1997). Therefore, the zero-inflated negative binomial model (ZINB) is presumed to be the most appropriate for this analysis.

The results of this analysis are also presented in Table 4.3. The model specification for those groups expected to be in the Always-0 category is identical to that used to analyze the differences between participants and nonparticipants in Chapter 3. The specification for those in the Not-Always-0 category mirrors this analysis, but also takes into consideration previous court experience and the political environment in Congress.

In examining the results of the analysis from both the NBRM as well as the ZINB, one of the most interesting and surprising results is the contrast between the effects of the internal and external factors in the models. In both event count models, the internal factors have very little impact on the outcome. The rate of participation according to this analysis, seems to be based almost solely on external considerations. In the NBRM, the only internal factors affecting the rate of court participation are *Group Orientation* and *Participate in Lobbying*. However, when the event count model is considered separately from those groups that do not even consider the courts as an option, none of the internal factors in the model are statistically significant. In stark contrast, all of the external factors are significant (at $p<.001$ level) in both event count models. In the binary portion of the ZINB, the only internal factor affecting the participation choice each year is group orientation and the only external factor included in the model,[21] whether the charity is a government grantee, also affects the participation choice.

[21] No other external factors could be included in the group level of analysis, which is examined over the decade of the 1990s, because other external factors are dependent on timing.

Table 4.3: Parameter Estimates of Event Count Models for a Group's Court-Based Advocacy Participation by Year

Variable DV: frequency/yr	Negative Binomial Model Coefficient Std. Err.		Zero-Inflated Negative Binomial Model Not Always 0		Always 0	
Internal Factors			Coef.	Std. Err.	Coef.	Std. Err.
Gross Income/$1M	.0003	.004	-.004	.003	-.051	.036
Fund Balance/$1M	-.001	.002	.002	.003	.019	.010
Orientation of Group	.547**	.176	.148	.221	-1.988*	.892
Members	.256	.194	-.266	..206	-3.274	2.97
Based in D.C.	-.187	..272	-.100	.266	.296	1.22
Participate in Lobbying	.503**	.187	-.012	.209	-4.534	3.46
External Factors						
Istook	1.767***	.346	1.795***	.351	--	--
Government Grantee	1.448***	.229	1.012***	.258	- 1.589**	.620
Court Experience <2	2.542***	.192	2.339***	.193	--	--
Court Experience <4	.925***	.218	.798***	.207	--	--
Court Experience <6	.752***	.219	.677***	.207	--	--
Constant	-5.816	.337	-4.75	.403	1.15	.368
Pseudo R-square	.311	--	--	--	--	--

* p<.05, ** p<.01, *** p<.001; N = 6107 (non-0 observations = 235); Vuong Test = 2.35 (p=.009) favoring ZINB over NBRM; the Likelihood ratio test comparing the zero-inflated poisson to the ZINB = 132.70 (p=.000)[22].

Internal Factors

In the analysis of cumulative participation for the ten-year period of the study, the financial capacity variables, considered jointly, were found to have a slight positive effect on a group's propensity to participate as court-based advocates (see Chapter 3). Further,

[22] The results of the Zero-Inflated Poisson Model appear in Appendix A.

as research has shown resources to be important predictors of court participation (Olson, 1990; Scheppele and Walker, 1991; O'Connor, 1980), I expected to find that as gross income and fund balance increases, the rate of annual court participation would also increase (see H1: Financial Capacity). However, in the analysis of the frequency of annual participation, the financial capacity variables do not affect the rate of participation in a significant way (see Table 3). Although the parameter estimates of fund balance approach, statistical significance (p=.06) in the binary model, neither gross income nor fund balance are statistically significant in the event count model. In fact, even when considered jointly[23], the financial capacity variables do not affect the annual rate of court-based advocacy among charities. Therefore, I reject hypothesis one (H1), and conclude that the annual financial situation of a charity does not seem to affect either the rate at which they choose to participate in the courts, or the choice, when considered annually, to advocate in the courts at all. The results of this analysis, when coupled with those in Chapter 3, suggest that charities are concerned with the financial capacity of the organization to finance their court-based advocacy activities in the long-term. However, these same groups seem willing to discount financial capacity concerns in the short-term. This may point to managerial and board confidence in the group's ability to survive temporary decreases in profitability and financial position in the short-term.

I expected to find that group orientation was an important determinant in the rate of court-based advocacy among charities (see H2: Group Purpose). The results of this

---

[23] A likelihood-ratio test compared the nested ZINB equations with and without the financial capacity variables, and with a p=.32, I accept the null hypothesis that the financial capacity variables have no effect on the annual rate of participation.

analysis provide limited support for previous research (Kobylka, 1991; Scheppele and Walker, 1991; Boris and Mosher-Williams, 1998) suggesting that *Group Type* is important and that rights-oriented groups are less likely to be included in the set of charities that do not have the opportunity to participate in the courts (see Table 4.3). However, the results of the "Not Always 0" set of charities included in the ZINB analysis suggests that group orientation is not likely to affect the rate at which charities choose to advocate in the courts each year (p=.50). Therefore, while I conclude that rights-oriented groups are most likely to advocate in the courts, I must reject the hypothesis (H2) that rights-oriented groups do so more frequently than civic-participation charities.

The results of the binary logistic model of court-based advocacy among charities in Chapter 3 suggest that the presence of dues-paying members in a charity will increase the likelihood that an advocacy charity will choose to participate in the courts at some point during a ten-year period. I concluded that the results of Chapter 3 supported the work of previous research that pointed to the importance of organizational maintenance concerns as a motivation for groups to consider the wishes of their members (O'Connor, 1980; McIntosh, 1985; Scheppele and Walker, 1991). Based on these results, I expected to find that the presence of *Dues-paying Members* increased not only the likelihood, but also the frequency, of court-based advocacy by charities (H3). Therefore, the results of the zero-inflated negative binomial model analysis of the annual rate of court-based advocacy among charities were unexpected. As reflected in Table 4.3, the coefficient of the dues-paying membership variable is insignificant and not in the expected direction, as it is negative for both the "not always 0" and the "always 0" sets of charities. In sum, the presence of *Dues-paying Members* does not affect the annual participation decision, or the rate at which groups engage in court-based advocacy within the year.

These results suggest, that while *Dues-paying Members* may influence group advocacy venue decisions over the long-term, they are not likely to have such an effect in the short term. Concluding that individual members are not likely to be consulted as the group makes day-to-day advocacy venue decisions seems logical. However, members are likely to be given periodic opportunities, perhaps through an annual meeting or event held by the charity, to provide ideas and responses. The presence of *Dues-paying Members* does not affect the annual participation and frequency choices, therefore, but when examined over the long term, the charity's decision makers have allowed for the preferences of these members.

An organizational history of political involvement (*Participate in Lobbying*) was also important when considering participation decisions from a long-term perspective. The fact that a group was involved in grassroots or legislative lobbying (*Participate in Lobbying*) affected the likelihood that they would participate in the courts in the analysis set forth in Chapter 3. When considered annually in the NBM, organizational experience with political involvement was a positive influence ($b=.50$, $p<.01$) on the rate of court-based advocacy by charities (see Table 4.3).

However, once the model separates groups that do not consider the courts as an advocacy venue, the significance of political involvement changes dramatically. In the ZINB, the coefficients for both the "always 0" and the "not always 0" groups are both negative, although neither is statistically significant (at the $p<.05$ level). The results of this analysis suggest that while political experience is important from a long-term perspective, it seems to have no effect in the short term. Although no clear explanation can be drawn from existing literature, it seems likely that this is an artifact of the variation in long and short-term decision-making practices in nonprofit organizations. Within the nonprofit sector, although regular strategic planning is advised, in practice, the approach to long-term decisions tends to be somewhat ad-hoc (Maranville, 1999). Therefore, annually the operational decisions tend to be made by management, and perhaps the board of directors. When strategic planning does occur, the preferences of broader constituencies are considered (Mulhare, 1999). Boards of Directors intend the long-term plans that they develop to guide management as they make operational decisions.

Therefore, one may infer that a group with political experience would be more likely to set up a long-term plan that encourages management to engage in advocacy activities over the life of the plan. This sort of activity is expensive and cost may be a factor in reducing the frequency of participation that could occur over the short-term. Thus, as managers and boards are making short-term annual advocacy decisions, they may not systematically consider these plans. Thus, when considered in the long-term the *Participation in Lobbying* history is a relevant factor because the plan will guide management over time. However, within the span of a year, management and the board may not be guided by these plans or the political history upon which they are built.

The proximity of the headquarters of the organization to Washington, D.C. (*Based in D.C.)* was not an important factor in either the cumulative analysis of participation in Chapter 3, or in the strategy analysis in Chapter 5. However, I included it here to verify that even in the annual frequency considerations the geographic proximity to the government did not affect court-based advocacy. Again this variable is insignificant. The hypotheses (H6), that the *Location of an organization's headquarters in the District of Columbia* increases the frequency of participation in court-based advocacy, is rejected.

External Factors

Throughout the latter half of the 1990s there was increasing hostility in Congress toward nonprofit advocacy activities, especially advocacy by charitable nonprofits, as exemplified by the Istook amendment. This was a salient issue within the nonprofit sector (Reid, 1999; Cox and McClosky, 1996), and was expected (H6) to affect the frequency of court-based advocacy after 1994. In the analysis presented in Chapter 5, after 1994, charities were more likely to appear as direct parties compared with appearing as amicus. The political environment hypothesis (H6) suggested that groups would turn away from a hostile environment in Congress and advocate in the courts with greater frequency after 1994. The analysis supports this explanation (see Table 4.3). The effect of the Istook amendment is highly significant ($p<.001$) in the negative binomial model and remains so in the zero-inflated negative binomial model. The magnitude of the effect of this change in Congress is readily apparent in Table 4.4. The rate of participation in the courts increases by a factor of six for those groups that consider the courts as an advocacy venue (see Table 4.4).

Table 4.4: Factor Change in Expected Count of Charities' Annual Court Participation Events

Variable DV: frequency/yr	Negative Binomial Model		Zero-Inflated Negative Binomial Model Not Always 0		Always 0	
Internal Factors	Unit Increase	SD Increase	Unit Inc.	SD Increase	Unit Inc.	SD Increase
Gross Income/$1M	1.00	1.00	1.00	.93	.95	.44
Fund Balance/$1M	1.00	.97	1.00	1.04	1.02	1.57
Orientation of Group	1.73	1.22	1.16	1.06	.14	.48
Members	1.29	1.09	.77	.91	.04	.33
Based in D.C.	.83	.96	.90	.98	1.34	1.07
Participate in Lobbying	1.65	1.14	.99	1.00	.01	.30
External Factors						
Istook	5.85	2.32	6.02	2.35	--	--
Government Grantee	4.26	1.32	2.75	1.23	.20	.74
Court Experience <2	12.71	1.77	10.3	1.69	--	--
Court Experience <4	2.52	1.22	2.22	1.19	--	--
Court Experience <6	2.12	1.16	1.97	1.14	--	--

Further, the Istook amendment increases the expected rate of court-based advocacy by nearly 3 percent, for the "average advocacy charity" (see Table 4.5). These results highlight one of the most significant findings of the study. Changes in the political environment lead to changes in the way charities interact with government. Public charities that wanted to engage in advocacy during the 1990s found an outlet for their advocacy activities in the courts after Congress threatened to silence their political voice.

These groups participated in the courts more frequently after 1994 and their decision to pursue litigation as a direct party exhibits a greater desire for control of the cases they undertook by choosing to file as litigants most frequently (see Chapter 5, see also Wasby, 1985).

In addition, the restrictions placed on charities through government grants were important determinants in the annual rate of participation in court-based advocacy. For this external factor, the negative binomial model and the zero-inflated negative binomial model together reveal an interesting linkage for this variable (see Table 4.3). The results of the factor change analysis in Table 4.5, also show the impact of these government restrictions. Groups that receive government grants face severe restrictions on how much lobbying they can do in the political branches. I hypothesized (H7) that government grantees, restricted by a lack of private funds with which to lobby, would be less likely than non-grantees to engage in court-based advocacy frequently. However, the results of the ZINB refute this hypothesis (see Table 4.3). *Government Grantees* are in fact more frequent court-based advocates than charities receiving no government funds. The "average advocacy charity" that is also a government grantee is likely to have greater frequency (by 6%) of participation in the courts over an "average advocacy charity" that does not receive government funds. These groups, like all advocacy charities after 1994, seem to respond to increased advocacy limits by seeking new or additional opportunities for voicing their policy preferences.

For both groups, *Government Grantees*, and all advocacy charities after 1994, this results in more frequent court-based advocacy. Among *Government Grantees* who view the courts as an advocacy venue (Not-Always 0), the expected annual counts for court-based advocacy increases by a factor of 2.75 over non-grantees (see Table 4.5).

Table 4.5: Changes in Predicted Rate

for Charities' Annual Court Participation

Variable DV: frequency/yr	**Negative Binomial Model**		**Zero-Inflated Negative Binomial Model**	
Internal Factors	**0 to 1 Increase**	**-+SD/2 Increase**	**0 to 1 Increase**	**-+SD/2 Increase**
Gross Income/$1M	.000	.000	.000	.006
Fund Balance/$1M	-.000	-.001	-.000	-.003
Orientation of Group	.010	.003	.018	.007
Members	.004	.001	.011	.008
Based in D.C.	-.003	-.001	-.004	-.001
Participate in Lobbying	.009	.002	.019	.010
External Factors				
Istook	.022	.012	.027	.016
Government Grantee	.044	.004	.059	.006
Court Experience <2	.146	.008	.146	.009
Court Experience <4	.021	.003	.021	.003
Court Experience <6	.016	.002	.017	.002

For the average/modal charity, the predicted rate is .01, and the probability of always 0 is .75.

The external factor that has the greatest effect on the frequency of participation is perhaps the least surprising. *Previous Court Experience* is extremely important in predicting the future rate of court participation (see Table 4.3). For a group involved in court-based advocacy within two years (*Court Experience<2 years*), the expected annual frequency of court-based advocacy increases by a factor of 10.37 (see Table 4.4), holding all else constant. In addition, if we further remove the court experience, and it occurred more than two but less than six years previously, the group's expected count increases by a factor of approximately two (see Table 4.4). The hypothesis (H8) that recent previous court experience would increase the frequency with which a charity chooses to advocate in the courts is therefore strongly supported by this analysis.[24]

Conclusion

The analysis of the annual rate of participation of advocacy charities reveals several interesting nuances that the cumulative participation analysis of Chapter 3, and the strategy analysis of Chapter 5, do not. First, this analysis clearly reveals differences in short- and long-term decision making. The analysis in Chapter 3 suggests that when considered over a ten-year period, internal factors such as political experience and member involvement are relevant to court-based advocacy participation. However, the analysis in this chapter reveals that these factors do not significantly affect the decision to advocate in court when considered annually.

