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CONTESTING THE CONSTITUTION: CONSERVATIVE CHRISTIAN LITIGATORS
AND THEIR IMPACT

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

Hans J. Hacker, M.A.

* * * * *

The Ohio State University
2000

Dissertation Committee:

Professor Lawrence Baum, Adviser

Professor Gregory Caldeira

Professor Elliot Slotnick

Approved by

Lawrence Baum
Adviser

Political Science Graduate Program
ABSTRACT

My dissertation research explores the influence of conservative Christian litigating interests on court-crafted policy. I employ qualitative analyses to develop rich descriptions of three standard-bearing Christian litigating firms representing the Religious Right in court. I investigate how these firms establish goals, acquire resources, and bring those resources to bear in an effort to achieve their goals in court. All three groups have participated at all levels of the court system, litigating to influence outcomes in such key social policy areas as abortion, protestation, and religious expression in the public schools and square. Data on the groups and their litigation behavior are drawn from elite interviews of firm personnel, from court records, media sources, and published and unpublished materials by and about the groups.

In the course of this analysis, I identify a pattern in the behavior of Christian litigation firms that has implications for our understanding of group litigation. Each of the three groups has taken different approaches to litigation. These different approaches cannot be explained by variation in resources or group goals as defined in conventional interest group studies. I find that while these influential groups articulate similar goals, they use the courts very differently. I explore why similarly situated religious groups develop such divergent litigation agendas.
In the final analyses of the project, I posit that the concept of religious ideology helps define what methods groups will employ to influence policy. Group orientation to policy influence diverges between “principled” and “pragmatic.” A pragmatic approach is characterized by willingness to depart from strict principle and play by the norms of policy makers in the courts. A principled approach lacks willingness to depart from religious and ideological principle to achieve policy influence. Different approaches may determine preferred strategies for achieving goals, relative emphasis on trial and appellate litigation, and capacity to present courts with legal arguments for policy change.

The distinction between these two approaches is especially relevant to groups that are guided by strong religious views. But it is relevant to other types of groups as well. The extension of this distinction to other types of litigating interests may help refine our approach to studying those groups and help to explain patterns of behavior within those types. Thus, I seek to contribute to theory building on the forces that shape the behavior of elite interest group leadership and the behavior of groups in the litigation process. Further, I seek to enhance what we know about the set of conservative Christian litigators that are playing an increasingly active role in the courts.
To Lisa Hacker – the friend and wife whose steadfast sense of love is my deepest motivation, and whose companionship is my chief reward I dedicate this volume.

and

To Greta Hacker –

the Nutmeg of Consolation
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VITA

August 7, 1965 .......................................................... Born – Manhattan, New York

1988.................................................................B.A., Music, The University of North Texas

1994.................................................................M.A., The Ohio State University

The Ohio State University

1999 – 2001.................................................................Adjunct Professor.
The University of Maryland

FIELDS OF STUDY

Major Fields: Political Science
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CHAPTER I

INTRODUCTION TO CONSERVATIVE CHRISTIAN LITIGATION

1.1 Introduction

Over the past decade, a set of public interest litigators has arisen to champion the cause of social conservatism in the courts. These litigation specialists rally under the banner of the conservative Christian movement in the United States. They have litigated many high-profile issues and brought a significant body of cases through state and federal court systems, and especially to the Supreme Court. Through adoption of sophisticated litigation strategies (pioneered by liberal interest groups) they have had a profound impact on court-crafted policy. Increasingly, conservative Christian litigators see favorable interpretations of law and policy emerge from courts. Even when losing, they have shaped the course of judicial policy making. Christian litigators are also active in other ways that effect social policy. They pressure administrators and public officials to comply with their objectives, advocate the cause of rank-and-file Christians where they see a violation of religious freedoms, and defend abortion protesters at trial. They have started over 1000 student-led Christian clubs in public schools, and they write volumes on how average Christians can protect their religious expressive rights in public and the
workplace. They are some of the most active public interest firms in the nation. They are also some of the best funded. This study explores the role of conservative Christian litigators in shaping social policy, including interpretations of constitutional and general legal doctrines. I approach the study of conservative Christian groups through an analysis of how they function, i.e., what they do to influence policy, and how they gather the resources necessary to accomplish their policy aims. I want to know these things for several reasons. First, conservative Christian litigating organizations are important for understanding the development of court-crafted policy in the United States. Thus, they merit study by social scientists. Yet social scientists have largely neglected to study these organizations closely despite their political power, stability and policy influence. A second and related goal is to add to the knowledge of organized interests by examining a set of groups that is sometimes overlooked. Finally, I attempt to explore and explain the behavior of conservative Christian litigators using methods applied to other sets of interest groups.

The importance of the study in describing conservative Christian litigators should not be underplayed. Despite a wealth of research in the area of public interest law, conservative social litigating interest groups remain relatively understudied. This is especially true since the conservative political movement (commonly referred to as the Religious Right or the New Christian Right) underwent massive structural changes in the mid-1980s. These changes led to the development of well-funded and highly sophisticated law firms. These firms are led by politically astute individuals with well-developed missions for affecting court-crafted policy in a variety of areas. In describing
life within conservative Christian interest groups. I begin with the assumption that the political relevance of those organizations litigating the conservative social agenda warrants our interest. Thus, I take on the task of describing several conservative Christian litigating firms and the individuals that lead them. The descriptive portion of this research will serve the twin goals of adding to general knowledge of interest groups and describing a set of interests about which we know little.

To accomplish these two goals, I examine three leading conservative Christian litigating organizations: The American Center for Law and Justice (ACLJ) based in Washington D.C., The American Family Association Law Center (AFALC) of Tupelo, Mississippi, and the Liberty Counsel (LC) of Orlando, Florida. Each is involved in aspects of social policy areas of deep concern to the Religious Right, specifically abortion policy, church/state relations and family policy. The ACLJ is largely involved in church/state litigation, but has represented abortion protesters before the United States Supreme Court. The AFALC defended abortion protesters in the only joint state and federal prosecution under the Freedom of Access to Clinic Entrances (FACE) act. However, it has participated in resolving disputes over religious expression in the courts, and is especially attuned to litigation involving policies effecting the family. Finally, the LC is deeply involved in religious liberty litigation, but has also participated in defending abortion protesters on a more limited scale. Obviously, there is some overlap of litigation efforts. However, among the groups much variation exists in the strategies employed, funding levels, primary litigation emphases and other characteristics important to the goals of this research.
The parameters of the study do not suggest including any particular type of litigating conservative social interest. I employed a decision rule for selecting groups based on a preliminary analysis of what data are obtainable and how much variation exists in the activities of groups litigating within various policy. The option I have selected requires comparison of groups which, while distinct from each other, litigate in policy areas that overlap. Thus, the three groups selected have similar or overlapping missions.

Data on these organizations and their leaders were gathered from interviews conducted at the offices of each group, from information supplied by each, from court records, and from print media and scholarly publications. I use these data for descriptive analysis of each group. I hope that understanding what goals groups have, what resources they require, how they acquire them, what constraints groups operate under, and what aspects of a litigation strategy they emphasize will help uncover the full extent and context of engaging the legal system as a conservative social litigator. The descriptive portion of the analysis is framed around developing those variables that will serve as primary indicators when addressing the third goal of this research – analyzing determinants of group behavior.

As a third goal for this study, I will explore whether those findings that apply to other sets of interests also explain the differences in behavior among conservative Christian interest groups. Within the context of conservative Christian litigating interests, I explore a set of relationships between broad sets of variables that have demonstrated importance in the interest group literature: group goals, resource acquisitions, and their
importance as determinants of group behavior. I propose to study these relationships in an effort to explain why variations in the behavior of these groups occur.

In selecting this goal for the present research, the work of Lee Epstein (particularly *Conservatives in Court*, 1985) provides a model for approaching the study of interest groups and has been important to the development of this project. Epstein draws directly from prior research on interest group behavior in making the assumption that resources are universally important across interest group types (Epstein, 1985). She states that “whether participating as amicus curiae, intervenors, or direct sponsors, groups require financial resources, although the amount of funding that is needed seems to vary with the strategy.” (Epstein 1985, p. 107) Her conception of strategy parsimoniously combines the actions groups take with the goals that those actions are designed to fulfill.

Logically, Epstein makes an analytical jump from this conception of strategic behavior to an exploration of groups’ more or less thoughtful analysis of their context and their hopes for shaping policy. For Epstein, differences in context and goals across groups are revealed in behavioral differences – behavioral variations are indicators of strategic and contextual differences among groups. Further, she notes that not only do groups with different goals and expectations behave differently, but also they will prefer some resources to others depending on those goals. In fact, the goals of the group will dictate, at least in part, required levels of resources for achieving those goals.

Out of Epstein’s analysis a question emerges that has become the central focus of this work. Does behavior so clearly demonstrate differences in group goals that it can be
said to reveal variations in goal setting across groups? To test the analytical jump that Epstein makes from group behavior to group goals, this research explores the relationships between group goals, the acquisition of resources necessary for pursuing those goals, and the behaviors that may carry those goals to fruition. I propose a framework to sort out the relative influences of resources and goals on group behavior. Herein, I propose a set of relationships between these sets of variables and seek to explore the nature of those relationships more fully in an effort to answer the question proposed above. This will be done in an effort to explain the strategic behavior of conservative social interests that have already selected litigation as the primary method for achieving their policy aims.

The relationships between primary variables specified in this work follow below. First, I propose that policy goals determine the nature of litigation activities a group will pursue, while resource levels determine how much a group can afford to litigate. Second, while it may appear that group behavior is fashioned around the kinds of resources available to a group, the relationship between resources and behavior results from specified group goals for influencing policy. It appears that groups gravitate toward acquiring certain kinds of resources over others and that behavior changes as a result of where a group can obtain funding. However, these preferences for resource types are at least in part the result of an organizational consideration of what resources will further its pursuit of (indeed allow it to pursue) established goals. Moreover, group strategic behavior is generally consistent with group goals, rather than being wholly the product of what resources are available at the time. In summary, there is a crucial interaction
between what a group wants and hopes to do, what it can afford to do, and what it in fact does. I seek to uncover these interactions by exploring how group leaders have established organizational goals, how they build their organizations through the acquisition of resources, and how strategies for achieving organizational goals develop over time.

In what remains of this chapter, I will set out information relevant to the study of conservative interests. First, I explore research on interest groups that litigate for social change. Investigation of groups and individuals litigating in the public interest has yielded rich theories and definitional characteristics. These include exploring group types, identifying the policy areas in which litigating interests are most active, exploring the tactics used by groups to approach litigation, defining their organizational structure and identifying other key variables explaining the role of public interest law firms in affecting court-crafted policy. Second, I examine the historical context that has shaped the Christian Right movement and its elite leadership. In the past, theological differences have determined when and how Christians will enter politics. Once in politics, the movement encountered setbacks that have influenced the tactics used by activists and the importance of litigation for achieving the goals of the movement. Finally, I examine the specific legal context encountered by conservative litigators in the three policy areas outlined above – abortion, church-state and family values policy areas. This information is clearly important for developing our knowledge of conservative litigators, just as the study of conservative litigators has relevance for our knowledge of interest groups generally.
1.2 Analyzing Group Litigation and Strategies

The kinds of interest groups that lobby courts are very distinct from one another, and can be analyzed in a variety of ways. (Epstein 1991) Scholars differ over the most appropriate schema for classification of interest groups, even the limited types germane to this research – those whose primary purpose is to influence the development of social policy. Some studies explore the strategies of single groups, or a set of interests (Vose, 1959, Olson, 1984, Epstein, 1985). Others use strategy and tactics to explore differences across group types (Scheppel and Walker in Walker, ed. 1991), while others examine the influence of groups on the courts in a particular policy area (Sorauf, 1976, Ivers, 1993, Epstein and Kobylka, 1992). Litigating social interest groups can be classified according to their historical roles in litigation (O'Connor and Epstein, 1989), the scope of group litigation aims (Sarat and Scheingold, 1998), organizational structure (Baum, 1987, Epstein, et al, 1992), or broad patterns of involvement (Aron, 1989).

Among those groups that establish primary goals related to using the courts for social aims, civil rights litigators and public interest law firms offer a wide range of characteristics that allow distinctions from each other and further distinctions within these types. In what follows, I characterize groups that litigate for social change using some of the schema identified above. This task will involve distinguishing social interest groups from other kinds of groups where appropriate (for example, from commercial interests, governmental lobbies and unions) and making distinctions within categories (citizen or consumer lobbies and legal aid societies versus public interest law firms). However, as a primary concern, I review what scholarship tells us about the
characteristics of groups litigating for the purpose of changing social policy. This inquiry will also reveal our relative lack of knowledge of socially conservative litigating interests.

A primary method for classifying groups is by group type. One analysis of groups that use the courts distinguishes between categories of groups on the basis of financial status and constituency. (Scheppele and Walker, 1991) Profit-making (commercial) pressure groups lobby the courts on issues affecting their interest in conducting business and appear to dominate the sheer amount of interest group participation. (Galanter, Scheppele and Walker) In fact, the majority of interest group participation in courts also appears to be carried on by groups representing commercial interests as well as unions. (Scheppele and Walker, 1991) In contrast, Scheppele and Walker found that so-called citizens groups (as well as related groups they classify as nonprofit organizations) are significantly less likely to litigate than unions and commercial interests. This is surprising since “given all the attention paid to these groups in the political science literature, one would expect citizen groups to be among the heaviest litigators.” (Scheppele and Walker 1991, p.177)

Within the category of nonprofit litigating interests and citizen groups, we find a variety of organizations that are as dissimilar from each other as nonprofit groups are from commercial and labor union litigating interests. These interests include nonprofit governmental and professional/public lobbies, nonprofit interests that fulfill social roles (The American Red Cross, a variety of Protestant and other religious sects, hospitals and educators) and public interest litigators. Public interest litigation takes a variety of forms
including the activities of legal aid societies, the citizens groups discussed above, and
civil rights litigators, or interest groups litigating for social change. What distinguishes
types of public interest litigators will be taken up below.

Across group types, other methods of categorization have been employed to
analyze groups. Scholars employ ideological characteristics to analyze diverse sets of
groups. For example, Epstein’s *Conservatives in Court* employs ideology to chart the vast
influence that conservative litigators have had in such diverse policy areas as business law,
pornography, law enforcement, and public interest litigation. For decades, the study of
litigation for social change was limited almost exclusively to those groups associated
with liberal ideology – the NAACP and its Legal Defense Fund, ACLU and its Women’s
Rights and Reproductive Freedom Projects, AJC, and others. Historical-based approaches
have also yielded rich analyses of groups including Women’s groups (O’Connor, 1980),
the handicapped (Olson, 1984), criminal rights groups, death penalty supporters, abortion
rights, and pro-life groups (Epstein and Kobylka 1992).

Historical analysis may help us understand the differences and similarities
between the types of groups lumped together under the rubric of public interest law.
However, the most significant distinctions for this study come when we attempt to
distinguish interest groups litigating for social change from public interest law firms and
legal aid societies. As O’Connor and Epstein (1989) note, reasons for placing all of these
groups together have to do with the manner in which different disciplines study the same
phenomenon - “they have merely focused on different historical stages of development.”
(p. xii)
The existence of public interest litigation (broadly construed) in the United States dates back to at least the late nineteenth century with the emergence of legal aid societies.\(^1\) The legal aid movement was not centralized, its goals were localized, and its leaders had no grand vision for influencing broad policy. Eventually, cooperation among legal aid groups was established through an umbrella organization now known as the National Legal Aid and Defender Association. Moreover, the National government began subsidizing the movement in the 1960s through a legal services program, dedicating federal dollars to underwrite existing legal aid societies and bankroll new ones. Although the legal aid movement in the United States has gone through significant changes over time, its central purpose remains unchanged – to provide free legal representation to the poor and disadvantaged in society.

Out of the legal aid movement emerged a new kind of litigating interest which has garnered more attention from legal scholars and social scientists. This second era in public interest law is denoted by the creation of organized interest groups designed to use the courts to achieve policy goals – in this case a dedication to promoting citizen protection in a rapidly developing society. O'Connor and Epstein note the two influences which shaped early social litigating groups – the legal aid societies provided a structural basis for creating groups dedicated to protecting the underrepresented in court, and early 20\(^{th}\) century progressive-era organizations suggested the possibility of effecting long-term

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\(^1\) Legal Aid Societies emerged as groups offering free legal services to ethnic poor. The first Legal Aid Society in the United States is reputed to be Der Deutsche Rechtsschutz (the German Society) of New York, dedicated to providing free legal aid to protect German immigrants. See O'Connor and Epstein 1989, p.xii.

Early litigating social interests combined these influences in ways that distinguish them from the legal aid societies. First, as noted, they did not limit themselves to the provision of cost-free legal representation, but promoted broad policy change. This dedication to change at the level of social policy led to the contribution of some unique strategies for influencing judicial outcomes, including test case sponsorship, recruitment of expert counsel, and the introduction of social science data to the consideration of legal issues. The second area of difference lies with bases of financial support. While legal aid societies have come to rely primarily on governmental subsidies, litigating social interests drew their support from foundation and trust grants, and membership contributions. Thus, early social policy litigation is generally associated with the National Consumers' League because of that group's contribution in the areas of both organizational structure and strategy for approaching the courts.

Finally, social scientists have paid close attention to what has become known as the public interest law movement (what Scheppele and Walker call citizen groups). This set of interests can be distinguished from the earlier social interest group movement by their level of organizational and strategic development. They are an "amalgamate, combining aspects of legal aid and group litigation, while bringing [their] own unique style to judicial corridors." (O'Connor and Epstein 1989, p.xiii). Developing in the 1960s and 1970s, this latest iteration includes several organizations that survived from the earlier stage of social interest group litigation -- notably the NAACP and ACLU. They
began to litigate in the interest of the general public on a wide array of specific concerns, not simply broad social policies. Organizationally, these groups began to spin off legal projects dedicated to litigation in specific areas of the public interest. The most notable of these sister projects include the ACLU's Women's Rights Project and the NAACP's Legal Defense Fund. This development in internal organization had the effect of insulating the project from the parent organization's other lobbying activities (under IRS code, organizations risk their tax-exempt status if they engage in certain kinds of lobbying). Further, they attracted the notice of private foundations and trusts that sought to channel resources directly to litigation efforts in specific areas of the law.

The leaders of the new social litigating organizations began developing certain kinds of legal strategic initiatives that grew out of U.S. Supreme Court decisions, specifically *NAACP v. Button* 371 U.S. 415 (1963) and *In re Primus* 436 U.S. 41 (1978). These cases challenged the notion that public interest law firms may not act as "private attorneys general" in bringing cases to court (*Button*), and must abide by the practices of the legal profession with regard to obtaining clients (*Primus*). In both cases the Court recognized the special needs of groups representing both the interests of the broad public and those of minorities petitioning the courts. *Button* and *Primus* became the basis for legally pursuing a test case strategy. In part, public interest groups employ a test case strategy by searching for potential clients and cases that best fit a group's criteria for

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2 For example, compare *Muller v. Oregon* 208 U.S. 412 (1908), where the Supreme Court continued to decide general issues involving government regulation of business practices, and Ralph Nader's book *Unsafe at Any Speed*, which brought unsafe auto manufacturing practices to the public's attention. In line with this trend, the public interest law movement moved on to more specialized litigation in public interest areas related to treatment of minorities and women.
bringing an issue to the courts' attention. Without the removal of barriers such as
standing to sue requirements and client selection, public interest law firms would have
little capacity to represent the broad interests of their clientele.

Perhaps more significant to this study, a second schema for distinguishing groups
qua groups, is conducted on the basis of strategies and tactics employed to influence
judicial outcomes. Scholars note the significance of litigation strategies and tactics to
fulfilling group goals, and for their influence on such important group characteristics as
1959. Scheppele and Walker 1991) Because of the stylized court environment, groups
may participate in litigation in one of three ways – through case sponsorship,
intermediate behavior, and as amicus curiae, or “friends of the court.”

Test case sponsorship is defined as initiation and management of a case in an
effort to guide courts toward consideration of specific legal questions, and in hopes that
the courts will accept their reasoning for deciding those questions in a way favorable to
their position. (Epstein 1991, pp. 340–41) Sponsorship allows groups to maintain a
significant degree of control over such importance case aspects as selection of plaintiffs,
legal and factual record, and appeals process. As Sorauf (1976) notes, groups that
primarily engage the courts as sponsors of test cases maintain a higher degree of control
over their organization and affiliates. Groups employ this centralized management style
to influence the development of precedent and information flowing to the courts. Sorauf
states that “[t]he general pattern of information is, therefore, expressed in patterns of
group litigation” (Sorauf 1976 p.74). i.e., case sponsorship. He distinguishes three groups
from one another based on their capacity to act as case sponsors. For example, the American Civil Liberties Union (ACLU) and American Jewish Congress (AJC) maintained strict control of their affiliates’ decisions to begin litigation. Once litigation was initiated, the groups’ headquarters exercise almost complete control over legal arguments presented to the courts.

The third group, Americans United for Separation of Church and State (AU), participated in a more attenuated form of case sponsorship, and its behavior defines the second type of group involvement in litigation – intermediate participation. This form of litigation results in less control over case selection and information, as well as a different internal structure. Intermediate participation is participation in a case as sponsor or as an intervenor after a trial court decision is rendered. Lack of participation in a decision at the trial level removes certain aspects of a case from the control of a group. These aspects include controlling the trial level factual and legal record, selecting plaintiffs appropriate to litigating a particular legal issue, and controlling the legal arguments presented to the courts. Because the AU selected intermediate participation as its primary method of influencing the courts, its internal structure differed significantly from that of the ACLU and AJC. It worked closely with local affiliates and plaintiffs after the filing of the lawsuit, and its headquarters had much less capacity to influence the legal arguments presented.

Finally, groups may participate in litigation as *amicus curiae*, or ‘friends of the court.’ This strategy for participation allows the group to have input in cases to which it is not a party, submitting briefs in support of the position of one or another of the parties
to a suit. The benefits of this form of participation are many. It is much less costly to prepare and submit an *amicus* brief. Caldeira and Wright estimate the cost of preparation and filing at $8,000, with actual costs ranging from $500 to $50,000. (Caldeira and Wright, 1990) A group may feel it is increasing its reputation as it creates a record of participation in an issue area. Further, groups often feel that they indeed influence judicial outcomes by providing courts with helpful legal reasoning for ruling on policy issues. On the other hand, *amicus* participation severely limits the role of groups in litigation. *Amici* have little or no control over facts attending the cases in which they participate, nor have they influenced the court record at lower levels. Why then would groups choose *amicus* participation over case sponsorship?

Various reasons exist for groups preferring to litigate as *amicus* rather than case sponsors. As noted, some groups are forced into this more limited form of participation by the overwhelming costs and commitments of case sponsorship. Others are forced into the role of *amicus* when government steps in to defend a challenged law. This is the situation that conservative litigators faced throughout the 1980s. Repeated challenges to state laws and federal actions limiting access to abortion not only drove conservatives into the courts, but limited their ability to participate. They were forced to support state governments as *amicus* in their defense of challenged statutes, or request intervenor status from the courts when government showed little enthusiasm for mounting a defense. A noteworthy instances of such an event involved the Carter administration's defense the Hyde amendment in *Harris v. McRae* 448 U.S. 297 (1980).
While noting the influence of strategy on the behavior and internal characteristics of litigating groups, scholars have often neglected to test these generalizations on various kinds of groups. The seminal study in the area of interest group litigation is Clement Vose’s *Caucasians Only*, a consideration of the NAACP’s test case sponsorship strategy in its successful effort to overturn restrictive housing covenants. (Vose, 1959) Between its publication and that of Lee Epstein’s *Conservatives In Court* (1985), approximately 60 case studies on interest group litigation were published. Of these, 51 were studies of liberal interests. (Epstein 1985, 7) Quite clearly, interest group scholarship would benefit from the application of generalizations concerning interest group behavior to various kinds of groups that use the courts for policy purposes.

Finally, a segment of the interest group literature deals with questions concerning the circumstances under which groups will resort to the use of courts for policy ends. While these questions are not specifically related to this study, it is worth noting that conflict between socially liberal and conservative groups has led to development of theories regarding use of the courts. Initial theories of disadvantage (Vose, 1959; Cortner, 1968; O’Connor, 1980) gave way to a more balanced view of the role of courts in policy formulation. As Epstein notes, a more current view on groups entering the courts involves the adversarial circumstances existing between groups over policy questions. Once one set of groups entered the courts, the other set had little choice but to oppose them there, or risk losing victories gained before other branches. “Seen in this light, once the ACLU and other pro-choice groups moved the abortion debate into the legal system, they practically forced pro-life organizations to follow suit.” (Epstein 1991, p.344)
1.3 The Religious Context

The year 1964 is often marked as the end of an era of religious political conservatism in the United States. Following the defeat of Barry Goldwater in that year's presidential election, the religious conservative movement appeared to have fizzled politically. Discredited earlier in the century by various forays into politics, the conservative movement now had little to no effective force in either political party. Its leaders began to pay increased attention to building up its various denominations as institutions rather than political machines. Conventional wisdom indicated that conservatism would not have an influence on politics in the future, and that the church would contend mostly with traditional religious roles in America, such as providing aid to the poor, becoming involved in social policy at the local level, and preaching and teaching the Gospel.

As conservative religious denominations and sects recovered from their political defeat (as well as the financial crises of the 1950s), their leaders and members became more, not less, concerned with politics. The reemergence of the conservative religious movement as a political force confounded scholars, leading one to comment that "[o]f all the shifts and surprises in contemporary political life, perhaps none was so wholly unexpected as the political resurgence of evangelical Protestantism in the 1970s." (Wald, 1984). In retrospect, we can see the confluence of factors that have led to this resurgence, including reaction within the electorate to the gains of the civil rights movement, the social upheaval that accompanied the anti-war movement of the 1960s and early 1970s, and the effects of Nixon's Southern Solution on the makeup of the Republican party.
Regardless of the mystification of scholars examining the movement, religious conservatism reemerged in a new political manifestation as a result of its rebuke at the polls in 1964.

During the late 1970's and early 1980's, a new set of conservative religious leaders emerged. These were policy entrepreneurs who realized the need for politically astute organization, and who felt confident they could play politics with some success for their followers. Groups like the Moral Majority, Christian Voice and National Christian Action Coalition managed grassroots campaigns geared at electing sympathetic candidates, and keeping them accountable throughout the legislative process. (Craig and O'Brien 1993, p. 52) Their policy initiatives were directed primarily at the legislative branch, and they enjoyed the (at least tacit) support of the Republican held White House. (Craig and O'Brien 1993, p.169) Casting most legislative battles as zero-sum games where defeat spelled disaster for their efforts, conservative leadership largely failed in their bids to influence policy. (Moen 1992, p.29) However, they represented the first really conservative attempt at mastering the kind of political sophistication characteristic of other lobbyists and movements. As such, they continued to demonstrate the need for a highly flexible and sophisticated conservative political apparatus. Their influence still resonates through what has come to be called the New Christian Right (NCR).

