STATE FRAGMENTATION THEORY:
AN ANALYSIS OF INTEREST GROUP LITIGATION ACROSS THE FIFTY STATES

Justin W. Angotti
University Honors in Political Science
Dr. Gregg Ivers, Advisor
Dr. Maryann Barakso, Advisor
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INTRODUCTION

How do interest groups choose the political institutions they will use to effect change? Why do some litigate while others lobby? Do groups actually have control over these choices or are there external factors which influence their decisions? Previous scholars have treated the question of interest group litigation largely as a means of last resort—"a strategy to be used when all else fails or as a technique to be employed when goals are clearly unattainable in other political forums" (Epstein 1985: 10)—but their theories of causation have often been criticized.

The original theory of interest group litigation was centered primarily on the political disadvantage theory, which focused on litigation by groups

> highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals, they are almost compelled to resort to litigation (Cortner 1968: 287).

More recent studies of interest group participation in litigation in state courts of last resort, however, show an increase in the overall level of litigation. Epstein (1985), O'Connor and Epstein (1983), Jacob (1978), Berry (1977), and Greenberg (1974, 1977) have found increases in interest group litigation across the spectrum of groups, not just by those considered "outsiders" in the polity. Thus, Susan Olson argues that

> the political disadvantage theory is inadequate as a theory of interest-group litigation in general because it is heavily based on the atypical and time-bound experience of the National Association for the Advancement of Colored People (NAACP). The NAACP litigated because many other political channels were completely closed to blacks in the segregated South due to discriminatory laws and overt social intimidation. Today blacks as well as other minority groups have legal access to all policy-making processes and pursue their goals through a variety of political strategies (1994: 856).

Two important areas Olson fails to consider, however, confound her critique for the discontinued use of the political disadvantage theory: first, interest groups which represent minorities similarly situated to African-Americans in the United States prior to the Civil Rights Movement; and second, the political opportunity structure as it is perceived by interest groups. Olson's first assertion that all minority groups now have full access to the policy-making process is contradicted by the case study I chose: the lesbian, gay, bisexual, and transgender (LGBT) rights movement.

Using the LGBT rights movement to analyze Olson's conclusions, there is evidence to suggest that the Civil Rights Movement and the NAACP may not have been as unique as claimed. Kenneth Sherrill agues that

> gay people are saddled with the burdens of cumulative inequalities and that, as a consequence, the national majoritarian political process—particularly as manifested in the electoral system—is far more likely to deprive [LGB] people of [their] rights than to protect those rights….In the United State today, gay people as a group are subject to the constant threat—and the frequent reality—of violence. This factor tends to diminish the political power of homosexuals both because it creates disincentives for gay people to identify themselves as such and because it creates disincentives for members of other groups—potential allies—to associate themselves with gay people….Here, there is a clear parallel to racist politics in the South prior to the passage of the Civil Rights Acts of 1964 and 1965 (1996: 469-471).

Sherill's research on the LGBT rights movement suggests that the political disadvantage theory may remain applicable in the contemporary polity, since members of the LGBT community are discriminated against in a way which parallels the pre-Civil Rights Act South. Sherill (1996) suggests that in today's society, racism has been replaced by homophobia, resulting in the inequalities which exclude members of the LGBT community from the policy-making process.

Second, it is important to consider the political opportunity structure as it is perceived by interest groups attempting to effect social change. Eisinger's (1973) formulation of the political opportunity structure—the extent to which a political system is open to the social and political goals and tactics of a movement—provides the groundwork for my analysis. Because groups operate with limited resources (volunteers and finances) (Banaszak 1996: 28), and their "[o]rganizational decisions—regarding goals and tactics, for example—are presumed to be influenced largely by the exigencies of resource management" (Barakso 2004: 3), their decision to mobilize in a particular political arena must have some basis in this perception. Epstein (1985) argues that because "a wide range of groups regularly resort to the judicial arena… [c]ourtrooms may no longer be much different than legislative corridors" (148). Why then do some groups or movements litigate at a disproportionately higher rate than they lobby legislators? When considering the decision by interest groups to litigate, it is particularly important to take into account Gerald N. Rosenberg's conclusion in *The Hollow Hope* that courts themselves are generally ineffective in precipitating social change (1991). Using Rosenberg's findings as a foundation and expanding on McAdam's (1982) contemporary model of political opportunity structure and cognitive liberation, in which there is a close link between subjective perceptions and the structure of opportunities, I ask: To what extent does the perception of less open legislative and executive channels have an effect on an interest group's decision to use litigation as a strategy to achieve social change?