Second, this chapter highlights the relevance of a charity's political environment and also the government regulations under which they operate. Charities turned to the courts to voice their policy preferences more often after the political climate in Congress grew more hostile toward their advocacy activities. In addition, government grantees were more frequent court-based advocates than those charities operating solely on private funds. When considered together, these results point to an effort by charities to seek out

[24] The magnitude of the effect of the previous court experience variables does slightly alter the findings. A ZINB excluding the court experience independent variables results in group orientation becoming statistically significant ($p<.000$) in the model within both the "always 0" and the "not always 0" sets. In addition, the importance of lobbying elsewhere for the "always 0" set is raised to statistical significance ($p<.000$). All other results are consistent with the model in Table 4.3.

new avenues for advocacy as they face increasing restrictions in the more traditional advocacy arenas.

Finally, this chapter suggests that once a group has turned to the courts as a venue for advocacy, they are likely to continue to do so with greater frequency. Previous research has suggested that groups will continue to turn to the courts only if they have met with some success in that arena (Hansford, 2001; Scheppele and Walker, 1991). Although the rate of success was not considered in this analysis, this finding points to the possibility that charities are returning to court because they have found success, and identifies the need for future research in this area. In Chapter 5, charitable court-based advocates are analyzed as to the roles chosen by the participants at the case level to discern systemic factors that influence these strategy choices.

CHAPTER 5:

CHARITIES' CHOICES OF LEGAL STRATEGIES

Introduction

Charities were active in the courts in the 1990s in a number of ways. This chapter addresses only those groups that participated in the courts. The advocacy charities in the study chose a variety of legal strategies: filing as litigants, filing amicus curiae briefs, supplying counsel to a party, filing as intervenors, and petitioning as movants. The various ways in which these groups chose to advocate in the courts suggest charities use several different legal strategies when engaging in court-based advocacy. This chapter seeks to explain variation in the legal strategies of groups that advocate in the courts.[25]

Early analysis of advocacy in the courts often focused on the legal strategies of one specific group as it attempted to affect policy through the courts. The first such study examined the NAACP Legal Defense Fund's success in affecting civil rights policy by supplying counsel for tenants to challenge discriminatory housing covenants (Vose, 1959). Although the NAACP's litigation efforts are perhaps the best known, several studies examined the effectiveness of particular legal strategies. For example, a number of scholars have turned their attention to the effects of amicus briefs on both the courts and the groups who file them (O'Connor and Epstein, 1983; Caldeira and Wright, 1990, 1993). Further, the motivations for groups to choose to advocate as litigants have been

---

[25] The term "legal strategy" has been used broadly by scholars. Here, I focus on one important aspect that relates to the form of court participation a group chooses.

found to vary (Schlozman and Tierney, 1983; Scheppele and Walker, 1991). "Some groups seek immediate victory, others go to court to facilitate their organizational maintenance and development, and finally groups bring and join cases in an effort to establish broad-ranging constitutional principles . . . "(Kobylka, 1991). While these studies advance our understanding of one choice of legal strategy, research has not addressed the variation in legal strategy choices within and between groups.

Research suggests that groups will use the courts when their goals and characteristics match the special advantages of the court structure (Scheppele and Walker, 1991). Groups considering court-based advocacy must face procedural rules that serve as barriers to court access. "Not all interest groups will find these walls worth scaling, and many will not be able to – it is important to note that an interest group's use of the courts may depend more on the requirements of litigation and on the special limitations and capacities of the courts than on the group's specific agenda," (Scheppele and Walker, 1991, p.161). Groups whose fortunes change with the political climate, and have an organizational agenda that matches the rules of the courts closely, are more likely to become court-based advocates. In order to take advantage of the institutional compatibilities, the group must choose from the available strategies of participation appropriate to the venue. As discussed in Chapter 2, the advocacy strategies permissible under current governmental regulations are limited for charitable organizations. Therefore, court-based advocacy charities would benefit from developing an understanding of all available legal strategies to attempt to influence policy outcomes. Understanding the influences on their decisions related to choice of legal strategy is important for nonprofit managers so they may improve the quality and efficiency of those choices. In addition, public administrators and legislators who are working to regulate the influence these subsidized groups may have on public policies, may want to understand the court-based advocacy strategies groups choose.

Existing research has not explored the choice of legal strategy among groups in the courts fully. Groups may choose to instigate litigation or supply counsel to an individual or another group. In addition, groups may choose to intervene in a case that is already before the court. Many groups choose to participate in a variety of ways over time. The data collected for this study support this conclusion. Among cases with group participants, 43% represented situations in which groups chose to file as litigants. Groups appeared as amici in nearly 40% of the 1136 cases.[26] The remaining cases in the study are occurrences of groups supplying counsel (14%) or participating as intervenors (2%). Additional nonprofit groups were present on 771 (68%) of the cases and participated most frequently as litigants (237 cases or 21%) and as amici (348 cases or 31%). When considered anecdotally, there is great variety in the forms of court participation among these charities. Many groups, the AIDS Project of Los Angeles being one, participated in the courts only once in the ten-year period of the study, and thus chose only one legal strategy, that of amicus. Some groups, such as the American Parkinson Disease Association, chose the strategy of direct participation exclusively and appeared as a litigant in five cases during the 1990s. On the other hand, many other groups chose to participate in the courts using more than one legal strategy. For example, the National Federation of the Blind participated in forty-three cases during the study period, appearing

[26] Although data were collected on 1136 cases in the study, financial data could not be verified for 181 of the groups. While the comparative data presented here consider the for of participation in all 1136 cases, only 955 cases are considered in the analytical section of the chapter.

as litigants in thirty, as a "friend of the court" in nine, by supplying counsel in two, and as an intervenor in two cases. Similarly, the American Lung Association participated as a litigant sixteen times, as an amicus seventeen times, and as an intervenor seven times, for a total of forty cases in the decade of the 1990s. This variation in the choice of legal strategy among groups presents an interesting puzzle.

Analytical Framework

Earlier research is helpful in identifying factors that influence the choice of legal strategy among and within groups over time. Groups that participate directly in litigation will have the highest level of control over the case (Epstein and Kobylka, 1992). This legal strategy choice will permit the group to establish the factual context and to make some choices about the court environment as well (Sorauf, 1976; Wasby, 1984; Kobylka, 1991). However, as a litigant, the group will also bear a substantial financial burden as the litigation proceeds. In addition, the group must be willing to focus a great deal of attention and resources on the narrow policy goals of the case.

Research on group participation in the courts suggests that resources are an important influence on the legal strategy decision (O'Connor, 1980; Scheppele and Walker, 1991; Olson, 1984; Caldeira and Wright, 1990). Court participation can be a costly endeavor in terms of financial and human resources. Both the level of resources and the source of those funds can affect whether groups turn to litigation as a strategy to carry out policy goals (Olson, 1984; Scheppele and Walker, 1991). In this study, financial capacity is used to represent several indicators of resources important to the group's legal strategy choice. The income and financial stability of the corporation are the best measures of the group's ability to employ and maintain the necessary staff and legal expertise to stay abreast of the trends in certain public policy areas. As the group's financial capacity increases, I expect the group will enhance its ability to control the litigation. For well-funded groups, this ability will increase the likelihood of choosing to participate directly on the case as a litigant. While the primary advantage of direct participation is control, the most obvious advantage of indirect participation, through filing an amicus brief, is its relatively low cost. I expect groups with fewer financial resources to file amicus briefs as a cost-effective way of influencing policy outcomes.

H1: FINANCIAL CAPACITY - Groups with higher levels of gross income and fund balance are more likely to choose the legal strategy of filing as a litigant more often than choosing to file amicus briefs.

Another important internal resource of many organizations is the membership base of the group. Membership is a difficult idea to define (Reid and Krehely, 2001a). The tax code does not offer a qualifying definition for membership. To understand the influence of this body of persons associated with the group, defining what membership means is important. Here, I focus on those members who are most likely to influence the organization's policy goals. These members with a financial link to the organization will be the most important for organizational maintenance considerations. Therefore, for the purposes of this study, members are understood to be those persons who pay dues to the organization. Thirty percent of the cases considered in the choice of legal strategy analysis in this chapter involve groups with dues paying members.

Dues-paying members expect the organization to use these members' contributions in a way that will meet the mission of the group. Involvement in a court case may help organizations meet the goals of their members and therefore help the organization maintain a strong membership base. Meeting this organizational maintenance need and progressing toward their policy goals are both important motivations for the organization's court-based advocacy efforts (O'Connor, 1980). The findings of Chapter 3 of this study support that conclusion. Members are found to have a positive and significant influence on court participation. The presumption here is that organizational maintenance considerations may outweigh policy outcome concerns. Members expect to see evidence of the work of the group, but they may be less likely to evaluate the outcomes of the efforts stringently. To keep members in the group, and maintain or increase their contribution levels in the future, the members must be presented with evidence that the group is engaging in mission-based advocacy. Therefore, when deciding whether and how to advocate in the courts, nonprofit managers may be more likely to choose the legal strategy with the lowest level of resource commitment, thus allowing participation in more cases. They do so, at least in part, to satisfy member expectations.

H2: MEMBERSHIP INVOLVEMENT - Groups with dues-paying members are more likely to file an amicus brief than to file as a litigant.

In existing scholarship, two theories emerge to explain the nature of advocacy in groups. Some suggest that advocacy activities will become specialized early in the life cycle of the group. Once a group has chosen its specialty it is less likely to engage in an alternative form of advocacy (Gais and Walker, 1991). However, scholars have also suggested that advocates will seek out opportunities to influence policies affecting their organizational goals. In this line of thought, the advocates become proficient at attempting to influence policies and their expertise reaches across institutional boundaries (Scheppele and Walker, 1991). The analysis in Chapter 3 supports the latter theory, which finds that groups that participate in legislative or grassroots lobbying are also more likely to appear in courts. In this examination of legal strategy choices, I address these issues. The intricacies of advocacy associated with particular venues seem to reinforce the specialization hypothesis. In the courts, specialization may be necessary for groups that choose the "litigant strategy" in a case. If advocates are legal specialists, we would expect to find that the group focuses on direct-party litigation, and control of the case, as its primary strategy. In contrast, groups with extensive experience with legislative lobbying may choose only to participate as amici, as it requires less legal specialization.

H3: SPECIALIZATION HYPOTHESIS - Groups that have been involved in grassroots or legislative lobbying are more likely to file an amicus brief and less likely to file as litigants.

The level and jurisdiction of the court are also important factors in determining legal strategies among court-based advocates. The level of the court refers to whether the case takes place at the trial or appellate (including last resort) level of the court system. I introduce this variable in order to account for procedural differences in court levels concerning the filing of amicus briefs. Nearly 30% of the cases considered in this analysis took place at the trial level, 55% took place at the appellate level, and the remaining 16% were in courts of last resort. In this study, jurisdiction refers to whether federal or state court heard the case. To influence policies nationally, it is more efficient to advocate in courts with a federal jurisdiction. According to Abrahamson and Gutmann (1987), although fewer groups will appear in state courts, those that do are likely to appear as litigants. Previous research has explained that groups are less likely to participate in court at the state level because of resource constraints (Grumet, 1985). The data support the contention that groups are more likely to appear in federal courts collected for this study. The charitable advocacy nonprofits in this study participated in 65% federal level cases and only 35% state level cases.

H4: JURISDICTION AND LEVEL - Groups participating in state courts are more likely to file as litigants, while groups participating in federal courts are more likely to file an amicus brief. In addition, groups participating in cases in the appellate courts are more likely to file as amici.

Within the decade of the 1990s the timing of the case may also be a crucial factor in the legal strategy choice. Following the proposal of the Istook amendment, advocacy groups became less certain of their ability to influence the policy process through Congress. Those without litigation expertise may have turned to the courts in an attempt to have input into policies while being blocked elsewhere. However, the additional attention to the topic created great uncertainty related to advocacy activities by nonprofit charities. Nonprofit managers may have been reluctant to become too involved in advocacy through direct litigation. In addition, nonprofits turning to the courts as a new outlet for their advocacy efforts would have lacked court experience. The lack of litigation expertise, coupled with relative ease of entry as amici and reluctance to exceed permissible levels of advocacy and a desire for visibility, would cause those groups to choose a legal strategy requiring less commitment, fewer resources, and higher visibility as they made early forays into the judicial branch. Therefore, I suggest, following the proposal of the Istook amendment in 1994, groups became more likely to choose legal strategies requiring lower levels of commitment.

If indeed more groups turned to the courts to engage in advocacy, then we would also expect to see a marked increase in the choice by some groups to supply counsel to those with less court-based advocacy experience.

H5: ISTOOK - Groups participating in cases filed after 1994 are more likely to file as amici than to file as litigants.

I also think the presence of other nonprofit groups on a case to influence a group's choice of legal strategy. A group may choose to join a case indirectly, as the number of other groups involved on the case increases. The size of the pool of participants reduces the resource burden that is to be carried by any one group among the pool participants. Therefore, it is unclear whether the influence of the number of other groups involved in the case will, in the aggregate, have a positive or a negative impact on a group's choice. Furthermore, it is not clear whether participating as amici will be encouraged or discouraged by the presence of other groups on a case. The notoriety of the case may increase with the number of participants, making it more likely that the group will learn of the opportunity for advocacy.

Certain groups using a particular strategy may also affect the strategy choice of other groups. The presence of other nonprofit groups as litigants or as amici may encourage or deter the additional litigant or amicus participation of an advocacy charity. For example, with a class action suit, many litigants, some of whom may be groups, join together to sponsor the claim. Then the presence of an additional litigant(s) may increase the probability of additional groups joining the cause as direct parties. This may also happen among groups appearing as amici. Occasionally the presence of other amici seems to encourage the involvement of additional groups as amici. Several tobacco liability cases included in this study illustrate this possibility. In these cases, several groups, including the American Heart Association, the American Lung Association, and the American Cancer Society, chose to participate as amici in suits filed against cigarette manufacturers. In fact, in each case where the American Heart Association appears as an amicus, the American Cancer Society also appears as an amicus. Therefore, I hypothesize that the presence of another group choosing a particular legal strategy on a case may encourage the same form of participation by other groups.

H6: BANDWAGON HYPOTHESIS - The presence of additional groups as litigants on a case will increase the probability that a group will choose the litigant strategy, while the presence of amici on a case will increase the likelihood a group will choose the amicus strategy.

Finally, the involvement of the government on a case may influence both the outcome and the participation of other parties on the case (Songer and Sheehan, 1993; McGuire, 1995). Similar to my expectations regarding the appearance of other groups, the involvement of the government may call public attention to the case, and increase the likelihood that the group will learn of the opportunity to participate. In addition, government involvement may heighten the interests and expectations of members of the group and subsequently influence the decisions of the group. Further, government involvement on a case can be seen as an indicator of the importance of the involved policy. I expect the influence of government involvement on the strategy of participation to decrease the likelihood of direct participation. I posit that the involvement of the government may cause groups to lessen their commitment level in the case.