As the influence of these leaders declined, another generation of conservative leadership arose to take their place and lead the latest incarnation of conservative politics, the NCR. This generation, having learned the lessons of previous Congressional defeats, took stock of the political changes afoot (conservatives largely lost the influence in state
legislatures that they had enjoyed for a decade or more), and began to develop competencies in other policy arenas. Their efforts to develop the political sophistication of the NCR have kept the struggle between conservative and liberal interests at the forefront of political debate. This research explores one aspect of that early recognition that political sophistication was required for religious conservatism to survive its interaction with politics.

The aspect of NCR political participation explored in this work is the role of litigating conservative social interest groups. Litigation has become increasingly important as a means for achieving policy goals for all interest segments of society. Yet, scholars have largely failed to scrutinize its importance for the NCR, turning instead to the conservative grassroots movement. Conservative lawyers have been responsible for leading the litigation efforts of the movement on nearly every item on the conservative policy agenda. Their influence in the areas of abortion policy and church-state litigation has been pronounced. They have also become closely involved in developing cases in an untested and largely unformulated policy area, termed family values litigation. The role of conservative litigators in these three policy areas will be taken up below.
1.4 The Legal Context

In the mid-1980s, as the leaders of the Christian Right were losing influence in Washington, the movement was suddenly reincarnated as a set of savvy interest groups prepared to take advantage of an ever more responsive judiciary. Starting with the 1983 case *Akron v. Akron Reproductive Health Services*, New Christian Right (NCR) attorneys began to coordinate their actions, initially to pursue a test-case strategy in the area of abortion policy.

Such coordinated legal behavior became the model for pro-life participation in a variety of policy areas. As litigation has become more central to fulfilling the movement goals of the NCR, conservative public interest law firms have increased the number of cases they bring to courts in an effort to overturn the gains of opponents in other venues of government, or defend their recent gains in the court system. They continue to do these things with a large degree of success.

This section sets out the general state of the law in three policy areas examined by this research. It is my intention to explore the topic of legal context in an effort to comprehend limitations the status of the law places on conservative social litigators. This is especially important since the conservative movement has undergone such complete changes in leadership that those litigating their agenda do not have a long-established track record and plans for policy influence. Each group included in this analysis has participated in all three policy areas. Their entrance into policy litigation has occurred at various stages in the courts’ development of that policy area. Abortion and church state are two well defined policy areas. The third, family values, is a less distinct area of law.
dealing with such issues as family leave, pornography, Christian education, textbook adoption procedures, right to die legislation, homosexual rights, and various other policies said to impact the American family.

The line of abortion cases can be broken into two parts: *Roe v. Wade* (1973) through *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and a new line of cases beginning with *Bray v. Alexandria Women's Health Clinic* (1993). The first dealt with permissible legislative regulation of abortion rights. Although issues remain (for example, partial birth abortion\(^3\)), the Court seems to have solved the puzzle of *Roe* by allowing the determination of the existence of an abortion right to remain good law. However, it gutted the legal rationale for that right, and supplanting Blackmun's trimester approach with an "undue burden" test. The second line of cases were an amalgamate of permissible regulation of protestation and other cases related to the pro-life movements abortion protest activities. It is in this line of cases that the current leaders of the conservative social litigating groups became involved extensively.

With its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Supreme Court seems to have laid to rest (at least for a time) the questions of whether a right to abortion exists under the Constitution, and whether that right exists independent of any state regulation. *Casey* appears to have ended a long line of cases beginning after the Court's articulation of an abortion right in *Roe*. Liberal groups, on the defensive in state legislatures, challenged consent and abortion funding provisions of

\(^3\) The Court does continue to adjudicate related matters. See *Stenberg v. Carhart* 120 S. Ct. 2597 (2000).
state laws. Their litigation activities continued through the 1980s in the form of challenges to parental notification requirements, federal funding prohibitions, and new state “model legislation,” or complete packages of restrictions including limitations on doctors, record keeping provisions, requirements for parental notification and consent, informed consent and 24-hour waiting periods. The combined effects of the challenges to state regulations of abortion were to move the Court away from the Roe trimester doctrine and toward acceptance of some state regulation.

In Webster v. Reproductive Health Services, a plurality on the Court explicitly rejected the Roe doctrine as “unsound in principle and unworkable in practice.” But the Court substituted no doctrine in its place, suggesting instead that these were decisions best left to state governments. Indeed, in leaving the states free to determine whether they would regulate abortion or intervene in an abortion procedure to save human life, the Court precipitated a series of state-level conflicts between pro-choice and pro-life advocates with state legislatures as the battle grounds. Further, the Court in a series of cases following Webster, reaffirmed its support of state mandated parental notification and consent provisions that contained judicial by-pass options for juveniles. In another

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1 Bellotti v. Baird (1976), Planned Parenthood v. Danforth (1976), and the trilogy cases Beal, Maher, and Poelker (1977)

2 H. L. Mattheson (1980)

3 Harris v. McRae (1980)


Finally, in *Casey*, the Court moved to resolve these state-level battles through the articulation of what it called the "undue burden" test. Under this rationale, the Court maintained that *Roe* was still good law, but a plurality held that the states could regulate abortions as long as they did not unduly burden a woman’s access to abortion services. What would constitute an undue burden would be determined by the courts. In *Casey*, the Court found that the Pennsylvania law’s requirements for counseling and a waiting period did not unduly burden the right to an abortion, and so it sustained those portions of the law.

The set of conservative social litigating interests at the center of this research came into being in the late 1980’s or early 1990’s. They were unable to participate, or participated in very limited ways, in most of the landmarks that distinguish the first set from the second set of cases. Further, the current state of the law limits these new litigating groups in broad ways. Having resolved that abortion would remain legal, while states would have power to restrict abortion provision, the Court appears unwilling to consider any new direction in the central questions of abortion at this time.\(^9\)

Thus, the current set of litigating interests is restrained by the Court itself from bringing any direct challenges to *Casey*’s endorsement of abortion as a Constitutional


\(^{10}\) In fact, by a vote of 6 to 3 the Court denied review of *Adar v. Guam Society of Obstetricians and Gynecologists* in 1992. Other rejections were to follow.
right. However, social conflict over abortion rights did not end with the Court’s decision in \textit{Casey}, and so the Court took up a new line of related inquiry into abortion protestation and clinic access. Beginning with \textit{Bray v. Alexandria Women’s Health Clinic} (1993), the new leading Christian groups participated fully in litigating the new set of issues that the Supreme Court determined to use to resolve social tensions over abortion.

In the 1980s, pro-life activists began blockading abortion clinics in an effort to “rescue” the unborn from abortion procedures. Their actions led to violence and civil unrest, prompting some federal judges to enjoin abortion protesters from acting to blockade clinics under an obscure 1871 law known as the Ku Klux Klan Act. This law allowed for the prosecution of individuals who conspire to deprive others of their civil rights. After announcing plans to blockade a group of Virginia clinics, a group called Operation Rescue was ordered not to engage in the planned action under the Ku Klux Klan Act. Michael Bray, once convicted in the bombing of another abortion clinic, appealed the injunction to the Supreme Court. Bray was represented before the Court by Jay Sekulow, head of the American Center for Law and Justice. The Court rejected the lower courts’ rationale for expanding federal jurisdiction to the enjoining of abortion protestation.

However, \textit{Bray} ended in a hollow victory for pro-life supporters. Shortly after the Court’s decision, Congress moved to stop abortion clinic blockades by passing the Freedom of Access to Clinic Entrances Act (FACE). FACE made it a federal offense, punishable by fine and imprisonment, to “use or attempt to use force threats, or physical obstruction to injure or interfere with anyone providing or receiving abortions.”
Other conflicts resulted in the courts attempting to sort out FACE claims on one hand, and Free Speech claims by protesters on the other. Lower courts instituted "bubble-zones" in which those attempting to get access to abortion services could not be approached by protesters. The Court has upheld the use of such zones, but struck down extraordinary efforts by lower court judges to protect abortion providers and clients, as well as restrict the access of protesters to clinics. In *Madsen v. Women's Health Center*, the Court considered the use of a permanent injunction against protesters creating a 36-foot buffer zone around a clinic. Judy Madsen was represented by Mat Staver, head of the Liberty Counsel. The Court rejected the rationale for a 36-foot bubble zone, opting instead for less militant restrictions on free speech and assembly rights.

In these cases, conservative social litigators have been increasingly active in representing the position of the NCR — a position holding, in part, that buffer zones and other efforts to curb protestation fly in the face of First Amendment freedoms. Indeed, on the day President Clinton signed it into law, the ACLJ filed suit against the federal government to declare the FACE act unconstitutional on First Amendment grounds, and the AFALC directly challenged the constitutionality of the act in an abortion protestation case (*U.S. v. Miller* 1995). Conservative social litigators have seen mixed results in this second line of cases. However, the courts have been receptive enough to encourage them to rely on speech rights claims in this area.

The Court has also been willing to reexamine its position on church-state matters, particularly regarding religion and public education. The Court's position on state-sponsored religious exercises had been firmly settled in *Everson v. Board of Education*. 
(1947). Further, it created a lasting mechanism for determining whether state actions promoted religion in public life (including education) in *Lemon v. Kurtzman* (1971). This mechanism took the form of a three-part test for constitutionality that a governmental action must withstand. Justice Black, speaking for the Court in *Everson*, used the Wall of Separation metaphor as the guiding principle for determining when state actions violate the Establishment Clause of the First Amendment. One scholar has referred to this metaphor as "the fixed star guiding [the Court's] constitutional decision making in establishment clause cases." (Ivers, 1993) Following *Everson*, the Court struck down state-sponsored and teacher-led religious activities in public schools from prayer (*Engel v. Vitale* 1962) to Bible recitation (*Abington v. Schempp* 1963). The Court took up various aspects of state involvement with religion, particularly state funding of religious educational institutions, but its primary metaphor for determining what constitutes impermissible state action remained constant.

The Court opened the decade of the 1980's by reaffirming its holdings in *Engel* and *Schempp*. In *Stone v. Graham* (1980), the Court reversed a state supreme court's finding that posting a copy of the Ten Commandments in a public high school served an understanding of the Bible as history and literature. The Court found that the action by the school district in placing the copy in its school did not meet the *Lemon* test's requirement that the action of the state have as their primary emphasis a secular purpose. It appeared that supporters of religion in public life would meet with the same fate as they had in previous decades. They were at least in part correct. In *Wallace v. Jafree* (1985) the Court considered a challenge to a state mandated "moment of silence," and struck
down the state action, ruling that such state-mandated times of meditation during the
school day violated the Secular Purpose prong of the *Lemon* test.

However, out of *Wallace* came the first stirrings of displeasure with what then
Justice Rehnquist called its “rigidly separationist” interpretation of the First
Amendment’s Establishment Clause. Rehnquist urged the Court to throw off the
metaphor of a wall of separation, and abandon *Lemon* as the test for determining
unconstitutionality. Further, Justices O’Connor and Powell, in concurring with the
majority, suggested that moment of silence legislation could be constructed in such a way
that it would not violate *Lemon*.

While the Court remained unwilling to reinterpret the Establishment Clause in
favor of the state, striking down state-sponsored religious invocations at high school
graduation ceremonies (*Lee v. Weisman* 1992), and a state attempt to create a separate
religious school district (*Kiryas Joel Village School District v. Grumet* 1994), it did
remain inclined to grant review to those making new claims on the Establishment Clause.
In the early 1990’s, the Court took up a series of cases involving equal access policies.
The first in this line of cases involved a challenge to the Equal Access Act, passed in
1984 by the U.S. Congress. This act required public schools to allow religious student-led
clubs access to school facilities if those schools also allow secular clubs to use facilities
after hours.

In *Board of Education of Westchester Community Schools v. Mergens* (1990), the
constitutionality of this act was challenged. Jay Sekulow acted as counsel for a student
whose Bible club was not allowed to hold after hours meetings using school facilities
because of its religious nature. For the first time, defenders of religion in schools framed their arguments in terms other than the Establishment Clause. On the offensive, Sekulow ignored whether the Act met the Court’s three-part test for constitutionality, and elected instead to frame his arguments around a Free Speech and Equal Protection argument. The Court, determining that the actions of the School District in rejecting the claims of the Bible club had a tendency to remove religion’s capacity to defend itself within the educational context of an open exchange of ideas, ruled the Equal Access Act constitutional on the basis of Sekulow’s Free Speech and Equal Protection argument.

The Court continued to take equal access cases through the early 1990’s, determining that public universities cannot deny funding to religious clubs on the basis of their religious orientation (Rosenberger v. University of Virginia Regents and Visitors 1995), and that public schools renting their facilities to community groups must allow religious groups the same access (Lamb’s Chapel v. Center Moriches Union Free School District 1993).

In all these cases, the Court appeared willing to risk establishment, or multiple establishments, of religion in schools so long as equal access was granted to religious expressions. When presented with considerations of free speech and expression, or free exercise and equal access, the Court often opts for those arguments over the establishment objections of those defending the exclusion of religion from public institutions. Thus, the Court appears to accept the legal question framed as “In what circumstances does multiple establishment encourage free exercise of religion?” rather than as questions were framed earlier in the Court’s history (i.e., “Does this represent
government entanglement?”). Those supporting “equal access” contend that when the
Court held solely to a strict interpretation of the Establishment Clause, it had already
unconstitutionally narrowed the free exercise of religion. (Fowler & Hertzke. Religion

Litigation in the area of family values, or for pro-family policy, does not have the
same broad policy content qualities as the abortion or church-state policy areas. Perhaps
the reasons for this lie in the history of pro-family conservative litigation. These early
efforts were directed toward stopping the spread of obscene material. Led by a
conservative Cincinnati-based group called Citizens for Decency through Law,
conservatives focused on local conditions and pressuring officials to “clean up” the
community. Moreover, in spite of this group’s efforts to obtain a favorable Supreme
Court ruling (which it partially accomplished in Roth v. United States. 1957), it remained
concerned with local level conditions. Upon hearing of the test the Court formulated for
determining if literature was obscene (certainly not a complete victory for anti-obscenity
groups), the CDL leader, Charles H. Keating was said to have told Cincinnati police
“Now you can make arrests with some hope of convictions.” (Epstein 1985. p.82)

The family values area does not have any particular line of cases to boast.
However, several test cases are currently pending in lower state and federal courts for
two of the three groups in this study. The AFALC in particular has been active in the
anti-pornography and pro-family campaigns of its parent organization’s leader, Rev. Don
Wildmon. The AFALC has become involved in several legislative and community
campaigns to assist in passing “model” anti-pornography and zoning legislation. with the
promise to help defend the legislation should it be challenged in court. Currently, model bills have been passed by numerous communities, with no real court challenges emerging. The AFALC was very active in placing an initiative on the ballot in Washington State that would ban what it calls “Partial Birth Infanticide.” The organization has been active in formulating the legal logic behind this initiative. On the heels of its narrow defeat in the 1998 Washington State elections, the AFALC plans to actively promote such initiatives in other states.

All three groups heralded a new line of legal inquiry in the area of homosexual rights as they relate to Christians in society, particularly the workplace. NCR attorneys are attempting to cast the struggle over objections to homosexual advocacy in the workplace as a matter of free expression. Each group stated that concern over homosexual rights has increased among all potential case contacts each year. According to one attorney, it has reached the level that he can no longer ignore it as a part of his group’s litigation strategy.

The objective of this research is to describe and analyze the litigation behavior of three conservative social interest groups. As described above, the courts continue to produce rulings favorable to conservative interpretations of fundamental provisions of the Constitution. At the very least, conservative litigators have significant impact on shaping the kinds of cases brought to the courts, and offering legal reasoning which the courts are free to alter, accept or reject. The impact of conservative litigators is significant and warrants our concern and careful study. Chapter 2 of this research contains a more precise account of the design of this project, laying out expectations for the behavior of
conservative litigators given their goals, resource constraints and the legal context.

Chapters 3 through 5 describe group litigation strategies in detail and addresses
organizational development, resource acquisition and legal context. In Chapter 6, I
explore patterns of association among factors that may influence group behavior. In
conducting the analysis, I identify a pattern of behavior among the groups that cannot be
explained by an appeal to external group constraints. I conclude the analysis by
developing the concept of religious ideology. This concept may improve our
understanding of forces that shape the behavior of groups. By understanding religious
ideological constraints on group behavior. I identify and explore an internal characteristic
that influences what behavioral options conservative groups will consider efficacious.
CHAPTER 2

DETERMINING THE INFLUENCE OF GOALS
AND RESOURCES ON GROUP LITIGATION BEHAVIOR

2.1 Approaching Conservative Christian Interest Litigation

Conservative interests are important for politics. Political conflicts between socially conservative and liberal elements in American society have structured political debate, forced election outcomes and taken up the time of courts for most of the 20th century. In response to the reality of conservative political influence, there is a burgeoning literature describing the evolving grassroots movement called the Religious Right. (Wilcox 1996; Hertzke 1988; Moen 1992; Hoïrenning 1995; Ivers 1990)

Unfortunately, empirical knowledge of the nature of conservative litigating interests is small when compared to that of liberal social interests. Furthermore, the Religious Right does not appear to be losing influence. On the contrary, its strategies for influencing policy at all levels appear to be maturing and increasing in complexity. Thus, as conservative litigation efforts follow accepted notions of social movement adaptation and maturation (Blanchard 1988), the importance of describing and explaining conservative efforts to shape court-crafted policy becomes more significant.

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In this chapter, I outline the design of this research inquiry. I provide an overview of the analysis and methodology employed, and set out expectations for group goal formation and resource acquisition. I also state expectations for the influence of goal formation and resource acquisition on group litigation behavior. I describe a new typology of group goals and group litigation behavior. Additionally, I provide theoretical justification for conducting an inquiry into the behavior of conservative litigating interests.

2.2 Theoretical Perspectives on Interest Group Litigation

It is widely held in both the theoretical and empirical social science disciplines that organized pressure groups are important for understanding the context in which policy is formulated. Theoretical justifications for interest group research explore how problems are manifested as policy issues to be addressed by government. Interests function in part to transmit the preferences of a group of citizens to government, to involve a constituency in political issues through the dissemination of information, to set the agenda of government by turning its concerns into policy issues for government action, and to affect government by monitoring both governmental actors and programs sponsored by government (Walker 1991; Berry 1977; Cigler 1991). While the success of interests in effecting the policy process is somewhat in dispute, interests are present at every level of government, and they pursue issues with intent to achieve policy goals. Exploring the determinants of group behavior and testing the generalizations that can be
made about behavior are therefore crucial for understanding the impact of interests on the policy process. Furthermore, the study of interest group behavior and its determinants is important for considering the motivations of organized interests as well as the constraints under which they operate.

Initially, social scientists, such as Bentley and Truman, pictured the policy process as a stable mechanism for making decisions, involving the same number and core of policy analysts and policy makers. (Bentley 1940; Truman 1951) This model of policy formulation mirrors that of structural-functionalist social movement theory, which posits that social movements arise out of the desire for equilibrium in social systems. When new technologies and other social changes upset the balance between social structures and socio-cultural values, movements arise to stabilize society, or reach a new social equilibrium, by folding new experiences into traditionally held beliefs.

In the United States, this stable environment was replaced by an "age of conflict" in which government played an expanded role in the lives of citizens. Consequently, interest groups proliferated and competed in an ever-increasing number of open policy sectors, including the court system. At the same time, social scientists challenged the notion that a cohesive and representative public policy would automatically emerge from a pluralistic process in which a multitude of interests arose to contribute and defend themselves within the political process. Instead, they began to see that an open and destabilized policy making system does not necessarily mean the public interest will be served. The unstable environment introduced a measure of uncertainty into the strategies of organized interests, and into our understanding of the role of interests in effecting
public policy output. Thus, group context and resource variables became important for understanding and explaining the strategy and behavior of groups as diverse as the business and peak associations examined by Truman (1951) and the many studies of organized liberal interests conducted during the 1960's and 70's.

This new area of inquiry is in line with a pluralist perspective of interest group litigation. It emphasizes the role of courts as part of a system over a strictly behavioral approach. Behavioralism emphasizes judges' attitudes and attributes leaving "little room for consideration of the effect of external factors on the resolution of judicial questions." (Epstein and Kobylka, 1992 p.24) Following in the footsteps of Clement Vose's *Caucasians Only*, scholarly work in the area of group legal context tended to focus on a set of liberal interests in the areas of religious freedom, gender issues, and racial discrimination. Furthermore, scholars primarily tested hypotheses relating to the litigation strategies of these groups, including the resources necessary for carrying their objectives to the courts, and measurements of success in the courts. The findings of those who explore these linkages (Krislov 1963, Caldeira and Wright 1990, Epstein 1991, Olson 1984) note increasing levels of group litigation activity. Some attempt to link this activity to judicial decision making (Perry 1991; Caldeira and Wright 1990; McGuire and Caldeira 1992). Several lines of research emerge including the impact of interest group participation on decisions on the merits (actual perceivable influence on policy emerging from the courts) and the motivations and goals of groups that litigate. The present research deals with the latter question, and attempts to explore how groups maximize
their chances of achieving their goals by engaging in various kinds of participatory behavior.

The study of interest group litigation goals initially focused on a set of assumptions about the characteristics of groups, and their motivations for litigating. These included the assumption that litigation coordinated by groups produced greater odds of success (Vose 1959), and that litigating groups were primarily identified with liberal politics (O’Connor and Epstein 1989). In particular, initial studies assumed that the primary goal of any litigating interest was to see its policy aims become law. Beginning with Clement Vose’s *Caucasians Only* (1959), scholars focused on successful and coordinated group litigation efforts to shape or reshape public policy (Manwaring 1962; Cortner 1968). Other studies have focused on how groups supplement successful test-case strategies with other tactics including acquiring necessary resources (Sorauf 1976; Epstein 1985), pursuing an extended test-case strategy through which groups acquire “repeat player” status (Galanter 1974; Kobylka 1991; O’Connor 1980), and coalitional behavior (Sorauf 1976).

The study of interest group litigation has expanded into related areas including exploration of possible motivations for pursuing a litigation strategy. Initial forays suggested that groups that were unproductive in other governmental arenas would enter the courts in an effort to balance the dominance of more politically advantaged groups (Cortner 1968). However, further analyses demonstrate quite clearly that this is not the case. A wide array of organizations, including corporations, professional societies, not-for-profit and other charitable organizations, resort to the courts (Caldeira and Wright
1990; Epstein 1991). Social scientists turned to an exploration of other motivations, suggesting a variety of organizational characteristics as explanations for litigation participation. Some suggest that groups with considerable resources within highly contentious policy environments are likely to enter the courts to solidify policy goals (Schepele and Walker 1991). Others focus strictly on organizational capacities such as financial resources and their sources (Olson 1984), professional staff and internal structure (O'Connor 1980, Epstein and Kobylka 1992).

In the interest group literature focusing on litigation, the entry of conservative social organizations into the courts is particularly notable (Epstein 1985). While remaining somewhat unexamined, Conservative Christian litigating interests have become significant participants in litigation. They present the potential for examining broad motivations for litigating under a set of conditions and constraints that may differ significantly from those of liberal litigating interests. This research seeks to explore the influence of various group motivations for litigation on group litigation behavior, as well as focus on a segment of the interest group litigation universe. In doing so, I hope to refine our understanding of determinants of interest group behavior. Thus, the goals of this research are to describe conservative Christian litigating interest groups, and explore determinants of interest group behavior. In the following section, I outline these goals and relate them to research objectives and expectations stated below.
2.3 Statement of Expectations and Objectives

In addressing the first goal of describing conservative Christian litigating interests, I employ case study analyses to develop descriptive data on conservative Christian litigating firms. Data emerging from these deeply narrative analyses are used to explore the characteristics of Christian litigating firms. Some of the characteristics studied in the descriptive portions of the project include group goals, organizational structure, group resources and methods of acquiring resources, organizational development and growth, coordination with sister organizations and the litigation agendas of each group. While providing valuable insight into the nature and character of a relatively unstudied segment of public interest law firms, these data are also used to create indicators of group behavior, group goals and group resources. These indicators are used to explore the second goal of the research project -- refining our understanding of determinants of interest group behavior.

In addressing the second goal, an objective of this research is to develop a schema for classifying group litigation behavior and group goals. Using this schema, described in detail below, I categorize behavior according to depth of group involvement in litigation. Some litigation behavior (for example, case sponsorship) reveals that a group is deeply involved in shaping the issues and arguments presented to courts by cases. Other forms of litigation behavior (for example, Amicus curiae participation) reveal that a group has less influence on the issues presented to courts. This kind of participation, conducted on the fringes of a case, indicates a lack of depth of involvement. I develop classifications of group goals using a schema for identifying broad organizational motives -- for policy
influence, increased reputation and media-oriented goals. I develop these classifications, and decision rules used for categorizing behavior and goals, in detail below (see Sections 2.3.1 and 2.3.2).

The reasons for exploring determinants of interest group behavior are two-fold. First, I hope to clarify schemas used by scholars in previous studies (see Section 2.2.2 above), and explore the relative influences of goals and resources on litigation behavior. Second, the analysis may reveal subtle behavioral differences among groups. For example, it is noted above that groups with different goals may participate in litigation in much the same way. Thus, there may be differences among groups that are not revealed by litigation behavior. The rich analysis of conservative litigating interests may provide the basis for an extended comparison of groups’ goals and litigation behavior.

The analysis described above employs qualitative indicators of varying levels of systematization and specificity. Thus, where there are available quantitative indicators that approximate the rigor and specificity of metric observations (as one might expect to find in quantitative analyses), I put forward formal expectations for relationships between independent and dependent variables. However, this research also explores several objectives, including the revision of typologies of group behavior and group goals described above. These objectives are stated less formally, and provide the tools for analysis of conservative Christian litigation behavior.
2.3.1 Objective: Developing a Typology of Group Goals

Objective 1:
Interest groups resort to litigation for the purposes of a) influencing policy and building up precedent favorable to their position, b) developing a reputation as an expert in a particular issue area, and c) bringing attention to themselves and their cause in the media and in the minds of the public.