By balancing the criticisms of the political disadvantage theory with the belief that, as a rational actor, a group's resource allocation decisions should reflect the most effective institutional channels in producing social change, my research not only adds to the debate on

why interest groups choose to litigate for change but attempts to explain one of the external factors which may influence a group's decision-making process.

Furthermore, examining the LGBT rights movement is important because there is little actual scholarly analysis on the tactics the movement utilizes to effect social change. Although the homophile movement began in the early 1950s (D'Emilio 1992), the Stonewall riot of 1969 sparked the gay and lesbian liberation movement, which was finally able to create a collective identity through the process of coming out (D'Emilio 2003). This newly formed identity allowed the gay rights movement to achieve more widespread involvement and success throughout the 1970s and 1980s. To date, however, there is no literature which analyzes the LGBT rights movement's use of litigation to affect social change. Thus, my research also contributes to the scholarly debate among political and social scientists studying social movements and their development, not just those interested in interest group litigation theory.

Finally, although previous scholarship has provided insight into multiple aspects affecting an interest group's decision to litigate, most studies focus on participation in the Supreme Court or other appellate levels of the federal judiciary (Farole 1998: 19). Because considerably less attention has been given to interest groups' use of state courts of last resort, it is still not entirely clear why groups at the state level choose the judiciary over other channels in the laterally fragmented state. While the ultimate goal of any interest group in the political process is to advance its policy goals (Farole 1998: 19, referencing Epstein and Kobylka 1992), it is less clear why groups choose to pursue this objective through the courts in light of Rosenberg's conclusions in *The Hollow Hope*. Thus, my research contributes to a greater understanding of the choices interest groups make at the state level.

In this paper, I utilize a case study of same-sex marriage rights litigation and legislation from 1974 to 2006, as well as a measure of state party control, to determine the extent to which an interest group's perception of less open legislative and executive channels has an effect on the decision to use litigation as a strategy to achieve social change. In the first section of the paper, I review the applicable literature, in order to establish the reason for and manner in which interest groups participate in litigation as a means to affect social change. In the second part, I develop and animate a research strategy for testing the extent to which the external influences of less open legislative and executive channels plays a role in a group's decision to turn to the courts.

Overall, the findings suggest that neither the political disadvantage theory nor Olson's (1994) arguments against it are entirely correct. The results indicate that the perception of less open legislative and executive channels, two veto points in the laterally fragmented policy process, require a more nuanced view of an interest group's decision to utilize the courts to affect social change. Thus, the final section of my paper discusses these findings, offering some suggestions for future research, and articulates a new theory of interest group litigation: the state fragmentation theory.

LITERATURE REVIEW

The Role of the Courts in Creating Social Change

> JUSTICE JACKSON: "I suppose that realistically the reason this case is here was that action couldn't be obtained from Congress. Certainly it would be here much stronger from your point of view if Congress did act, wouldn't it?"
>
> MR. RANKIN: "That is true, but…if the Court would delegate back to Congress from time to time the question of deciding what should be done about rights…the parties [before the Court] would be deprived by that procedure from getting their constitutional rights because of the present membership or approach of Congress

> to that particular question" (Oral argument in *Briggs* v. *Elliott*, quoted in Rosenberg 1991: 1, quoting Friedman 1969: 244).

While it is clear from both the federal constitution, as well as those of the many states, that courts are only one branch of a larger system of government—one political channel in a laterally fragmented state—the exchange between Justice Jackson and U.S. Attorney General J. Lee Rankin "rests on a more interesting premise that is all the more influential because it is implicit…court decisions produce change" (Rosenberg 1991: 1). The extent to which this underlying assumption is true, however, has been widely debated by scholars of judicial politics. Americans view courts as seemingly "important producers of political and social change" (Rosenberg 1991: 2), as a way to transform societal norms when other branches of government are unwilling or unable to act (Rosenberg 1991: 2), and as activists in the American political process for those unable to find representation elsewhere (Crain and Tollison 1979: 165, quoting Landes and Posner 1975: 875, references omitted). Nevertheless, many scholars contend that "[i]n the absence of federal and legislative support…litigation is usually a waste of reformers' time" (McCann 1994: 3, referencing Dolbeare and Hammond 1971; Horowitz 1977; Rosenberg 1991). Most notably, Gerald N. Rosenberg argues that scholars should focus on a Constrained Court view, one which acknowledges the constitutional limitations of courts, having neither the power of the sword nor the power of the purse, and recognizes "the role of popular preferences and economic resources in shaping outcomes" (Rosenberg 1991: 2-3), rather than accepting the conventional Dynamic Court view, which holds that courts are "powerful, vigorous, and potent proponents of change" (Rosenberg 1991: 2). On the other hand, the Constrained Court view