Therefore, while a group may choose the legal strategy of filing as an amicus to meet membership demands, they are less likely to engage as litigants because the vast resources of the government makes success unlikely.

H7: GOVERNMENT PRESENCE - Government involvement on a case decreases the likelihood that a group will participate as a litigant and increases the likelihood that a group will choose the amicus legal strategy.

Data and Methods

As discussed in Chapter 3, the data for this analysis were collected from two primary sources, (1) the financial information available on the 990 information returns filed annually with the IRS and (2) content analysis of published opinions rendered in those cases where groups appeared in an advocacy role (N=1136). The specific coding and origins of the variables are explained in Table 1: Variable Measurement.[27]

The three possible legal strategies considered in the analysis, filing as a litigant, filing an amicus brief, or supplying counsel for an individual or another organization, are nominal outcomes and cannot be ordered. This chapter uses the multinomial logit model to estimate the effects of a set of explanatory variables on the strategy choice. The multinomial logit with three outcomes is roughly equivalent to running three binary logits comparing the outcomes in pairs (Long, 1997; Steelman and Powell, 1993). Here, the

---

[27] Table 5.2 shows the distribution of the outcome variable with three legal strategy choices: filing as a litigant, filing an amicus curiae brief, and supplying counsel for other groups and individuals. In the original coding procedures the outcome variable included three additional categories: intervenor (27 cases) , named sponsor (0 cases), and other (6 cases). In each of the six cases coded "other" the group was actually classified as a movant in the published opinion of the case. As the intervenors and movants were actually performing on a case in a manner quite similar to that of the litigants, I checked for the validity of category combination using the Wald test for combining outcomes (Long and Freese, 2001) and determined that these categories are indistinguishable with respect to the variables in the model. Therefore, the 33 additional cases were included with the litigant strategy in the analysis.

legal strategies are examined through the following comparisons: filing as a litigant as compared with filing an amicus brief, supplying counsel compared with filing an amicus brief, and filing as a litigant compared to supplying counsel. As with the binary logistic regression, the multinomial logit is a nonlinear probability model that leads to difficulties in the interpretation of the estimates.

TABLE 5.1: Variable Measurement

Variable Name	Concept Measured	Operationalization
DEPENDENT VARIABLE		
LEGAL STRATEGY CHOICE	Type of group participation in individual cases that occurred between 1990-99: amicus, litigant, supplied counsel, intervenor, named sponsor, or other.	The dependent variable is drawn from content coding of cases collected from searches for the names of groups in the sample using the ALLCASES Westlaw database. Strategies coded as 1=litigant, 2=amicus, 3=supply counsel.
INTERNAL INDEPENDENT VARIABLES		
GROSS INCOME/$1 MIL	Positive Cash Flow	This independent variable is drawn from the National Center on Charitable Statistics [NCCS] Core Files database. It measures the gross income (in millions of dollars) of the organization reported by the group on their From 990 in the year of the case.
FUND BALANCE/$1 MIL	Level of Financial Reserves	This independent variable is drawn from the NCCS Core Files database, Fund Balance (in millions of dollars) is measured as the fund balance reported by the group on their Form 990 in the year of the case.
DUES PAYING MEMBERS	Does the group have dues paying members?	This independent variable is a dichotomous yes (1) if membership dues are reported on the group's Form 990 information return in the year of the case. The variable is taken from an examination of the NCCS Core Files database.
INVOLVED IN LEGISLATIVE OR GRASSROOTS LOBBYING	Does the group also participate in legislative or grassroots lobbying ?	This independent variable is drawn from the NCCS Core Files database. It is a dichotomous variable coded 1 if the group reported any grassroots or exempt lobbying expenditures on Form 990 in the year of the case.

EXTERNAL INDEPENDENT VARIABLES		
COURT JURISDICTION	Do groups make different strategy choices in state vs. federal courts?	This independent variable is a dichotomous variable coded based on the content of the case: 1=federal and 2=state.
COURT LEVEL	Do make different strategy choices at various levels of the courts?	This ordinal independent variable is coded based on case content: 1=trial 2=intermediate appellate 3=last resort.
ISTOOK	Did legislative attempts to limit lobbying in Congress cause groups to become more involved in court-based advocacy?	This independent variable is a dichotomous No (0) if the case took place before 1994 and Yes (1) if the case took place from 1994 through 1999.
NUMBER OTHER GROUPS	How many other nonprofit groups participate on the case?	This independent variable was coded based on case content and represents the total number of groups participating on the case.
PRESENCE OF OTHER NONPROFIT LITIGANTS	Are any other nonprofit groups present as litigants?	This independent variable is dichotomous and was coded based on case content and is coded one (1) if any other nonprofit groups were on the case as litigants and zero(0) if there were none.
PRESENCE OF OTHER NONPROFIT AMICI	Are any other nonprofit groups present as amici?	This independent variable is dichotomous and was coded based on case content and is coded one (1) if any other nonprofit groups were on the case as amici and zero(0) if there were none.
GOVERNMENT PRESENT	Was the government also involved on the case?	This independent variable was coded 1 if the government was involved on the and 0 otherwise.

Due to the complexities of interpretation of a nonlinear model with multiple nominal outcomes, two interpretation techniques are recommended: discrete change in the probabilities and factor change in the odds (Long, 1997; Long and Freese, 2001). Although the predicted probabilities vary according to the values of the explanatory variables, examining the discrete change, or the change in the predicted probability from a specified start value to an end value demonstrates the predicted probabilities for specified group characteristics and provide insight into the impact of certain characteristics. In addition, since "discrete change does little to illuminate the dynamics among outcomes" (Long and Freese, 2001, p.203), the odds ratios, or the factor change coefficients, are also examined. The odds ratio, which is not dependent on the values of the dependent or other independent variables, can be interpreted as the expected change in odds between two outcomes given a known change in one explanatory variable when we hold all other independent variables constant (Long and Freese, 2001).

Results

The comparison group for the form of legal strategy analysis is "filing an amicus curiae brief." Although this category is not the modal category, as noted earlier, the frequency distribution between those cases in which groups filed as litigants and filed as amici were split fairly evenly (see Table 5.2).

In addition, the amicus curiae strategy is a more appropriate category for comparison since existing literature on group involvement in the courts reveals a great deal more about this strategy choice (e.g., Cladeira and Wright, 1990). Table 5.3 details the results of the three binary comparisons resulting from the multinomial logistic regression.[28] The measures of fit for the model are strong, with a Pseudo R-square of .35 and a Proportional Reduction in Error (PRE) of .52.

---

[28] The results in Table 3 were achieved by applying the specified multinomial logit model using the amicus strategy as the base category (columns I and II in Table 3) and then by performing the analysis using the litigant strategy as the base category (column III in Table 3).

Table 5.2: Descriptive Statistics of Variables

Variable Name	Frequency	Mean	Std. Deviation
DV = Legal Strategy Choice {L=Litigant, A=Amici, S=Supply Counsel}	L=436 A=385 S=134	----	----
Internal Factors			
Gross Income/$1M	----	14.42	48.22
Fund Balance/$1M	----	24.71	72.05
Dues Paying Members	Y=678, N=277	.29	.45
Involved in Legislative or Grassroots Lobbying	Y=231, N=724	.24	.43
External Factors			
Court Jurisdiction {S=state, F=federal)	S=338, F=617	.35	.48
Court Level {T=Trial, A=Interm. Appellate, L=Last Resort}	T=277 A=520 L=158	1.88	.66
Istook	Y=666, N=289	.70	.46
Number of Other Groups	----	5.52	11.35
Presence of Other Nonprofit Litigants	Y=218, N=737	.23	.42
Presence of Other Nonprofit Amici	Y=286, N=669	.30	.46
Presence of Government	Y=647, N=308	.68	.47

N=955 (181 cases with missing or unverifiable data are not included in the analysis)

TABLE 5.3: The Legal Strategy Choices of Court-Based Advocacy Chosen by Charitable Nonprofits 1990-1999

DV = Legal Strategy Choice	I. Litigant Strategy - vs- Amicus Strategy	II. Supply Counsel Strategy -vs- Amicus Strategy	III. Supply Counsel Strategy -vs- Litigant Strategy
INTERNAL FACTORS			
Gross Income/$1M	.018*	-.15**	-.17*
	(.008)	(.084)	(.084)
Fund Balance/$1 M	-.004	-.08*	-.08*
	(.003)	(.039)	(.039)
Dues Paying Members	-.27	-1.68***	-1.42***
	(.215)	(.348)	(.340)
Involved in Leg. Or GR Lobbying	-.16	1.11***	1.27***
	(.245)	(.278)	(.267)
EXTERNAL FACTORS			
Court Jurisdiction	.17	.13	-.05
	(.238)	(.301)	(.285)
Court Level	-.73***	-.77***	-.04
	(.173)	(.212)	(.193)
Istook	.43*	.81**	.38
	(.211)	(.272)	(.257)
Number Other Groups	-.08**	-.11***	-.03
	(.016)	(.023)	(.025)
Presence of Litigants	-.23	.05	.28
	(.230)	(.282)	(.256)
Presence of Amici	-3.77***	-1.42***	2.35***
	(.345)	(.276)	(.395)
Government Presence	-.48*	.29	.76**
	(.226)	(.296)	(.265)
constant	2.84	1.17	-1.67
	(.396)	(.481)	(.413)

* p<.05, ** p<.01, *** p<.001; N=955 ;Pseudo R Square =.35;PRE = .52

I will discuss the results of the model in three sections within the text. First, the results of the hypotheses tested concerning the choice between the "litigant strategy" and the "amicus strategy" will be discussed for both the internal factors and the external factors considered in the model. A third results section will discuss the preliminary results of the "supply counsel strategy." The existing literature on this form of participation is limited. Thus, no hypotheses were presented regarding this form of participation choice. However, the preliminary results of this analysis suggest that the strategy merits further attention and thus will be discussed briefly in this analysis.

Internal Factors

As demonstrated in Table 5.3, the effects of the internal factors more clearly emerged in these comparisons of legal strategies. As the cash flow of the organization, in millions of dollars, increases, the likelihood that they will turn to the litigation strategy also increases. In contrast, groups that have experience interacting with the political scene, are more likely to choose to file an amicus brief, than they are to choose to be a direct party. In the financial capacity hypothesis [see H1] I suggested that as the cash flow and financial reserves of the charity increased, so too would the likelihood a charity would file litigation as their primary advocacy strategy in the courts. The analysis in part supports this hypothesis. As *Gross Income* increases, holding all else constant, the propensity of a group to participate as a litigant increases, and the group's propensity to participate as an amicus decreases. However, in comparing the litigant strategy with the amicus strategy, the relationship between legal strategy choice and *Fund Balance* of the organization is not statistically significant. Thus, the analyses support only part of the financial capacity hypothesis. These results suggest that charities having sufficient financial capacity to choose a direct party strategy will be more likely to take this path through the courts than groups without such capacity. In comparing the litigation strategy with the amicus strategy, the *Gross Income* of the organization does have a positive and statistically significant effect on the choice to participate as a direct party. Cash flow seems to be of greater concern in determining strategy than does overall financial condition of the group.

The hypothesized effects of the presence of *Dues-paying Members* also receive partial support in the model. The presence of *Dues-paying Members* was expected to increase the likelihood of the "amicus strategy" and to decrease the likelihood of the "litigant strategy" (see Hypothesis H2). Again, this hypothesis receives some support from the analysis. The presence of dues-paying members increases a group's propensity to file as amicus relative the litigant strategy. The difference in the odds of filing an amicus brief compared with the odds of filing as a litigant is not significantly different at the $p<.05$ level. However, the discrete change analysis reveals that, for average[29] charities, being a group with involved members increases the predicted probability that a group will choose the amicus strategy for their court-based advocacy activities by .05 (see Table 5.5). The overall impact of the presence of financially involved members increases the likelihood that groups will choose to file amicus briefs over the other forms of participation. These findings support early research suggesting that groups will participate as amici to meet the demands of members and fulfill their organizational maintenance, and their policy, goals (McIntosh, 1985; Sorauf, 1976; O'Connor, 1980).

---

[29] Average charities in the analysis were specified at the mean for all interval and ordinal variables and at the mode for all dichotomous variables.

TABLE 5.4: Factor Change in the Odds of Choice of Legal Strategy
(when p>|z| < 0.05)

Internal Variables	p Value (z)	Factor Change in Odds for Unit Increase in Variable	Factor Change in Odds for Std. Dev. Increase in Variable
Gross Income			
Litigant (1) - Amicus (2)	.02	1.02	92.81
Litigant (1) - Supply Counsel (3)	.04	1.19	2.34
Supply Counsel (3) - Litigant (1)	.04	.84	.0003
Supply Counsel (3) - Amicus(2)	–	–	–
Amicus (2) - Litigant (1)	.02	.98	.43
Amicus (2) - Supply Counsel(3)	–	–	–
Fund Balance			
Litigant (1) - Amicus (2)	–	–	–
Litigant (1) - Supply Counsel (3)	.04	1.08	323.00
Supply Counsel (3) - Litigant (1)	.04	.92	.003
Supply Counsel (3) - Amicus (2)	.03	.91	.002
Amicus (2) - Litigant (1)	–	–	–
Amicus (2) - Supply Counsel (3)	.03	1.09	431.75
Dues-Paying Members			
Litigant (1) - Amicus (2)	–	--	–
Litigant (1) - Supply Counsel (3)	.00	4.12	1.90
Supply Counsel (3) - Litigant (1)	.00	.24	.53
Supply Counsel (3) - Amicus (2)	.00	.19	.47
Amicus (2) - Litigant (1)	–	–	–
Amicus (2) - Supply Counsel (3)	.00	5.39	2.14
Court Level			
Litigant (1) - Amicus (2)	.00	.48	.62
Litigant (1) - Supply Counsel (3)	–	–	–
Supply Counsel (3) - Litigant (1)	–	–	–
Supply Counsel (3) - Amicus (2)	.00	.46	.60
Amicus (2) - Litigant (1)	.00	2.08	1.63
Amicus (2) - Supply Counsel (3)	.00	2.16	1.67

Istook			
Litigant (1) - Amicus (2)	.04	1.54	1.21
Litigant (1) - Supply Counsel (3)	–	–	–
Supply Counsel (3) - Litigant (1)	–	–	–
Supply Counsel (3) - Amicus (2)	.00	2.25	1.45
Amicus (2) - Litigant (1)	.04	.65	.82
Amicus (2) - Supply Counsel (3)	.00	.44	.69
Number of Other Groups			
Litigant (1) - Amicus (2)	.00	.92	.40
Litigant (1) - Supply Counsel (3)	–	–	–
Supply Counsel (3) - Litigant (1)	–	–	–
Supply Counsel (3) - Amicus (2)	.00	.90	.30
Amicus (2) - Litigant (1)	.00	1.08	2.50
Amicus (2) - Supply Counsel (3)	.00	1.11	3.33
Presence of Amici			
Litigant (1) - Amicus (2)	.00	.02	.18
Litigant (1) - Supply Counsel (3)	.00	.10	.34
Supply Counsel (3) - Litigant (1)	.00	10.48	2.93
Supply Counsel (3) - Amicus (2)	.00	.24	.52
Amicus (2) - Litigant (1)	.00	43.27	5.62
Amicus (2) - Supply Counsel (3)	.00	4.13	1.92
Involved in Leg. Or GR Lobbying			
Litigant (1) - Amicus (2)	–	–	–
Litigant (1) - Supply Counsel (3)	.00	.28	.58
Supply Counsel (3) - Litigant (1)	.00	3.57	1.73
Supply Counsel (3) - Amicus (2)	.00	3.05	1.61
Amicus (2) - Litigant (1)	–	–	–
Amicus (2) - Supply Counsel (3)	.00	.33	.62
Government Presence			
Litigant (1) - Amicus (2)	.04	.47	.70
Litigant (1) - Supply Counsel (3)	.00	.62	.80
Supply Counsel (3) - Litigant (1)	.00	2.15	1.43
Supply Counsel (3) - Amicus (2)	–	–	–
Amicus (2) - Litigant (1)	.04	1.61	1.25
Amicus (2) - Supply Counsel (3)	–	–	–

The specialization hypothesis suggested that groups involved in grassroots or legislative lobbying are less likely to choose the direct party litigant form of participation in the courts (see H3). Typical advocacy charities were only slightly less likely (between 3 and 4 %) to appear as litigants than as amici.