A trend in studies of interest group litigation has been to describe the goals of groups with reference to their behavior. These studies stipulate that behavior reveals, in and of itself, the underlying reasons for engaging in that behavior. Here, I demonstrate that the relationship between goals and behavior is not so clearly defined. No particular litigation activity reveals the goals that a group has in mind when pursuing that activity. Often, groups with vastly different aims will engage in similar litigation activities. Some strategies employed overlap with various goals. Further, scholars have not clearly identified a criteria for defining categories of behavior. using the supposed underlying goal to label a behavioral category in some instances, or the type of behavior itself in others. These variations point to the need to explore the linkages between group goals for litigation and behavioral options open to litigators. This section focuses on developing a rationale for creating a typology of group goals. However, the following discussion demonstrates how intertwined in the literature are the concepts of goals and behavior.

O’Connor (1980) notes that while social scientists have often limited their study of interest group behavior to those in which a definable and achievable purpose is evident (namely policy influence), she will explore a range of behaviors that are “characterized by the presence of identifiable goals as well as reasons for initial selection . . .” (O’Connor, 1980, p.3). O’Connor lists outcome-oriented litigation activity (a reference to
the identifiable goal of litigating to influence policy) along with amicus curiae litigation activity (a reference to an identifiable behavior) as examples of litigation strategies. Outcome-oriented litigation is characterized by one behavioral constant - a test case strategy, defined as control over all aspects of litigation through direct sponsorship of a case with the goal of eventually obtaining a favorable policy ruling by a court of last resort.

Additionally, O'Connor includes publicity-oriented litigation activity. Here, she refers to an alternative goal that groups set when sponsoring litigation. Groups pursuing a publicity-oriented goal are faced with less than favorable litigation outcomes, and seek the alternative of drawing attention to their cause (O'Conor 1980 p.5). How outcome- and publicity-oriented litigation programs differ from one another beyond distinctions between underlying goals remains unexplored, or at least only partially defined. Moreover, as O'Connor notes, there are many reasons for pursuing an amicus curiae litigation strategy. These include concern over arguments presented in a case that may directly affect the organization, advocating a particular narrow point of law, or pursuing an amicus strategy because of limited finances (O'Connor 1980 p. 4)

Epstein (1985) makes similar reference to the relationship between goals and behavior. However, she notes important distinctions for the study of conservative litigating interests. Conservatives, often on the same side of government in litigation, must obtain government's permission to sponsor or intervene in litigation, or must utilize the behavior of amicus curiae participation even when pursuing outcome-oriented goals for litigation. Further, she notes the existence of two conservative litigating groups that
pursue an outcome-oriented strategy for influencing policy, but do so almost entirely through amicus curiae participation. Thus, we cannot assume that those groups pursuing an outcome-oriented strategy will rely mainly on case sponsorship (the so-called preferred method of litigating for policy change). On the other hand, one might wonder if O’Connor’s category of amicus curiae participation merely identifies a behavioral type rather than a behavior distinguished from other behaviors by identifiable goals. Obviously, the reasons for sponsoring litigation or participating as amicus are much more complex than the schema of recent scholarship for explaining behavior has allowed.

While most interest group literature has focused on those groups pursuing a policy- or outcome-oriented litigation strategy, various other goals exist for litigating. These include the related goals of developing a reputation through institutional agenda-setting, and attracting positive publicity to the group’s cause. Strategists that litigate for the express purpose of elevating an issue on the agenda of a policy-making body (courts or otherwise) are often concerned with increasing the stature of the group through improved reputation and credibility. This goal is accomplished in various ways. Groups may litigate hoping to persuade judges to take their claims seriously, or to accept a case for review. They may seek increasingly positive public perceptions of their side of an issue through use of the public media. This kind of publicity can lend legitimacy to a cause, as well as force policy-makers to take a stand on the issues considered salient. O’Connor notes the efforts of the National Woman Suffrage Association to bring a case to the Supreme Court. It did not expect a victory in the courts as much as it sought out
sympathetic publicity, and all its benefits, including a reputation as a leading organization in the women’s suffrage movement (O’Connor 1980 p.5).

Thus, from previous analyses of interest group litigation, three categories of interest group goals emerge. They are distinguishable from litigation behavior itself, and represent the reasons, or motivations, for a group to pursue litigation in the courts. These categories, as defined in Table 2.3, are policy-oriented goals, reputation-oriented goals and media-oriented goals.

2.3.2 Objective: Developing a Typology of Group Litigation Behavior

In separating group litigation behavior from group goals, I attempt a clarification of how group behavior is analyzed. Here I use the concept of depth to classify litigation participation. The definition of depth and related indicators are provided in Table 2.3. Depth refers to the amount of involvement required for a group to participate in litigation. Thus, depth is the degree of group engagement in or association with litigation. I conceptualize depth as degrees of involvement, demanding successively more participation in conducting litigation. In the following section, I propose expectations for how group goals influence depth of involvement in litigation. However, below, I outline a typology of group litigation behavior based on the concept of depth, and present reasons why such a classification scheme will help us understand relationships between the primary sets of variables included for analysis -- group goals, resources and behavior.
The primary rationale for creating a typology of litigation behavior based on the concept of depth is the conceptual clarity it provides analyses conducted in this research. I treat group goals and litigation behavior as distinct features of interest group litigation. Separating goals from behavior provides the opportunity to directly explore the influences of various factors on litigation behavior. The concept of depth provides a mechanism for ordering various behavioral options with respect to each other. In operationalizing the concept of depth, I make two related assumptions. First, I order behavioral options based on the degree of commitment to litigation each requires. Second, I order similar behaviors based on jurisdiction. Below, I discuss each of these assumptions in turn.

First, previous analyses of interest group litigation note that differences exist in the commitment required from groups pursuing various behavioral options. These analyses focus on two potential behavioral options -- case sponsorship and amicus curiae participation. Generally, case sponsorship is perceived as requiring much more of an organization's time, skill and resources. Many note the high cost of sponsoring a case, versus the relatively low expenses associated with preparing an amicus curiae brief. These two forms of participation transfer easily into a typology of group behavior based on depth of involvement. Clearly, case sponsorship requires a greater degree of involvement in litigation, while among all behavioral options amicus curiae participation demands the least commitment of groups' time and resources. In ordering behaviors with respect to each other, I use a decision rule based on the level of commitment required by each behavioral option.
Second, where similar behaviors are distinguished only by difference in the jurisdiction of the court before which the litigation occurs. I order those behaviors based on the jurisdiction of the court. For example, instances of case sponsorship occurring before intermediate appellate courts are placed ahead of those instances occurring before trial level courts. Thus, the jurisdiction of the court figures into the placement of behavioral options along the continuum of depth. It is entirely possible that a group might find some litigation before a trial-level court more demanding than litigating that same case on appeal. However, generally speaking, the stakes are greater the higher a case goes in the court system -- the potential impact of higher court decisions is greater, the arguments obtain a greater degree of abstraction, and the possibility that the court will exert power to review or revise policy also increases. In short, an argument can be made that litigation before appellate courts is more demanding than litigation before trial courts, and so forth.

Epstein (1991) defines case sponsorship as initiation and management of a case by a group in an effort to guide courts toward consideration of specific legal questions. Under this definition, a group will sponsor a case for the purpose of receiving a decision favorable to its position. Epstein and others classify case sponsorship that is initiated after a trial court decision as an intermediate behavior. This kind of case sponsorship generally receives less weight because it reflects a lack of control over the trial court record. Control of the trial court record is necessary for a group to achieve the alleged aim of influencing policy by obtaining a favorable ruling. Lack of such control is a threat to the group's ability to present arguments that achieve that aim.

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The present analysis distinguishes between two types of case sponsorship. These two types are "one-shot" case sponsorship (instances where groups sponsor a case, either at trial or before an appellate court, but do not pursue the case any further or participate at other stages) and the Test Case Strategy (instances where groups participate in a case across jurisdictions). For the purposes of this study, I expand the traditional definitions of sponsorship and the test case strategy to reflect differences in depth of participation. First, I distinguish participation as case sponsor based on how far the case proceeds through the court system. Under my definition of depth, the farther a case proceeds on appeal, the greater the amount of commitment of time, energies and other resources required from the sponsoring group. Thus, under this classification scheme, instances of participation as case sponsor in the same case across jurisdictions represent the greatest degree of involvement within the depth typology. However, there are many possible levels of involvement within the case sponsorship category. Table 2.1 provides a ranking of options within the category of case sponsorship. These options run from Test Case Strategy (sponsoring a case from trial to final disposition before a court of last resort) to "one-shot" case sponsorship before a trial or appellate court.

So far, I have distinguished types of case sponsorship and amicus curiae as levels of participation based on depth. To these behavioral options I add another that has become more important over time (at least for conservative litigators) -- participation as Counsel on Brief. A group that participates as Counsel on Brief generally works in collaboration with the group sponsoring litigation. Counsel on Brief add their expertise to that of the sponsoring group, assisting that group in framing legal questions and argument
without bearing other costs associated with litigation. Participation as Counsel on Brief requires more commitment of time and resources from a group than amicus curiae participation, but significantly less resources than case sponsorship. I have classified Counsel on Brief as an intermediate behavioral option according to depth of involvement in the conduct of litigation.

Table 2.1 ranks behavioral options with respect to each other along a continuum of depth. I define amicus curiae participation as that behavioral option requiring the least amount of involvement. Amicus curiae participation is followed on the depth continuum by participation as Counsel on Brief and by the various types of Case Sponsorship. Instances where groups employ a full test case strategy fall at the far end of the continuum, representing the behavioral option requiring the greatest degree of involvement. In the following sections I lay out expectations for how group goals influence group litigation behavior. I begin, however, by describing expectations for interest group litigation that I use as a tool for revealing the full extent and context of groups' litigation agendas.

2.3.3 Expectation: Frequency of Litigation Participation

This expectation is designed to provide insight into the litigation agendas of the three groups included in the study. Groups need resources to fund their litigation activities, and these resources help them move toward a more extended litigation agenda.
Expectation A:

Where a litigation agenda is defined as the number of times a group resorts to litigation in the courts: As a group acquires more, and more stable, monetary resources, greater expertise and more intergroup support, the amount of litigation will increase. A group with less, and unstable, monetary resources, less expertise and less opportunity to work within coalitions will litigate less.

While it is self-evident that more resources equate with more litigation, an exploration of patterns of association between frequency of litigation participation and changes in resource levels may reveal much about the group calculus for expanding a litigation agenda. Furthermore, weighting each instance of litigation participation equally, without concern for type of participation, may provide a discernable picture of group litigation. Parts of this picture include the issue areas of primary concern at various points in time, and the jurisdictions a group emphasizes in its overall litigation agenda.

Furthermore, I consider when periods of growth or instability occurred in a group's history, what method of participation is most preferred, and other general patterns associated with pursuing a litigation agenda. Thus, this expectation is a tool for examining various characteristics of group litigation, not simply how resources influence the amount of litigation a group will undertake.

Here litigation behavior is identified as any instance in which a group participates in litigation. Analyses associated with this expectation examine the raw number of times a group enters the courts as a litigation participant over time, weighting each instance equally.
2.3.4 Expectation: Depth of Litigation Participation

Using the schemas developed above for typing group goals and group behaviors, I explore the depth of group involvement in litigation. Below, I outline expectations for the relationship between group goals and group behavior. These expectations are designed to explore the specific impact of group goals on behavior, and to determine if groups act in ways that are consistent with their stated objectives. The first expectation addresses the influence of policy-oriented strategies on litigation behavior. A group adheres to a policy-oriented goal when it engages in litigation for the purpose of influencing court decisions that impact the state of policy in a defined policy area.

**Expectation B1:**
A group that has goals consistent with a policy-oriented strategy will emphasize deep involvement in litigation by pursuing continuing case sponsorship as its primary and preferred litigation behavior.

The second expectation addresses the influence of reputation-oriented goals on litigation behavior. Groups that have reputation-oriented goals engage in litigation for the purpose of distinguishing the group as an expert among sister organizations and the general public.

**Expectation B2:**
A group that has goals consistent with a reputation-oriented strategy will emphasize an intermediate level of involvement in litigation by pursuing intermediate forms of litigation participation (case sponsorship and Counsel on Brief) as its primary and preferred litigation behavior.

The third expectation addresses the influence of media-oriented goals on litigation behavior. Groups that have media-oriented goals engage in litigation for the purpose of drawing the public's attention to an issue, create favorable publicity for their cause and forcing policy-makers to consider an issue as salient.
Expectation B3:

A group that has goals consistent with a media-oriented strategy will emphasize minimal forms of involvement in litigation by pursuing amicus curiae participation as its primary and preferred litigation behavior.

Finally, Table 2.2 provides a way of viewing the expected relationships between group goals and litigation behavior. This table places group goals on a continuum of depth, according to expectations for their impact on litigation behavior. I expect that groups seeking to influence policy will participate in litigation at the greatest depth while groups with reputation- and media-oriented goals will participate at lesser levels of depth. As Table 2.2 demonstrates, groups seeking policy influence over the long term fall farther along the depth continuum than groups emphasizing policy influence for various other reasons – lending expertise to the courts or assisting “sister organizations” by lending their name and credibility for the purposes of litigating. Regardless of the reasons for seeking policy influence, where a group articulates goals consistent with a policy-orientation, I expect them to emphasize behaviors characterized by greater depth of litigation involvement.

2.3.5 Expectation: Relative Influences of Goals and Resources on Behavior

The expectations for the impact of group goals on group behavior stated above contain an implicit assumption concerning the relative influences of independent variables on litigation behavior. This assumption is that groups will act in accordance with their stated objectives regardless of the amounts or types of resources available to
them. The following expectation seeks to formalize and explore the relationships between resources and goals.

**Expectation C:**
When considering the relative impact of resources and goals on group litigation behavior, resources are necessary, but not sufficient for carrying out a litigation strategy. Group goals determine whether a group will select litigation behaviors characterized by more or less depth.

Thus, fluctuations in a group's resources may create changes in the overall amount of litigation that a group pursues. However, goals are the preeminent determinants of a group’s depth of involvement in litigation. Thus, it is reasonable to expect that when a group obtains greater and more stable resources it will increase the sheer number of times it litigates. However, unless the group adjusts its goals, it will continue to pursue litigation behavior types that are consistent with its previously defined objectives.

For example, a group that seeks to influence policy will select litigation behaviors that require a great depth of involvement in litigation. As the group obtains more resources, it will increase the sheer amount of litigation participation. However, its litigation participation will remain consistent with its overall objectives for influencing policy. It will increase the depth of its involvement rather than participating at the fringes of a greater number of cases. On the other hand, a group that seeks to draw media attention to its cause and increase its stature with sister organizations will seek out a number of high profile cases. It will participate on the fringes of those cases, thus leaving time and resources to argue its position in the media and to the public. Unless this group adjusts its goals, it will continue to cultivate its role as the representative of its
movement, even when it acquires more resources. This expectation holds when groups experience a declining resource base as well.

2.4 Research Design and Methodology

2.4.1 Overview of the Analysis

The analysis is conducted in three stages, beginning with Descriptive Analyses in Stage 1. In Stage 1, I develop a narrative within a set of chapters dedicated to the analysis of each group in turn. The goal of this analysis is to describe life within a conservative Christian litigating organization. In this stage, description of conservative Christian interests proceeds by way of an exploration of those characteristics that become the dependent and independent variables of stages 2 and 3. The goal of this portion of the analysis is to understand what goals Christian litigating groups have, what resources they require, how they acquire them, what constraints groups operate under, and what aspects of a litigation strategy they emphasize. Stage 1 begins with an extended treatment of group goals. I employ the typology of group goals developed above to categorize groups included in the analysis. Next, I turn to an examination of each group’s resource needs and acquisitions. I consider how each group goes about finding and acquiring the resources it needs. I consider differences that exist in sources of monetary support for groups with different goals, and how these groups plan to build their resource bases to become the organizations they envision. The final portion of Stage 1 involves describing the specific strategies and behaviors of each group, how these behaviors have developed
over time, and how the organization itself has developed over its lifetime -- whether
group behavior has changed as resources develop.

In Stages 2 and 3, I consider the impact of resources and goals on litigation
behavior. Stage 2 examines the relationship between changes in frequency of litigation
involvement and changes in levels of resource needs and acquisitions. I use the intuitive
relationship between frequency of litigation participation and resources to describe each
group's litigation agenda in detail, exploring the various characteristics described above
(see Section 2.3.3). While I suggest that frequency of litigation increases as groups
acquire more resources, the expected relationship between frequency and resources does
not explain why a group selects certain behavioral options over others.

In Stage 3, I consider the impact of group goals on the selection of behavioral
options open to the groups. In explaining the impact of goals, I explore the depth of group
commitments to litigation, applying the typology of behavior outlined above. The
decision to select a behavioral option over another is the product of the goals of the
organization for becoming involved in litigation. Overall, stages 2 and 3 of the analysis
will attempt to explore the complex relationship which exists between the goals of a
group (what it hopes to accomplish) and the resources it can acquire to pursue those goals
(what it feasibly can accomplish).

The analysis of the influence of goals on behavior emphasizes the life of the
organization over time. The research explores the central expectations with special
emphasis on the general effects of goals on behavior and organizational development. I
seek to trace broad categories of effects, linking concepts (like frequency and depth of
litigation involvement) and trends in organizational growth (like resource acquisition) to general patterns of litigation behavior and involvement. The analytical methods I have adopted are those best suited for making the broad connections between these concepts and patterns of behavior revealed through close scrutiny of organizational life, i.e., a descriptive, deeply narrative approach, followed by an exploration of patterns of association among broad concepts. The research design and methods employed here fit the project's level of abstraction.

The case studies of these three groups will yield a basic understanding of life within conservative Christian litigation firms. The study compares a small number of conservative social interests to each other to determine how well conventional wisdom about interest group behavior applies to conservative Christian litigators. As such, it is important to understand how findings can be generalized to a broader set of groups. This study approaches conservative litigators using little suspicion and much more interest in what motivates conservatives, and more precisely what motivates these conservatives, to litigate. Throughout the history of the modern political science discipline, similar kinds of in-depth analyses have provided rich results for further investigation. I hope that this research will produce inferences about Christian litigators that can be applied to a wider array of conservative interest groups and tested on similarly-situated liberal interests.
2.4.2 Unit of Analysis

I make comparisons of groups across general characterizations of those groups, rather than across court cases in which all groups had an opportunity to engage. Thus, the unit of analysis is the group. I analyze groups from the standpoint of their behavior, and compared them on the basis of characterizations that emerge from that analysis. However, it is not behavior that is being analyzed or compared *per se*. Rather, I compare groups *qua* groups, and behavioral differences are the basis of that comparison.

In the early stages of the analysis, I rely heavily on description and narrative for exploring key variables. This narrative will later become the basis for the construction of indicators of those key variables (group goals, resources and behavior). In the analysis of key expectations, I develop broad thematic expositions of the dynamics of life within a conservative Christian litigating firm. This strategy is typical of case studies, where hypotheses are tested through rigorously applied qualitative analyses.

2.4.3 Data

Table 2.3 records indicators and data sources for all variables included in the analysis. The construction of indicators for exploring expectations required substantial data collection from the chosen groups and from external sources. Financial records, records of participation in litigation, media reports of participation and other vital pieces of information are part of the public record. These publicly-available data supplement original data gathered through extensive interaction with group leadership and staff.
each case study, I interviewed the general counsel of each organization, as well as other key staff attorneys, and financial officers.

2.4.4 Specification of the Dependent Variables

As stated above, the descriptive and narrative portions of the analysis (conducted in Stage 1) will contribute to the rigor of the qualitative analyses carried out in stages 2 and 3. In stages 2 and 3, I define the dependent variables using two concepts related to group litigation involvement. Both dependent variables facilitate observation and description of conservative Christian litigating interests. In Stage 2, group litigation involvement is treated as frequency of resort to the courts over time (hereinafter referred to as frequency). Frequency is defined above, and treated at length in Section 2.3.3.

In Stage 3, group litigation involvement is conceptualized as litigation involvement along the dimension of depth of participation (hereinafter referred to as depth). As noted above, Table 2.1 orders the behavioral options open to litigating groups according to depth of involvement. The specification of the depth variable is grounded on the expectation that certain litigation behaviors require a greater degree of organizational commitment to litigation participation. Table 2.3 defines each dependent variable, its indicators and data sources.
2.4.5 Specification of Independent Variables

I divide independent variables into two categories: group goals and group resources. In Stage 1 of the analysis, I will explore group goals and group resources through an examination of group founding, life and development over time. I explore how group goals and resource levels have developed or changed with time. Group goals are centrally important in Stage 3 of the analysis where expectations central to the analysis are tested. Table 2.3 specifies definitions, indicators and data sources for each group goal and resource identified for analysis.
<table>
<thead>
<tr>
<th>Depth</th>
<th>Litigation Behavior</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greatest Depth of Involvement</td>
<td><strong>Full Test Case Strategy</strong>&lt;br&gt; (trial court to court of last resort)</td>
</tr>
<tr>
<td></td>
<td><strong>Case Sponsorship</strong>&lt;br&gt; (int. appellate to court of last resort)</td>
</tr>
<tr>
<td></td>
<td><strong>Case Sponsorship</strong>&lt;br&gt; (trial to int. app. level - cert denial)</td>
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<tr>
<td></td>
<td><strong>Case Sponsorship</strong>&lt;br&gt; (trial to int. app. level - no cert)</td>
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<td></td>
<td><strong>Case Sponsorship</strong>&lt;br&gt; (int. appellate court level only)</td>
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<tr>
<td></td>
<td><strong>Case Sponsorship</strong>&lt;br&gt; (trial court level only)</td>
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<tr>
<td></td>
<td><strong>Counsel on Brief</strong></td>
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<td></td>
<td><strong>Amicus curiae</strong></td>
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<tr>
<th>Least Depth of Involvement</th>
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</table>

**Table 2.1** Types of Group Litigation Behavior According to Depth of Involvement
Greater
Depth

Lesser
Depth

A  B  C  D  E

Key:

A. seeks to influence court-crafted policy over the long-term
B. seeks to influence policy by "lending expertise" to the courts.
C. seeks to influence policy over the long-term by "lending credibility" to sister litigating organizations
D. seeks to increase stature within the conservative movement
E. seeks to draw media attention to a cause

Table 2.2 Types of Group Goals and Their Impact on Group Litigation Behavior
### Dependent Variables:

<table>
<thead>
<tr>
<th>Name</th>
<th>Definitions</th>
<th>Indicators</th>
<th>Data Sources</th>
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<tbody>
<tr>
<td>1) Frequency of Litigation Involvement</td>
<td>The variation in the overall number of times a group participates in litigation across years</td>
<td>Recorded participation of any kind by a group in a case litigated in any state or federal court</td>
<td>Searches conducted on the Lexis/Nexis Academic Universe database</td>
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<tr>
<td>2) Depth of Litigation Involvement</td>
<td>The degree of engagement in or association with litigation participation. Degrees of depth are identified by behavioral options known to require a progressively higher level of involvement, moving from the most peripheral connection with the conduct of litigation to a high degree of connection with litigation efforts by guiding cases through the courts to their final disposition.</td>
<td>Case Sponsorship: Recorded participation as attorney of record. Here, participation in the same case across jurisdictional levels will be weighted more heavily than participation that ends after a single instance.</td>
<td>Searches conducted on the Lexis/Nexis Academic Universe database</td>
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**Counsel on Brief**: Name of organization or its attorney listed as On Brief within the published opinion of the court | Searches conducted on the Lexis/Nexis Academic Universe database |

**Amicus curiae**: Name of organization or its attorney listed as amicus, or as preparer of amicus brief within the published opinion of the court | Searches conducted on the Lexis/Nexis Academic Universe database |

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**Table 2.3 Variable List**

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Table 2.3, Continued: Variable List

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<td>1) Level of Monetary</td>
<td>The amount of monetary resources collected by a group from resources outside the group (including grass-roots donors, private large contributors, foundations and grants) during a given year</td>
<td>Number of dollars representing the budget of the group during a given year</td>
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<td>Resources</td>
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<td>2) Number of Attorneys</td>
<td>the number of attorneys, staff, associate and senior-level, employed by a group during a given year</td>
<td>A amount representing the number of attorneys in the employment of the group</td>
<td>Media reports, IRS documents and statements from staff during interviews</td>
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<td>3) Number of Staff Support</td>
<td>the number of non-attorney staff employed by a group during a given year</td>
<td>An amount representing the number of non-attorney employed by the group</td>
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<td>4) Inter-group Cooperation</td>
<td>The number of times a group cooperates with a sister group, participates in litigation in which a sister organization also participates, or the percentage of work per year in which cooperation with another group occurs.</td>
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<td>Searches conducted on the Lexis/Nexis Academic Universe database and interviews conducted with group leaders</td>
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<tr>
<td>5) Policy-Oriented Goal</td>
<td>A goal to litigate for the purpose of influencing court decisions that have impact on the state of policy in one or more issue areas, to build up precedent favorable to those whose interests a group represents, and to influence how existing policy is interpreted by courts.</td>
<td>Statements made by group leaders that their group is dedicated to pursuing a policy-oriented goal as its primary mission</td>
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<tr>
<td>6) Reputation-oriented Goal</td>
<td>A goal to elevate an issue onto the agenda of the courts for the purpose of distinguishing a group as expert among sister organizations and the general public</td>
<td>Statements made by group leaders that their group is dedicated to pursuing a reputation-oriented goal as its primary mission</td>
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<td>7) Media-oriented Goal</td>
<td>A goal to elevate an issue onto the agenda of the courts for the purpose of drawing the public's attention to that issue, creating favorable publicity for the cause, and force policy-makers to consider the issue as salient</td>
<td>Statements made by group leaders that their group is dedicated to pursuing a media-oriented goal as its primary mission</td>
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CHAPTER 3

A PLACE AT THE TABLE: JAY SEKULOW
AND THE ACLJ

3.1 Introduction

Jay Sekulow is not the type that would come to mind if most people were to think of the leading attorney for the Religious Right. He is in almost every way precisely what one would not associate with that social and political movement. That he is the founder of the Religious Right's most successful litigating organization, the American Center for Law and Justice (ACLJ), is surprising. That he is the de facto attorney general to the Religious Right's de facto president, the Reverend Pat Robertson, is even more so. In the first place, Jay Sekulow is Jewish. He has never converted from Judaism to Christianity. He worships as a Messianic Jew, a sect of Judaism so far outside the Jewish mainstream its existence is usually denied by most Jews as an impossibility. In the second place, Jay Sekulow often finds himself on the wrong side of issues at the heart of modern conservatism and the Religious Right in particular. He supports gun-control measures, is adamantly opposed to the death penalty as a matter of principle, and he likes Bill Clinton. Not to mention he supported Jimmy Carter for president . . . twice. Attorneys of other
conservative litigating organizations speak of him with grudging respect, and a shake of the head in bewilderment – he has after all taken six cases to the United States Supreme Court over the last ten years and participated heavily in four more. Of those ten, he has won eight, two of which were decided by a unanimous court. Congress has convened to pass legislation because Jay Sekulow managed to convince a majority of Supreme Court justices that abortion protesters could not be prosecuted under a hundred year-old statute aimed at stopping the Ku Klux Klan. *(Bray v. Alexandria Women's Health Clinic* 1993)*

He speaks of Justice Thurgood Marshall with deep respect and admiration. He likes one of the most liberal members of the Court, Justice Ginsburg, because, in his words, ”she reminds me of my mother.”