> suggests that the conditions required for courts to produce significant social reform will seldom exist. Unpacked, the Constrained Court view maintains that courts will generally not be effective producers of significant social reform for

> three reasons: the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's inability to develop appropriate policies and its lack of powers of implementation (Rosenberg 1991: 10).

Rosenberg's analysis supports the Constrained Court view. He finds that

> U.S. courts can *almost never* be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in the political context can rarely be solved by courts….Turning to courts to produce significant social reform substitutes the myth of America for its reality. It credits courts and judicial decisions with a power that they do not have (1991: 338, emphasis in original).

Rosenberg details four conditions under which courts can effect major social change:

1. Courts may effectively produce significant social reform when other actors offer positive incentives to induce compliance.
2. Courts may effectively produce significant social reform when other actors impose costs to induce compliance.
3. Courts may effectively produce significant social reform when judicial decisions can be implemented by the market.
4. Courts may effectively produce social reform by providing leverage, or a shield, cover, or excuse, for persons crucial to implementation who are *willing to act* (Rosenberg 1991: 33-35, emphasis in original).

Contrasting Rosenberg's theory on the effectiveness of courts in creating social change is Michael W. McCann's 1994 *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. McCann examines legal mobilization and argues in his case study that

> legal discourses and institutional mechanisms not only provided crucial resources for waging struggles in [the forums of legislation and collective bargaining] but also shaped to a considerable degree the very terrain on which those struggles for new rights were waged [and that the] practical deployment of legal conventions contributed significantly to reform progress by and for women workers (1994: 278).

McCann's (1994) finding that the judiciary was able to have some impact on the polity suggests Rosenberg's Constrained Court theory is not entirely correct. Similarly, Schultz and Gottlieb (1998) criticize Rosenberg's conclusions, noting the importance not necessarily in the immediate changes which followed *Brown v. Board of Education of Topeka* (1954), *Roe v. Wade* (1973), and *Baker v. Carr* (1962), but "how they reshaped choices, expectations, institutions, and structures" (181). Because the Supreme Court gave legitimacy and legal support to those seeking rights traditionally outside the political process, "…American politics was significantly different the day after these decisions" (Schultz and Gottlieb 1998: 181). The Court's opinions opened new political avenues and made groups, such as African-Americans, part of the status quo rather than outsiders in the polity (Schultz and Gottlieb 1998: 181).

In responding to his critics, Rosenberg has reemphasized his central theory in *The Hollow Hope*, that only after overcoming institutional constraints and meeting one of his four conditions, can courts effect true social reform (1998: 256, quoting Rosenberg 1991: 338). Rosenberg has also noted that "[c]ourts can be particularly effective in preserving the status quo. This is principally because court decisions upholding status quo arrangements require little change in existing institutions and practices" (1998: 257). Rosenberg's arguments suggest that analyses of interest group litigation should take external influences into account when studying interest group litigation, since the Constrained Court is an ineffective means of creating social change.

Why Do Groups Turn to the Courts?

If, as Rosenberg (1991) argues, courts are ineffective, costly, and potentially counterproductive, why do groups continue to turn to the judiciary? Early research suggested "interest groups first began using litigation as political action because they were 'disadvantaged'

in the legislative and executive branches of government" (Ivers 1989: 15). Since being first commented on by Vose (1958: 1959) and later explicitly articulated by Cortner (1968), the political disadvantage theory created a wealth of literature supporting the idea that groups turned to the courts "when (1) there is no other alternative available to effectuate the policy objectives of an organization and (2) when a group lacks access to the legislative or executive branches of government (see, for example, Manwaring 1962; Barker 1967; Sorauf 1976; Berry 1977; O'Connor 1980; and Wasby 1983)" (Ivers 1989: 16). Scheingold (1974) views the decision by interest groups to engage in litigation as a means to effect social change as based on "the assumption that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization that it is tantamount to meaningful change" (5). Scheingold concludes that politically disadvantaged groups view "litigation…as an effective way to redress mistakes, and deal with the shortcomings of American politics that result in the denial of rights and neglect of constitutional values" (1974: 85). More contemporary literature, however, has called into question the applicability of the political disadvantage theory.