The discrete change in predicted probability of an average advocacy charity that lobbies choosing to appear as a litigant rather than an amicus is -.04, suggesting some limited support for the specialization hypothesis (see Table 5.5). Further, the increase in the predicted probability of an average charity that lobbies, more than one that does not, choosing an amicus strategy is .03. The results of this analysis seem to suggest that groups specializing in legislative lobbying may in fact view the "amicus strategy" as a viable lobbying strategy in a judicial setting, despite a lack of legal expertise. This reinforces the findings of Chapter 3, which suggested that groups with political experience were more likely to lobby in the courts than groups without such experience. While charities with political experience are more likely to choose to file as amicus than to participate as litigants, the variation between the strategy choices is slight. This suggests that although groups may prefer to specialize in one lobbying strategy among venues (Gais and Walker, 1991), within the judicial venue charities with political experience do not avoid the "litigant strategy" altogether.

Table 5.5: Changes in Predicted Probability for Legal Strategy Choice of Average Advocacy Charities*

Legal Strategy	Average Charity Pred. Prob.	Changes in Predicted Probability as Dichotomous Variables Change from 0 to 1 (holding all else at average*)						
		Members	Lobbyist	State	Istook	Litigants	Amici	Govt.
Litigant	.752	-.050	-.037	.031	.086	-.045	-.686	-.079
Amicus	.244	.053	.027	-.031	-.088	.045	.686	.077
Supply Counsel	.004	-.003	.010	-.000	.002	.001	-.000	.002

*Average Charity is defined as the mean value for ordinal and nominal categories and the mode of all dichotomous variables
{members=0, lobbyist = 0, state=0, istook=1, amici=0, litigants=0, govt=1; rest =mean}

External Factors

External factors also affect the form of court participation for these groups. As presented in Table 5.3, the presence of other groups and the government were important predictors in the model. As the total number of other groups appearing as amicus or direct parties in a case increased, the likelihood of a group's participation being in the form of an amicus brief also increased. The presence of nonprofit organizations as amici appeared to contribute to "participation in kind." Among groups that participate in the courts, they were more likely to appear as amicus when other groups also appeared as amici. In contrast, group participation was less likely to be as a litigant (compared with amicus) when there were other nonprofits appearing as a direct party in the case. The involvement of the government on a case also appeared to correspond to the form of group participation. The presence of governmental litigants increased the likelihood that, in cases with group participation, charities would appear as amicus or supply counsel, rather than as a direct party in the case.

Groups also appeared more frequently as amici in cases decided in federal court but as direct parties in state court cases. This modest effect is evident in the discrete change calculation that suggests charities were more likely to file as litigants in state court (.03) and less likely to file as amici in that jurisdiction (-.03). The results of the model also attest to the importance of including a variable that distinguishes between the levels of the court system. The odds of appearing as amicus (rather than a direct party) are more than two times greater as a case moves from the trial to the intermediate appellate level, and finally, to the court of last resort.

The analyses have not supported the hypothesized effects surrounding the Istook Amendment in this model. In fact, the odds of appearing as a litigant are slightly higher than the odds of appearing as amicus. The discrete change analysis of the "average charity" indicates that the impact of Istook was a .09 increase in the predicted probability of appearing as a litigant. Contrary to expectations that in the post-Istook era groups would appear in the courts in forms that were more efficient, this result suggests that groups that did participate in the courts after 1994 were more likely to do so as a direct party.

"Supply Counsel Strategy"

Very little is known about the "supply counsel strategy." In this study, charities supplied counsel to direct party litigants on 134 (14%) of the cases included in the analysis. Although the existing literature does not provide insights as to the expectations of what sorts of groups will choose this strategy, this study suggests some preliminary findings on the subject. Within this study, the overall impact of this strategy choice is small, compared with the "amicus strategy" and the "litigant strategy." However, several interesting relationships do emerge from the analysis. First, groups participating in court that also have previous political experience in other branches are more likely to choose to supply counsel. Further, as discussed above, when the government participates on a case, charities are less likely to appear as litigants on a case. Somewhat surprisingly, charities seem slightly more likely to choose to supply counsel than to file as an amicus in this situation. In addition, charities with ample financial resources are most likely to appear as direct party litigants, and slightly less likely to supply counsel as a strategy.

Finally, charities with dues-paying members are significantly less likely to supply counsel than those groups without members.

Previous political involvement by the charity has the greatest impact on a group's propensity to choose the supply counsel strategy. As illustrated in Table 4, no matter the values of other variables, the odds are more than three times larger that charities with previous political experience will choose to supply counsel compared with choosing the amicus strategy (factor change in odds = 3.05) or the litigant strategy (factor change in odds = 3.57).

As gross income increases by one standard deviation the odds that a charity will choose to supply counsel compared with choosing to appear as a litigant are smaller by a factor of approximately .84 (See Table 5.4). While this seems somewhat intuitive, it is also a bit surprising. Early case studies, including *Caucasians Only* by Vose (1959), suggested that groups with ample resources will serve as counsel for individuals and other groups as they advocate for policy changes in the courts. The contrast in the effect of financial effect on the litigant strategy and the supply counsel strategy are puzzling. Previous research has suggested that, rather than the magnitude of the resources available to a group, the proportion of the group's own resources being smaller than those of its opponents will lead a group to litigate (Olson, 1990). No previous empirical studies have analyzed the supply counsel strategy choice, but this study suggests that as the number of other groups on a case increases, the likelihood that a charity will supply counsel on the case decreases compared with both the litigant and the amicus strategy. Therefore, it is reasonable to assume that while wealthy groups may be overall more likely to litigate, as opposing resources mount, they may in fact be less likely to participate in a case by supplying counsel. Further, this finding suggests that changes in the accessibility of the courts to charities may have changed their behavior. As standing rules relaxed, those groups with sufficient resources may now, in contrast to the strategy choices made by the NAACP-LDF in the 1950s and 1960s, choose to appear as litigants more frequently and to supply counsel less often.

The presence of governmental litigants increased the likelihood that, in cases with group participation, charities would appear as amicus or supply counsel, rather than as a direct party in the case. There is no statistical difference between the strategy choices of filing an amicus brief and supplying counsel. However, when considered in relation to the choice of appearing as a litigant, charities seem more likely to supply counsel (factor change in odds = 2.15) than to file as amici (factor change in odds = 1.61).

Finally, relative to both the "litigant strategy" and the "amicus strategy," groups with members are far less likely to supply counsel. The odds of choosing to supply counsel compared with filing an amicus brief are .19 times smaller, and the odds of choosing to supply counsel relative to participating as a litigant are .24 times smaller for membership groups than for nonmember groups (see Table 5.4).

Discussion

Tschirhart (1997) suggests that nonprofit organizations often form coalitions trying to extend their power in the congressional policy arena. The results of this study suggest support for the theory in the judicial venue as well. Groups seem to be more likely to participate as amici when other nonprofit organizations are present on the case.

This finding holds for all forms of participation. I hypothesized that the number of other nonprofit groups on a case would affect the type of strategy employed by other charities also involved with the case. The results of the multinomial logit model suggest that as the number of other nonprofit groups on a case increases by one, the odds of choosing the amicus strategy compared with both the supply counsel strategy and the litigant strategy are greater. Further, the presence of other nonprofits as either amici or as litigants, generally increases the likelihood that a charity will choose to participate by filing an amicus curiae brief. The presence of other amici increases the predicted probability that an average advocacy charity will choose the "amicus strategy" by .69. Similarly, the presence of other nonprofit organizations as amici on a case differentiates the strategy of filing as a litigant and supplying counsel from the strategy of filing an amicus brief.[30] The odds of choosing the "amicus strategy" over the "litigant strategy" are forty-three times greater if other amici are present. In addition, the odds of choosing to supply counsel over the litigant strategy are ten times greater if other nonprofit amici are present (see Table 5.4).

Finally, the results of the analysis strongly support the government presence hypothesis [H8], which suggested that government involvement on a case would decrease group participation as a direct party and increase the likelihood that groups would use the "amicus strategy." As expected, the odds a charity advocating in the courts will choose the amicus strategy are 1.6 times greater if the government is present on the case. In

[30] In examining the odds ratios for the presence of amici and the presence of litigants, variances in the levels of statistical significance exist. In the case of other amici, all odds differences are statistically significant at the $p<.05$ level. However, in considering the effects of other litigants on the case, the odds ratios are not statistically significant.

examining the discrete change in predicted probabilities, the same relationship holds. The presence of the government increases the predicted probability of the amicus strategy by .12.

Conclusions

This analysis of the choice of legal strategy among court-based advocates seeks to explain the variation in legal strategy choices and this study presents some interesting preliminary findings. Perhaps the most significant finding comes from examining the effects of the presence of others on a case. The presence of other nonprofit groups, either as litigants or as amici increases the propensity to choose the amicus strategy. This finding is somewhat surprising. I expected groups with similar policy goals to form coalitions and participate on a case together, to increase the impact of their voice in the courts. These results suggest that charities are forming coalitions to support coalition members and to oppose the viewpoint of other nonprofit litigants by filing as amici rather than sharing the costs of participating as a direct party. Those charities with legal experience and large financial resources are perhaps expected to bear the burden of participating as a direct party, while other nonprofits provide support both as grassroots and legislative lobbyists and by choosing to be amici.

In addition, the presence of the government on a case has strong implications for the strategies chosen by even these relatively wealthy advocacy charities. The presence of the government on cases in which the charity chose to participate substantially decreased the likelihood that the charity would file as a litigant. Rather, charities were much more likely to choose to employ either the amicus or supply counsel strategy.

Surprisingly, internal factors do not seem to affect the strategy decisions of charities advocating in the courts. Financial capacity, as represented by proxies for cash flow and financial resources, differentiates instances where groups are more likely to participate by supplying counsel. The magnitude of the effect of cash flow is greater than that of financial resources on hand. However, the effects on strategy choice are surprising because the common wisdom suggests that organizations with larger financial capacity will provide counsel to smaller organizations and individuals in need. If this is the case, then the charities may be representing their own organization in addition to, or in lieu of, providing legal counsel to assist others. Further, charities with previous political experience are less likely to choose to file as direct parties. Therefore, these internal factor results suggest that those charities choosing to litigate as a direct party are most often wealthy organizations without members that do not engage in lobbying activities in the political arena. In contrast, charities choosing an amicus strategy seem to be those groups that are politically active, have involved members, and have slightly fewer financial resources than their litigant counterparts. Unfortunately, this analysis does not reveal the frequency of the participation of these groups. If in fact a large number of groups are involved as infrequent litigants, whereas a small number of groups choose to implement the amicus strategy repeatedly, this will affect our understanding and interpretation of the legal strategy choices of charities. I now turn, in Chapter 6, to some overall conclusions drawn from the analysis of the court-based advocacy of charities.

CHAPTER 6: CONCLUDING THOUGHTS ON CHARITIES, ADVOCACY, AND THE COURTS

Introduction

The nonprofit sector is composed of those groups that do not operate in order to distribute profit and are not a part of the government. The law prohibits the organizations in this “third” sector from distributing earnings, and may apply to be granted tax-exempt status under Section 501 of the Internal Revenue Code (Gordon, Greenlee, and Nitterhouse, 1999). The nonprofit sector consists of approximately 1.5 million organizations (Salamon, 1999) employing more than 6 percent of the U.S. workforce (Hodgkinson and Weitzman, 1996). Approximately half the organizations in the nonprofit sector operate as public charities under Section 501(c)(3) of the Internal Revenue Code.

To be granted charitable status, nonprofit organizations must claim to be serving the public in a qualifying way according to the U.S. code (26 U.S.C.A. 501(c)(3)).[31] This public benefit may come in the form of education, protection of animals or children, or even amateur athletics. The public benefit derived from charitable nonprofits is most often associated with services to some sector of the public. In addition to this easily identified public good, nonprofits often make claims on the government speaking for their members and clients. We often blur the distinction between a charity and a political interest group.

---

[31] Section 501(c)(3) specifies the ways in which an organization may qualify as a charity. For example, an organization may be serving the public through educational services, protection of youth, or protection of animals - all of these are "qualifying ways" to serve society according to the IRC.

"Charities frequently feel that their commitment to their clients requires them not only to provide the special benefits for which they were founded but also to defend the interests of their clients in terms of public policy" (Douglas, 1987). While some large nonprofits are consciously political, other small nonprofits become advocates as a reaction to policy and political changes that have adverse effects on their organization and its constituents (Reid, 1999). Although the services they provide vary, many of these charities share an interest in policy advocacy as part of their mission. Political advocacy is often associated with the term "special interest group" which carries a negative connotation. However, research on nonprofit interest groups shows that, rather than having a narrow appeal, they often enjoy both broad public support and involvement (Hrebenar, 1997).