Quite simply, Jay Sekulow is one of the most exciting legal minds in the country. His work reflects the complexity of his logic, and often places him at odds with his compatriots. At first glance, Jay Sekulow’s association with the Religious Right is somewhat bewildering. However, his place within the movement is the key to understanding how Christian litigators have developed a high degree of legal sophistication over the past decade. This refinement has vastly increased their influence on the formulation of court-crafted policy. Sekulow has lighted the way for those who wished to use the courts to secure a role for the Christian church in society. His genius has been in defining goals for Christian litigation that assimilate and reflect the norms of the judiciary – respect for precedent, argument couched in legal terms, and an

incremental approach to changing law and policy. This chapter is dedicated to understanding Sekulow's influence on Christian litigation, how he redefined the central aims of Christian litigators in the 1990s, and how he has struggled to carry those aims to fruition through his organization, the ACLJ.

3.2 Jay Sekulow: Legal Eagle, Legal Bulldog

How different is Jay Sekulow from his fellow Christian litigators? At a time when most Christian attorneys believe there is a secular war being waged against Christianity and the Christians are losing, Sekulow states there has never been a better time to be Christian and Protestant in America. For example, Sekulow litigated a case that brought prayer back into public schools. *(Board of Education of Westside Community Schools v. Mergens* 1990) But, it came back in the form Sekulow wanted, not the Religious Right's rank-and-file. "Student-led prayer is what we want," says Sekulow, "not state-led. If we thought about it for a minute we'd realize that!" *(Sekulow 1998)* He has fired an associate who wanted to argue that killing abortion doctors is justifiable homicide. *(Murray 1995)* He pioneered the free-speech defense for public display of religious belief and protest. He follows his logic into legal conflicts with the Small Business Administration over loans to a day-care center using a Christian curriculum. *(Murray 1995)* He has grappled with the IRS over a church's tax-exempt status after campaigning

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12 From this point forward, all quotations are from an interview with Jay Sekulow on August 20, 1998, except where noted.
against Bill Clinton (Branch Ministries, Inc. v. Rossoti 1999), stating that “Dr. King spoke in Selma about the tactics of Bull Conner and nobody revoked First Baptist’s tax-exempt status.” (Fisher 1997) He has done battle with public schools.

The ACLJ’s central victories in court have involved recasting public schools as public forums for student expression of faith-based belief. The organization has defended students who wanted to use facilities for a student-led Bible club (Board of Education of Westside Community Schools v. Mergens 1990), and hammered the public school that phoned police when its principal saw students praying around a flagpole on the National Day of Prayer. (Kapp 1995) But, Sekulow says he supports religious freedom, not Christian freedom, and he cringes when he hears colleagues call for an American return to the values of a “Christian nation.” The ACLJ’s stated policy is that it is “committed to defending the First Amendment free-speech rights of all people of faith.” (ACLJ 1992) “I’m not concerned about competing worldviews.” Sekulow states. “The danger is in keeping any of them out of the forum.” (Roman 1993). He has in fact defended Jews For Jesus, Hare Krishnas and Scientologists against government imposed restraints on free speech. (Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc. 1987)

Sekulow’s influence within the Christian Right cannot be understated. So far, he has managed to frame legal issues in a way that seems to guarantee a victory in court for the conservative viewpoint and the Religious Right. From a policy standpoint, Sekulow has displayed consistent influence over the formulation of policy alternatives on hot-button issues ranging from abortion to homosexuality, outdoing many within the broad
ranks of the conservative religious and political establishment. Sekulow has had lasting influence, even when other conservative leaders managed to destroy the religious grassroots network they developed so carefully during the 1980s, and when Conservative Republican leadership in Congress managed to squander their political capital during the 1990s. In an era where conservatives appear to be writing the rules so that they lose, Sekulow has shown amazing staying power, and his organization has thrived. Art Spitzer of the National Capitol Area ACLU, one of Sekulow’s arch-rivals, notes his genius: “Jay has had a real impact on the development of the law. He’s been successful in his crusade to say that religious speech is just another form of speech. He’s someone who enjoys intellectual exercise.” (Fisher 1997)

It is Sekulow’s intellectual approach that has changed the face of Christian litigation in the United States. However, his intellectualism, liberalism and tolerance are not always well received by his compatriots. He states that “[a] Jewish liberal is not the same as a gentile liberal. I bring a uniquely Jewish perspective to the cause of Christian liberties in America. I always frame these cases as a question of free speech, not church versus state. That means you tolerate speech you don’t like, which not everyone in the Christian conservative movement is willing to do. I often surprise some of my Christian friends on issues like flag burning. If you can’t burn it, the liberty behind it is meaningless.” (Fisher 1997)

While Sekulow’s views on religious freedoms often place him at odds with other Christian litigators, his views on appropriate behavior, inside and outside the court room, have stunned his adversaries. He is not what others had come to expect from Christian
litigators. "People say I'm rude and aggressive," he notes. "The Supreme Court was used to Christian lawyers being meek, mild and manageable. I'm a reasonable fanatic." (Fisher 1997) Sekulow is a passionate speaker, aggressive debater, and a commanding presence. During various appearances on CNN's Crossfire, ABC's Nightline, CBN's the 700 Club, and other broadcasts, Sekulow has demonstrated his rhetorical skills. As the following excerpts demonstrate, he refuses to back down under heavy fire, and remains focused on conveying his message. Consider this exchange which took place between co-host Harry Smith, Jay Sekulow and Barry Lynn of Americans United for Separation of Church and State during the July 13, 1995 broadcast of CBS This Morning:

Smith: ...We're talking about President Clinton's speech yesterday in Virginia about religious expression and prayer in schools. ...If you look at the president's speech yesterday and look at the Supreme Court decisions of the last several years, you're still not going to get a prayer at a graduation ceremony, are you -- Barry Lynn?

Lynn: No, you're not ...What the president did yesterday was not to play politics with this issue. The persons who played politics with this issue -- people like Jay Sekulow and his boss, Pat Robertson, who have insisted that we get a vote on a completely unnecessary constitutional amendment on this issue so that they can bash any member of Congress who doesn't vote for it as being anti-religious and anti-God. So, when Jay Sekulow has the nerve to say the president is playing politics with prayer, he better look at his own house first.

Sekulow: Well, let me say, Harry I respectfully disagree with my friend Barry Lynn. Let me -- let me make it real clear. Here we are in the middle of July, the president of the United States goes to a public high school. High schools don't meet generally in the middle of July. This one, for some reason, students are there, and he is discussing these things as the religious liberty equality amendment is already in field hearings and --about to take place in Washington, DC, two weeks after the Supreme Court. much to the dismay of my friend Barry Lynn. rules overwhelming in two cases for religious expression in --both in public and in schools...

Smith: Both of you guys hang on a second. Is this something we should be mud-wrestling about on television right now or at any point . . .

Sekulow: Sure
Lynn: No, if the -- if the . . .
Sekulow: It's politics. Barry
Lynn: Jay, let me finish. He’s doing this in the middle of the summer because he wants to give the Department of Education an opportunity to issue guidelines before the next school year opens so that you don’t have the possibility . . . of all these threats of litigation.

Sekulow: Right.

Lynn: The truth shall set you free. Why are you afraid of the truth?

Sekulow: Thank you for the biblical quote.

Lynn: Why are you afraid of the truth?

Sekulow: I’m not afraid of the truth. Hold it. Here’s what – here’s what you’ve got in reality at bottom. You’ve got an attempt to politicize [sic] the issue because 15 months ago the president said he could not send out a directive.

Now he can.

Lynn: Maybe he just didn’t want to send out Pat Robertson’s directive.

Sekulow: But he just did.

This is one of many instances in which Sekulow has willingly stepped before the cameras to debate issues with rivals on neutral ground. His passion for confrontation, and his confidence in the clarity and rationality of his arguments have stood him in good stead, and frustrated his opposition. A refusal to allow his position to be radicalized (e.g. the flurry of exchange toward the end of the above excerpt) is a hallmark of his rhetorical style.

Sekulow’s emphasis on free speech as the crucial First Amendment freedom is clear when he defends student-initiated prayer at public school functions. Consider this exchange between Michael Kinsley, Bob Peck of the ACLU and Jay Sekulow on CNN’s “Crossfire”:

Kinsley: “Is it totally unimaginable to you, Jay, that a nonbeliever or a believer in a minority religion would be made . . . to feel like an outsider and unwanted at an official graduation ceremony at a public high school where there was a prayer?”

Sekulow: “An 18-year-old at a graduation, or a 17-year-old, in America better get used to speech they disagree with or feel uncomfortable with. This is a free society.”
Peck: “It is not the offense of the speech. It is the fact that government said this is an event you are going to have to attend and you are going to have to sit through it.”

Sekulow: “Oh, you are going to have to sit through this 30-second prayer that you find repugnant. Well, tough. This is America... This is what I love: I'm sitting next to Bob Peck from the ACLU, whom I respect, who's saying 'Let's censor speech.' (CNN 1993, as cited by Roman 1993)

3.3 Founding the ACLJ

3.3.1 Sekulow Acquires Experience Before the High Court

Sekulow began to litigate First Amendment issues at the behest of Mosha Rosen, the head of Jews for Jesus. Rosen was looking for an attorney to defend Jews for Jesus evangelists who were arrested under a city ordinance declaring First Amendment free speech rights were in abeyance at Los Angeles International Airport. (Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc. 1987) Sekulow, in the middle of dissolving his law practice and filing for personal bankruptcy in Georgia, claims to have been pulled in the direction of defending people of faith, but never acted on that instinct. When approached by Rosen, Sekulow had little desire to take the case, and felt that the airport directors would settle before proceeding too far through the federal courts. They did not do so.

The pivotal event in this case, and perhaps in Sekulow's career, came while preparing for oral argument before the Supreme Court in 1987. During a conversation immediately before entering the Court chambers for oral argument, Sekulow asked the Los Angeles district attorney why he continued to appeal his case, and why he chose to interfere with Jews for Jesus evangelists when so many other groups went unhindered in
their efforts to proselytize. The Los Angeles DA responded that the airport commissioners “did not think Christians would put up a fight. They had a regulation to test, so why not pick on the pious, placid Christians . . .?” (Sekulow 1990)

According to Sekulow, the answer contributed to the ferocity of his onslaught during oral argument that day. The perceived challenge to his faith evoked a response that raised Sekulow’s consciousness about the legal profession’s tolerance of faith-based public expression. In any event, despite presenting aggressively and interrupting the Chief Justice, Sekulow won his first case before a unanimous Supreme Court. He went on to found a public law firm called Christian Advocates Serving Evangelism (CASE), and committed his career to litigating First Amendment speech, free exercise and establishment claims. He lead CASE for three years until a growing friendship with Rev. Pat Robertson resulted in his association with the ACLJ.

3.3.2 Pat Robertson Founds the ACLJ

Around 1990, Rev. Pat Robertson began to implement plans for a high-powered Christian litigating organization affiliated with Regent Law School and his Christian Broadcasting Network. Following the unraveling of the grassroots movement in the mid-1980’s (Ivers 1996; Wilcox; Utter and Story 1995; Hertzke 1988), and the Reagan administration’s reluctance to support the agenda of the religious right, there was widespread reluctance among Religious Right leadership to rely solely on developing

13 The *American Lawyer* later called Sekulow’s performance that day “rude, aggressive and obnoxious.”
political influence within Congress and the Presidency. Moreover, victories in Congress and at the White House were often hollow, given early conservative losses when those policy victories were challenged in federal and state courts.

Robertson appears to have acted on two goals when initiating the founding of the ACLJ. First, he hoped to restore "fundamental religious freedoms in America." (Gleick 1995) His concern that religious freedoms were being undermined extended far beyond the case Jay Sekulow had just argued before the Supreme Court. He envisioned an organization that would litigate the Religious Right's position in a vast array of issue areas including religious expression and abortion policy. Robertson has also cast the role of the ACLJ as leveling the playing field for people of all faiths to express that faith in public forums, regardless of the issue at hand. (Martinez and Savage 1995) Second, he wanted to create an organization that would counter the efforts of liberal public law firms, specifically the ACLU. (Niebuhr 1995) Early forays into the courts by Christian organizations had met with failure, in part because those who argued for the religious right had no tolerance for the nature of the judicial decision making process, and little respect for the importance of precedent within that process. Subsequently, Christian litigators made few attempts to provide judges with the legal rationale for which they searched, and experienced even less success convincing judges to support their positions.

To accomplish both goals, Robertson needed a sophisticated legal machine that respected the dictates of the legal profession for reasoned argument and an incremental approach to policy change.
It is almost legendary at the ACLJ that when Robertson formed the organization, his first move was not to hire a general counsel to develop a litigation strategy and build the organization, but to hire a top-flight fundraiser. However, after being introduced to Sekulow by the Dean of Regent Law School, Robertson knew he had found his chief litigator. Sekulow had developed the rudiments of his litigation strategy at CASE, and was busy testing it in the courts. Furthermore, his book, *From Intimidation to Victory: Regaining the Christian Right to Speak* (1990), outlined his general principles for litigating First Amendment cases. His fierce defense of Christian rights in public spaces struck a chord with those in the Christian Right, like Robertson, who wanted to see courts endorse their policies. As Robertson intended, the ACLJ emerged in 1990 fully formed with a clearly defined mission, an already proven litigation specialist with a tested litigation strategy and a well-developed fund-raising system completely distinct from Robertson’s other enterprises.

Sekulow has been called Pat Robertson’s consigliere, and there is a general impression among the public and the media that Robertson runs the ACLJ. There is no doubt that the ties between the ACLJ and Robertson are strong. Sekulow delivers regular legal updates on the 700 Club (Robertson’s flagship television program), and the ACLJ keeps its headquarters on the campus of Robertson’s Regent University. However, there is a sense that, if called upon to do so, the ACLJ could break free and “go it alone.” In fact, Sekulow notes tremendous autonomy to take the cases he chooses. He runs the organization the way he sees fit.

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14 It was not even his second move. Robertson hired Keith Fournier as executive director.
Pat Robertson has without a doubt a vision to be a counterpoint to the American Civil Liberties Union. There’s no doubt about it. He’s talked about it since the 70’s. He waited and waited, and he and I got to know each other over a number of years, and a friend of mine (Keith Fournier) became the executive Director of the ACLJ. We were friends and we got along so I was doing the legal work. Saying I’m ‘Consigliere’ to Pat Robertson is I think another way of saying that Pat Robertson is the founder of the ACLJ. Does he run its day to day affairs? No. Could he tell you the top five cases we have? Probably not. I’m not sure that he cares to know.

3.4 Developing Goals for the ACLJ

The primary reason for the existence of the ACLJ is to influence policy and build precedent favorable to the expression of religious faith in social, political and cultural contexts. When asked to describe the goals of the organization, Sekulow replied “I made a statement a long time ago that the only books we wanted to write were books that ended up in those [book]cases right there [pointing to shelves holding the Supreme Court Reporter]. And we’ve had good success there.” That is certainly an understatement. In addition to its successes before the Supreme Court, the ACLJ has brought numerous cases before lower federal and state courts, and has always aimed to establish favorable precedent of national scope.

During questioning about the goals of his organization, Sekulow often referred to the power of the courts in making and interpreting policy as the basis for litigating high-profile cases. He has noted that “it is ultimately the courts which decide the scope of religious liberties in America.” (Sekulow 1995) His descriptions in the media of the ACLJ’s litigation goals are peppered with civil rights era rhetoric. “They can’t change the
rules because it happens to be religion,” says Sekulow. “Whether you agree or don’t agree with it, you don’t want religion treated as a second-class citizen.” (Roman 1993) The Supreme Court appears to sympathize with that argument, and with Sekulow’s efforts to reframe church-state issues in terms of free expression.

Friends and foes alike note the centrality of influencing court-crafted policy to the ACLJ’s mission. In an article on public interest law firms litigating religious liberty cases, one author compares the role of the ACLJ in the court system to that of the Christian Coalition in electoral politics, and notes its ultimate goal of “arguing cases up to the Supreme Court.” (Niebuhr 1995) Tom Jipping of the Free Congress Foundation says the ACLJ “[has] had an enormous impact. By winning cases in the Supreme Court, they send a message . . . Just like the ACLU has been able to discourage religious practice through the threat of litigation, the ACLJ has been able to encourage [it] by winning.” (Roman 1993) Bob Peck of the ACLU notes how the ACLJ pursues its goals using a planned litigation strategy. “They’ve been successful in part because they are careful in choosing their cases. They have a good advocate in Jay because he is able to attract high-visibility cases . . . and because he thinks about long-term strategy. He does build on cases.” (Roman 1993)

Bringing cases up to the Supreme Court is the central goal of the organization, but Sekulow is content to take what comes his way, and he has a clear notion that the goals of the organization fit with an array of cases representing a variety of issues. “We look at cases that are going to set a national precedent, or at least a state precedent. In other words, we do represent individuals that are arrested for handing out gospel tracts and get
them out of it in a criminal case. We do that because we have regional offices all over the country and its good for our lawyers to do it. We want to make sure the Gospel is proclaimed. But these cases are dictated by the times. I know what’s hot now, but I can’t tell you what’s going to come in the door tomorrow.”

There is a clear congruence here between the ACLJ’s legal goals and its spiritual mission. But, Sekulow makes it clear that he is not aiming to proselytize (as earlier Christian lawyers attempted to do). His mission is quite different.

We want to open the avenues, one for the proclamation of the Gospel, two . . . to make sure that a Christian world view can be accepted in the marketplace of ideas as legitimate expression. . . . I want to see the day where the Christian world view is welcome at the table and anticipated because there’s something valid here to offer.

However, what “comes in the door tomorrow” has changed over time, and within this broad mandate to represent the interests of the church in society, the ACLJ follows trends in church state litigation. Sekulow notes the changes in the types of cases that his constituents (as he calls them) bring to him, while emphasizing the overall sameness of the ACLJ’s goals as a litigating organization.

“When we started in 1987, (formerly I was doing cases for Jews for Jesus and other ministries) everything was evangelism access. Those were the cases in the 80’s. The 90’s it’s not. Part of that is because [after] the Jews for Jesus cases in the Supreme Court and a couple of other ones we’ve had you don’t have those cases anymore. Now it’s establishment clause cases, it’s the voucher cases. We are right now involved in one of the leading voucher cases in the country in Maine. We took the case knowing we would lose in the lower courts with the idea we would go to the Supreme Court. I told our law clerks yesterday that’s where I suspect it’s going to go, and it will go there.

Other goals are crucial to the ACLJ as well. But, they appear to be important only in so far as they support the central aim of influencing policy formulation. For example.
Sekulow’s radio program, Jay Sekulow Live!, is designed to influence public perceptions about the place of religion in society. It does this by addressing specific situations encountered by its listenership and educating Christians about their rights in their communities, workplaces and schools. However, its primary goal is to provide a pool of potential cases from which the ACLJ draws. Sekulow notes the differences between his radio call in show and his litigation efforts while recognizing that the program works to further the central goals of the organization. “The program is completely separate [from the litigation]. It’s caller-driven, its Jay-driven. We’ve had great success with it and it also gives us a good sense of what’s going on out in the market.” When asked if his organization was concerned about influencing public attitudes and perceptions, Sekulow responded “Absolutely. Because public attitudes and perceptions impact judges, judges make law. They’re supposed to interpret laws, but they make them.”

3.4.1 Making the Box Bigger: Legal Policy Goals and Religious Doctrine

Sekulow sees part of the ACLJ’s mission as educating the leadership of the Religious Right on how to approach the courts, and appeasing them when their efforts do not end in a positive outcome before the Supreme Court. Conservative leaders have used Supreme Court decisions to “rally the troops.” or bring the attention of membership to their cause. This had resulted in rather negative rhetoric directed at the Court. This rhetoric has been fueled by a desire to win at all costs in the political process. Sekulow’s approach to the courts flows from lessons he learned in early litigation efforts.
Two issue areas stand out as particularly galling to Religious Right leadership. The first is in Church-State litigation. In ruling that public schools may not require students to participate in teacher-led times of prayer, that public schools may not post the ten commandments in classrooms, and that cities may not display a creche depicting the birth of Christ, the Supreme Court has acted to flesh out the constitutional provision that government may not take any action “respecting an establishment of religion.” However, Religious Right leadership says that these decisions go beyond the spirit of the law to demonstrate hostility toward expressions of religious faith both public and ceremonial. They cite such discrepancies as policies that disallow the display of the Ten Commandments in public schools and courtrooms, and those that provide funding for artists who defame sacred religious symbols.

The second area is abortion policy. In ruling that states have authority to tailor abortion restrictions unless those restrictions “unduly burden” the abortion rights of women, the Supreme Court has acted to revise the standards of permissible state intervention in abortion policy. However, the trend in the reluctance of state legislatures to enact restrictions on abortion after the Supreme Court’s ruling in Webster continued after it handed states more discretion in Casey. State legislatures still introduced regulatory proposals, but calls for outlawing abortion outright disappeared. Successful regulatory measures guaranteed abortion rights while enacting only Court-sanctioned restrictions. One might think that the pro-choice side had carried the day both in the courts and legislatures. However, Religious Right leaders have reassessed their role in
abortion policy, shifted focus as the abortion debate moved on to other issues, and acted to preserve the expressive rights of abortion protestors.

In both of these issue areas, the ACLJ has become the leading organization making the Religious Right’s position known in the courts. But, it is an organization that appears to be significantly more pragmatic and less prone to conservative angst than leading Christian organizations of the past several decades. For example, in the past other conservative Christian organizations have exploited specific instances of abuse perpetrated by public officials -- especially where those officials inappropriately curtail freedoms of religious expression in public places or schools. However, the ACLJ appears willing to assess the overall state of religious freedoms, rather than dwell on those particular abuses.

The organization’s consistent stance on issues of First Amendment rights as they relate to secular and other religious expressions stems from its early victory in Board of Westside Community School District v. Mergens (1990). Sekulow refers to this case as “foundational.” It is the case that for Sekulow defined the ACLJ’s mission and character. Thornton notes the significance of Sekulow’s victory in establishing the ACLJ’s approach to First Amendment litigation, and its key merger of religious doctrine with legal goals. “One of the questions that the justices asked Jay in Mergens was ‘well, if we open this up to Bible groups does this mean we are going to have to let the Satanists and the Nazis into the schools as well. And the answer is ‘Freedom is freedom’ . . . The price of freedom is that sometimes we hear things we do not want to hear.” (Thornton 1998)
This continues to be a theme in ACLJ rhetoric. The case established the “place at the table” approach that has been the ACLJ’s bread and butter.

For Sekulow, *Mergens* was also a challenge to encourage Christians to make use of their access to public schools. Both Sekulow and Thornton referred to Sekulow’s response after the Court released its opinion in *Mergens*. Sekulow was on hand when the opinion came down, and as he left the Supreme Court building, he says he swore not to “put the victory up on the shelf like a trophy.” He would work to encourage students to start Bible clubs in their local schools. In response to the Supreme Court’s decision in *Mergens*, the ACLJ started a sister organization called “Ripe For the Harvest.” It has assisted in establishing Bible clubs in more than 700 high schools in the United States.

However, the ACLJ’s position is not widely held within the New Christian Right, by the rank-and-file membership or by its leadership, whose efforts to change policy often include limitations that would undermine First Amendment freedoms. The ACLJ recognizes the Christian leaders’ frustration with policies that appear to reject or curtail mainstream Christian moral views, also recognizes that the Christian Right’s response is often beyond the Constitutional pale. Sekulow sees this as a general lack of faith in the efficacy of the Church’s Gospel message. Thornton notes the limited view of the Christian Right’s rank and file in light of Sekulow’s own legal and religious mission. “Jay has said that his mission is “to make the box bigger for people,” to make the box that they place God in bigger. We all place God in some kind of framework for understanding him. It is defining and confining. Perhaps the church’s box is too small.”

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3.5 The ACLJ's Organizational Structure and Resources

The resources of the ACLJ qualify it as one of the best-funded public interest law firms in the country. In 1990, it came into existence with a $6 million budget and a small, capable and experienced leadership team in place. Yet, the ACLJ's executive director, Keith Fournier, referred to the ACLJ as an organization in its adolescence. (Gleick 1995) How does an organization with such financial power and legal talent mature after such extraordinary beginnings? Traditionally, scholars have examined a number of resources which impact the efficiency of group capabilities and their maturation over time. These resources include monetary budget, acquisition of legal expertise, adequate staff and facilities, a well-developed organizational system and support from sister organizations in sharing the costs of litigation efforts. In this section I examine the resources of the ACLJ as they have developed inclusive of its existence as an organization.

3.5.1 Organizational Structure

The ACLJ is often referred to as the conservative counterpart to the American Civil Liberties Union (ACLU). Its name was chosen to encourage that comparison. However, significant differences emerge when viewing organizational structure and management styles. The ACLU is noted for the autonomy of its regional offices. ACLU chapters make their own decisions concerning their litigation agenda. The national office often only becomes involved in cases developed by regional affiliates when those cases come before higher courts, or courts of last resort. Occasionally, ACLU regional affiliates
end up on different sides of the same case. One example of the consequences of ACLU decentralization occurred in a case litigated by the ACLJ. In Schenck v. Pro-Choice Women's Network (1997), three state affiliates filed amicus briefs in support of the ACLU’s position, while the National Office of the ACLU filed an amicus brief against.

The ACLU maintains its own system of regional and state affiliates. These function to handle the over 100,000 requests for information and intervention in First Amendment related disputes per year. Sekulow states that 99% of these situations are resolved through the use of demand letters and educational materials. However, those cases in which the ACLU goes to court are closely managed by the regional directors and Sekulow’s senior staff. He contrasts the ACLU’s organization structure and affiliate autonomy to that of his firm. “That autonomy will never happen however in the ACLU. We’re not going to do that. The ACLU has this model where their regional offices are very autonomous, where they can file against each other in positions. That’s not going to happen here—that’s toppling the upright.” Joel Thornton, Sekulow’s senior lieutenant, notes that the effect of this centralization of authority on case selection is not always positive.