In contrast to the studies of liberal organizations litigating to advance socially liberal causes—the politically disadvantaged groups—Epstein (1985) studied the decision of conservative interest groups to choose litigation rather than one or both of the other institutional channels: the legislative and executive branches. Epstein found that rather than being politically disadvantaged, conservative groups possessed political clout and used litigation as an offensive, rather than defensive, strategy when they perceived one channel in the laterally fragmented state to be closing: the judiciary (1985: 147-148). The controversy over interest group litigation theory suggests that research on the topic should take into account not necessarily institutional

barriers, as the political disadvantage theory did, but a group's perception of barriers to fully engaging in the policy-making process.

Through Which Channels Do Groups Litigate?

Alford and Friedland (1985) recognize that the extent to which a state is centralized or decentralized contributes to the types of interest groups which have access to state. In a decentralized state, like the United States, state fragmentation is divided into two elements: lateral fragmentation or vertical fragmentation (Werum and Winders 2001: 389). A state's lateral fragmentation contains a separation of powers between the different political channels—legislative, executive, judicial—each have "particular powers, affording groups influence at different points in the policy formation process" (Werum and Winders 2001: 389). A state's vertical fragmentation is based on the principle of federalism and "gives competing groups different *levels* at which to try to influence state policy: local, state, and federal….Because not all state arenas have equal influence on impact or policy formation, social movements [and interest groups], like other political actors, make tactical choices in pursuit of movement goals" (Werum and Winders 2001: 389-90, emphasis in original).

In contemporary American jurisprudence, state courts of last resort are the final decision makers on most issues of constitutional law, with an overwhelming majority of cases being filed in state courts rather than federal courts.[1] In fact, only approximately two percent of state court decisions ever getting appealed to the Supreme Court of the United States (Glick 1991: 87). Thus the state has become an increasingly important channel in the vertically fragmented state. This new judicial federalism "refers to the renewed willingness of state courts to rely on their own law, especially state constitutional law, in order to decide questions involving individual

rights…and represents an attempt to reinvigorate the idea of federalism by reviewing the idea of state autonomy…" (Abrahamson and Gutmann 1987: 90-99), especially in the context of

> a series of cases [in which] the Court revitalized the "equitable abstention" doctrine as a barrier to removal from state to federal courts, discouraged federal injunctive relief against the enforcement of state law, instituted limits on federal *habeas corpus* relief, and imposed stricter limitations for raising claims in federal courts (Tarr and Porter 1982: 919).

This line of cases culminated with the Supreme Court's decision in *Michigan v. Long* (1983), where the majority established the "plain statement rule" exempting state decisions from federal review as long as they are based explicitly on the state's constitution or laws and do not violate a federal right. As noted by Justice William J. Brennan in 1986, "the '[r]ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions…is probably the most important development in constitutional jurisprudence in our time'" (Tarr 1994: 73). Legal scholars have identified several areas of civil rights law in which state courts of last resort have rooted decisions in their declarations of rights, including the expansion of the right to privacy beyond the fundamental rights guaranteed under the constitution (Tarr 1994). Consequently, "the federal Constitution establishes minimum rather than maximum guarantees of individual rights [in the theory of new judicial federalism], and the state courts determine, according to their own law…the nature of the protection against the state government" (Abrahamson and Guttman 1987: 90).

In addition to the ability of state courts to insulate their decisions from federal review, they have become an important contemporary policy arena for a second reason. "The growing conservatism of the Supreme Court and lower federal bench has resulted in more restrictive doctrine in areas of individual rights, and this in turn has given liberal interests incentive to turn

to state judiciaries" (Farole 1998: 4). From 1968 to 1992, only one Democratic president was elected in the United States: Jimmy Carter. Thus, the federal judiciary has become increasingly filled with Republican appointees, driving "the federal bench further to the right" (Epstein 1994: 337, citing Alumbaugh and Rowland 1990). In the context of new judicial federalism, interest groups are presented with a compelling reason to consider state court rather than federal litigation in the vertically fragmented state (Epstein 1994: 337). Thus analyses of interest group litigation should begin focusing on state courts of last resort, rather than on the federal judiciary, which hears only a small fraction of appeals each year.