Much of the policy advocacy by nonprofits takes place in traditional political channels (King and Walker, 1991; Jenkins, 1987). However, charities are limited in the amount of legislative and grassroots lobbying they may legally do. In addition, legislative proposals in Congress have sought to curtail even further how much legislative advocacy that a nonprofit may engage in (Reid, 1999). In contrast, charities do not face stringent limitations in the amount of participation they may pursue in courts. Although structural barriers to entry exist, groups able to pass these threshold tests (Scheppele, 1988) are not strictly limited in the types or amount of participation they may pursue in the judicial venue. Further, many groups have met with substantial policy success in the courts including those defending the rights of the disabled, minorities, children, and women (Reid, 1999). Although studies documenting organized litigation campaigns defending the civil rights of these minority groups are well known (e.g.Vose, 1959; Olson, 1984;

Woliver, 1993), little is known about why and how charities may turn to the courts as they seek to influence public policies. The purpose of this study was to identify the internal organizational characteristics and the external environmental factors that increase the likelihood and frequency of court-based advocacy activities, as well as those factors that may lead a group to choose one legal strategy over another.

Findings of the Study

The chapters in this study have provided several interesting and revealing facets of the activities of charities advocating in the courts. I examined two sets of variables to learn the impact of those factors under the direct control of the organization, and environmental factors beyond the control of the group. Both internal and external factors are influential in determining if, how, and how often charities advocate for their policy goals in the courts.

Internal Factors

The results of the analyses in this study reveal several interesting effects of internal factors. First, and perhaps most telling, is the differential impact between court-based advocacy decisions when examined over a short period of time (see Chapters 4 and 5) versus a cumulative time period (see Chapter 3). When examined from a cumulative perspective, over the entire decade of the 1990s, internal factors appear to have been quite important to the decision-making process. Managers and board members seem to consider the impact of a series of decisions on the organization over time. However, in annual or case-by-case considerations, these internal factors lose a great deal of their importance. In the short term, decision-makers may be responding primarily to external factors as they advocate. Although separating the timing of the decisions is difficult, if the organizations are looking back over past decisions and considering the pattern of advocacy as they go forward, this seems a logical conclusion. However, as the day-to-day operations of many nonprofits are hectic, and at times more reactive than proactive, I presume this reflection to be only periodic as the group undertakes long-term planning.

Chapter 3 sought to identify the type of advocacy charity that seeks out policy opportunities in the judicial venue. The findings of the analysis in Chapter 3 suggest that groups who participate in the courts incorporate financial considerations into their court-based advocacy planning. As average gross income increases, the likelihood that a group will turn to the courts also increases. An increase in $17 million (one standard deviation) in gross income increases the probability of court participation by .14, for an average advocacy charity[32]. When considered jointly, cash flow and financial situation were relevant factors in predicting participation in the courts among advocacy charities. Further, an organizational history with political involvement encouraged court-based advocacy, suggesting that groups that are politically active in other venues may develop expertise as advocates and seek opportunities in all venues. If a group is involved in grassroots or legislative lobbying, it is approximately 20 percent more likely to advocate in the courts than a group without political experience. The results of this study also suggest that groups with financially involved members seem more likely to participate in the courts than groups without dues-paying members. Groups with dues-paying members are about 7 percent more likely to pursue policy goals through the courts. Finally, the group's

---

[32] Holding all other variables at their means.

orientation toward civil rights issues, as opposed to civic participation issues, increases the likelihood it will choose to participate in the courts.

Only one previous study has addressed the question of what types of interest groups pursue policy goals in the courts. Using the broader base of all interest groups, Scheppele and Walker (1991) finds that more than 55 percent of groups in their study used the courts for some reason. Their results, based on a 1985 survey sent to interest groups, suggest that over the long-term[33] groups most likely to turn to the courts to pursue their policy goals was affected by resources, political climate, political experience, and policy area (Scheppele and Walker, 1991). The results of this study provide support for their findings concerning resources and political experience.

The results of this study, based on the top five percent of income-earners among advocacy charities, differ from existing literature in three significant areas. First, the most significant departure in findings from the Scheppele and Walker study (1991) lies in the propensity of a nonprofit group to go to court at all. They find that nonprofit and citizen groups are not likely to pursue policy goals in court (Scheppele and Walker, 1991). However, this study suggests that approximately 20 percent of advocacy charities will advocate in the courts. As their study is based on information collected before the starting point of this study, this finding may be time-sensitive.[34] Second, the findings of Spill (1997) suggest that the presence of members will decrease a manager's propensity to

---

[33] I make this assumption based on the fact that several questions in the survey ask about a general practice, or ask for a response based on "the last five years."

[34] This will also be discussed in the short-term decisions section of the external factors of the study, as Istook is found to affect the propensity of charities to litigate in the courts.

choose to turn to the courts in pursuit of organizational policy goals. As demonstrated in Chapter 3, the presence of dues-paying members increases the probability of court-based advocacy among charities. Finally, Scheppele and Walker (1991) find only partial support for the claim that rights-oriented groups are more likely to pursue policy goals in the courts. They suggest that wealthy conservative groups with profit-based interests are most likely to use the courts, while those groups with rights claims do not comprise a large part of the interest-group litigation (Scheppele and Walker, 1991). However, the findings of this study suggest that charities with rights-oriented missions are more likely to advocate in the courts, when examined over a ten-year period.

In the short-term, the impact of internal factors was considered in two ways. First, I examined the impact of internal factors on the strategy choices of the group. Second, I analyzed the annual rate of participation of charities, and considered the importance of internal organizational characteristics. The analysis of legal strategies employed by charities is considered first.

Organizations with high levels of annual income are more likely to choose litigation as a legal strategy to pursue their policy goals. As gross income increases the propensity to litigate increases while the likelihood of filing as an amicus decreases. Further, as gross income increases, the likelihood that a group will choose to supply counsel decreases. The presence of members increases the likelihood that groups will choose to file as amicus over both the litigant and supply counsel strategies. Previous political experience seems to lead groups to choose a less direct legal strategy. The predicted probability for an average charity that lobbies falls by 4 percent more than one that does not engage in lobbying. However, charities that lobby are more likely, by a factor change in odds of about three, to choose to supply counsel and to file as amici.

The results of the analysis support the contention in existing literature that wealthy organizations are most likely to maintain control over the litigation efforts by filing as a direct party (Scheppele and Walker, 1991; Wasby, 1985). What is surprising in these results is the impact of financial capacity on the likelihood of choosing to supply counsel. Unfortunately, no empirical work has examined the strategy of supplying counsel.[35] Olson (1990) suggests that the total resources of the opposition to a group's cause are of considerable import to their venue choice. The findings of this study suggest that in turning to courts, groups with lower financial capacity are most likely to choose to appear as amici or to supply counsel, rather than appear as litigants. The analysis also supports earlier research that suggests that groups will participate as amici to satisfy their organizational maintenance considerations (Handler, 1978; O'Connor, 1980). Finally, perhaps the most interesting finding of this portion of the study is the difference in effects of political experience on court-based advocacy strategies. Charities with previous political experience (*Participate in Lobbying*) are more likely to choose to participate either by supplying counsel or by filing an amicus brief. However, the results of this analysis suggest that the specialization hypothesis needs to be modified somewhat. Charities that participate in the policy process broadly tend not to file as litigants. This suggests that the lobbying strategies of groups are only specializing when the groups have sufficient resources to choose strategies more carefully. For example, groups who file as

[35] While Scheppele and Walker (1991) consider "Suits for Members" and "Class Actions" as strategies, these are not clear substitutes for the supply counsel strategy as defined in this study.

litigants tend to be wealthy organizations with more narrow and intense policy considerations, while groups that choose to file as amici tend to be less wealthy and use a variety of strategies to influence public policies. This finding provides some support and delineation to the contention of Gais and Walker (1991) that groups tend to specialize their lobbying strategies early in the life-cycle of the group and maintain this strategic approach through the life of the group.

As suggested in Chapter 5, the impact of the internal factors on short-term annual participation rate decisions are minimal. The annual financial situation of the charity does not have a significant effect on the rate of participation. In addition, a group's orientation to rights issues does not increase the annual frequency of court participation. The presence of dues-paying members does not affect the annual rate of participation decisions of charities. There was also no significant difference in the annual rate of participation between charities engaged in grassroots or legislative lobbying and those that are not. Therefore, in the short-term decision making process, political experience may not be a relevant factor.

Placing these findings within the context of existing literature is difficult. Most of the studies that examine the motivations of interest groups to turn to the courts, do so by considering their involvement either by surveying the organization to identify general patterns of participation (Scheppele and Walker, 1991; Spill, 1997) or by examining all of the participation decisions of groups within one strategy (e.g., Caldeira and Wright, 1990) or within one policy arena (Kobylka, 1991; O'Connor, 1980). The analysis presented in Chapter 5 is quite different from any of these existing studies, in that it seeks to explain variations in the factors that lead groups to repeated court participation. The results of the zero-inflated negative binomial model suggest that this type of analysis is necessary to differentiate long-term participation choices from the short-term participation choices of interest groups.

External Factors

In the long-term, the only external factor considered in the analysis was government regulations. Government grantees face more stringent lobbying restrictions than nonprofits that do not receive direct funding from the government. However, the presence or absence of government funds in the budget of the nonprofit organization was not relevant to their long-term participation decisions. This study provides the first preliminary evidence that the regulations included in grants and contracts may not be effective deterrents to advocacy.

In the short-term, external factors are highly relevant to court-based advocacy decisions. First, once a group has decided to participate in the courts, groups consider a number of external factors as they choose which legal strategy to employ. For example, the presence of other amici on a case dramatically increases a group's propensity to choose the amicus strategy. Unfortunately, the content of the published opinion of the case does not provide insights into the order in which the groups were added to the case, or their reasons for participation. However, based on the information provided in the case it seems likely that as the number of groups participating on the case, either as amici or as litigants, increases so too does the likelihood that other nonprofits will become aware of the case. Therefore, the group's ability to participate on a case increases simply through their heightened awareness. While it is not clear if other nonprofits are encouraging participation among their policy allies, or prompting their competitors to join a case, it seems likely that a network of sorts develops within the nonprofit community allowing for increased awareness of policy issues being heard in the courts. Further, the presence of the government also increases the likelihood that a group will choose to participate as an amicus. The strategy choice may be based on the reluctance of groups to go "against" the resources of the government. In addition, as in the case of other nonprofit groups, it seems likely that the presence of the government on the case also increases awareness of the case overall. Finally, the effect of the political environment in Congress was surprising. In cases following the proposal of the Istook amendment, groups were far more likely to choose to file as litigants than to choose either of the other two strategies. This finding seems to reinforce the earlier findings that groups view the strategy of filing an amicus brief very differently from that of filing as a litigant. The strategy choices of charities in court seem to diverge on political environment, financial capacity, and political experience. Groups with higher levels of income facing a hostile political climate in the political branches, may choose to participate in the courts as direct parties. However, charities with lower levels of financial resources, who feel less impact from the political changes may choose to take a broad approach to advocacy and continue to work as grassroots and legislative lobbyists as well as by filing as amicus.

In contrast to the short-term findings of the internal factors considered in the rate of participation model, the external factors have a high level of impact. Changes in the political environment in other branches have a substantial impact on advocacy. The rate of participation among groups that consider the courts as a possible advocacy venue increases by a factor of six after Congress proposes the Istook amendment. In addition, although not in the expected direction, the restrictions placed on government grantees were relevant in short-term decisions. For government grantees who view the courts as a potential advocacy venue, the rate of participation increases by approximately six percent over non-grantees. Finally, once a group has decided to participate in the courts, the likelihood that they will continue to do so, especially in the short term, increases dramatically.

Implications and Recommendations for Further Research

I have taken a broad view of advocacy by charitable organizations to assess the depth and dimensions of court-based advocacy. Two sets of variables are important in accounting for turning to the courts to pursue policy goals. The first is a set of internal organizational characteristics, including financial capacity, group orientation, and the presence of members. The results of the study suggest that while an organization's financial capacity is important in explaining participation over the long term, and in explaining strategies employed in the courts, previous literature may have overstated the importance of financial resources in short-term decision making. As suggested by Olson (1990), examining the resources of an organization from a different perspective, such as in relation to opposition, may be necessary to reveal how these considerations affect court-based advocacy. In addition, having a rights-orientation, while encouraging court participation over the long term, does not automatically lead groups to choose to advocate in the courts (Scheppele and Walker, 1991). Finally, the effect of the presence of dues-paying members remains uncertain. Although in the long term members increase the likelihood of participation, by increasing the propensity to choose to file as amicus, the short-term impact on the rate of participation is not significant.

The second set of variables consists of external environmental factors that may cause a group to turn to the courts to pursue policy goals, including government funding, political environment, and political and court experience. Increases in hostility in the political environment seem to increase court participation in both the long and short term, and leading the group to choose to file as litigants. This is similar to the findings of Scheppele and Walker (1991) who find that changes in the political environment are relevant in explaining court participation. Other important external factors relate to the involvement of the government. Government grantees are more frequent court participants than non-grantees, while the presence of the government on a case leads groups to choose to participate as amici most often. Finally, both political experience and court-based experience effect court-based advocacy participation in terms of both strategies and frequency of participation.

These findings suggest that, despite public perception, charities are broadly involved in influencing public policies. Although the restrictions placed on charities through grants, as well as legislative initiatives, can at times affect their advocacy choices, charities that want to advocate seem to find ways to be involved in the policy process. The behavior of charities in court provides insights that, in many ways, support the findings of previous studies based on the broader population of interest groups. Like all interest groups, many organizational and environmental considerations affect charities.

Further, the importance of members to the organizational health, of charities and interest groups alike, affects their lobbying and advocacy behavior. Charities, like many other interest groups, are pursuing both policy and organizational maintenance goals in the courts.

This study has helped to identify a variety of internal and external factors that influenced the advocacy behavior of charities in court during the 1990s. I have shown that approximately 20 percent of the highest income-earning advocacy charities are using the courts as a venue for their advocacy. Charities in the courts implement a variety of legal strategies, allowing them to take full advantage of court-based advocacy opportunities. Finally, I have shown that while many charities still do not consider advocating through the courts as an option, others use the courts frequently to influence public policies. Although some see legal participation as an underused advocacy strategy among charities (Reid and Krehely, 2001b), compared with legislative and grassroots lobbying, this analysis shows that many charities *are* making their voices heard in the courts.

REFERENCES

Aarons, D.F. (1999). Nonprofit Management and Advocacy: Examining Barriers to Democracy. Conference Paper. Association for Research on Nonprofit Organizations and Voluntary Action, Washington, D.C., November 4-6.

Abrahamson, S.S., & Gutmann, D.S. (1987). The new federalism: state constitutions and state courts. Judicature, 71, 88-99.

Ainsworth, S. & Sened, I. (1993). The Role of Lobbyists: Entrepreneurs with Two Audiences American Journal of Political Science, 37(3), 834-866.

Atkinson, R. (1989). Major Legal Topics to be Covered in a Law School Course on Nonprofit Organizations. Conference proceedings of the research agenda: legal issues affecting nonprofit corporations. New York: New York University School of Law.