Good facts and good clients make good cases. That’s the hardest part - picking a good client, particularly when you pick from all over the nation and you don’t have time to go spend three days with somebody and get a feel for it. You have to do a lot of this over the phone and you have to go spend an hour with somebody and make a determination if this is a person that really has the vision to see this thing through and understand how tough this could become. (Thornton 1998)

The goal of the ACLU is to have an office within each Federal circuit’s geographic jurisdiction. Currently, the ACLU has regional offices in the northeast (Connecticut), west (Arizona), and southeast (Alabama). Additionally, there are state offices located in New
York City, Dallas, Washington, D.C., and an office in the hills of Kentucky. These offices range in size from one attorney to seven or more. Each state office is closely supervised by a regional office, which in turn reports to the ACLJ headquarters in Virginia Beach, Virginia. However, Sekulow and his executive staff run things out of Sekulow’s private office in Atlanta, Georgia.

We don’t even list this as an official office per se. We do that for couple of reasons. One is, this is where my senior staff is located. Our senior staff for the [entire] organization. The people in this office run the ACLJ. If you’re in the Atlanta office, your involved in not just in ‘should we do this case or should we not do this case.’ You’re running the operations of the American Center for Law and Justice - the finance side, the media side, even some of the major case selection . . . That’s all done out of here.

The policy of micro-managing the ACLJ’s national caseload has produced considerable consistency in the arguments it presents across jurisdictions. It has also provided a system of apprenticeship for new attorneys who become staff counsel right out of law school.

Despite the top-down management style of the ACLJ, each office exhibits its own style and is encouraged to become responsive to particular types of cases arising in its region. Sekulow emphasizes the differences, noting that the Dallas office reflects the sophistication and polish of the North Texas legal culture, and the Kentucky office has been particularly aggressive in defending Appalachian churches. Anticipating a change in party control of the White House in 2001, Sekulow says that there may be changes in the function of the Washington, D.C. office.

Election changes may take place in the year 2000 that will change our profile in D.C. significantly. When Bush was in the White House, we were a small organization then, but I was in Washington all the time. Since President Clinton’s been there. I haven’t been there all the time. [For the] congressional things I’ve done. I’ve been [in Washington D.C.],
but it’s not the same. I think it’s going to change. And we’ll increase our office presence in DC significantly.

3.5.2 Acquiring Resources: “There’s Never Enough”

The acquisition of financial resources is vital to the life of a litigating organization. The ACLJ has been particularly successful in acquiring the money it needs to litigate, to implement a long term litigation strategy, and to sustain its base of financial support. The ACLJ is a donor supported organization, funded mainly by direct-mail solicited contributions. In 1998, the average amount contributed from direct mail solicitations was $24. That figure will be revised upward after the ACLJ completes its campaign to attract larger individual contributions from major donors. According to Joel Thornton, the ACLJ has a very aggressive program for acquiring new donors that has been bolstered by Sekulow’s radio program, his appearances on the 700 Club and the organization’s high profile. “In the Christian marketplace, we are a slice,” says Sekulow. “Not everybody’s interested in Christian litigation. You have a lot more support for organizations like . . . Focus on the Family than you can get for a litigation group. We’re willing to deal with that. That’s fine.”

However, as part of the public perception that the ACLJ is run by Pat Robertson, there is also the perception that Robertson’s money funds the litigation activities of the ACLJ. Such speculation has been bolstered by the 1997 sale of Robertson’s media interests to Rupert Murdoch’s Fox Network. Sekulow is quick to dispel the notion that Robertson still contributes, or that the ACLJ profited from that multi-billion dollar sale.
"We were independent from the word go. The first year we had a very close economic relationship with CBN [Robertson’s media network]. They helped seat us. But once we got past that first year, we have not received a dollar from CBN unless there was money raised on the air [specifically] for the American Center for Law and Justice."

Table 3.1 shows just how effective the ACLJ has been in increasing its donor base. Over the course of this organization’s brief life, it has doubled its initial budget of $6 million in 1990 to $12 million in 1998. Sekulow is closely involved in soliciting for donors. "Moneying this thing is a full time job and doing the cases I do is a full time job, so I get two full time jobs. I have a great administrative staff, I have a great support staff; I have a good structure here in my office. We’re really set up for this, so it works out very well." Despite the recognition that money is an ever-present need if the ACLJ is to carry on its work, very little of Sekulow’s air time is taken up with asking for money, and there is no “hard sell” characteristic of other religious organizations. Listeners are encouraged to donate money only twice during a half hour broadcast, and only if they are interested in the ACLJ’s work.

The ACLJ has worked with private foundations in the past\textsuperscript{15}, but appears to have moved on to a grassroots and major individual contributor plan. After Robinson’s initial involvement in collecting the ACLJ’s $6 million start-up contributions, no more than 12\% of the ACLJ’s annual budget has come from foundations or trust grants. Sekulow

\textsuperscript{15} Citing reasons of confidentiality, the ACLJ was unable to provide the names of the three foundations with which it worked most closely in the early 1990s.
hopes to change that by identifying major donors from within their already established set of donors. At the time of this interview, the ACLJ was gearing up for a major donor campaign. Today, only a small portion of the ACLJ’s budget still comes from foundation support.

Lately, most of that money has come from an organization called the Alliance Defense Fund (ADF), of which the ACLJ is a member. The ADF functions as a peak group (i.e., an association whose membership is made up of other related associations rather than individuals) for conservative litigators. Its donations to litigating groups defray the costs of going to trial and help stabilize Christian public interest law firms’ financial status. Sekulow serves as the ADF grant review committee chair. There is a strong effort through the ADF to parcel out, not simply monetary resources, but multiple issues and clients in cases that call for multiple teams of lawyers. Thus, conservative litigators work together informally through their membership in the ADF to defray the costs of litigation, provide start-up money to conservative Christian public interest law firms, and coordinate litigation activity. The ACLJ participates heavily in the ADF, but this participation is not reflected much in its budget or behavior. Sekulow states that, while he takes his role in the ADF seriously, his efforts impact other groups more than his own.

The ACLJ has seen an ever-expanding base of monetary support since its inception. Although Sekulow has little concern about the stability of his donor base (the ACLJ even has its own endowment), seeking out monetary support remains a large part of what he does. Significant organizational resources are directed toward acquiring
and processing the donations that support the central mission of the organization.

However, when asked if his organization has ever had to limit what it does because of a lack of resources, he responds "You do. Additional lawyers you’d like to hire because of the number of demand letters that go out. Not so much litigation. If there’s litigation, we’re going to get to it. I mean we’ve got over 30 lawyers on staff, we’re going to get to it. But there’s dozens of demand letters that we could be sending out every day that we can’t do just because of the limited resources. I know it’s hard to say ‘limited resources’ with $12 million, but it is."

Inevitable comparisons arise between the budget of the ACLJ and the ACLU. Current projections place the ACLU budget at approximately $30 million per year, dwarfing the ACLJ. However, the mission of the ACLU is more diverse than that of its conservative counterpart. The ACLU funds a number of projects related to civil liberties, while the ACLJ primarily directs its money toward litigating Establishment and Free Exercise claims. Thus, the ACLJ in a few short years has developed into an organization that is monetarily equipped to meet the challenges of its foes in court.

3.5.3 Acquiring Legal Talent

Table 3.1 shows tremendous growth in the number of attorneys employed by the ACLJ. While its budget has doubled, the number of attorneys employed has increased nine fold over the life of the organization. This is the result of some very active recruitment by Sekulow and his Senior staff, as well as a fortuitous event early in the
organization's history. Generally, ACLJ attorneys are recruited from three sources—the graduating classes of Regent Law School, the corps of experienced attorneys on staff with other organizations, and the group of over 500 volunteer attorneys associated with the ACLJ. This section examines the acquisition of legal talent by the ACLJ over the course of its history.

After he was hired in 1990, Sekulow merged his own organization, CASE, into the ACLJ. Joel Thornton, a recent law school graduate and a long time clerk at CASE, became Sekulow's Senior Counsel. Keith Fournier, also an attorney, served as the ACLJ's Executive Director. Two other senior attorneys, Stuart Roth and John Stepanovich, joined the ACLJ in 1991. These two remain with the organization today as Senior Counsel, and each runs a regional office. By the start of its second year of existence, the ACLJ consisted of four attorneys and its executive director.

In 1992, the ACLJ began recruiting experienced legal counsel. Sekulow and Fournier realized that they needed a first-rate stable of experienced litigators to carry the organization forward, but, rather than finding that talent through recruiting efforts, the talent found them. At a November, 1992 meeting of all the major Christian public interest law firms held in Washington, D.C., Sekulow and Fournier stole the show. Their combination of aggressive litigation and organizational structure appealed to many of the senior counsel of other organizations. Sekulow recalls the event.

In the history of Christian public interest law firms, this meeting is historic. I don’t think we realized the significance of it until five years later. All of the lawyers for all of the legal groups got together at the Willard Hotel in Washington, D.C. for a day in a very informal setting. And from the meeting, relationships started developing with senior counsel and everybody liked the way that the ACLJ was structured better
than their own entities to some extent. In the other entities you had non-
lawyers as the head of the organization. They do a great job, but they’re
not lawyers. We were headed up by me and Keith Fournier. We were
both lawyers. Keith did the administrative stuff and I did the litigation. It
was very attractive to these guys and over a period of time the head of
Free Speech Advocates. Pat Monaghan, which was a pro-life group, came
over. He and I had been friends for years, but he came on as our senior
counsel. Ben Bull from the American Family Association came on as
senior counsel. Jordan Lawrence who was the senior counsel at
Conservatives of America, joined us. He’s now separate, but we work
very closely with him in the Alliance Defense Fund. Mark Troobnick,
who was a deputy at Concerned Women of America, is still one of our
senior counsels in our office in Washington, D.C. Jim Henderson, all
these guys from different organizations, joined us. It created a little bit of
tension in the beginning.

As a result of that meeting, Sekulow and Fournier acquired top-flight legal talent with
experience in First Amendment litigation. Today, that core group remains largely intact.
Keith Fournier left the ACLJ in 1997 to head up a Catholic litigating interest group.
Benjamin Bull, after a brief leave of absence, has returned to overseeing the European
Center for Law and Justice (ECLJ). This core of legal talent functions like partners in a
law firm. They are responsible for managing the ACLJ’s caseload, training the junior
staff, developing long term strategies to expand the organization, and litigating its most
prominent cases.

An examination of the raw number of attorneys employed by the ACLJ reveals
that most are part of the junior staff, and most received their education at Regent Law
School. According to Sekulow, the ACLJ employs many potential junior staff counsel as
clerks. “They’re in our training program for three years [during law school], we hire
them, and then 70% of them make it.” These junior staff attorneys handle cases that have
little chance of going to trial, and they work with a more senior associate learning their
In analyzing the strengths of his corps of attorneys, Sekulow notes that his younger attorneys are not as far along as he would like. "We're very good at the senior counsel level. We're weak on the associate counsel level. We need more. We should be getting these younger lawyers trained and educated now." Although he speaks of Regent Law School in positive terms, one can attribute the lack of ability among the junior counsel to the quality of education provided there. It has the lowest bar exam passage rate of any law school in Virginia (Fisher 1997), and it has struggled to keep its accreditation. (Gleick 1995) Sekulow responds that Regent is relatively newly established, and as a professor there he works to improve its quality. In reflecting on the 30% that do not continue with the ACLJ, Sekulow notes the demands of his round-the-clock practice.

They like being law clerks, but the intensity of the practice, it's tough because you don't go on vacation in this kind of work. And young people coming out of law school are kind of taken back by that. 'What do you mean you don't go on vacation?' That's the reality... I had a lawyer the other day say 'I'm going on vacation and I'm not taking my computer.' Well, he's going to be going on a long vacation!

The final source of attorneys for the ACLJ comes from the ACLJ's volunteer attorney staff of five hundred or more scattered across the country. These individuals volunteer their time and expertise. There is a reciprocal relationship between the ACLJ and its volunteer staff. Volunteers often bring cases to the ACLJ's attention and will act as counsel of record in jurisdictions where no ACLJ attorney has been admitted to the bar in that state. Conversely, the ACLJ will often refer cases to volunteer attorneys, will work closely with volunteers in preparation for those cases that go to trial, and has been known to hire volunteers into paid staff attorney positions. When asked if such a thing was
common practice, Sekulow at first stated that it was a rare occurrence. Then, upon
reflection he noted that it happened much more often than he thought. His entire Dallas
office is composed of attorneys who were once volunteers, and he has acquired state
directors for Hawaii and Pennsylvania as a result of his interaction with volunteer
attorneys. Notably, these former volunteers continue to pursue their private practices,
while offering the ACLJ office space and a home base in that area for litigation
preparation.

Our office in Dallas, which is basically made up of lawyers in practice,
they still have a successful private practice. But Dennis and I worked on a
number of key cases together. Here’s a guy I worked with for years, he is
65 or 70 years old, great lawyer, all [the attorneys in his office are]
Christians, and they wanted to help and they became our Dallas office.
And we’ve got a couple of lawyers on there that only work on things for
us. Jim Costran in Pittsburgh, we worked with him on a couple of cases.
He’s a U.S. Marine JAG officer. He’s now state law director for
Pennsylvania. Bob in Hawaii. We worked on the beginnings of the
Hawaii same sex marriage case, we worked and worked and worked. I
told my associate ‘I like Bob. Let’s get him as a state legal director, let’s
hire him.’ And we hired him.

However, Sekulow says his expectations for volunteer attorneys’ legal skills are
not particularly high, and their assistance is usually related to their geographic
relationship to a case rather than their knowledge of the issue area.

Usually they’re very helpful. It’s on a case by case basis, and it’s like
anything else. Some of them are great, some are just excited to help. But
they’re all cooperative and you’ve got to have them. We’ll file a case in
New York or in a small town in Minnesota, and the local lawyers there
[will assist]. We’ll do the research and writing, but they’re there to help us
and they’re very helpful. We don’t usually let them just take the case and
run with it.
3.5.4 Organizational Growth

As previous sections demonstrate, the growth of the ACLJ over a decade has been impressive. The organization has doubled its working budget, developed a large donor support base, and executed a plan for developing more consistent financial support. It has developed a structured network of offices with experienced leadership guiding its mission in each locale and region. It has acquired legal talent and developed a pipeline for new attorneys to enter the organization. In every resource area considered, the ACLJ appears to have matured at a constant and rapid pace. However, this is not entirely true from the perspective of those who run the organization. Both Sekulow and Thornton note that the ACLJ seems to grow at an incredible rate for several years, followed by several years of normalcy. At the time of this interview, the ACLJ was in the midst of a growth cycle. "It comes in waves," Sekulow stated.

The first few years it was a whirlwind. Then it kind of settled down. Then the last year and a half or two years, its been a whirlwind again. And I think the whirlwind will probably continue through the year 2000. Then it will settle down a little bit. ... This is the way these things go. What we're trying to do is establish a serious support base so that we can get the mandate done.

The ACLJ's growth has not come without a few miscues and miscalculations. In the mid-1990s, Sekulow opened two branch offices at the same time -- one in San Francisco, the other in New York City. The New York office has remained a vital part of the ACLJ's East coast strategy even though it is run by only one attorney. The San Francisco office opened, litigated one important case, and closed down almost
immediately. Sekulow says that closing up shop in San Francisco had nothing to do with
the amount of work available or the types of cases litigated.

We didn’t have the staff maturity. New York City has worked because the
one lawyer we have is supervised by our North East regional office, which
is only an hour away in Connecticut, 40 minutes by train. That office is
headed up by Vince McCarthy who’s been practicing law for 25 years and
his wife who’s been practicing law 18 years. Between [them], they’ve got
on-site supervision. San Francisco was too far from our western regional
office. The geographies didn’t work. I want to open up back in San
Francisco. But. I’ve got to open an office that is staffed with people who
have seasoning. That is our greatest challenge right now.”

3.6 Strategizing a Place at the Table: The ACLJ’s Litigation Agenda

The present research employs two dependent variables as concepts for exploring
the behavior of interest groups that litigate. The first concept is Frequency of Litigation
Behavior. This concept defines litigation behavior as change in the raw amount of
litigation per year, i.e., the number of times an organization resorted to litigation at any
court level in any jurisdiction during a particular calendar year compared to other years.
The second concept is Depth of Litigation Participation. Depth refers to the degree to
which organizations become involved in the cases in which they participate. An
organization may become deeply involved in a litigation effort by sponsoring the
litigation, and by participating in litigation beginning with the inception of a case. An
organization may choose to become involved in litigation at a broader level primarily by
submitting amicus curiae briefs in a large number of cases. The goals of each group,
relative to the resources they can acquire, determine how an organization will become
involved in litigation.
In this section, I turn to a discussion of the means that Jay Sekulow and the ACLJ use for carrying their goals to the courts, i.e. the litigation agenda. A litigation agenda consists of specific actions taken by a group to pursue litigation in the courts. I begin with a general overview of the ACLJ’s litigation agenda and its methods for pursuing litigation. I will then turn to a consideration of the frequency of ACLJ participation in litigation, and conclude with an examination of the depth and breadth of ACLJ litigation involvement.

3.6.1 Present Litigation Trends: What’s Coming Through the Door

The types of cases coming to the ACLJ from its supporters have changed since it began its work in the early 1990s. According to Sekulow, the courts currently appear less willing to take free expression cases (although this appears to be changing). This lull, and its supporters’ demands, have produced some changes in the types of cases the ACLJ litigates. Additionally, the organization has found other ways to use its energy. Joel Thornton, Associate Counsel, notes the change in cases and issues over time. In its infancy, the ACLJ’s smaller size and budget allowed it to focus on “defending the right to proclaim the gospel in public places.” (Thornton 1998) It emphasized litigation on schools as public places (Board of Education of Westside Community Schools v. Mergens 1990), then expanded its agenda to include streets and public buildings (U.S. v. Kokinda 1990, and Lamb’s Chapel v. Center Moriches Union School 1993), including a line of cases involving public protestation (NOW v. Scheidler 1994). As the ACLJ’s resources
grew, its capacity to respond to its clientele expanded as well. ACLJ supporters have increased the number of complaints about gay rights ordinances in particular — an area in which the ACLJ has become increasingly active during the lull in Free Expression litigation. From this discussion, it appears that as the ACLJ’s resources have developed over time, the type of cases it takes has changed as a result of legal environmental factors and supporters’ concerns. However, of central concern to this study are those factors that contribute to changes in litigation strategy. Are the changes in the ACLJ’s behavior a product of greater resources, or have other factors influenced the litigation agenda of the organization?

Thornton notes that the change in the ACLJ’s litigation agenda is as much a product of its own success before the Supreme Court as it is the courts’ unwillingness to accept cases defining the issue area further. Even an incremental approach to litigation eventually culminates in an end-game scenario. “The strategy has always been to . . . chip away at a law as much as you can. It’s step by step, precept upon precept, until you get the interpretation you want. But, we are not doing much of that anymore [in the area of free expression]. We’ve defined what it means to have a Christian club in schools. Does it mean we can come on campus, participate in announcements, hold fund-raisers like every other club? We’ve worked all that through.” (Thornton 1998)

As a result, Thornton says that the ACLJ finds itself litigating similar issues at lower jurisdictional levels and taking cases involving new issues. “We’ve done amicus briefs in the last couple of [Supreme Court] sessions. A Supreme Court case is the tip of the iceberg . . . the glorious tip of the iceberg, but there is much more to do besides just
that. Influencing policy in the long term means filing in a number of cases that clarify issues raised in previous ones. Arguing before District court, Courts of Appeals ... we have cases all over the country. Any one of them could go to the Supreme Court if the time was right.” (Thornton 1998) Thornton notes that the organization’s success has required it to identify new issue areas while remaining true to its overall goals.

Back when we started, same sex marriage wasn’t an issue. Had it been there, if it had been a crucial issue, we would have addressed it. I think all of the cases we take on are in keeping with that initial mission. And this issue is the same as the others. Its about the right to believe and act on that belief. (Thornton 1998)

Even in light of new issue concerns such as disputes over gay rights ordinances, the ACLJ continues to pursue claims falling under policies it helped to craft through litigation. This type of interaction, although rarely involving litigation, falls within the ACLJ’s goal to educate the public about religious freedoms. For example, through its radio program, the organization receives numerous requests for assistance when Bible clubs are restricted from accessing school buildings, or when individuals are restrained from public expressions of religious belief. These are generally resolved with a letter or call. Thornton conveys an example of the ACLJ’s activity during the 1996 Atlanta Olympics. Sekulow and Thornton met with city and Olympics Committee officials to ensure that evangelists received access to public places, including streets around Centennial Park. Their presentation at that meeting referenced Supreme Court’s decisions in *U.S. v. Kokinda* (1990), and other cases the ACLJ litigated concerning public access. As a result, the city, its private organizing committee and the United States Olympics committee agreed not to interfere with the activities of evangelists during the games.
Thornton notes how easily breaches in that policy were resolved as a result of his contacts with Olympics organizers.

"There [are] 8,000 missionaries arriving in Atlanta for two weeks. There are going to be so many you can't ignore them. As a result of that meeting, I have the contacts. We had Jews for Jesus missionaries there. I was playing tennis with my father. My phone rings. 'I'm on public property. I have security guards here that work for Congress Center, they are hassling me.' I call the lawyer of that organization, and said 'hey we talked about this. We don't want to sue.' I call the missionary back, and he says 'there is no one hassling me anymore'." (Thornton 1998)

Changes in the timbre of the ACLJ's litigation agenda have allowed it to pursue its interests in founding international affiliates. In 1998, the ACLJ established a European Center for Law and Justice and assigned a senior staff member to oversee its operations. There are plans for an Australian Center for Law and Justice as well. Thornton notes the effect of the current drop in higher level litigation. "The lull has helped us focus on other things besides what is going on in U.S. courts. We have been working hard on the European Center for Law and Justice, beginning to understand what it means to take cases through the European Union court system." (Thornton 1998)

3.6.2 Frequent and Increasing Use of the Courts

Table 3.2 displays the extent of ACLJ involvement in litigation, defined here as the frequency of group participation. Row totals for this table show the raw amount of litigation conducted by the ACLJ in each year (i.e., the amount of litigation without

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16 Sekulow sent Benjamin Bull to oversee the operations of the ECLJ.
regard to jurisdiction or issue area). The data indicate that the organization has been participating in litigation at an increasing rate from 1987 through 1998\textsuperscript{1}. Although the ACLJ has moved toward a more extended litigation agenda, participation rates appear to stabilize for a time beginning in 1995. This leveling off lends credence to Sekulow’s assertion that the organizational growth of the ACLJ slowed for a period of years before picking up again moving into the 2000 election year.

Additionally, Table 3.2 displays instances of ACLJ litigation by jurisdiction. Sekulow and Thornton’s claim that the ACLJ seeks to influence national policy by participating in cases filed in federal courts is borne out by the data. The 98 instances of ACLJ litigation participation presented for analysis include 85 cases filed in federal courts, and one case filed in Bankruptcy court. This overwhelming amount of participation in federal cases represents the fulfillment of an initial commitment to provide federal courts with policy alternatives of a national scope. The ACLJ has carried the Religious Right’s message to the courts, but to the federal courts in particular.

3.6.3 ACLJ Litigation Participation

Scholars use various methods to categorize litigation participation types. O’Connor explores the participation of Women’s litigating groups using a typology of participation that includes direct sponsorship of litigation, participation in litigation as Amicus curiae, and intermediate behaviors. (O’Connor 1990) Modes and definitions of

\textsuperscript{1} Figures for 1999 represent only the first half of the judicial term for that year.
litigation behavior are set out in Chapter 2. There, sponsorship is defined as an action that usually involves serving as attorney of record and bearing the cost of litigation. *Amicus curiae* intervention is a court-sanctioned form of participation in which a group submits a brief supporting one party or the other, and urges the court to adopt its rationale for arriving at a decision favoring that party. Finally, intermediate behaviors involve participation as “Counsel on Brief.” A group that participates as counsel on brief assists in the preparation of submissions to the court, and may even bear part of the cost of litigation, but does not sponsor litigation or participate in oral argument.

Table 3.3 displays the litigation conducted by the ACLJ according to year of participation and type. Here, I examine category totals for type of participation, trends in type of participation over time, and other characteristics of ACLJ litigation involvement. As Table 3.3 shows, in 60 of the 98 instances of litigation involvement (nearly two-thirds of its litigation activity), the ACLJ served as case sponsor. Furthermore, the data demonstrate a trend over time toward higher levels of participation as case sponsor, a revelation of the ACLJ’s deep involvement in influencing court-crafted policy.Instances of case sponsorship trend upward from 1990 (the official date of the ACLJ’s formation) to a peak in 1997. Moreover, a brief examination of Table 3.4’s totals demonstrates that the large bulk of the 60 instances of participation as case sponsor occur in cases filed in federal court -- 6 instances of case sponsorship in Supreme Court cases, 21 in Courts of Appeal, and 25 in District Court. These data reveal that the actions taken by the ACLJ reflect its overall mission – to effect a profound impact on the shape of policy at the national level.
Table 3.3 reveals that the ACLJ made use of two other types of litigation participation. The ACLJ participated in 27 cases as *Amicus curiae*, and this rate of participation is linked to its overall interest in case sponsorship. Since 1996, amicus participation has dropped considerably, even as case sponsorship reached its highest levels. Much like case sponsorship, the vast majority of the ACLJ's amicus participation occurred in the context of federal cases. It is noteworthy that almost 41% of the ACLJ's amicus submissions were in Supreme Court cases (see Table 3.4). *Amicus curiae* jurisdictional levels of participation are the opposite those of Case Sponsorship. Two complementary explanations present themselves. First, it is significantly easier to prepare and file an amicus brief in a Supreme Court case than it is to sponsor a case. Financial costs for shepherding a case through the courts are high, and the chances are low that a particular case will be granted certiorari review. Thus, even a group such as the ACLJ, one that focuses on deeply influencing policy at the national level through case sponsorship, will find it efficacious to file a significant number of amicus briefs. Second, arguments presented to higher courts, even those arguments contained in amicus briefs, have a much higher chance of influencing policy outcomes. Therefore, a group such as the ACLJ has every reason to submit an amicus brief in important cases in which it does not act as sponsor. Finally, the ACLJ appeared as Counsel on Brief in ten cases over its lifetime. There does not appear to be any particular trend for this intermediate participation. Sekulow has stated that the ACLJ will assist sister organizations where it is able to do so, but providing this assistance is not his foremost concern. (Sekulow 1998)
Thus, intermediate behaviors do not figure prominently in the ACLJ’s overall litigation strategy.