What Tactics Do Groups Use When Litigating?

While the extent to which interest groups are strategic in their litigation choices remains a topic of scholarly debate, there is a consensus "that groups possess two distinct means through which they may participate in litigation: direct sponsorship of a case or cases; and the submission of *amicus curiae* briefs" (Ivers 1989: 18).

Although direct sponsorship of litigation is preferred by most groups, giving them the ability to control the case from its inception, including choice of forum and legal arguments advanced; the theory of planned litigation is really nothing more than a myth (Wasby 1984). Realistically, "'too many people are doing too many things….If you are going to bring up cases A, B, C, and D, before you can, twelve other assholes bring it up.' That forces you to 'move when you can,' with litigation more like 'street warfare'" (Wasby 1984: 94, reference omitted). Additionally, the cost of direct sponsorship for groups with limited resources is particularly high, often making it impossible even for large groups like the American Civil Liberties Union (Farole 1998: 23).

The second, and more popular means of interest group participation in litigation, is *amicus curiae* brief submission. While the friend-of-the-court brief offers interest groups less control over litigation strategy, it does

> (1) strengthen, through repetition and endorsement, the arguments of one of the litigants (2) supplement the arguments by using materials or slants on materials that are not purely legal and might not be suitable for the principal litigants' use… (3) to frame arguments that raise legal issues of broader implications than those raised by the counsel for the principal (Ivers 1989: 19, citing Puro 1971: 2)

and (4) to expand the scope of conflict in an attempt to shift the balance of power in a political conflict (Schattschneider 1975: 4). In fact, given the number of cases filed in any one particular area of law each year across the country, "an amicus brief may be the only way [an] organization can make its views known [to the court]" (Wasby 1984: 113). Thus, virtually every relevant study of organizational participation in litigation has used amicus participation as an indicator of interest group activity (Caldeira and Wright 1988: 11).

METHODOLOGY

Case Study

In order to examine the extent to which the perception of less open legislative and executive channels has an effect on an interest group's decision to use litigation as a strategy to achieve social change, I chose to conduct a case study of same-sex marriage rights within the greater LGBT rights movement. I chose same-sex marriage rights not only because of their role in the current polity, but because the case study provides a contemporary example of a social

movement advocating for social change, allowing me to base my hypotheses on the work of Rosenberg (1991).

Time Frame

My central focus is how the LGBT rights movement used access to institutional channels to advance same-sex marriage rights between 1974 and 2006. Like Werum and Winders (2001), I

> chose 1974 as the starting date for several reasons. First, unlike the late 1960s and early 1970s, when the gay liberation movement engaged largely in disruptive forms of collective action, the mid-1970s saw an important shift in tactics toward institutional forms of political mobilization (Adam 1995; Cohn and Gallagher 1984; Herman 1994; Rosen 1980/1981). Second, in late 1973, members of the gay liberation movement founded the Lambda Legal Defense Fund to raise funds for gay rights litigation (Cain 1993) and the National Gay Task Force, predecessor of the National Gay and Lesbian Task Force or NGLTF (Licata 1981). Also, at that time various states witnessed the official recognition of a gay rights students group at university campuses. For instance in the fall of 1973, Maine became one of the nation's earliest battlegrounds concerning the recognition of lesbian and gay university students; this was followed by the passage of a gay rights platform at the state's Democratic Party convention (Cohn and Callagher 1984). Finally, in 1973/1974, the American Psychiatric Association removed homosexuality from its official diagnostic manual aimed at identifying mental illnesses, thus contributing to the destigmatization of homosexuality (Adam 1995; see also Aiken 1975) (391-392).

My decision to use 2006 as the cut-off point brings my analysis as close to the present as possible, while still allowing for the collection of a complete data set, rather than attempting to use partial state court of last resort opinions or case filings for 2007. Additionally, in November of 2006, a number of states elected new state legislators, which created the potential for shifting the balance of power in the legislature from one political party to the other, creating a logical stopping point for my longitudinal analysis.