Bartholomew, K. (1999). The Evolution of American Nongovernmental Land Use Planning Organizations. Journal of the American Planning Association, 65(4), 357-363.

Baumgartner, F.R., & Jones, B.D. (1991). Agenda Dynamics and Policy Subsystems. The Journal of Politics, 53(4), 1044-1074.

Baumgartner, F.R., & Leech, B.L. (1998). Basic Interests: The Importance of Groups in Politics and Political Science. Princeton, N.J.: Princeton University Press.

Berry, J.M. (1999). The Nonparticipation of Nonprofits. Conference Paper. Association for Research on Nonprofit Organizations and Voluntary Action, Washington, D.C., Novermber 4-6.

Boris, E. & Mosher-Williams, R. (1998). Nonprofit Advocacy Organizations: Assessing the Definitions, Classifications, and Data. Nonprofit and Voluntary Sector Quarterly, *27*(4), 488-506.

Boris, E.T., & Steuerle, C.E. Eds. (1999). Nonprofits & Government: Collaboration and Conflict. Washington, D.C.: The Urban Institute Press.

Burstein, P. (1998). Interest Organizations, Political Parties, and the Study of Democratic Politics. In A.N. Costain and A.S. McFarland (Eds.) Social Movements and American Political Institutions. Lanham ME: Rowman and Littlefield Publishers.

Brace, P.R., & Hall, M.G. (1997). The Interplay of Prefernces, Case Facts, Context, and Rules in the Politics of Judicial Choice. The Journal of Politics, 59(4), 1206-1231.

Caldeira, G. A., & Wright, J. R. (1988). Organized Interests and Agenda Setting in the U.S. Supreme Court. The American Political Science Review, 82(4), 1109-1127.

----------(1990). Amici Curiae before the Supreme Court: Who Participates, When, and How Much? The Journal of Politics, 52(3), 782-806.

Caldeira, G.A. & Zorn, C. J. W. (1999). The Dispersion of Advocacy: Amici Curiae in the Supreme Court. Conference Paper. Annual Meeting of the Midwest Political Science Association, April 15-17.

Cameron, A.C., & Trivedi, P.K. (1989). Regression Analysis of Count Data. New York, NY: Cambridge University Press.

The Center on Nonprofits & Philanthropy at the Urban Institute. (2000). Using Data from the National Center for Charitable Statistics (NCCS) for Advocacy-Related Quantitative Research [Article posted on the World Wide Web]. Washington DC: Krehely, J. Retreived October 15, 2001 from the World Wide Web: http://www.urban.org/advocacyresearch/data_TEST.html

The Center on Nonprofits & Philanthropy at the Urban Institute. (2000). Understanding the Word "Advocacy": Context and Use. [Article posted on the World Wide Web]. Washington DC: Reid, E.J. Retreived June 26, 2001 from the World Wide Web: http://www.urban.org/advocacyresearch/structuring.html

The Center on Nonprofits & Philanthropy at the Urban Institute. (2000). Political Parties, Interest Groups, and Congressional Elections. [Article posted on the World Wide Web]. Washington DC: Herrnson, P.S. Retreived June 26, 2001 from the World Wide Web: http://www.urban.org/advocacyresearch/structuring.html

The Center on Nonprofits & Philanthropy at the Urban Institute. (2000). The Uses of Section 527 Political Organizations. [Article posted on the World Wide Web]. Washington DC: Fei, R.E. Retreived June 26, 2001 from the World Wide Web: http://www.urban.org/advocacyresearch/structuring.html

The Center on Nonprofits & Philanthropy at the Urban Institute. (2000). The Practical Economies of "Pay to Play" Politics. [Article posted on the World Wide Web]. Washington DC: McChesney, F.S. Retreived June 26, 2001 from the World Wide Web: http://www.urban.org/advocacyresearch/structuring.html

Cigler, A.J. & Loomis, B.A. (1986). Interest Group Politics. Washington, D.C.: CQ Press.

Cordes, J., Henig, J.R., & Twombly, E.C. (2001). Nonprofit Human Service Providers in an Era of Privatization: Toward a Theory of Economic and Political Response. Policy Studies Review, 18(4), 91-102.

Cortner, R. C. (1968). Strategies and Tactics of Litigants in Constitutional Cases. Journal of Public Law - Emory Law School, 17, 287-307.

Costain, A.N. & McFarland, A.S. eds. (1998). Social Movements and American Political Institutions. Lanham ME: Rowman and Littlefield, Publishers.

Cox, J.R. & McCloskey, M. (1996). Advocacy and the Istook Amendment – Efforts to Restrict the Civic Speech of Nonprofit Organizations in the 104th Congress. Journal of Applied Communication Research, 24 (4), 273-291.

Dahl, R.A. (1967). The City in the Future of Democracy. The American Political Science Review, 61(4), 953-970.

de Figueiredo, J.M., & de Figueiredo Jr., R.J.P. (1998). The Allocation of Resources by Interest Groups: Lobbying, Litigation and Administrative Regulation. Conference Paper.

de Tocqueville, A. (1862). Democracy in America. [Tr. by Henry Reeve, esq. Ed., with notes, the translation revised and in great part rewritten, and the additions made to the recent Paris editions now first translated, by Francis Bowen]. Sever and Francis: Cambridge, MA.

Douglas, J. (1987). Political Theories of Nonprofit Organization. In J.S. Ott (Ed.), The Nature of the Nonprofit Sector, (2001). Boulder, CO: Westview Press.

Dunlap, R.E. and Mertig, A.G. Eds. (1992). American Environmentalism: The U.S. Movement, 1970-1990. Washington D.C.: Taylor & Francis New York, Inc.

Epstein, L. (1991). Courts and Interest Groups. In J. B. Gates and C. A. Johnson (Eds.), The American Courts: A Critical Assessment. Washington D.C.: Congressional Quarterly, Inc.

Epstein, L. & Knight, J. (1998). The Choices Justices Make. Washington D.C.: Congressional Quarterly Inc.

Epstein, L. & Kobylka, J.F. (1992). The Supreme Court and Legal Change: Abortion and the Death Penalty. Chapel Hill NC: University of North Carolina Press.

Epstein, L. & Rowland, C.K. (1991). Debunking the Myth of Interest Group Invincibility in the Courts. The American Political Science Review, 85(1), 205-217.

Epstein, L., & Segal, J.A. (1997). Supreme Court Agenda Setting: Assessing Cross-Institutional Constraints. Conference Paper. Midwest Political Science Association, Chicago, IL.

Farole Jr., D.J. (1998). Interest Groups and Judicial Federalism: Organizational Litigation in State Judiciaries. Westport. CT: Praeger Publishers.

Fishman, J.F. & Schwarz, S. (2000). Nonprofit Organizations: Cases and Materials, Second Edition. New York NY: Foundation Press.

Froelich, K.A., Knoepfle, T.W., & Pollak, T.H. (2000). Financial Measures in Nonprofit Organization Research: Comparing IRS 990 Return and Audited Financial Statement Data. Nonprofit and Voluntary Sector Quarterly, 29(2), 232-254.

Gais, T. & Walker, J.L. (1991). Pathways to Influence in American Politics. In J.L. Walker, Jr. (Ed.) Mobilizing Interest Groups in America: Patrons, Professions, and Social Movements. Ann Arbor: University of Michigan Press.

Galanter, M. (1974). Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change. Law and Society Review, 9, 95-160.

Gordon, T.P., Greenlee, J.S., & Nitterhouse, D. (1999). Tax-Exempt Organization Financial Data: Availability and Limitations. Accounting Horizons, June.

Gormley Jr., W.T. (1998). Witnesses for the Revolution. American Politics Quarterly, 26(2), 174-196.

Grumet, B.R. (1985). The changing role of the federal and state courts in safeguarding the rights of the mentally disabled. Publius, 15, 67-80.

Hacker, H.J. (2000). Conservative Christian Litigating Interests: Religious Ideology and Approach to Policy Influence. Conference Paper. Southern Political Science Association Annual Meeting, Atlanta, Georgia, November 8-11.

Handler, J.F. (1978) Social Movements and the Legal System: A Theory of Law Reform and Social Change. New York, NY: Academic.

Hakman, N. (1969). The Supreme Court's Political Environment: The Processing of Noncommercial Litigation. In J. Grossman and J. Tannenhaus [Eds.] Frontiers of Judicial Research. New York: Wiley.

Hansford, T.G. (2001). Organized Interests and the Decision to Submit an Amicus Brief in a U.S. Supreme Court Case. Conference Paper. Southern Political Science Association Annual Meeting, Atlanta, Georgia, November 7-10.

Hodgkinson, V.A., & Weitzman, M.S. (1996). Giving and Volunteering in the United States, 1996. Washington DC: Independent Sector.

Hojnacki, M. And Kimball, D.C. (1998). Organized Interests and the Decision of Whom to Lobby in Congress. American Political Science Review, 92, 775-790.

Hopkins, B.R. (1987). The Law of Tax-Exempt Organizations. New York: Wiley.

Hrebenar, R.J. (1997). Interest Group Politics in America. Armonk, NY: M.E. Sharpe.

Hunter, K.G., Wilson, L.A., & Brunk, G.G. (1991). Societal Complexity and Interst-Group Lobbying in the American States. The Journal of Politics, 53(2), 488-503.

Independent Sector. (2000). Charity Lobbying and the Public Interest [Article posted on the World Wide Web]. Washington DC. Retreived October 21, 2001 from the World Wide Web: http://www.independentsector.org/clpi/publicinterest.html

Istook, Ernest (1995). "Statement of Rep. Istook," In Congressional Record H8393 (daily edition July 24, 1995).

Ivers, G. (1998). Book Review of: Solvinf the Puzzle of Interest Group Litigation by Koshner, A.J. (1998) in Law and Politics Book Review, <UNT_LPBR@UNT.EDU>, 8(8), 322-324, August.

Jenkins, C.J. (1987). Nonprofit Organizations and Policy Advocacy. In W. Powell (Ed.), The Nonprofit Sector: A Research Handbook. New Haven, CT: Yale University Press.

------------- (2000). Outline of the forthcoming chapter - Nonprofit Organizations and Political Advocacy. In R. Steinberg and W. Powell (Eds.), The Nonprofit Sector (2nd Ed.).

-------------- (2001). Social Movement Philanthropy and the Growth of Nonprofit Political Advocacy: Scope, Legitimacy and Impact. Forthcoming in E. Boris (Ed.), Non-Profit Advocacy and the Policy Process II. Washington, DC: Urban Institute Press.

King, G. (1989). Event Count Models for International Relations: Generalizations and Applications. International Studies Quarterly, 33, 123-147.

King, D.C. & Walker, J.L. (1991). The Origins and Maintenance of Groups. In J.L. Walker, Jr. (Ed.) Mobilizing Interest Groups in America: Patrons, Professions, and Social Movements. Ann Arbor: University of Michigan Press.

Krehely, J., & Golladay, K. (2001). The Scope and Activites of 501(c)(4) SocialWelfare Organizations: Fact Versus Fantasy. Conference Paper. Association for Research on Nonprofit Organizations and Voluntary Action Annual Meeting, Miami, Florida, November 28 - December 1.

Kobylka, J. F. (1991). The Politics of Obscenity: Group Litigation in a Time of Legal Change. New York: Greenwood Press.

Koshner, A.J. (1998). Solving the Puzzle of Interest Group Litigation. Westport, CT: Praeger Press.

Lampkin, L.M., & Boris, E. T. (2002) Nonprofit Organization Data: What We Have and What We Need. American Behavioral Scientist, 45(11), 1675-1716.

Laws, G. (1997). Voluntary Organizations and Advocacy: The Case of Housing for Older Americans. Nonprofit and Voluntary Sector Quarterly, 26(3), 307-335.

Let America Speak Coalition. (1995, November). Lobbying and Political Activity Restrictions for Federal Grantees and Contractors: A Comparison of Federal Law and Regulation [Article posted on the World Wide Web]. Gallagher, J.G, Harmon, Curran, Gallagher & Spielberg for the Let America Speak! Coalition. Retreived October 15, 2001 from the World Wide Web: http://www.ombwatch.org/las/1995/galrpt.html

Long, J.S. (1997). Regression Models for Categorical and Limited Dependent Variables. Thousand Oaks, CA: Sage Publications.

Long, J.S. and Freese, J. (2001). Regression Models for Categorical Dependent Variables Using Stata. College Station, TX: Stata Corporation.

Maranville, S.J. (1999). Requisite Variety of Strategic Management Modes: A Cultural Study of Strategic Actions in a Deterministic Environment. Nonprofit Management and Leadership, 9(3), 277-291.

McCann, M.W. (1998). Social Movements and the Mobilization of Law. In A.N. Costain and A.S. McFarland (Eds.) Social Movements and American Political Institutions. Lanham ME: Rowman and Littlefield Publishers.

McCants, W.D. (1999). Disability & ADA: Supreme Court Rules on Institutional Confinement of Disabled. Journal of Law, Medicine & Ethics, 27(3), 281-284

McFarland, A.S. (1998) Social Movements and Theories of American Politics. In A.N. Costain and A.S. McFarland (Eds.) Social Movements and American Political Institutions. Lanham ME: Rowman and Littlefield Publishers.

McGuire, K.T. (1995). Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success. Journal of Politics, 57(1), 187-196.

McGuire, K.T. & Caldeira, G.A. (1993). Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court. The American Political Science Review, 87(3), 717-726.

McIntosh, W.V. (1985). Litigating Scientific Creationism, Or “Scopes”II, III . . . Law & Policy, 7, 375-394.

Miano, M.M. (1996). Provision of Community Residences for People with Developmental Disabilities. Journal of Planning Literature, 10(4), 364-378.

Mulhare, E.M. (1999). Mindful of the Future: Strategic Planning Ideology and the Culture of Nonprofit Management. Human Organization, 58(3), 323-330.

Najam, A. (2000). The Four-C’s of Third Sector-Government Relations: Cooperation, Confrontation, Complementarity, and Co-optation. Nonprofit Management and Leadership, 10.

O’Connell, B. (1996). A Major Transfer of Government Responsibility to Voluntary Organizations? Proceed with Caution. Public Administration Review, 56(3), 222-225.

O’Connor, K. (1980). Womens’ Organizations’ Use of the Courts. Lexington MA: Lexington Books.

O'Connor, K., & Epstein, L. (1983). The Rise of Conservative Interest Group Litigation. The Journal of Politics, 45, 479-489.

----------(1989). Public Interest Law Groups: Institutional Profiles.

Olson, S.M. (1984). Clients and Lawyers: Securing the Rights of Disabled Persons. Westport, CT: Greenwood.

-------------- (1990). Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory. The Journal of Politics, 52(3), 854-882.

Orren, K. (1976). Standing to Sue: Interest Group Conflict in the Federal Courts. American Political Science Review, 70(3), 723-741.