3.6.4 Trends in Participation Rates Across Issue Areas

Tables 3.4 and 3.5 examine ACLJ participation by separating participation instances into various issue categories. Construction of categories involved an inductive determination of case attributes - categories are constructed as much out of what the ACLJ does as any defined decision rule. For example, Church State cases were divided between those involving displays of religious faith in public places and those involving religion in public schools. However, there is considerable overlap among those cases involving use of public school facilities for after hours worship or religious instruction by churches. Such cases were coded as “Church State: Public Places” because they did not involve a conflict over religious expression and curricular or extra-curricular activities. Furthermore, the ACLJ participated in a large number of cases defending abortion protesters, or challenging laws limiting protestation rights. I have created a separate category for these cases since the substance of the governmental action at issue differs significantly from those cases involving the right to obtain an abortion. Various other categories were created out of references to the importance of particular kinds of cases when ACLJ staff were interviewed.

In this discussion of Tables 3.4, 3.5 and 3.6, I examine category (column) totals, trends in issue participation across jurisdictions and over time, and other characteristics
of ACLJ issue involvement. Table 3.5 displays issue participation over time. Column
totals provide a picture of where the ACLJ invests its time and resources. Approximately
one-half of all ACLJ litigation has been in the issue areas of Church State: Public Schools
or Public Places. Clearly, Church State issues are the most important category of
litigation to the organization. When interviewed, Sekulow noted their importance, and
ACLJ documents refer to defending the church as the primary purpose of the
organization. On the other hand, Sekulow also noted the importance of flexibility and
responsiveness to the needs of the ACLJ's constituency. Examination of litigation in the
categories of Abortion: Protest and Abortion: Rights over time shows that it took up a
considerable percentage of the ACLJ's resources in the mid-1990s. The category
"Abortion: Protest" has the highest column total of all categories, and was by far the most
significant area of ACLJ issue participation in 1994 and 1995. During those years, the
ACLJ was involved in 16 abortion protestation cases, as compared to 6 cases in the two
Church State categories combined. Throughout the mid-1990s, the most aggressive
period of ACLJ litigation, abortion protestation accounted 23 instances of litigation
involvement from 1994 through 1998. The combined categories of Church State
litigation account for 26 instances of litigation participation by the ACLJ. Clearly,
abortion litigation remains a concern.

Other categories represent newer or less central areas of concern to the ACLJ.
Family Policy is of notable size. This area is an amalgam of issues said to influence the
family, including regulation of television and entertainment, and parents' rights. While
composing less than 10% of the ACLJ's litigation involvement, Sekulow and Thornton
noted the importance of the issue as an emerging area of concern. Other categories, such as Sexual Orientation and Bankruptcy are relatively minor areas of interest at present. However, Sekulow noted the recent aggressiveness of the IRS in revoking churches' and conservative organizations' tax exempt status, as well as intervening in bankruptcy proceedings where individuals have contributed money to religious enterprises. The ACLJ appears prepared to launch into these areas as the need arises.

The discussion above provides a more detailed examination of the frequency ACLJ’s litigation participation. However, raw amounts of litigation involvement do not provide a complete sense of the significance of each category of participation to the overall goals of the organization. Tables 3.4 and 3.6 attempt to explore instances of litigation participation providing a richer sense of how the ACLJ expends its energy, and to what ends. Table 3.4 examines only instances of participation in federal litigation. As noted above, the ACLJ’s participation in federal court litigation makes up the vast majority of litigation participation (more than 86 percent). Each level of federal jurisdiction is examined in terms of type of participation and issue area. Table 3.6 explores participation by type and issue area for the years 1994 through 1998, a period of intense growth as well as participation for the organization.

Table 3.4 divides the 85 instances of involvement in federal court litigation into federal jurisdictions. Comparisons of row totals (participation type) across jurisdictions demonstrate that case sponsorship remains the preferred method of participation for the ACLJ, except in instances of Supreme Court participation where amicus participation is more pronounced. Other differences in Supreme Court litigation become apparent upon

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comparison. ACLJ participation in Supreme Court litigation displays a more even
distribution of involvement across issue categories than that demonstrated by Table 3.5.
These differences are explained as reflecting the exigencies of appealing cases to the
Supreme Court and denial of certiorari review. However, Church State and Abortion
categories remain most important, involving all instances of case sponsorship and
intermediate participation. Overall, the ACLJ has sponsored six cases that have received
full treatment by the justices, and participated in an intermediate capacity in four more.
Balance across issue areas is revealed to be largely the product of amicus participation
across categories.

Participation at trial- and appellate-levels may provide a more precise picture of
the type of ACLJ participation in litigating specific issues. Trends in litigation revealed
during analysis of Table 3.5 continue here. The Church State categories and the
“Abortion: Protest” category remain important in the overall litigation efforts of the
group. Furthermore, they overwhelmingly represent the categories in which the ACLJ has
participated as case sponsor. Intermediate behaviors are extended to other less central
categories, and amicus participation at the trial- and appellate-levels is attenuated.
Overall, these data tend to confirm trends in issue area participation, while reinforcing the
ACLJ’s contention that case sponsorship is their primary method of participation in
litigation.

Finally, Table 3.6 allows comparison of overall trends to ACLJ participation
during 5 of its most significant years. During the time spanning 1994 through 1998, the
ACLJ grew at a tremendous rate, taking on more attorneys and resources than at any
other period in its brief history. An examination of types of participation by issue area reveals a few important differences. Amicus curiae participation rises from 26\% in all federal litigation to almost 32\% for the time period, while case sponsorship rates remained stable at 60\%. A few differences emerge in issue area importance. The organization continued to do more Church State litigation than any other kind. However, "Abortion: Protest" was an important category, accounting for more than half of the instances of case sponsorship. Throughout this period of intense participation and growth, the ACLJ appears to remain true to its overall plan for using the courts.

3.6.5 Deep Influence on Policy Innovation

It has already been noted that the ACLJ's litigation participation is directed primarily at federal courts. Furthermore, trends in litigation across jurisdictions have been revealed in the above analysis (see discussion above, including Tables 3.2 and 3.4). However, the depth of the ACLJ's litigation participation is also noteworthy. Of those 85 instances in which the ACLJ participated in federal court litigation, 31 were part of continuing participation across jurisdiction levels. These 31 instances are examined in Table 3.7. They represent ACLJ participation at different jurisdiction levels in 14 separate cases.

Of those 14 cases, the ACLJ participated in three which moved from U.S. District court to the Supreme Court. In two of the 14 cases, the ACLJ began its participation after appeal from the District court. These two cases were adjudicated by the Supreme Court.
Four of the 14 cases ended in a U.S. Court of Appeal after the ACLJ participated at the trial- and appellate-levels. Two of these 4 were denied certiorari review by the Supreme Court. Five instances represent multiple appearances by the ACLJ at the appellate level, returning to litigate separate, but related matters. In none of those five cases did the ACLJ participate at the trial-level. Examining the three jurisdictions, the largest number of cases fall in U.S. Courts of Appeal. Given the significant bottleneck that Courts of Appeal represent to parties who wish to bring their dispute before the Supreme Court, this is an intuitive finding.

These data reflect the ACLJ’s depth of commitment to litigation as a means for policy change. For example, of the ten Supreme Court cases in which the ACLJ played a leading role, one-half involved its participation at the trial- and or appellate-levels. These instances represent only a small segment of what the ACLJ does. However, it is exceedingly difficult to bring cases up through the judicial system to the Supreme Court, in finding cases with appropriate facts, and in finding clients who are willing to sustain the litigation through to the High Court. In spite of these difficulties, the ACLJ demonstrates a strong commitment, not simply to litigation, but to sustained and continuing litigation that has the potential for lasting impact on policy formulation.

3.7 A Mission to the World: The ECLJ and Beyond

The ACLJ is an organization focused on long-term impact. However, from the discussion above, one might conclude that the ACLJ is entirely focused on influencing
policy in the United States. This is not entirely true. The ACLJ is expanding into other countries, and demonstrating a profound concern for impacting policy on an international level. Perhaps the role the ACLJ played in securing the rights of a host of international missionaries during the 1996 Atlanta Olympics prompted an interest in expanding internationally. When discussing that event and the newly established European Center for Law and Justice (ECLJ), Thornton noted the influence of the Atlanta Olympics on the ACLJ's international mission.

That's an example of an international event, and international situations arising that will effect other events in the future all over the world. What happens here effects what happens over [in Europe]. What happens over there has influence here. That's why we ultimately want to have international centers all over the world. What motivates the ACLJ to open international centers is the same motivation that undergirds its mission in the United States -- protecting the capacity of Christians to present their faith as a viable and reasonable alternative in the marketplace of ideas. Moreover, the ACLJ believes that it can do its job more effectively in the United States if it extends its mission internationally. Thornton makes this point when discussing what effect opening the ECLJ will have on the ACLJ's work. “If we don't fight the fight in America against same-sex marriages, if we don't fight the fight to preserve Christians' right in public places in Europe, then we'll have to fight that fight again here or over there. The ultimate goal is to have an international objective. There is a group that wants to set up an Australian Center for Law and Justice. We want to have as many international centers as possible.” (Thornton 1998)

Although the ECLJ will have an entirely separate donor and resource base, there is little doubt that extending the ACLJ's resources internationally will affect its ability to focus on litigation in the United States. The extent of that impact remains to be seen.
3.8 Conclusion: Organizational Life and Change

This study has put forward several expectations for interest group behavior given the formulation of initial organizational goals and developments in organizational resources over time. This section draws some initial conclusions about the efficacy of those expectations for explaining organizational behavior from observations of organizational life and change. Generally, the above discussion of ACLJ goals, resources and behavior bear out expectations concerning litigation participation given resource development and its goals for pursuing litigation.

The expectation relating resources to behavior is found in Chapter 2 (see Section 2.3.5. Expectation C). This expectation states that changes in the amount of litigation participation are related to changes in the amount of resources that a group can accumulate. It posits that as resources increase, the raw number of times a group resorts to litigation will increase. Since ACLJ monetary and staff resources have increased over time, one would expect the frequency of its litigation participation to increase. Our discussion of ACLJ litigation reveals that the frequency of ACLJ participation moves in the expected direction. The raw number of instances that the ACLJ becomes involved in litigation has increased dramatically during the thirteen years of its existence.

The second expectation for group behavior (see Chapter 2, Section 2.3.3) relates groups' resources to litigation behavior. It posits that as resources increase, the kind of litigation a group does will remain consistent with its overall goals. It may branch out into other kinds of activities, but the core of its litigation agenda will remain consistent with the stated objectives of the organization. Our discussion of ACLJ goals reveals that
it has established goals for influencing court-crafted policy and building up precedent favorable to its position. From its inception, the ACLJ has been dedicated to providing judges with legal holdings to support its interpretation of First Amendment clauses. Its primary method for doing so has been case sponsorship, a behavior associated with a deep commitment to effecting policy change through litigation. Certainly, the above discussion reveals that the behavioral options open to the ACLJ have increased significantly. It has moved into various issue areas as these become increasingly important to its constituency. As its resources have increased, the ACLJ has remained committed to case sponsorship as a method of litigation participation. Furthermore, the ACLJ is often involved in its cases at the lowest jurisdictional levels, guiding cases through the courts and arguing its position to the Supreme Court where it is able. Its commitment to depth of litigation involvement has not wavered as its resources have increased, but it has remained focused on goals it established early in its history. Overall, this examination of the ACLJ provides support for the central expectations of this study.
Table 3.1: ACLJ Resource Growth over Time

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**Table 3.2: ACLJ Litigation by Year and Jurisdiction**

- USSC: United States Supreme Court
- SSC: State Supreme Court
- USCA: United States Court of Appeals
- USDC: United States District Court
- SCA: State Court of Appeals
- SCO: State Court of Origin

Source: Searches conducted on the Lexis Nexis database.
### Table 3.3: ACLJ Litigation by Year and Type

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Source: Searches conducted on the Lexis Nexis database
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**Table 3.4: ACLJ Federal Court Participation by Type and Issue Area**

(continued)
**Table 3.4, Continued: ACLJ Federal Court Participation by Type and Issue Area**

Source: Searches conducted on the Lexis/Nexis database

Coding Rules:

- **Sponsorship**
  - Name of ACLJ or attorney employed by the ACLJ listed as Attorney of Record within the published court opinion

- **Counsel on Brief**
  - Name of ACLJ or attorney employed by the ACLJ listed as On Brief within the published court opinion

- **Amicus curiae**
  - Name of ACLJ or attorney employed by the ACLJ listed as amicus, or preparer of amicus brief (e.g., for another organization) within the published court opinion
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Table 3.5: ACIJ Participation by Year and Issue Area

Source: Searches conducted on the Lexis/Nexis database
### Table 3.6: ACLJ Participation, 1994-1998, by Type and Issue Area

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Source: Searches conducted on the Lexis/Nexis database
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**Table 3.7: ACLJ Participation Across Federal Jurisdictions by Year and Jurisdiction**

Source: Searches conducted on the Lexis Nexis database
CHAPTER 4

THE AFA-CLP:

WISE AS A SERPENT AND INNOCENT AS A LAMB

4.1 Introduction

The American Family Association – Center for Law and Policy (AFA-CLP) is very much as one would imagine a conservative Christian litigating interest group. It is a small group of closely allied attorneys who fight a war to thwart social bias against Christians and the American family. The firm is the project of a crusader against pornography, obscenity and gay rights. He has won the animosity of powerful corporation and liberal interests through persistent and carefully orchestrated boycotts. His organization has the ear of Congressmen and local community leaders. Since 1990, he has invested millions of dollars into creating the leading trial-oriented law firm of the Christian Right. No conservative Christian law firm could have better credentials. Members of the firm speak articulately about the role of the church in civic life, the threat to the faithful from a corrupt and perverse society, and a political and social return to values upon which the nation was founded – ethics of Judeo-Christian origin.
These are themes with which many characterize the Religious Right in the United States. In fact, most of what the AFA-CLP does (and how it explains why it does it) is considered in the mainstream of the Religious Right. However, the law firm is unique in many respects. The AFA-CLP combines the litigation methods pioneered by firms like the ACLJ with an agenda comprised of traditional Religious Right issues. Further, it couples traditional methods of organizing religious law firms (under the auspices of a powerful, non-legal parent organization) with an aggressive and punishing approach to litigation.

Throughout its history, the firm has undergone extensive changes in structure and personnel while scoring significant victories in court. Having engaged in the most aggressive trial-level litigation, the firm has consistently moved to challenge social policies that do not square with conservative Christian beliefs. On its agenda are core issues which resonate with its membership: defending abortion protesters, challenging public school book selections and state educational systems, opposing gay-rights legislation and defending zoning ordinances aimed at stopping pornography. This chapter is dedicated to exploring the influence of the American Family Association on law and policy through litigation, and its contribution as the trial-level litigating arm of the Religious Right.
4.2 Bruce Green and the "Mobile Litigating Team"

The American Family Association Law Center is a highly aggressive, trial-oriented conservative public interest law firm composed of six attorneys. It is led by its General Counsel, Mr. Bruce Green. Green and the initial General Counsel, Benjamin Bull, built the organization from the ground up after it survived a false start and various leadership changes. Green's primary reason for building a small law center is to keep it highly mobile, agile and prepared. He states that the AFA-CLP is capable of sending its attorneys to any part of the country in a matter of hours, and appearing in court on behalf of its clients within a day. An aggressive approach to trial-level litigation has shaped the AFA-CLP into a lean outfit, geared toward defending the First Amendment rights of Christians at a moment's notice. Green notes that he is pleased with the results of his efforts.

"We've tried to build a small very aggressive elite group of trial attorneys, not necessarily motion attorneys, but trial attorneys. So we've engaged in a great deal of very aggressive litigation. That's our approach. I think we've built a very fine law firm that can handle these kinds of cases. I am very pleased with that. That's been our goal is to build a very solid, aggressive and very capable law firm. I think we've accomplish that." (Green 1998)\(^{13}\)

The AFA-CLP specializes in doing whatever is needed in defending believers. It has gone to what other organizations would consider extreme lengths to provide what Green calls "adequate representation." In a recent case in Connecticut Federal district court, the AFA-CLP leased a house in which to live and direct strategy throughout the trial. AFA-CLP attorneys rotated between Tupelo and Connecticut for a period of six

\(^{13}\) From this point forward, all quotations are from interviews with Bruce Green, Brian Fahling or Tim Wildmon on August 17 and 18, 1998, except where noted.
months. While this case was certainly special to the organization, such efforts by the AFA-CLP are not so unusual.

4.3 Founding the AFA-CLP

4.3.1 Rev. Don Wildmon and the American Family Association

Twenty-two years ago, in Tupelo, Mississippi, a Methodist minister named Donald Wildmon founded an organization called the National Federation for Decency (NFD). Initially running it out of his home, he used the NFD to launch campaigns against pornography, the programming choices of major media groups, and "an erosion of the civil and Constitutional rights of people of religious faith, particularly Christian groups."

After a number of years of campaigning and boycotting companies including American Airlines, the 7-11 Corporation, Kmart (owners of Waldenbooks) and Disney, the NFD changed its name to the American Family Association in 1987 (Clarkson 1993) and started what has become a nationwide network of 160 radio affiliates. The radio stations provide an array of programming including contemporary religious music, preaching, Bible and life lessons and other forms of religious education. They also serve as a network to communicate with AFA membership and create support for AFA campaigns against offending corporations or governments.
The AFA maintains a network of “Faithful and True” support groups (Wildmon 1998) which function as “AA for the pornographically addicted.” (Harden 1998) Additionally, the AFA claims over 500 local chapters scattered throughout the country. (Morten 1992) Individuals are steered to local chapters and area support groups when they call the national office in Tupelo. Local chapters mount campaigns against local businesses and national chains that advertise during “objectionable programming,” and picket local stores that sell pornographic video and printed materials. These campaigns are in line with the official AFA view that our society is prey to the “destructive and corrosive effect of pornography.” (Wildmon, Donald as quoted in Harden 1998) Local campaigns are often prompted by the national headquarters. A part of AFA strategy is to tape local programming at the Tupelo headquarters, and distribute information on programming content and advertising to its chapters nationwide.

Local chapters take part in nation-wide campaigns directed by the national headquarters. Examples include campaigns against CBS affiliates that aired condom advertisements during the Howard Stern Show, and against Pepsi which started a nationwide ad campaign involving pop artist Madonna. National campaigns have extended to include lobbying Congress over funding for the National Endowment for the Arts (NEA). (Morken 1992) Wildmon and the AFA have won some impressive victories, including a halt to the Pepsi/Madonna ads, and an agreement from 7-11 not to sell pornographic magazines in its stores. In 1998, the national AFA scored its greatest victory, convincing the Texas State Board of Education to divest $44 million in Disney stock. The decision came after the Board considered information provided by the AFA in
its thirty-minute film "How Texas is Bankrolling the Disney Empire." (Rouse 1998) "I have just one motivation-" said Wildmon in a 1995 interview. "to protect the family." He elaborates on his view of the family in American life:

This country was built on the family. In the past 30 years, the family has been under attack. During that time crime has risen, illegitimacy has risen, drug use is all but out of control. That's what happens when the family is weakened. The family is God's way of establishing order in the universe." (Jeffreys 1995)

Wildmon is confident that he can consistently marshal the AFA's two million members, and take on any business that he believes undermines family values. Business and media enterprises have found it difficult to ignore Wildmon and the AFA. In addition to a two-million membership base, the AFA is affiliated with 67 religious denominations. (Jeffereys 1995) and has considerable clout in Congress. However, for much of its existence, the AFA was vulnerable in the courts. In the 1980's, that is exactly where its opponents chose to attack it.

4.3.2 God's Hammer, Wildmon's Stinger

The law center was founded as part of both the AFA's business and ministry components; AFA lawyers also work to support AFA business interests, such as its radio network. As the parent of the AFA-CLP, the AFA oversees the law center's budget, provides staff support, and houses it in its Tupelo, Mississippi headquarters. Because of its strong connection to the causes of its membership, the AFA encouraged the development of a "grassroots law firm" capable of defending the rank-and-file at the
initial stages litigation. Consequently, the AFA-CLP has become one of the core enterprises of the AFA’s vast media and grass roots network. The integration of the AFA-CLP into the AFA’s daily activities did not happen by chance. It grew out of the parent organization’s experiences during the late 1980’s, and two fairly publicized suits brought against it from one of its primary targets.

As a result of its boycotting strategy, the Wildmon organization has been threatened with legal action for reasons including libel. A prime example is the 1988 AFA sponsored boycott directed at Penthouse Magazine, Playboy Corporation, the American Booksellers Association and others. This campaign developed into one of the AFA’s largest efforts to counter the sale of pornography by merchant stores and booksellers. In response, both the Playboy Corp. and Penthouse Magazine filed suit against the AFA in Florida Federal District Court under the Racketeer Influenced and Corrupt Organizations statute (RICO). One commentator described the alleged illegal activities of the AFA as follows.

Among the “patterns of racketeering” employed by the defendants -- according to the civil RICO lawsuit filed by the [plaintiff’s] lawyers -- have been letter-writing, boycotts and threats of boycotts. (Cesar Chavez is lucky the good guys approve of his letter-writing, boycotts and threats of boycotts.) . . . In the complaint filed in federal court in Florida, the American Family Association is charged with acts of “extortion” in trying to get magazine and book retailers, wholesalers, distributors and publishers to stop “selling certain materials protected by the First Amendment.” These acts consisted of sending “numerous” letters and postcards, picketing the home of an officer of a wholesale distribution company, and threatening to hold a press conference to expose to law enforcement authorities some stores for acting “illegally” under Florida law by selling magazines that carry ads for obscene videos. (Hentoff, 1989)
The suit, filed on the basis of the success of the AFA boycott (the corporations alleged that more than 1,400 convenience stores had refused to sell their goods), prompted the founding of the AFA Law Center under the leadership of Benjamin Bull. Bull successfully challenged both suits, which were dismissed. However, the legal efforts of Penthouse brought a flood of media exposure to the AFA, not all of it sympathetic. The press revealed (and the AFA admitted publicly) that the AFA's claim of illegal activity by booksellers was an incorrect interpretation of Florida statute. However, using RICO to prevent boycotting struck a chord of illegitimacy with the press, and of fear within the AFA. (Hentoff, 1989)

The second lawsuit was brought against the AFA by an artist receiving funding from the NEA. The suit, requesting $5 million dollars in damages, alleged that the AFA had violated copyright laws by using cropped portions of the artist's work in its membership newsletter, and that the AFA had libeled the artist in public letters to members of Congress. Bull won dismissal on most counts, but the AFA became subject to a restraining order enjoining it from using or distributing the artist's work. However, damages awarded to the artist amounted to one dollar.

Green states that Wildmon had been interested in establishing a public interest law firm focused on defending the religious liberties of Christians. *Penthouse v. American Family Association* (1989) spurred him to proceed, and add protecting his organization in court to its job description. The availability of in-house legal counsel

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19 Playboy's suit was dismissed without prejudice, providing the AFA protection from RICO actions in the future. Bull successfully argued for a summary judgement in the Penthouse suit. (Morken 1992)
would act as a deterrent to those corporations that attempt to stop AFA led campaigns through legal means. Green notes the significance of the lawsuit to the founding of the AFA-CLP.

That case was, for lack of better terms, the last straw. Don Wildmon had been concerned for several years about what he perceived to be the erosion of the civil rights and constitutional rights of people of religious faith, but at the same time our organization had been sued under RICO. There was both a concern for the exercise of our Constitutional rights as an entity, and at the same time the general push of the public out there. So he came up with the idea of founding the American Family Association Law Center that would be involved in the defense of Christian civil liberties generally without charge. And at the same time would be Don Wildmon's 'stinger' to defend the American Family Association.

Although the AFA has had in-house legal counsel since the mid-1980's (to assist in corporate work, FCC applications and some amicus activity in Supreme Court cases), the creation of the law center represented a fundamentally new direction for the AFA in making use of the courts. It was designed to pursue religious liberties litigation, and protect the AFA when its activities outside the court involved it in litigation. Early forays into the courts by AFA attorneys did not attempt either of these two primary functions.

Commenting on the founding of the AFA-CLP, Wildmon stated that he had learned about the courts by example - the ACLU's example. He defined the AFA-CLP's new strategy as putting foes of Christianity on notice. The AFA-CLP would "initiate actions that will put the pornographers, militant homosexuals and humanists on the defensive. Just as we have established over 500 local chapters of the AFA to fight for our rights in the public arena, we will establish a network of Christian lawyers across the country who will fight our battles in the courts." (Elliot 1992) The AFA moved from
simply affecting the democratic process to an all out assault on its enemies in the court system.

4.3.3 Comparing Early to Recent Participation Trends

In the mid-1980’s, the AFA hired several attorneys to manage its corporate business. Among them was Peggy Coleman, who initiated the AFA’s limited participation in a number of high-profile Supreme Court cases. Between 1989 and 1991, the AFA participated strictly as amicus. Several cases involved abortion rights, including *Webster v. Reproductive Health Service* (1989), *Hodgson v. Minnesota* (1990), and *Ohio v. Akron Center for Reproductive Health* (1990). Others involved cases falling in the area of Family Values. These included litigation over programming decency. In contrast, since the Court’s 1990 term, the AFA-CLP has participated in only one Supreme Court case, *Madsen v. Women’s Health Center* (1994), submitting an Amicus curiae brief.

For personal reasons, Peggy Coleman left the AFA in 1992, shortly after the formation of the law center and its move to a more trial-oriented litigation agenda. Although her departure had nothing to do with the AFA-CLP’s founding, it provides a convenient point at which to demarcate between pre-AFA-CLP litigation participation and the AFA-CLP’s activities in the courts. Thus, one can establish two periods of AFA litigation participation: between 1989 – 1991 when Peggy Coleman directed the parent

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20 with the exception of cases to which it was a party.
organization's strictly amicus litigation agenda, and from 1992 to present when the AFA-CLP was formed under the direction of Benjamin Bull and Bruce Green. When asked if changes in the AFA's type of participation across these two periods signaled changes in approach to the courts, or a refocusing of the AFA's efforts, Green demurred. The AFA's focus had not changed, only its method of litigating cases.