Data Sources

I used three complementary data sources to construct my longitudinal data set of attempts by the LGBT rights movement to affect social change in the area of same-sex marriage rights: same-sex marriage cases, same-sex marriage legislation, and state party control.

Same-Sex Marriage Cases

In order to gather data on same-sex marriage cases before state courts of last resort, I conducted a LexisNexis search for each of the fifty states: SAME-SEX w/s MARRIAGE and year = 1974 to 2006. The District of Columbia was excluded from my data set because of its highly unique institutional framework, as well as the inability to collect all of the longitudinal data necessary to complete my analysis.

Being primarily focused on interest group litigation, I, like many previous scholars, used organizational involvement as *amici curiae* as a measure of interest group activity (Epstein 1994; Caldeira and Wright 1988). Therefore, to limit my data set of same-sex marriage cases to only those with *amicus curiae* participation, I conducted an additional LexisNexis search: SAME-SEX w/s MARRIAGE and AMICUS or AMICI and year = 1974 to 2006. This particular search, however posed an interesting methodological problem: the cases returned did not exclusively contain *amici* advocating for same-sex marriage rights. Instead, the cases contained a variety of groups with varying ideologies filing *amicus curiae* briefs on behalf of both petitioners and respondents.

Thus, in order to examine the participation of the LGBT rights movement in the struggle for same-sex marriage right, I chose the two leading LGBT rights interest groups in

litigation—Lambda Legal Defense and Education Fund and the American Civil Liberties Union (Haider-Markel and Meier 1996: 336)—and conducted two final LexisNexis searches: (1) SAME-SEX w/s MARRIAGE and LAMBDA LEGAL DEFENSE AND EDUCATION FUND and year = 1974 to 2006; and (2) SAME-SEX w/s MARRIAGE and AMERICAN CIVIL LIBERTIES UNION or ACLU and year = 1974 to 2006.

Same-Sex Marriage Legislation

In order to gather data on same-sex marriage bills in state legislatures, I conducted a LexisNexis search for each of the fifty states: SAME-SEX w/s MARRIAGE and year = 1991 to 2006. While I chose to start in 1991 because LexisNexis does not offer archival legislation searches dating back any further, my final data set only includes data from 1993 to 2006. My decision only to include data from 1993 to 2006 came mainly from my initial observations. In both 1991 and 1992, there were no bills fitting my search terms and no cases with *amicus* participation. Because I use the presence of same-sex marriage legislation as a means of comparison to determine through which political channels interests group are participating, the inclusion of data prior to 1993 has no significance. Each bill found was coded as either being pro-same-sex marriage if it attempted to expand the definition of marriage to include same-sex couples, including bills for civil unions and/or domestic partnership benefits; or anti-same-sex marriage if it attempted to limit the definition of marriage to only a union between one man and one woman (see Appendix B for a discussion of my decision rules for coding bills in the state legislatures).

State Party Control[2]

Finally, in order to measure whether or not interest groups perceive the legislative and executive branches of each state as open or closed, I coded each state for party control from 1993 to 2006. While I was unable to directly ask leaders of Lambda Legal Defense and Education Fund and the ACLU whether they perceived the branches of government in each of the states in which they litigated as being open or closed to the LGBT rights movement, party control is a suitable substitute. Beginning in the 1970s, the LGBT rights movement began to affiliate itself with the Democratic Party. In 1972, for example, the Democratic presidential candidate, George McGovern, added a civil rights plank to the party's platform directly addressing the demands of LGBT activists. The contemporary polity has also seen LGBT support for Democratic candidates. A CNN exit poll conducted during the 2004 presidential election found that 77% of surveyed voters identifying at LGB(T) voted for Democrat John Kerry, while only 23% voted for Republican George W. Bush (CNN 2004). Thus, I assume for the purposes of this research that LGBT rights groups view Democratically-controlled state governments as more open than Republican-controlled governments.

There are a variety of ways to measure party control of the state government. For the purposes of my research, I based my coding of party control on Ansolabehere and Snyder (2006), defining each year in a state in two ways. First, I defined the legislature as being under Democratic control if Democrats had a majority in both chambers. Republican control was defined analogously. If neither major party had control, then I said the legislature was under divided control (Ansolabehere and Snyder 2006). Second, I examined control of the executive branch. I defined Democratic control as a state having a Democratic governor, and Republican control as a state having a Republican governor. Those states having both a Democratically-

controlled legislative and executive branch were coded as open. All other states, where at least one veto point existed in the legislative process, were coded as closed.