Ott, J.S. Ed. (2001). Understanding Nonprofit Organizations: Governance, Leadership, and Management. Boulder, CO: Westview Press.

Ott, J.S. Ed. (2001). The Nature of the Nonprofit Sector. Boulder, CO: Westview Press.

Pinto, S.E. (1998). Disability & ADA: Third Circuit Broadens Scope of "Qualified Individual" Under the ADA. Journal of Law, Medicine, & Ethics, 26(4), 357-359.

Putnam, R.D. (1995). Tuning In, Tuning Out: The Strange Disappearance of Social Capital in America. PS: Political Science and Politics, 28(4), 664-683.

---------------- (1995). Bowling Alone, Revisited. The Responsive Community, Spring, 18-33.

Rees, S. (1999) Strategic Choices for Nonprofit Advocates. Nonprofit and Voluntary Sector Quarterly, 28(1, March), 65-73.

Reid, E.J. (1999). Nonprofit Advocacy and Political Participation. in E.T. Boris a. C.E. Steuerke (Eds.) Nonprofits and Government: Collaboration and Conflict. Washington, D.C.: The Urban Institute Press.

Reid, E.J., & Krehely, J. (2001a). Idiosyncracies of "Membership" in U.S. Nonprofit Regulation and Political Proctice. Conference Paper. Association for Research on Nonprofit Organizations and Voluntary Action Annual Meeting, Miami, Florida, November 28-December 1.

--------------------------- (2001b). Nonprofit Advocacy and the Policy Process: Seminar Findings, Participant Dialogues and Future Research. Conference Paper. Association for Research on Nonprofit Organizations and Voluntary Action Annual Meeting, Miami, Florida, November 28-December 1.

Reid, E.J., & Montilla, M.D. Eds. (2001). Exploring Organizations and Advocacy: Strategies and Finances. Nonprofit Advocacy and The Policy Process, A Seminar Series, 2(1).

Salamon, L.M. (1999). America's Nonprofit Sector: A Primer, Second Edition. New York, NY: The Foundation Center.

Salamon, L.M., & Siegfreid, J.J. (1977). Economic Power and Political Influence: The Impact of Industry Structure on Public Policy. The American Political Science Review, 71, 1026-1043.

Salisbury, R. H. (1984). Interest Representation: The Dominance of Institutions. The American Political Science Review, 78(1), 64-76.

Scheppele, K.L. (1988). Legal Secrets: Equality and Efficiency in the Common Law. Chicago, IL: University of Chicago Press.

Scheppele K.L. & Walker, J.L. (1991). The Litigation Strategies of Interest Groups. In J.L. Walker, Jr. (Ed.) Mobilizing Interest Groups in America: Patrons, Professions, and Social Movements. Ann Arbor: University of Michigan Press.

Schlozman, K. L. & Tierney J. T. (1983). More of the Same: Washington Pressure Group Activity in a Decade of Change. The Journal of Politics, 45 (2, May), 351-377.

Silber, N.I. (2001). A Corporate Form of Freedom. Boulder, CO: Westview Press.

Silverstein, H. (1996). Unleashing Rights: Law, Meaning, and the Animal Rights Movement. Ann Arbor MI: University of Michigan Press.

Smith, Bucklin & Associates. (1991) Getting Political Support for Your Cause. In The Complete Guide to Nonprofit Management. New York NY: John Wiley.

Smith, D.H. (1990).The Impact of the Volunteer Sector on Society. In D.L. Gies, S. Ott, and J.M. Shafritz (Eds.) The Nonprofit organization : Essential Readings. Pacific Grove, Calif.: Brooks/Cole Pub. Co.

Smith, K.S. (1985). A Theoretical Analysis of the "Green Lobby." The American Political Science Review, 79(1), 132-147.

Smith, S.R. and Lipsky, M. (1993). Nonprofits for Hire: The Welfare State in the Age of Contracting. Cambridge MA: Harvard University Press.

Smucker, B. (1999). The Nonprofit Lobbying Guide, Second Edition. Washington D.C.: The Independent Sector.

Songer, D.R., Cameron C.M., & Segal, J.A. (1995). An Empirical Test of the Rational-Actor Theory of Litigation. The Journal of Politics, 57(4), 1119-1129.

Songer, D.R., & Sheehan, R.S. (1993). Interest Group Success in the Courts: Amicus Participation in the Supreme Court. Political Research Quarterly, 46, 339-354.

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

Spill, R. L. (1997). Fighting With One Hand Tied Behind Your Back. Dissertation. Ohio State University.

Steelman, L.C. & Powell, B. (1993). Doing the Right Thing: Race and Parental Locus of Responsibility for Funding College. Sociology of Education, 66(4), 223-244.

Talbert, J. C. Jones, B. D., & Baumgartner, F. R. (1995). Nonlegislative Hearings and the Policy Change in Congress. American Journal of Political Science, 39(2, May), 383-405.

Tarrow, S. (1998). The Very Excess of Democracy: State-Building and Contentious Politics in America. In A.N. Costain and A.S. McFarlans (Eds.) Social Movements and American Political Institutions. Lanham ME: Rowman and Littlefield Publishers.

Truman, D. B. (1951). The Governmental Process. New York, New York: Knopf.

Tschirhart, M. (1997). "A Three Sector Model of Community Service: Corporate Alliances with Nonprofit and Public Organizations" in N.M. Tichy, A.R. McGill & L. St. Clair (Eds.) Corporate Global Citizenship: Doing Business in the Public Eye, San Francisco: The New Lexington Press, 1997, p. 62-74. 3

------------------ (1996). Artful Leadership: Managing Stakeholder Problems in Nonprofit Arts Organizations. Bloomington, IN: Indiana University Press.

Vernick, J. S. (1999). Lobbying and Advocacy for the Public's Health: What Are the Limits for Nonprofit Organizations? American Journal of Public Health, 89(9), 1425-1429.

Vose, C.E. (1959). Caucasions Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases. Berkeley, CA: University of California Press.

Wahlbeck, P.J. (1998). The Development of a Legal Rule: The Federal Common Law of Public Nuisance. Law & Society Review, 32(3), 613-637.

Walker Jr., J.L. Ed. (1991) Mobilizing Interest Groups in America: Patrons, Profession, and Social Movements. Ann Arbor, MI: The University of Michigan Press.

Wasby, S.L. (1983). Interest Groups and Litigation. Policy Studies Journal, 11, 657-670.

--------------- (1985). Civil Rights Litigation by Organizations: Constraints and Choices. Judicature, 68(9-10), 337-352.

Woliver, L.R. (1993). From Outrage to Action : The Politics of Grass-roots Dissent. Urbana, IL: University of Illinois Press.

Wyszomirski, M.J. (1998). Lobbying Reform and Nonprofit Organizations: Policy Images and Constituent Policy. Policy Studies Journal, 26(3), 512-526.

Zorn, C. J. W. (1998). Decision to Appeal: The United States in the Federal Appellate Courts. Conference Paper: 3rd Annual Conference on the Scientific Study of Judicial Politics, October 3-5, 1998. East Lansing, MI.

APPENDIX A
PARAMETER ESTIMATES OF EVENT COUNT MODELS FOR A GROUP'S COURT-BASED ADVOCACY PARTICIPATION BY YEAR

Variable DV: frequency/yr	Zero - Inflated Poisson Model				Zero-Inflated Negative Binomial Model			
	Not Always 0		Always 0		Not Always 0		Always 0	
Internal Factors	Coef.	Std. Err.	Coef.	Std. Err.	Coef.	Std. Err.	Coef.	Std. Err.
Gross Income /$1M	-.005***	.001	-.025	.019	-.004	.003	-.051	.036
Fund Balance /$1M	.001	.000	.007	.004	.002	.003	.019	.010
Orientation of Group	.307*	.126	-.990***	.001	.148	.221	-1.988*	.892
Members	.063	.132	-.589	.341	-.266	..206	-3.274	2.971
Based in D.C.	.030	.154	.453	.436	-.100	.266	.296	1.226
Participate in Lobbying	-.360***	.109	-2.25***	.350	-.012	.209	-4.534	3.46
External Factors								
Istook	1.64***	.336	--	--	1.795***	.351	--	--
Government Grantee	.384**	.123	-1.65***	.339	1.012***	.258	-1.589**	.620
Court Experience <2	2.29***	.177	--	--	2.339***	.193	--	--
Court Experience <4	.673***	.150	--	--	.798***	.207	--	--
Court Experience <6	.381**	.138	--	--	.677***	.207	--	--
Constant	-3.82	.361	1.91	.250	-4.75	.403	1.155	.368

* $p<.05$, ** $p<.01$, *** $p<.001$; N = 6107 (non-0 observations = 235); the Likelihood ratio test comparing the ZIP to the ZINB = 132.70 (p=.000) indicating that ZINB is preferred.

APPENDIX B
TABLE 3.3: PARTICIPATION OF CHARITABLE NONPROFIT ADVOCACY GROUPS IN THE COURTS[36]

DV= Participation	B	S.E.	Sig.
INTERNAL			
Average Gross Income /$1 mil.	.05	.024	.022 (1)
Average Fund Balance /$1 mil	-.005	.01	.292(1)
Rights vs. Civic Orientation of Group	.67	.233	.002 (1)
Dues Paying Members	.404	.228	.076(2)
Involved in Legislative or Grassroots Lobbying	1.23	.225	.000(2)
Based in DC	-.045	.370	.451(1)
EXTERNAL			
Government Grants Received	-.028	.204	.445(1)
Constant	-1.89	.198	.000

Logistic regression analysis; N=659 ;Pseudo R Square = .09

[36] One group was dropped from the analysis because the Cook statistic = 2.53 for this case. The remaining 196 groups not included in the analysis were omitted due to missing data for these cases.

APPENDIX C
INTERNAL REVENUE CODE OF 1986 - SELECTED EXCERPTS

501(c)(3):

Under the Internal Revenue Code of 1986, Subchapter F: Exempt Organizations, Section 501 Exemption from tax on corporations, certain trusts, etc., Subsection (c) List of exempt organizations, Number (3) states:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or foster national or international amateur sports competition (but only if no part of its activities involves the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

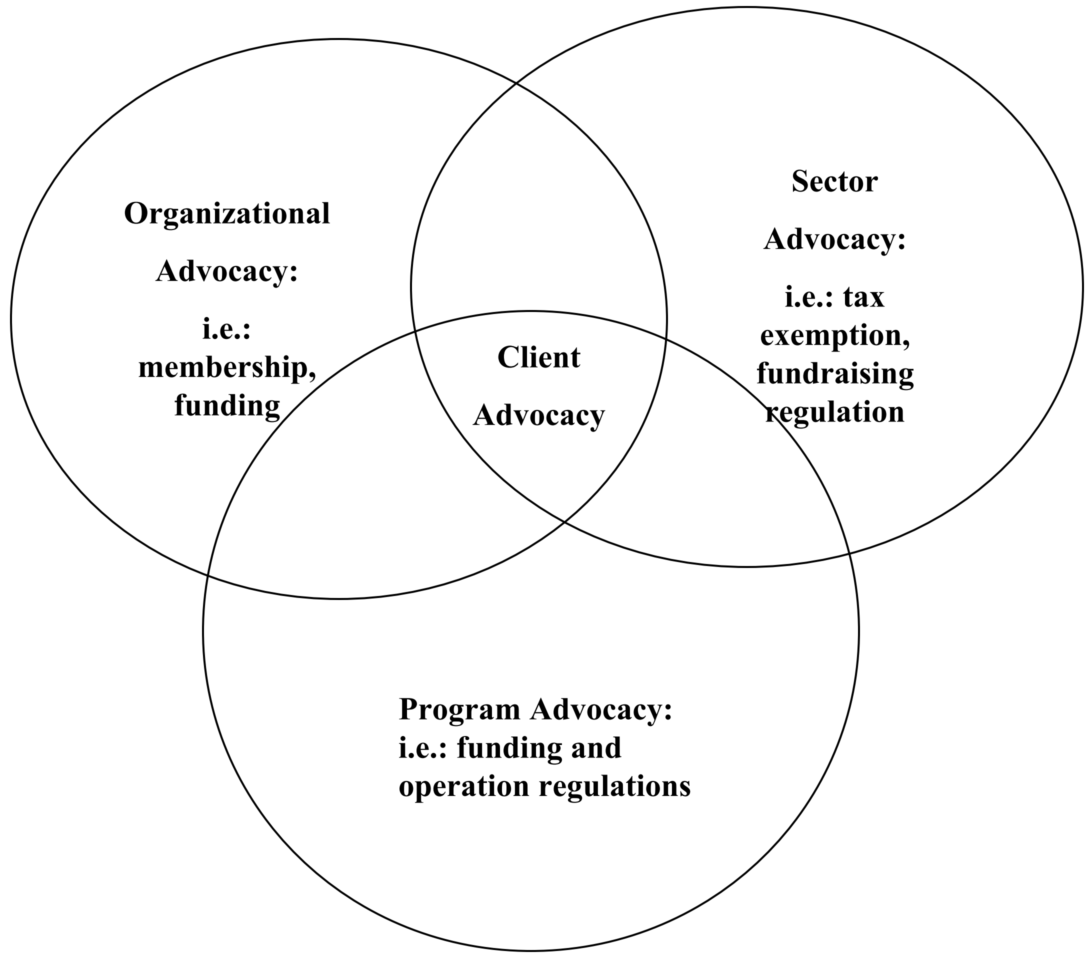
Subsection (h):

Expenditures by public charities to influence legislation, provides the following exception:

(1) General rule. – In case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally – (A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or (B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year. (2) Definitions. – (A) Lobbying expenditures. – The term "lobbying expenditures" means expenditures for the purpose of influencing legislation (as defined in section 4911(d)). (B) Lobbying ceiling amount. – The lobbying ceiling amount for any organization for any taxable year is 150 percent of the lobbying nontaxable amount for such organization for such taxable year, determined under section 4911. (C) Grass roots expenditures. – The term "grass roots expenditures" means expenditures for the purpose of influencing legislation (as defined in section 4911(d) without regard to paragraph (1)(B) thereof). (D) Grass roots ceiling amount. – The grassroots ceiling amount for any organization for any taxable year is 150 percent of the grass roots nontaxable for such organization for such taxable year, determined under section 4911.