There been no change or refocusing of our involvement in cases. It just so happens that a number of the things we have been involved with have not made their way to the U.S. Supreme Court recently. We've been involved in seeking certiorari on a couple of Supreme Court cases that have not been granted or we would have been there more often. But most of our litigation I would say for the past five years has been very active litigation at a lower court level, normally in the federal court, federal district courts, also the appellate courts, but in the state courts as well. So there has been a slight shift in our organization into more of what we call protracted litigation. Not necessarily shorter cases, but longer litigation that involves a trial at the end. . . . So we've been involved even more over the last several years in protracted longer-term litigation, difficult litigation. That's probably the only change in focus over the last several years. (Green 1998)

Despite Green's reflection on the period, there appears to be considerable rethinking of the AFA's litigation agenda. The AFA's limited participation only at the highest jurisdictional level reflected a particular set of goals. According to Benjamin Bull and others in the AFA, Coleman was looking for maximum impact in an area to which the AFA had not invested much of its resources. Furthermore, Green, Bull and Tim Wildmon, Vice-President of the AFA, agree that Coleman had a specific goal in mind that prompted the early amicus work - she was concerned about building up the reputation of the AFA in the area of abortion and family policy as a step in founding a First Amendment litigating organization. Given the available resources, amicus participation in high profile cases provided the "most bang for the buck." (Bull 1998)
In contrast, the efforts of the AFA-CLP to participate in Supreme Court cases suggest a very different focus. Since 1992, there is only one instance of the AFA-CLP participating as amicus, yet three instances in which it has appealed for certiorari review in cases in which it acted as sponsor. Although its application for review was turned down in each instance, these appeals represent an effort to engage the courts in a very different way than the AFA had previously participated in Supreme Court cases.

4.3.4 A Reason to Exist: Broad Organizational Motivations

This research hypothesizes relationships between variables said to affect group strategic behavior. Those variables include group resources and group goals. Group goals are defined as those things that a group identifies as purposes for pursuing an extended litigation agenda. Group strategic behavior is operationalized as the group’s litigation agenda, or those actions it takes in court to fulfill its primary goals. Thus, one expects that a group’s litigation agenda will reveal overall organizational goals. The present research tests this assumption by separating goals from the behaviors that are said to reveal them. This is done in an effort to sort out the relative influence of goals and resources on behavior.

In examining the AFA-CLP, two unexpected findings emerged. First, the AFA-CLP’s behavior had radically changed from one time period to another. Under the present theoretical framework, this should herald a change in organizational goals. Second, when interviewed, its director did not view this behavioral change as a reflection of changing
goals for pursuing litigation. Rather, he saw this as a slight shift in emphasis within the organization. In what follows I explore this shift, and show that it demonstrates an interesting quality of the AFA-CLP, its goals and what it will do to accomplish those goals.

The preceding section demonstrates changes in the AFA-CLP’s litigation agenda that, according to expectations put forward by this research, should reflect changes in underlying goals. When questioned about changes in organizational goals across the two time periods, Green responded:

I think generally our commitments have remained the same. But our emphases have changed. Primarily because they do naturally when you start over. Also an organization gets a general reputation for lack of better term. Or the firm will begin to have a role that they begin to reveal after a period of time. We are still fairly young, so ours has been developing in the area of aggressive trial litigation, less in writing briefs and doing amicus work. But it’s a matter of emphases. Our commitments are to the same types of cases and the same goals. I don’t think those have changed over the years. It remained pretty constant

What then are these goals that have remained constant across years in which the organization participated primarily as amicus in Supreme Court cases, and then turned to emphasizing trial-level case sponsorship? Green notes that the purpose of the AFA-CLP has always been twofold.

One [purpose] would be to defend the existing constitutional rights of believers when they are being infringed. And we believe that that happens regularly, in fact. The second would be to advance a particular cause. So in those categories I would say our involvement arose and even continues to this day - more in the area of defending the rights of believers to exercise their constitutional rights where we believe that there’s an erosion taken place. So there’s more of that. Naturally a litigation group would act more in that area.
However, the goals that Green notes (defending the rights of believers and advancing the cause of the Christian Right) are abstractions which can be identified with a range of concrete strategic goals. Such goals might include those presented to him when interviewed -- litigating to change legal doctrine and build up favorable precedent, developing a reputation as an expert in a particular field, or bringing public attention to the organization's cause. What could account for the shift in the litigation behavior that apparently does not reveal differences in group goals? Green himself noted that any type of goal that reflects a particular litigation pattern would fit within the two broad goals for litigation that he stated have remained constant over the years.

We would put all those categories that you defined [influencing policy, developing expertise or calling public attention to a cause] in either defending [religious liberties] or advancing [the Christian Right's cause]. Establishing precedence would fall into the category of advancing [those interests]. . . But, probably all of those categories that you mentioned would fall within defending the right of believers to engage in free speech and free exercise of religion on an equal plane with other groups.

It becomes apparent that, in discussing organizational goals, Green refers to the broad organizational motives that spurred the AFA to found the law center. Throughout the interview, Green articulated the motives justifying the organization's existence, and spent considerably less time identifying purposes for engaging the courts using a particular strategy. Thus, he is correct in stating that the AFA's broad motives for entering the courts are the same across time periods. In both periods, the AFA demonstrates an overwhelming concern to protect the religious liberties of Christians and advance its cause. However, the AFA's purposes for resorting to litigation appear to change over time. Thus, the AFA has always been concerned with defending religious
liberties, but the strategies the organization uses in that defense have changed as the
AFA-CLP developed from its beginnings into a fully formed organization.

This discussion reveals two important characteristics of the AFA-CLP. First, the
organization is driven by highly ideological concerns. When queried about specific
methods of engaging the courts, its director as well as three of its attorneys articulate a
comprehensive worldview that is based primarily on a religious interpretation of law and
politics. This worldview is of primary importance to AFA-CLP attorneys. It informs
every aspect of their work, from the cases they become involved in and the arguments
they make, to the structure of the firm itself. The AFA-CLP exists as a lean and
aggressive firm not simply so it can take the best advantage of the courts, but to protect
and defend the rights of believers. Engaging in the practice of law is of secondary
importance to the overall spiritual mission of the AFA-CLP.

The second characteristic has to do with the continuing relationship between the
parent organization and the AFA-CLP. When questioned further about the specific
strategic focus of the AFA-CLP, it became clear that Green’s initial responses to
questions stemmed from the parent organization’s involvement in the life of the AFA-
CLP. Green stated that he cares very much about influencing public attitudes and
perceptions, but is unlikely to use the courts for that purpose, because the parent
organization is so involved in changing public perceptions through boycotts and public
campaigns.

We are truly a litigation group. For instance the American Center for Law
and Justice has an educational component. And perhaps others do, too. We
exist fully for litigation, and in that context primarily trial work. So we
are purely a litigation group. But, the parent organization is very
interested in [changing public perceptions and education]. Now your question is a good one because it's in the context of using the legal system to do that. Because of the bifurcation of responsibilities [between the parent AFA and the AFA-CLP] we would be less likely to use the legal system to solve the public perceptions and public views of an issue. Not that we would be opposed to that. It's just we would be less likely to do it because it's not an area that we work in regularly. The parent organization does that. We seldom think of using the legal system that way.

The statement is particularly important for understanding how the AFA-CLP engages the courts. First, it suggests that because of the parent organization’s involvement, the AFA-CLP’s mission is somewhat attenuated. There are some goals that it has not (and will not) consider as purposes for resorting to litigation. For example, using the courts to address public opinion, or bringing the attention of the public to their cause is not an option for the AFA-CLP. Secondly, the limitations placed on the AFA-CLP’s goals consequently affect its litigation agenda. The AFA-CLP will be predisposed to certain litigation behaviors as a result of its default pursuit of certain goals. The discussion of goals, below, appropriately takes up this consideration in more detail. However, from this discussion, one can conclude that the overall influence of the parent organization is felt throughout the AFA-CLP. The mission and agenda of the AFA influences the life of the AFA-CLP from the potential reasons for engaging in litigation to the types of litigation behavior it will emphasize.
4.4 Developing Goals for the AFA-CLP

The above discussion of the AFA-CLP's founding suggests that goals are important for the organization on two levels -- broad motivations for litigation and specific goals for engaging the courts. First, the broad motives of the organization inform its work to a larger extent than other organizations included in this study. These motives must be explored to gain a clearer understanding of how the AFA-CLP makes use of the courts. The discussion of motivations will also provide an understanding of ways in which they shape the organization's agenda. Motives related to religious doctrine or worldview may enable or constrain aspects of litigation behavior. Second, in this study goals are important for identifying the scope of an organization’s litigation strategy. In the case of the AFA-CLP, the goals it defines for engaging in litigation remain somewhat obscured by the organization’s emphasis on its spiritual motivations. Furthermore, as discussed above, the mission of the parent organization restricts the possible range of goals the AFA-CLP can pursue. The implications of the restraints placed on the AFA-CLP by its parent organization with regard to goal-setting plainly require further elucidation.

4.4.1 The Lamb’s Innocence: Doctrinal Motivations

A hallmark of the AFA-CLP is the consistency of jurisprudential thought among its six attorneys. Green attributes this to the careful screening of attorney applicants, and hiring only those that fit a particular profile. He refers to the shared jurisprudence as a
natural law approach, and sounds themes familiar to Constitutional law theorists: principled decision making, and an intentionalist approach to Constitutional interpretation. For the AFA-CLP attorneys, these juridical themes fold logically into a Christian worldview that specifies the individual’s place before God, within society, and before the law that society creates. Thus, the shared jurisprudence is only a part of a Christian perspective that provides the overriding principles for engaging in litigation, or any other effort to effect and critique public policy. Brian Fahling, Green’s chief litigator, commented on the AFA-CLP’s notions of constitutional interpretation:

I would say that the whole AFA-CLP shares the same jurisprudence - that the principles of the Declaration of Independence undergird the Constitution and are judeo-Christian in origin. We do not believe the Constitution is a living and breathing document. It did not mean something two hundred years ago, and something else today. But, it is not the Constitution that we look for foundational principles. We go back to the starting place that is enunciated in the Declaration of Independence: ‘All men are created Equal and have been endowed by their creator with certain unalienable rights. Among these life, liberty and pursuit of happiness.’ These then were embodied in the Bill of Rights. You have to go back and prove what rights are for the individual. (Fahling, 1998)

A central component of this Biblical worldview is an adherence to the tenents of a natural law perspective. Fahling and his colleagues speak knowledgeably about differences between Clarence Thomas’ jurisprudence and Blackstone’s natural law. Their comments reveal a strong belief in the fallibility of humankind and the inability of law to compensate for those faults.

Ours is a rich heritage, but largely misunderstood. For example, the Clarence Thomas hearings -- they laughed and mocked at a natural law jurisprudence. He is not a natural law thinker – in the sense that he meant natural law. Blackstone talked about it in terms of the laws of nature and nature’s God. That is different from “natural law.” Natural law is what even someone like Holmes would say, you look at nature, you filter it
through your depraved little mind. What you conclude is what natural dictates. That is natural law. I don’t subscribe to that. There is no transcendence there. (Fahling, 1998)

According to Fahling, the courts have fundamentally misinterpreted the Constitution by attaching meaning to clauses where no such meaning existed in the past. This misinterpretation has led to a rejection of principled arguments by the courts, and provided a license to regulate speech and thought based on content. He cites Romer v. Evans as an example of a case impacting the AFA-CLP’s mission in which the Christian principles are subverted by the reasoning of the Court.

Romer v. Evans tells us that the only reason you could ever seek to limit homosexual rights is because of animus in your heart. So now all Christians who subscribe to an orthodox worldview with respect to that issue can have nothing but animus with respect to their views on homosexuals. Is that not now a compelling interest for the government to eradicate [that viewpoint]? If you are preaching up in your pulpit [against homosexuality] can the government demonstrate a compelling interest? Absolutely. (Fahling 1998)

The tangible manifestation of these views is a firm that, while poised to take advantage of new methods for engaging the courts, approaches litigation with a very different emphasis compared to the other groups examined in this research. The AFA-CLP avoids the pragmatic approach of the new Christian litigators in favor of arguments based on strict principle, even where a reliance on principle would cause them to lose in the courts. Furthermore, the AFA-CLP’s strict adherence to principled jurisprudence has created some tension between it and other Christian litigating groups. The AFA-CLP sees the behavior of other groups (behavior identified in this study as embodying a new level of sophistication in the courts) as unsound in theory and unprincipled in practice. Fahling states that the AFA-CLP’s jurisprudence sets it apart from its sister organizations.
including the ACLJ. According to Fahling, these organizations have confused the role of law with their goals for influencing policy. They no longer ask if the means they use to a particular end are justifiable. They simply pursue the policy goal, even when it means losing their principled position.

Ultimately, the melding of reformist religious doctrines (emphases on mankind’s fallibility and the efficacy of Biblical teachings as a guide for constructing social policy) with conservative jurisprudence leads the AFA-CLP to limit the impact of its methods for using the courts. The AFA-CLP declines to take an incrementalist approach to the reformulation of policy, or to provide judges (particularly appeals court judges) with the types of arguments that drive considered policy reform. Its stance may influence the kinds of cases it litigates, as well as the potential that those cases will be accepted for appellate review, because of the stridency and inflexibility of its rhetoric. There is some evidence that federal appeals court judges have rejected AFA-CLP logic because of the arguments they present to the courts.21 As strident as is the rhetoric of the AFA-CLP in those appeals briefs, the courts have rejected the AFA-CLP’s logic with considerable vigor and venom. In short, the AFA-CLP represents an amalgam of the old-style conservative Christian legal reasoning with those new-style litigation tactics that do not conflict with that approach.

4.4.2 Goals for Litigating

The AFA-CLP participates in litigation in pursuit of two goals it identifies as equally important. First, it is concerned about setting precedent, or obtaining a favorable interpretation of existing legal doctrine. However, the AFA-CLP places a decided spin on this goal, preferring a trial-level litigation agenda over involvement in appellate litigation. Green quickly points out that trial-level litigation has its place in effecting court-crafted policy, and that the AFA-CLP emphasizes it for two reasons. Green believes that a trial-level concentration will put the AFA-CLP in a better position upon appeal because it has been able to maintain complete control over issues and arguments throughout the trial. Further, it can maximize its impact on policy because relatively few cases are accepted for appeal beyond the intermediate level.

As a consequence of its trial-level emphasis, the AFA-CLP's appellate agenda is much less comprehensive than that of the ACLJ. Its involvement in precedent building cases is generally confined to participation in lower-level appellate courts (not courts of last resort). Ostensibly, this is because it has been unsuccessful in appealing to the U.S. Supreme Court. However, because of its limited involvement in appellate litigation, the AFA-CLP is content to obtain favorable rulings in limited jurisdictions, rather than stake all its hopes for influencing policy on acceptance of its certiorari petitions to the Supreme Court. The AFA-CLP is prepared to take select cases to the Supreme Court, appealing for certiorari review three times in the last five years (it has never had to defend a ruling from review by the high court). Thus, an organizational concern for influencing policy by winning on appeal exists with the AFA-CLP, but has taken a significantly different form.
than that of the ACLJ or other primarily appellate court litigators. In fact, the AFA-CLP has become involved in several precedent-setting cases in which it has prevailed. The most notable of these cases was one of its first, *Brown v. Woodland ISD Board*. The law center’s success in this case (a Free Exercise case which I explore in detail below), and the trend in conservative religious litigation away from Free Exercise arguments toward the Free Speech defense, prompted Green to attempt a revival of Free Exercise arguments in AFA-CLP cases that followed.

The later reason for a trial-level agenda (that most cases are not successfully appealed beyond the intermediate appellate stage) also allows the law center to meld its spiritual mission with its litigation agenda. It acts primarily on behalf of Christians who find themselves (or place themselves) within the toils of the law. The AFA-CLP moves to defend the First Amendment rights of believers at their point of entry into legal conflict. At some future point, trial-level litigation may result in an appeal in which the AFA-CLP will participate, and that appeal may result in a precedent setting result. However, this would be largely a byproduct of the AFA-CLP’s trial-level involvement. The AFA-CLP fulfills its mission to defend believers while engaging in some appellate activity, and giving appellate activity secondary status as an organizational goal.

The AFA-CLP’s second goal is establishing its reputation with the courts and its sister organizations. This goal, as with its interest in setting precedent, is cast in terms of trial-level litigation. According to Green, this means developing a reputation for zealously defending its clients, and a perception with judges that the AFA-CLP is a
professional outfit. Green spoke extensively about the importance of reputation to the AFA-CLP.

You have to be honest and say that [reputation and perceptions] always are a concern to you. I suppose to varying degrees. We are concerned that the courts will see us as a professional and civil law firm that takes its role and responsibilities in court seriously. At the same time because we litigate in various context and jurisdictions we get no favorite courts and if we are going to represent our clients zealously and do a good job we have to be willing not to be intimidated in various jurisdictions. So we're concerned that the courts will see us as very professional and civil and concerned with our role as officers of the court. At the same time we must be very very zealously represent our clients. So that reputation is one we hope is positive.

Thus, the goals of the AFA-CLP are cast in terms that will further their interests at the jurisdictional level in which they hope to have the most influence.

Here, it is important to note the ways in which statements about organizational interests in achieving goals differ across groups' jurisdictional emphases. For example, the ACLJ also has some concerns about its reputation with judges and in the media. It has made that concern secondary to its primary interest of building precedent. However, the secondary goal reinforces the primary concern, and is a byproduct of its success in achieving policy influence at the appellate court level. In contrast, the AFA-CLP has cast its interest in developing a reputation in terms of those norms which are characteristic of trial-level courts – concern for providing adequate and full representation, and a perception among trial-level judges that the firm is competent. As with the ACLJ, these concerns for reputation are subject to the primary interests in achieving favorable legal rulings.
Statements of organizational goals may also be viewed as a consequence of limitations placed on the AFA-CLP by its parent organization. Given the emphasis in the AFA on grassroots lobbying methods, and given its interests in defending its members when attacked in the courts, it is not surprising that the AFA-CLP would cast its goals in terms that are consistent with its parent organization's vision for litigation involvement. Plainly, developing a reputation for zealously representing clients furthers a perception of the AFA-CLP as a legal defender of the faith among those who are threatened with a trial-level determination as to the legality of their religiously motivated actions.

Moreover, according to Green, the perceptions of trial-level judges may have an impact on the outcome of trials. He states that a positive perception among judges will not harm his firm's chances in court, but a decidedly negative perception has caused him concern about outcomes in the past.

Being a part of the larger picture is a concern for the AFA-CLP. For Green, this means developing a reputation with other organizations as a competent firm willing to fight for its causes at the trial-level, rather than seeking out sister organization's assistance with litigation efforts. However, Green expressed a willingness to work with other groups, or at least coordinate informally.

We need to work together, be supportive of the other groups that are committed to the same causes. We are concerned that they see that and understand that. We want to make a contribution to the larger work, so we try to become skilled in our trial work. For a small group, we thought that was something we could do well. So we want to be known as ready, willing and able to assist our colleagues so to that degree that reputation is important to us. With the ability to work together for a common cause of course. We don't like the idea of being out there by ourselves alone and trying to do this work by ourselves.
The AFA-CLP has become more involved in developing that reputation over the last few years. It has begun participating in the Alliance Defense Fund (the "peak" organization of religious litigating groups) more consistently. Green serves on its grants committee, along with Jay Sekulow of the ACLJ.\(^{22}\) This aspect of AFA-CLP organizational life is taken up in more detail below.

### 4.4.3 Reputation & Precedent Setting in *U.S. v. Vasquez / U.S. v. Riley & Brown v Woodland ISD*

According to Green, the AFA-CLP’s mission has come into sharp focus as a result of its involvement in two cases. Early in the AFA-CLP’s history it represented school teacher Isaiah Brown in a religious grievance case that came before the 8\(^{th}\) Circuit Court of Appeals. More recently, the AFA-CLP represented several abortion counselors accused of violating the Freedom of Access to Clinic Entrances (FACE) act. Both of these cases helped define the two core goals of the AFA-CLP – obtaining favorable precedent and developing the AFA-CLP’s reputation.

The AFA-CLP argued the Isaiah Brown case before the 8\(^{th}\) Circuit sitting *en banc*. The case represents one of the few instances in which a major conservative litigating organization has prevailed in the 1990’s relying solely on the Free Exercise clause, and not making an argument for protection of religiously motivated behavior as free speech.

\(^{22}\) Shortly after I interviewed Bruce Green he resigned as General Counsel of the AFA-CLP and assumed the duties of General Counsel of the Alliance Defense Fund.
Green is particularly proud of the AFA-CLP’s role in obtaining a favorable precedent, even in a limited jurisdiction.

[W]e’re concerned that there have not been enough precedent setting Free Exercise decisions recently. If you check the case law you will find some very fine decisions in the Free Speech area. Jay [Sekulow] has been involved in a number of those. But, no decisions in the area of free exercise of religion. We are concerned about that. We think that is something that needs to be addressed. We became involved a couple years ago now in the Isaiah Brown case out of the 8th circuit. We won en banc on a religious grievance Free Exercise case. And it was [about] constitutional Free Exercise rights in the workplace. We think that the Ike Brown case was an important case, a precedent setting case. And it has been referred to as that and used in other jurisdictions. Now that’s just the beginning. We think a lot of work needs to be done in the area of Free Exercise and that’s an important area, and difficult area. It’s one where there are not a lot of cases. But, that’s one of our interests.

Although Free Exercise cases remain only a small part of the firm’s litigation agenda, it remains committed to litigating in the area: the AFA-CLP has litigated nine cases involving religion in public places and schools since Brown v. Woodland.

The AFA-CLP’s participation in U.S. v. Riley and U.S. v. Vasquez marked the beginning of its reputation among conservative Christian litigators as one of the premier trial firms in the movement. The AFA-CLP represented two of the defendants in a trilogy of cases filed in Connecticut Federal district court. The suit was brought jointly by the Connecticut Attorney General’s office and the United States Department of Justice – the first time National and state governments joined together to prosecute persons alleged to have violated the FACE act. The cases were in litigation for two years, and the trial of Carmen Vasquez and Bobby Riley lasted six months. During that time, the AFA-CLP

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23 The third case was U.S. v. Scott. The AFA-CLP participated in this case on appeal.
expended vast resources in defense of their clients, overseeing depositions and the trial from rented property in Connecticut, and flying their attorneys between Tupelo, Mississippi and Hartford, Connecticut.

According to Green, the Justice Department cooperated with the Connecticut Attorney General in an effort to expand the reach of the FACE act to cover behavior that had been previously protected—leafletting and counseling of patrons prior to entering an abortion clinic.

We thought that case was very important because of its test case scenario. Also [it represented] the most outrageous abuse of prosecutorial power we ever seen. Not only for that reason, but it was a defining case for us as far as developing the skills and abilities to litigate in the biggest cases, in most hostile context with a small group of attorneys. So it was very important for us we think - in the future we can litigate that kind of context.

Brian Fahling describes the activities of the government, the immediate identification of this case by Bruce Green as an important one for the law center, and the AFA-CLP's strategy in litigating against the National and Connecticut governments.

Bruce identified the case right away. We all saw immediately that it would be a huge case, a defining case for us. So we mapped out our strategy, and our strategy was to crush the government. Which was a little odd, but having gone up there and discovered the outrageous nature of the law suits we needed only know the truth was on our side. Certainly reasonable minds couldn't disagree. Even people on opposite sides of the issue when the truth came out couldn't be on the opposite sides of a miscarriage of justice. And so our goal was to crush the government. That was our goal, and that's what we did through the litigation process by the grace of God.

Amid a high level of media exposure and an initially unsympathetic judge, the AFA-CLP defended its clients by arguing a First Amendment claim against a battery of state and Justice attorneys. It faced these formidable forces alone, only turning to its sister organizations for assistance on the state's motion to seal video evidence. Fahling
ultimately convinced the judge and jury that his clients had committed no FACE violations and that FACE should not be extended to include counseling activities outside permanent buffer zones. The AFA-CLP’s performance in this case signaled its emergence as a major player among conservative Christian litigating firms. As a result, it interacts regularly with its sister organizations (Green states that he interacts almost daily with Sekulow and the leaders of other firms), and participates heavily as a leader of the Alliance Defense Fund. In terms of achieving its goal for developing a reputation as a trial-level litigating firm, United States v. Vasquez and United States v. Riley placed the AFA-CLP in elite company.

4.5 The AFA-CLP’s Organizational Structure & Resources

Having stumbled through a reorganization and several leadership changes, the AFA-CLP entered a brief period of growth in 1991 with a small number of attorneys and an almost boundless set of monetary resources. The AFA-CLP developed a strategy for conducting trial-level litigation and limited appellate participation in part by relying on the resources of its parent organization. However, there are many resources necessary to carrying out a litigation strategy. The AFA-CLP went about developing and acquiring the resources that allowed it to mature into a leading litigating organization in the Conservative Christian movement. In this section I explore the development of the AFA-CLP’s internal organizational structure and unique character. I uncover its efforts to acquire and use monetary and staff resources, to recruit legal talent, and develop support
among sister organizations. The analysis of organizational structure and resources will be inclusive of its reorganization under the leadership of Benjamin Bull and Bruce Green.

4.5.1 The AFA-CLP's Organizational Structure

As described above, the AFA-CLP is a "no-frills" law firm that aggressively represents the interests of believers in court. AFA-CLP Staff Counsel Michael DePrimo notes the aggressive nature of the firm which seeks out cases through its network of supporters, balancing its mission against its resource limitations.

We are involved in a couple cases where protest activities have come under attack from federal, state or local governments. We regularly go into the cases to defend street preachers, abortion protestors. Any time we see this happening, government using its muscle to deny rights, we take a good look at it. If we have the resources we take the case.

This aggressive attitude has had unforeseen influences on the internal structure of the firm. Since the AFA-CLP represents clients all over the country, it often encounters indifferent attitudes from judges who have no sense of the AFA-CLP's reputation as a trial-oriented law center, and who may have low expectations for the level of professionalism exhibited by Christian attorneys. The indifferent (and occasionally hostile) legal environment has encouraged close relationships among the six attorneys comprising the law center. When asked to describe his firm, Green begins by stating the name of each attorney, the attorney's spouse and how many children are in each household or on the way. Patrick Bond, the Assistant General Counsel who handles the
AFA’s corporate work notes that close ties exist between members of the extended organization.

Every lawyer genuinely loves the other members of the firm. There is often disagreements, but there is such respect from one to another that there is never any grumbling. The relationship of the lawyers extends beyond the law center. We socialize with one another, with each other’s families. So, there is a genuine oneness among the lawyers and the families that may be unique in a law firm. The comraderie is high, and I’ve never been in a law firm that has what we have in the sense of comraderie.