Intercoder Reliability

Intercoder reliability was only necessary when coding same-sex marriage legislation because of the subjective nature of determining whether a bill was pro or anti-same-sex marriage. I performed intercoder reliability tests throughout the study, and no significant recurring differences were found. Double coding was fully performed for 10% of all bills found. The intercoder agreement rate was 90% for the analyzed variables.

RESULTS

Same-Sex Marriage Cases

Of the 73 cases collected relating to same-sex marriage, there were *amicus* filings in 51 or 69.9%. Since this subset of cases included groups filing *amicus curiae* briefs advancing both pro and anti-same-sex marriage positions, LGBT rights interest group participation was defined as including only those cases in which Lambda Legal Defense and Education Fund and/or the ACLU participated (n = 41). Cases in which both groups filed were counted twice, since the decision for each group to participate in litigation should have been based on its own organizational constraints. Conversely, same-sex marriage litigation without LGBT rights interest group participation was defined as those cases in which neither Lambda Legal Defense and Education Fund or the ACLU participated (n = 45). The cases studied were filed in 32

states, creating a distribution across 64% of the United States. Table 1 displays the distribution of cases across the 33 states.

[Include Table 1 Here]

Same-Sex Marriage Legislation

Of the 222 bills coded as pro and anti-same-sex marriage, only 29 or 13.1% were pro-same-sex marriage. Since my hypotheses were partially based on the idea that those groups choosing to litigate would do so at a much higher rate than they lobbied, I compared the number of pro-same-sex marriage bills with the number of cases in which an LGBT rights organization filed an *amicus curiae* brief (n = 29:41). While the number of bills is not an indicator of the number of times LGBT rights interest groups attempted to lobby for a change in the status quo, the elementary comparison between legislation levels and litigation levels does show that on the whole, the LGBT rights movement litigates 17.2% more often than it lobbies policy makers. Knowing, then, that LGBT interest groups are focusing on litigation, I returned to examine my research question: To what extent does the perception of less open legislative and executive channels have an effect on an interest group's decision to use litigation as a strategy to achieve social change?

Same-Sex Marriage Litigation and the Perception of Institutional Openness

For each of the 86 cases in Table 1, I determined whether the state government would be perceived as open or closed to LGBT rights interest groups based on state party control. I then made two comparisons: (1) I compared the number of same-sex marriage cases with an LGBT rights interest group filing an *amicus curiae* brief in a state with an open institutional perception

to the number of cases with an LGBT rights interest group filing an *amicus curiae* brief in a state with a closed institutional perception (n = 16:25); and (2) I compared the number of same-sex marriage cases without an LGBT rights interest group filing an *amicus curiae* brief in a state with an open institutional perception to the number of cases without an LGBT rights interest group filing an *amicus curiae* brief in a state with a closed institutional perception (n = 7:38). My results are shown in Table 2.

[Include Table 2 Here]

Overall, I found that there is a statistically significant relationship (alpha = 0.02) between LGBT rights interest group litigation and the perception of institutional openness ($X^2 = 6.0$; p = 0.014). When an interest group perceives that one or more of the political channels—the legislative and/or the executive branch—in a laterally fragmented is closed, the group is more likely to direct its attention to the courts as a means to effect social change.

CONCLUSION

This paper sought to address one question: To what extent does the perception of less open legislative and executive channels have an effect on an interest group's decision to use litigation as a strategy to achieve social change? Juxtaposing two divergent opinions on interest group litigation theory, the political disadvantage theory (Cortner 1968) and a "broader theory that explains litigation in terms of certain initial conditions and opposing groups' legal and political resources" (Olson 1990: 855), my research suggests that neither fully explains the nuances of an interest group's decision to utilize the courts.

If, as my research suggests, the decision of interest groups to engage the courts as a means to effect social change is influenced by perceptions of veto points in the laterally fragmented policy process, then it is necessary to analyze interest group litigation under a theory different from those previously articulated by scholars. Based on my findings, I propose the use of the state fragmentation theory, which considers the impact of party control and an interest group's perception of openness in explaining the decision to utilize litigation to effect social change.