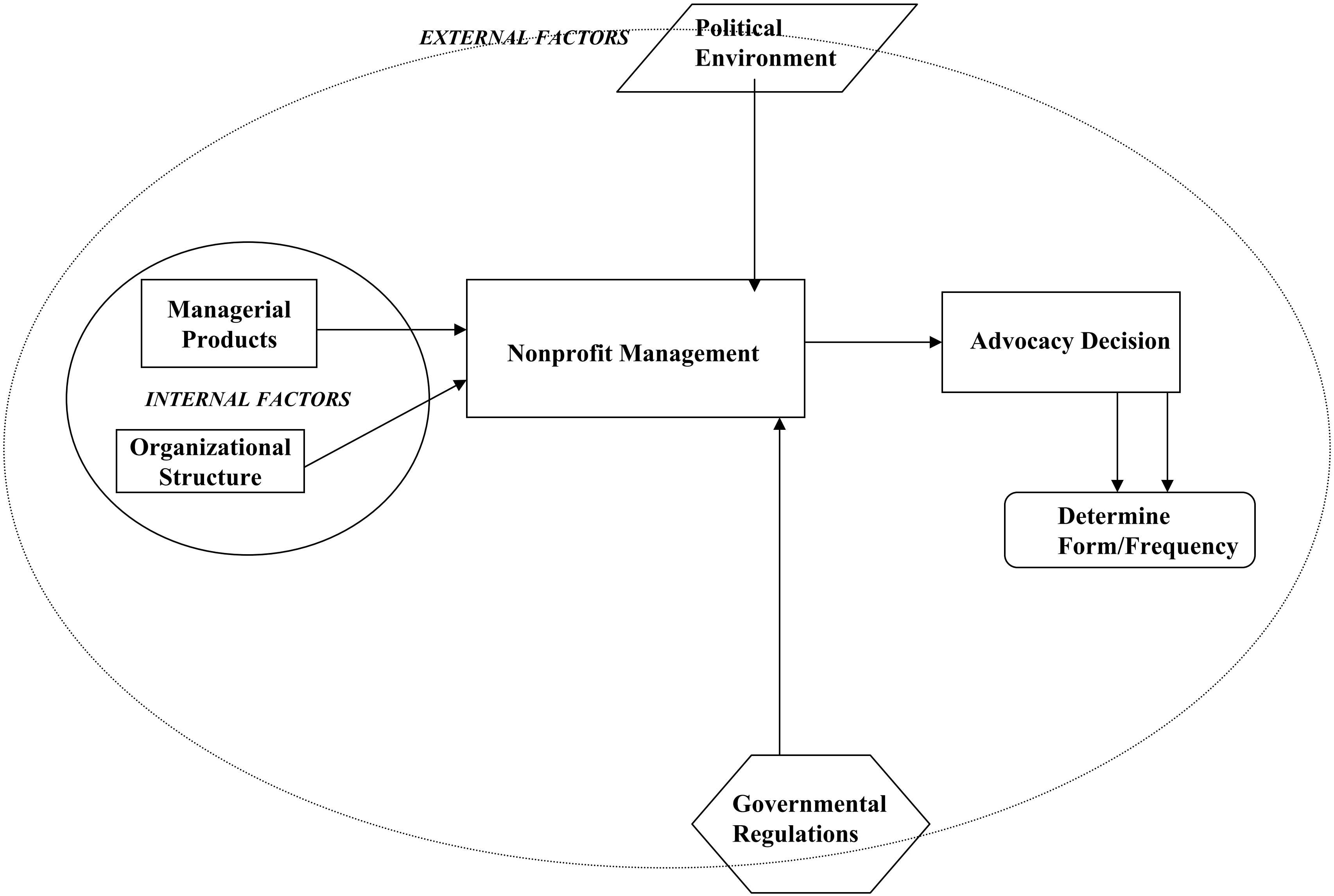
APPENDIX D
FIGURES

Figure 1:
<u>The Intersection of Charitable Advocacy Activities*</u>



*As adapted from Laws, G. (1997). Voluntary Organizations and Advocacy: The Case of Housing for Older Americans. <u>Nonprofit and Voluntary Sector Quarterly.</u> 26(3, September), 307-335.

Figure 2: The Court-Based Advocacy Model



APPENDIX E
CODING SHEET

GROUP ID:______ **CASE ID:_________**

Date Case Heard:____/____/____

Citation (or case name):

Repeat?: _____________________

Level of Involvement: Litigant / Amicus / Supplied Counsel / Intervenor / Named Sponsor /

Other:________ **Policy Area: ______**_________

-VS- Government? Yes / No **Court Level: Trial / Appeals / Last Resort**
if yes, which?_____________________

TRIAL? If yes, then -

Type: federal / state If state, which?

If federal, District: ___________________________________

Role of group: Plaintiff / Defendant / Neither Judge name:

Disposition form/remedy: Summary Judgement / Injunctive Relief / Damages Awarded / Motion of ___________ to _____________ granted or denied / Other – specify:
____

Outcome: Pro-plaintiff / pro-defendant / mixed / unable to ascertain
____
____

APPELLATE? If yes, then -

Type: federal / state If state, which? ______________ If federal, Circuit:________

Judges (note District if sitting on Circuit panel & if dissent):

If litigant: role of group in appeal: Appellant (petitioner) or Appellee (respondent) / Neither

Was there a cross-appeal? Yes / No

Outcome: Pro-appellant / pro-appellee / If mixed or unable to ascertain, specify
____
____

Disposition: Affirmed / Affirmed in part / reversed or vacated in part and remanded / Vacated and remanded / Remanded / Dismissed / Other: _____________

Other groups on the case:

Nonprofit Groups on case with unspecified preference for outcome:
Total: Litigants: Amicus: other?________

Nonprofit Groups that can be identified as cooperators with coding group:
Total: Litigants: Amicus: other?___

Nonprofit Groups that can be identified as competitors with coding group:
Total: Litigants: Amicus: other?___

APPENDIX F
DATA COLLECTION AND METHODOLOGY

Phase I: Forming a Group List

The first phase of the data collection process was to form a group list. I wanted to start with an objective list of charitable organizations that were known to have an interest in advocacy activities. I obtained the IRS Core Files and the IRS Masterfiles from the National Center on Charitable Statistics for the years 1990 to 1999. These data are based on the IRS 990 forms. All 501(c) (3) organizations with annual operating budgets exceeding $25,000 are required to file these returns with the IRS. While this is not the entire universe of charitable nonprofits in the U.S., it is thought to be the vast majority of groups making claims on the government.

I imported the 1999 data, information on approximately 712,000 charities, to construct an Access database and sorted the information based on the activity codes and the National Taxonomy of Exempt Entities (NTEE) code for each organization. These codes are listed on the 990 informational return filed with the IRS annually. I determined the advocacy-based activity codes and NTEE codes by using the list suggested by Boris and Mosher-Williams (1998). This "advocacy charity" group sort yielded information on the 35,947 advocacy charities in the U.S. I verified the reasonableness of this figure by comparing it to the number of advocacy charities reported by Boris and Mosher-Williams in 1996; they found just over 33,000 advocacy charities in their research.

This 1999 advocacy charity list was then sorted by reported revenues. This second sort was performed in order to gather data on those organizations most likely in a financial position to enter into court-based advocacy. Afer sorting by income level, I eliminated all charities with annual income levels at or below an income level of $500,000. This second sort and elimination yielded a list of approximately 13,000 groups. A charity with annual income of $500,000 would be able to make lobbying expenditures of $25,000 - $100,000 without risking the revocation of their tax-exempt status. Cladiera and Wright suggest (1988) that a group would expect to pay a minimum of $20,000 and would easily pay upwards of $100,000 if appealing while participating in the federal courts. Therefore, given the rigorous demands on the resources of these nonprofits and the high cost of court participation, it seems unlikely that groups with annual income levels below this amount would be able to participate credibly in the courts.

From this list I chose the groups at the top (5%) of the income spectrum. The income level was used to determine the 856 groups that composed the master group list for this study. These 856 groups are all charities that share an interest in advocacy activities and had an income level in 1999 that exceeded $3 million. That is not to say that all organizations in the top income levels were expected to participate in the courts. I used the charities at the top of the income spectrum because if they wanted to engage in court-based advocacy I believe they would have had the opportunity. I do not believe the same is true of all charities. According to Salamon (2002), in 1998 the wealthiest 4% of charities accounted for 70% of all expenses of charitable organizations. Unlike legislative and grassroots advocacy, court-based advocacy *requires* that human and financial resources be expended.

Phase II: Locating Acts of Court-Based Advocacy

For the purposes of this study, court-based advocacy is defined as any group choosing to participate in the courts in order to influence the court's policy decisions. Participation includes the following types of court involvement: filing as a litigant, filing an amicus curiae (friend of the court) brief, providing counsel to a litigant, providing counsel to an amicus, filing as a movant, or filing as an intervenor. The participation may occur on either the petitioner or the respondent side, but must be a voluntary act on the part of the nonprofit. Participation and strategy was determined based solely on information provided in the written opinion of the court. Labels of participation and strategy type were taken directly from the court's opinion. If the group was listed as a party in the heading of the case, as in *Red Cross v. Basinger*, then the Red Cross would be coded as a litigant. If the name of the charity was listed in the written opinion as having filed an amicus brief, then the group was coded as having participated as an amicus (see Appendix E for the coding sheet used to collect data).

Cases were identified through the Westlaw database ALLCASES. This database includes all published and some unpublished cases for all levels of state and federal courts. It is the most comprehensive list of cases available for the period of the study. I typed the name of each of the 856 groups in the study into the database. I then retrieved the written opinion of any and all cases in which the group name appeared. I reviewed each of these cases to determine why the group name was included in the written opinion. If, for example, the name "American Heart Association" appeared in 200+ cases. I reviewed the case to discern if the group was actually a participant in the case (as defined above). In many cases the group did not choose to participate in the case or was not involved in the case at all. In approximately 170 cases the name "American Heart Association" (AHA) appeared in the written opinion because it had been offered as a relevant part of the testimony in the case. Often doctors who were being sued for malpractice would testify that they had provided the guidelines for heart health, published by the AHA, to the patient. Furthermore, cases in which the organization was sued were not included in my study. If, hypothetically, the American Lung Association fired an employee who was blind and was then sued by that employee under the Americans with Disabilities Act, that organization did not make a choice to enter the courts and I did not include the case as an act of participation on the part of the American Lung Association.

In completing this review process, I collected 1136 cases which occurred during the years 1990 to 1999 and in which one of the name of one of the 856 charities on the master list appeared in the written opinion of the case because they chose to participate using one of the aforementioned strategy choices.

Phase III: Coding the Court Cases

Using the coding sheet that appears in Appendix E, I coded each of the 1136 cases identified as advocacy participation in Phase II. As discussed in the description of participation and strategy choice identification, I read the text of the written opinion in order to determine the appropriate values for all variables on the coding sheet. For example, if the court took place in Circuit Court, I coded the case as a federal and appellate level case. If there were other nonprofits participating on the case, I read the case and made note of how they participated.

After I had completed the coding on all 1136 cases, I had 10% of the cases re-coded by two other individuals. I then reconciled the coding of these cases with the 2nd coders. Reliability was found to be very high for all variables except the number of other nonprofits on the case and their preferences. These variables were carefully reconciled with the coders to ensure accuracy. However, I was not always able to determine the preferences of the amici and the "unspecified preferences" category introduced too much error into the variable, so these categorizations were omitted from the analysis. All of this coding information was then entered into a Quattro spreadsheet which became the "court coding database."

Phase IV: Gathering Organizational Data

I used the NCCS database to collect financial, group-type and membership data for each of the 856 groups on the master list. The primary financial data included the fund balance and the annual income levels reported by the organization on their 990. I was concerned with the quality of the financial data reported on 990s at the individual group level. This data has been shown to be somewhat unreliable in some past studies, although has more recently been shown to be reliable. As noted in Footnote 15 (Chapter 4) in the text: "The financial data reported on the 990 forms has limitations (Lampkin and Boris, 2002). Although the information has been shown to be reliable at the aggregate level, reliability at the individual level has been questioned. In order to address this concern, I verified all of the 1999 financial data using data that appears on the Guidestar web site and also eliminated any group that reported negative fund balances for the year. This data has been verified by two separate coders working for Guidestar. In addition, recent studies suggest that the information on the 990 forms is highly correlated with audited financial statements (Froelich et al., 2000) and with the IRS Statistics of Income files (Gordon, Greenlee and Nitterhouse, 1999)."

In order to maximize the accuracy of the financial data I verified the 1999 data from a second source, www.guidestar.com. As mentioned in the text, Guidestar has two independent coders enter the data into their database and then reconciles any discrepancies before posting the information on the database. Only the most recent financial data could be verified in this way. When financial data could not be verified for 1999, the data was entered as missing. In the aggregate analysis, the data for past years could not be verified, but the data has been shown to be consistently reliable at the aggregate level. Therefore I calculated the ten-year average for all the income level and fund balance financial data when possible.

I also used financial data from the 990 to gather information about specific organizational characteristics. As addressed in the text, I collected membership dues and lobbying expenditure data based on the reporting of these revenues and expenditures by the organization on its 990. The amounts were not included in the analysis, but the presence or absence of amounts in the categories was verified in guidestar when possible using 1999 data. These dichotomous variables were coded as 1= yes if membership dues were reported by the group and as 1 = yes if grassroots or legislative lobbying expenditures were reported by the group.

Finally the NCCS data was used to determine if the group was a rights-oriented group or a civic-participation group (Boris and Mosher-WIlliams, 1998). The dichotomous variable was coded 1 = rights if the group's NTEE code indicated they were a rights-oriented group based on the delineation of Boris and Mosher-WIlliams (1998).

Phase V: Database Design

In order to prepare the data for analysis I designed a different database for each research question. This was necessary because each research question uses a different level of analysis.

Database #1 - Cumulative Participation over 10 years

In this database I coded participation = 1 = yes if the group had participated in any case, regardless of frequency or strategy, within the 1990 - 1999 time frame. Internal characteristics included were collected as described above.

Database #2 - Annual Frequency of Participation

In this database, an annual perspective was used to identify participation. I counted the number of times the group has participated for *each* year from 1990 to 1999. I did not differentiate between strategy choices, I only counted total participation as defined in the description of Phase I. I also used annual organizational characteristic figures from the NCCS database that corresponded to the group and the year of participation. I also calculated previous court experience by lagging participation for the last 7 years in three categories.

Database #3 - Strategy Choice by Case

In this database, a case perspective was used to identify strategy choice of the group for each case in which they participated. Data were derived from the NCCS database and the case coding database I had compiled. As in Database #2, I used organizational characteristics reported on the 990 for the year in which the case took place.

Phase VI: Analysis

Stata statistical software was used to perform all of the analyses in the dissertation. Once each database was designed, I wrote .do files to perform the analysis to ensure consistency. I eliminated missing data from the dataset before beginning any calculations. Analysis for the model derived to address research question #1, with the dichotomous dependent variable Participation, was performed using binary logistic regression. Analysis for the model derived to address research question #2, with the count-based dependent variable Annual Frequency of Participation, was performed using several event count models, including Poisson, negative binomial regression, zero-inflated Poisson, and aero-inflated negative binomial regression. Analysis for the model derived to address research question #3, with the categorical dependent variable Strategy Choice, was performed using multinomial logistic regression.