Having articulated this new theory, where might future research take us? First, it is important to note the limitations of my study. Because I only study one very specific example of interest group litigation, litigation for social change, we should seek to expand the scope of my methodology to determine the extent to which my theory applies to all interest groups—liberal and conservative, advocates of social change and maintainers of the status quo, civil rights and business. Second, future research should attempt, where I have failed, to measure the impact of successful lobbying attempts on an interest group's decision to litigate. Finally, paired with O'Connor and Epstein's findings that conservative groups employed litigation as a tactic when they perceived the courts as a closed institution (1983), future research may also benefit from considering the extent to which the perception of a closing institution impacts the decision to litigate. Only through more expansive research and on-going considerations of the extent to which external factors influence an interest group's decision to litigate can we attempt to explain decision making based on the state fragmentation theory.

NOTES

1. Baum (1994) found that in 1991, approximately 254,000 cases were filed in federal courts (31) in comparison to the findings of Neubauer (1991), who estimated 94 million cases were filed in state courts nationwide during the same year (183-184).

2. The legislative seats held by each party and the party of the governor, used to determine whether a state was coded with an institutional perception of open or closed were:

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APPENDIX A

Table 1: Distribution of Same-Sex Marriage Cases Across the United States

State	Cases with LGBT Rights Interest Group Participation	Cases without LGBT Rights Interest Group Participation	Total
Alabama	0	2	2 (2.3%)
Alaska	1	2	3 (3.5%)
Arkansas	0	1	1 (1.2%)
California	4	3	7 (8.1%)
Connecticut	1	2	3 (3.5%)
Florida	1	0	1 (1.2%)
Georgia	0	1	1 (1.2%)
Hawaii	5	2	7 (8.1%)
Idaho	1	0	1 (1.2%)
Indiana	1	0	1 (1.2%)
Iowa	2	0	2 (2.3%)
Kansas	1	0	1 (1.2%)
Kentucky	0	2	2 (2.3%)
Louisiana	0	3	3 (3.5%)
Maryland	3	0	3 (3.5%)
Massachusetts	0	10	10 (11.8%)
Mississippi	0	1	1 (1.2%)
Missouri	0	1	1 (1.2%)
Montana	2	0	2 (2.3%)
New Hampshire	0	1	1 (1.2%)
New Jersey	1	0	1 (1.2%)
New York	2	2	4 (4.7%)
Ohio	4	0	4 (4.7%)
Pennsylvania	2	3	5 (5.8%)
South Carolina	0	1	1 (1.2%)
Tennessee	1	0	1 (1.2%)
Utah	0	2	2 (2.3%)
Vermont	2	2	2 (2.3%)
Virginia	0	2	2 (2.3%)
Washington	5	0	5 (5.8%)
Wisconsin	2	1	3 (3.5%)
Wyoming	0	1	1 (1.2%)
Total	41	45	86

Table 2: Relationship between Perception of Institutional Openness and Same-Sex Marriage Litigation

	Perception of Institutional Openness		
Same-Sex Marriage Litigation	Open	Closed	Total
With LGBT Rights Interest Group Participation	16 (69.6%)	25 (39.7%)	41 (47.7%)
Without LGBT Rights Interest Group Participation	7 (30.4%)	38 (60.3%)	45 (52.32%)
Total	23 (26.7%)	63 (73.3%)	86

$X^2 = 6.0$; $p = 0.014$

APPENDIX B

Decision Rules for Coding the Bills of State Legislatures

1. A bill shall be coded as "pro-same-sex marriage" if it extends marriage or a similar arrangement (domestic partnerships, civil unions, etc.) to same-sex couples.
2. A bill shall be coded as "anti-same-sex marriage" if it seeks to limit the definition of marriage to the union between one man and one woman, even if the bill offers some alternative (domestic partnerships, civil unions, etc.) to same-sex couples.
3. Each bill shall only be counted once. Thus, the House and Senate versions should not be counted separately.
4. If there is a version update to a particular bill, it shall be counted in the total number of bills for that year.
5. Any bill granting the legislature power to reserve marriage to persons of opposite sexes shall be coded as "anti-same-sex marriage."
6. The reporting of ballot initiatives shall only count toward the number of bills for the year if it is a proposal for some type of same-sex partnerships or the exclusion of the same type of partnerships.

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