The AFA-CLP’s physical surroundings are also a reflection of the internal structure. It is situated in a set of prefabricated buildings that house all of the AFA’s core projects. The law center’s offices contrast highly with those of the other firms included in this research. At best, the facilities can be described as austere. Nothing expensive adorns the offices, beyond the equipment needed to pursue the AFA-CLP’s litigation agenda. The attorneys work in small, undistinguished offices situated around a common work area. Nothing of note distinguishes the General Counsel’s office from that of his least senior associate. The office arrangements of the AFA-CLP are an external representation of the firm’s internal organizational structure – no frills. equal treatment among attorneys and staff, and a lean organization focused on litigation.

Working relationships between attorneys and staff are structured around the parent organization’s requirements for frugal use of resources. AFA-CLP attorneys work with staff on aspects of litigation, but there is no duplication of effort. For example, AFA-CLP attorneys are responsible for generating their own letters, briefs and pleadings, rather than dictating these to support staff. Staff members participate at a much higher level than is generally expected of legal assistants, assisting attorneys during the
discovery stage of trial and working with little supervision from staff attorneys. Green notes that this internal structure allows the AFA-CLP to litigate as if it were a much larger firm.

What this allows us to do, by not duplicating work, by having attorneys who do everything from lick stamps, to do briefs, and legal assistants who do discovery work... It allows for us to litigate as a larger firm because we don't waste time, we don't duplicate effort, we don't have dictation and retyping, everyone is involved in the process of litigation in our offices. Our legal assistants have been with us for a long time, we don't have a great deal of turnover. And they are very important to our work. I don't know if that's common. I do know with some firms the turnover is quite large, it's not with us. It would be very difficult for us. We rely upon our assistants in about every area.

Thus, the firm uses its internal structure and the mandates of its parent organization to maximize the use of its resources. Ultimately, the character of the organization has been formed by the two influences of the parent organization and the uncertain legal environment in which it often works. These two influences have shaped the AFA-CLP into a firm with an aggressive approach to seeking out litigation, a functional approach to applying resources to its task, and a strong sense of community among its members.

The AFA-CLP does not maintain any regional offices, although it works closely with a nation-wide network of volunteer attorneys (See Section 4.5.3: Acquiring Legal Talent, below). Thus, decisions about what cases to place on the organization's agenda are quite centralized, and under the authority of the General Counsel. Green states that he does not believe the AFA-CLP will expand to include more attorneys in the future. nor does the AFA have any plans to open regional offices or affiliates. The AFA-CLP's entire litigation agenda is handled by its six attorneys with the resources and assistance of the
parent organization. AFA-CLP attorneys can (and have) manage a caseload of national scope, and can appear in court quite quickly when required.\textsuperscript{24}

4.5.2 Resources in Abundance

The resources so vital to the life and growth of a litigating interest ground are provided fully and completely to the AFA-CLP by its parent organization, the American Family Association (AFA). The AFA-CLP looks to the AFA for monetary and physical resources, authorization to hire new staff, technical support and overall sponsorship. In return, the AFA-CLP handles all of the parent organization's corporate work and defends it when its activities create the threat of legal action. There are certain consequences for this arrangement, and questions arise over the autonomy of a legal firm funded completely by a non-legal entity. This section will address the level of resources available to the AFA-CLP, how those resources have developed over time, the benefits and consequences of the firm's funding arrangement with the AFA, and conclude with a comparison of the AFA with other conservative Christian litigating firms, specifically the ACLJ.

The money directed by the AFA to the AFA-CLP for Law and Policy derives from the individual contributions of AFA members. Like many other Christian grassroots

\textsuperscript{24} The AFA-CLP is so highly mobile that even the ACLJ's "SWAT team" approach to litigation pales in comparison. While the ACLJ can appear in court within a matter of days, the AFA-CLP has been known to move within hours to obtain an injunction and court hearing. The Center is assisted by the parent organization's business fleet of aircraft when it becomes necessary to make an appearance in court quickly.
organizations, the AFA is a donor-supported organization funded by direct-mail and radio solicitations for funding. The average contribution to the AFA is $17, with little or no monetary support coming from foundations or large private donations. The AFA has a huge donor base including individuals who have been active members for decades. Green notes the loyalty of the parent organization's membership, stating that this faithful support is maintained by Don Wildmon's insistence on frugality and financial accountability. Members are not asked to donate more than a set number of times per year, and the AFA is not known as an organization that makes inordinate demands from its members. Members are encouraged to direct their donations to one or another of the AFA's core programs. The AFA-CLP for Law and Policy is listed as one of the key programs to which members can contribute. Additionally, a portion of general donations (those donations not directed to any one AFA program) is set aside for the AFA-CLP's budget. In return for their contributions, members receive regular organizational newsletters and updates, as well as other materials designed to elevate their interest in social issues. The AFA-CLP contributes legal updates to these organizational newsletters an average of one month out of the year (Wildmon 1998). However, the Center publishes "The Christian Lawyer," its own monthly newsletter sent out to supporters and volunteers nationwide. (Morten 1992)

There is little direct evidence of the amount of money spent by the AFA on the AFA-CLP. One scholar states that the budget of the AFA-CLP amounted to $750,000, or 15% of the AFA's annual budget in 1990. (Morken, 1992). In 1995, indications are that the AFA-CLP's budget had increased to over $1 million annually. (McCord 1995) More
recent estimates are unavailable, and the AFA, citing reasons of confidentiality is unable
to release specific financial information. However, staff members indicate that the
amount of financial resources available to the AFA-CLP has increased steadily over the
course of its life. The steady increase in funding has occurred without expanding the
number of attorneys within the firm, and without current staff expending organizational
resources in an effort to acquire that funding.

Green comments on the beneficial relationship that exists between the parent
organization and its law firm, noting that the costs borne by the parent are considerably
greater than the portion of its budget dedicated to the firm’s use. In addition, the parent
also bears the institutional costs of soliciting and acquiring monetary resources.

Because we are a division of the American Family Association, we do not
have a lot of the fundraising responsibilities that some interest groups
have. We have a very streamlined organization. We do not have the type
of overhead expenses that a law firm normally has, and so that money is
put back into litigation itself. And we have been very very fortunate to be
funded largely by the AFA, with the necessary funding to litigate our
cases. Our [parent] organization is frugal. They do not invest in frills, they
don’t spend a lot of money on fundraising, and we don’t have fancy
accommodations, and all that goes into litigation.

Thus, the AFA-CLP is once again able to maximize the use of its resources because it
does not need to invest its time and finances into acquiring more.

Additionally, the monetary resources provided by the AFA appear to be
boundless. Green notes that the Center has never experienced a financial squeeze from
the Wildmon organization.

I have absolutely no recollection of ever having a shortage of funds to
litigate any case as far as is necessary to do that. In fact it has
strengthened us tremendously to know that financially we can take a case
as far as necessary. I cannot think of a situation right now in which we
could not take a case all the way to the United States Supreme Court and ever have any concern about finances.

Later in the interview, Green returned to the issue, reflecting again on the consistent level of commitment in funding provided by the parent organization.

I am not aware of any time that there’s ever been a concern for finances in our organization. And I attribute that to very fiscally responsible policies in our organization. Very open, very seriously concerned for the use of donors’ money. And I think that comes from the founder of the organization. He’s a no frills person. He is not willing to spend money on things that are window dressing, [but he is] willing to spend money on what is necessary to fulfill our mission. I think we are known at least by our supporters as frugal and yet never being in a situation where we had to say we can’t do this because we don’t have enough funds... [N]ever for financial resources. ...and I hope that stays that way.

While this kind of arrangement might be beneficial in certain respects, there have been indications that it has caused internal friction. Ben Bull, the founding General Counsel, left for the ACLJ in part because of a concern over running a law firm that is overseen by non-lawyers. Additionally, Jay Sekulow related the general impression among Christian litigators that the ACLJ model (litigators running the daily and strategic responsibilities of a firm) was attractive to many. The shift of top legal talent to the ACLJ and away from firms like the AFA, indicates that this might have been the case. Thus, the financial relationship between the AFA and the AFA-CLP might include a potential negative aspect.

When questioned about the specifics of the Center's relationship with its parent, Green emphasized its positive nature (funding availability, etc.), and emphatically stated that he has almost complete discretion over the firm's agenda within the standards of frugality established by Don Wildmon. Green notes that Wildmon and the AFA board of
directors have little or no knowledge of the specifics of cases the firm is litigating. This provides Green with a significant level of autonomy to run the firm as he sees fit. However, he noted that the abortion protest cases in Connecticut were an example of more involvement from the parent organization.

[Wildmon has] no direct knowledge of a single case unless it is unusual and was brought to his attention. [Otherwise] he is not the kind of person to get involved in that. We serve a useful function if we are ever needed for the corporate entity. He believes in giving the funding to serve the larger Christian community, and that is his goal. Once that goal is accomplished he doesn’t have any more interest in it. The board has been very supportive in that [as well]. On a quarterly basis I do come to a board meeting, and I make a presentation to the board about our cases.

AFA Vice-president, Tim Wildmon, confirms Green’s notion that he is given significant autonomy by the parent organization.

If they have something they really believe in we leave it to them. To be honest with you, 98 to 99 percent is at the discretion of Bruce on the cases they take. Well all of it practically that he’s recommended we take. And he knows there are financial ramifications and restrictions. and he uses good judgement about that. (Wildmon, 1998)

Wildmon also confirmed Green’s statement that financial resources are in flux, and there is money available to the firm if it requires it for a particularly important case.
4.5.3 Acquiring Legal Talent

According to the wishes of the parent organization, the number of attorneys employed by the AFA-CLP has remained constant at six. Both Green and Tim Wildmon indicated that there were no plans to add new attorneys in future. Green established this number as the maximum needed to efficiently pursue the Center's trial-oriented agenda. However, Wildmon indicated that there is money to acquire new legal talent, and the number of attorneys was set by Green, not the parent organization. Generally, there are two methods by which the AFA-CLP goes about acquiring legal talent. The primary method is based on an attorney profile developed internally. Secondarily, the organization may select from its corps of more than 400 volunteer attorneys. This section examines the acquisition of legal talent by the AFA over the course of its history.

The present team of AFA attorneys has been together for about four years. All of those attorneys hired by Benjamin Bull have moved on to other organizations with the exception of Stephen Crampton, Bull and Green's chief lieutenant, and Green himself. Of the six attorneys presently on staff, three were members of Regent Law School's first graduating class. However, there is no developed pipeline from Regent Law School to the AFA, as is the case with other organizations. There is some overlap between the two methods of acquisition. Benjamin Bull hired Bruce Green as an associate counsel based on his match with the organization's profile, and also because of his participation as a volunteer attorney. Upon Bull's departure, Green quickly hired Brian Fahling out of a law

\[\text{25 They are Bruce Green, trial specialist Brian Fahling and Staff Counsel Mike DePrimo. Regent University graduated its first class of law students in 1986.}\]
firm in Seattle. Although Fahling and Green were acquainted in law school, Fahling's experience as a trial attorney made him an immediate asset to a group deprived of the General Counsel who also acted as its trial specialist.

Green's training has been in diverse areas including law and theology. A graduate of Dallas Theological Seminary, Green worked for a time as a student instructor, then enrolled in law school at Regent University. Graduating in 1986, he took a position as a federal law clerk, and then as a staff attorney for a newly appointed federal judge in Montana. Several years later, he unexpectedly found himself assisting an AFA attorney in a religious freedoms case. Through his acquaintance with this attorney, Green kept up with the AFA and its work. Six months later, Bull offered him a job as staff counsel. As Green and his family were packing their things to move south, Bull called to say he was leaving for a position with the ACLJ. Within a few months, Green had assumed leadership of the law center.

The AFA-CLP uses its network of volunteer attorneys in much the same way as the ACLJ -- it identifies cases in various jurisdictions in part through its volunteers, and then manages those cases while volunteers act as second chair local counsel. Green describes how the network of volunteers have assisted in developing the AFA-CLP's agenda and continued to assist AFA attorneys through out preparation and trial.

There are two ways you can use volunteer attorneys. One, to expand the reach of organization where you would not otherwise have litigation capability. For instance, the Rutherford Institute does almost all (if not all) of their litigation through local attorneys who litigate under the name of Rutherford Institute. That allows them to spread their outreach and deal with a lot of paper. They are an organization that deals with a number of different subjects not just constitutional litigation. Then, there is the way that we do it. And that is where the litigation is done by our attorneys who
are specialists in constitutional litigation, who travel and conduct litigation as first chair litigators. The local attorneys assist them through their admission to appear as counsel in a particular jurisdiction, assist them if they need a local ball-handler. Depending upon the level of trust and influence, they could be more involved some times and less in others.

Green notes several reasons why he does not rely on volunteer attorneys to pursue local actions in the manner of the Rutherford Institute.

Our volunteer attorneys are normally used not to litigate under the name of the American Family Association by themselves, but to assist as local counsel. We do that for a number of reasons. One is, there are so many willing to assist, so it is not difficult find lawyers. But they specialize in estates or personal injury or insurance defense. We don't want to be put in a situation where you deal with rather technical constitutional issues and they would not think that they were prepared. So very fine lawyers, our experience has been. Ours are very good lawyers, but they are used as local counsel as a general rule.

Within this network of volunteers is a core group that participates more consistently than other volunteers. Green states that he encourages this participation as the level of trust between the volunteer and the AFA-CLP grows. Yet, the AFA-CLP would not consider allowing even these more experienced and skilled attorneys to operate under the name of the AFA, or litigate cases without the oversight of an AFA-CLP attorney.

4.5.4 Organizational Growth

The AFA-CLP's growth as an organization is not clearly demarcated. Since its founding in 1990, it has had an almost complete turnover in personnel as well as a change in leadership. Institutional growth from the perspective of monetary resources is somewhat obscured by its relationship with the parent organization -- the provision of
funds from its general budget is largely undocumented, and the parent organization picks up the cost of non-legal expenses such as fundraising, provision of side benefits to contributors (newsletters and information), and other related non-litigation costs.

On the other hand, the AFA appears to be an organization that is very alive and vital, focused on its mission and acquiring the things it needs to accomplish that mission. Its leadership has established consistency in organizational focus. Its budget appears to be growing slowly, yet steadily. Although the number of attorneys remains fixed by organizational policy, the number of support staff has grown considerably from five in 1990 to eight in 1996 and eleven in 1998. According to Green, the AFA added to its legal support staff consistently over the previous year. Furthermore, the parent organization remains committed to providing the AFA-CLP with any and all resources it requires to fulfill its mission of defending the AFA's interests and the rights of believers in the free exercise and expression of their religious convictions. From these indications, one might conclude that the AFA-CLP is a slow growing organization filling a niche in the market of Christian Right Constitutional litigation.

4.5.5 Coordinating Litigation

Coordinated litigation is not an area in which the AF Center participates consistently. However, when it does participate with sister organizations. Green states that the effect on the organization and the case outcome has been pronounced. The majority of instances in which the AFA participates with sister organizations are in
related cases that have multiple defendants -- for example, in abortion protestation cases. The AFA, unable to invest all of its time in representing each plaintiff while managing other cases on its agenda, and will call on its sister organizations to take over a case for one or more of its clients. Green notes that a natural byproduct of this division of labor is a sharing of the costs associated with that litigation. However, the primary reason the AFA calls in sister organization in these instances is not because of financial limitations.

Green states that the AFA-CLP coordinates litigation with sister organizations in only ten percent of the cases on its agenda. Further, the AFA-CLP has never formed a coalition with a sister group for the purposes of dividing costs and labor where both groups are representing the same client in the same case. Although on the very edge of coordination among organizations, referrals from sister groups make up a significant component of the AFA's coordinated efforts. (Morken 1992) Overall, AFA-CLP's shared participation takes the form of coordinated rather than coalitional behavior.

The AFA-CLP, like many other Christian Right litigating groups, participates heavily in the Alliance Defense Fund (ADF), a clearinghouse for information, funding and coordination among Christian litigators. Don Wildmon is a founding member of what is becoming one of the most significant methods for coordination among Christian litigators. Green serves as a member of the organization's grant committee, a powerful place from which to work with fellow Christian litigators in identifying and subsidizing potential cases, and referring them to Fund member attorneys for litigation. Green and his fellow ADF members have accumulated a substantial record in a short period of time, underwriting the student club funding suit against the University of Virginia (Regents and
Visitors of the University of Virginia v. Rosenberger 1995) and a suit, recently granted certiorari review by the Supreme Court, filed against the University of Wisconsin over student fee allocations. (Board of Regents of the University of Wisconsin v. Southworth 120 S.Ct. 1346 2000) (Cusac 1997)

4.6 Strategizing Like A Serpent: The Law Center's Agenda

In this section, I turn to a discussion of the AFA-CLP's litigation agenda, or the things it does in court to pursue its objectives for policy influence. As stated in earlier chapters, the present research employs two different conceptions of group behavior as dependent variables to gain a clearer understanding of what groups do in court. The first, Frequency of Litigation Behavior, is designed to explore changes in the number of instances in which a group has resorted to the courts over time. The second concept, Scope of Litigation Activity, tracks groups' level of involvement in cases in which they participate. Groups are said to participate broadly or deeply depending on their level of participation.

Below, I provide a general overview of the AFA-CLP's litigation agenda and the methods it uses to pursue its goals in the courts. This overview includes a general summary of litigation related activities pursued by the organization. Next, I examine the frequency of AFA-CLP participation in litigation over time, and conclude by considering the depth or breadth of the AFA-CLP's involvement in litigation.
4.6.1 Summary of Overall Litigation Agenda

The overall agenda of the AFA-CLP is not completely or accurately reflected in the record of its trial and appellate participation. Various aspects of the Center's agenda are absent, including many conflicts it has successfully mediated, and the occasions in which it has assisted local governments with public policy initiatives. In this section, I will summarize and explore these diverse aspects of the AFA-CLP's agenda, including a consideration of the nature of the legal conflicts it pursues. I then move on to an in depth analysis of the Center's litigation participation in later sections.

The nature of AFA litigation behavior (both directly and indirectly available for analysis) is limited in two respects. First, the organization limits its agenda to cases involving governmental action. Only under unusual circumstances will the Center consider pursuing a Title Seven case involving religious discrimination by a private entity. The organization is often involved in actions against municipalities, less frequently defending them when sexually-oriented business zoning ordinances are challenged in court. Thus, the mission of the AFA-CLP to defend the rights of believers in the public sphere is reflected directly in limitations it places on its own litigation agenda.

Second, according to Green, the group will not use its resources for amicus work. The Center is dedicated to trial-oriented litigation, and pursues cases providing the best opportunity to use expertise it has developed in a limited number of areas. Green notes that these areas include First Amendment issues of Free Expression (usually taking the form of abortion protestation cases) and Free Exercise, as well as pornography litigation.
When asked if the Center would participate as amicus in a case where a municipality preferred to use its own counsel, Green reiterated the group's commitment to litigation sponsorship, and its policy to refuse any requests for amicus participation.

Typically because of the difficulty of those kinds of cases we believe we can be of best assistance if we come in and direct the litigation. Actually litigate a very aggressive manner to defend the rights of those municipalities and that we are much more help that way than in the amicus work itself. Normally we would seek lead counsel.

Thus, its policy impact is limited to those cases in which circumstances allow it to participate fully in litigation.

Turning to aspects of the Center's agenda related to litigation. AFA Attorneys note that the vast majority of conflicts are disposed of through negotiation, transmittal of a demand letter, or settled out of court after a law suit is filed. Since these suits do not appear among the list of cases the AFA-CLP has litigated, a large part of the firm's litigation behavior is excluded from direct consideration. However, both Green and Fahling state that the Center becomes involved in more than one hundred cases each year which are concluded before going to trial. These cases are referred to the Center by the parent organization or other conservative litigating groups.

Green notes the significant workload of these cases, while providing an example of such a situation that arose immediately before our interview.

I got a call before I came to meet you and a woman said that she was not allowed to have a Christian activity in a local public park. She has what we consider a drop-dead date where the activity is scheduled and she has been told she can't do that. Those are the kinds of things that we seek

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2a The AFA maintains a toll-free number for contacting core projects. The pre-recorded message includes an option for contacting Law Center personnel directly if the caller believe their constitutional rights have been violated.

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injunctive relief for -we're not seeking financial damages, we deal with Constitutional rights. . . [Writing a demand letter is] a very common practice. I don't know any group that would want to litigate against municipalities or the states, or anyone. All of them that I know are interested in the rights of their clients and if they can discuss it, if they can send in a demand letter generate some discussion, if they can even use the telephone to resolve a matter prior to litigation, it's less expensive, less troublesome, much more civil.

Fahling noted that it is the policy of the Center to stay out of court and avoid litigation where it is possible. He also notes that in many cases where he does file suit, the conflict is resolved in a matter of days, and certainly before any scheduled hearings. (Fahling, 1998) However, Green notes that writing demand letters as a second important purpose.

We use the demand letter approach in order to resolve matters and to avoid litigation. But, we also use it to identify those government entities that are set in concrete, that need litigation to keep them from infringing on right. It serves a dual purpose.

Thus, the policy of approaching conflicts with the intent not to litigate assists the AFA-CLP to identify those parties that require more aggressive treatment in the courts.

Other cases do involve the initial stages of a lawsuit, but these also fail to be reflected in the trial and appellate record of the AFA-CLP. Fahling notes that the Center has become involved in literally hundreds of such cases. Most receive little notice from the news media. However, in 1999, Fahling's suit against the City of Fountain Valley, California on behalf of an immigrant church generated considerable press. This case is an excellent example of the kind of governmental action that prompts an aggressive response from the AFA-CLP. It is also an example of an important event for the organization that fails to find its way into case law books.
In July, 1999, the City of Fountain Valley cited the Shalom Alliance Church, consisting of largely Chinese immigrant and urban membership, for violation of a city commercial zoning ordinance prohibiting worship by groups of 50 persons or less within city limits. The inspector issuing the citation was quoted as saying "If it were any other type of meeting of less than 50 people, there would be no problem. It's that the church is actually conducting worship there that is the problem. City code expressly prohibits worship from being conducted outside the areas defined as residential in our city." (Franklin 1999) The ordinance, among four other zoning ordinances to generate legal challenges in Southern California over the last several years, prohibited churches while allowing lodges and fraternal organizations to meet within commercial limits. The citation issued by the city included provisions for imprisonment and a $1000 fine per day if the church did not "immediately cease to operate church services or bible study sessions at this facility." (Luo 1999)

The pastor's efforts to dissuade the city from enforcing the citation did not result in a change in policy, so he called the American Family Association. Fahling responded that the "statement [by the city inspector] was so palpable, it warranted our investigation." He filed suit against the city alleging the zoning ordinance involved content-based discrimination against religious speech, and requested a restraining order, compensation for litigation expenses and damages in the amount of $10 for injury to parishioners constitutional rights. (Franklin 1999) The response from the city was immediate. The counsel quickly drafted a new land use policy which did not include prohibitions against religious speech and assembly. City officials were quoted as noting
the important role churches play in the community, and the unintended and unconsidered consequence for speech that the ordinance created. Ultimately, the case was settled out of court after the new ordinance was instituted.

This situation involved a significant outlay of resources by the AFA-CLP. It committed its chief litigator to clients on the other side of the country, and bore the costs of using local counsel, filing the suit and negotiating an outcome with the city. Both Fahling and Green state that situations such as this one are characteristic of what the AFA does on a daily basis. Its litigation agenda is national, often involving the actions of municipalities, and in most cases these conflicts are resolved outside of the courtroom.

A second aspect of AFA-CLP behavior related to its litigation agenda is its involvement in public policy initiatives including efforts to craft and defend zoning ordinances that restrict sexually-oriented businesses. Other policy initiatives involve the organization in abortion and gay rights related issues. These kinds of behaviors are a component of what the AFA-CLP does, but also remain largely excluded from its litigation record. Green states that the Center's involvement in public policy initiatives has been substantial.

One of the things we've done historically is to assist municipalities with the enactment of ordinances designed to defend against possible secondary effects of sexually-oriented business. So we assist with drafting and the enactment process itself, the fact finding, the entire process of enacting ordinances in that area. Model ordinances. Site plans everything we have always been doing model ordinances but, we go beyond that to give the municipality that is pretty unseasoned at this some help. We have even sent lawyers out and walk them through the process of how you accumulate your data. How you go about your fact finding, and exactly how to see that process through the enactment itself. So we have done quite a bit of that - model legislation.
As noted above, the AFA-CLP is also available to litigate on behalf of cities when these ordinances are challenged. Such services are offered free of charge to municipalities as to all AFA-CLP clients. However, Fahling notes that the instances in which the AFA-CLP has assisted in the drafting of a model ordinance and then defended that ordinance in court are very few.

The AFA-CLP is deeply involved in various other policy areas. It assists local officials and AFA members with ordinances that ban benefits for governmental employees involved in same sex relationships. Additionally, the Center has been consulted on ordinances which limit legal penalties for those who choose not to do business with gays, relying on religious convictions. Where the Center is able, it works directly with municipal governments to draft such policies. However, where it has met with resistance from local governments, it has worked to support local groups sponsoring ballot initiatives. Green notes that same sex marriage ordinances are a growing segment of the Center's work.

Another growth area for the AFA is in crafting what Fahling calls "Partial Birth Infanticide" ordinances. Its most intense involvement was during the 1998 election season. The AFA assisted in the drafting of a Partial Birth Infanticide ordinance that appeared as an issue on the ballot in Washington State. Although the issue failed to pass, the AFA was largely responsible for developing the legal rationale for such initiatives - the Inevitable Delivery Theory. Official AFA-CLP documents call their work on initiatives banning partial birth abortion procedures "matters of first importance" to their supporters and to the Center itself. (American Family Association 1998)
Inevitable Delivery Theory, also used as the logic for laws in six states. (CNET 1999) suggests that the partial birth procedure can be distinguished from those procedures protected under Roe v. Wade, and its progeny. Advocates maintain that Roe's logic applies to procedures to abort a fetus in utero. Fahling expounded on the medical and legal rationale for the theory.

It occurred to us that something different is happening. [The partial birth procedure] is not abortion. Everybody kept calling it abortion, keeping it in a realm in which we couldn't win. We can't win in the abortion debate, we lose every time. We can win the debate in abstract terms but in the courts we lose. But, what they were trying to prescribe was not abortion because something distinct was happening. It occurred to us that we moved from an in utero termination of a pregnancy to a monumental medical, and now legal, event which is having past the terms of the in utero state into the birth canal. When you puncture that amniotic sack, pass the cervix, what's happened? It's a birth. Birth is happening. It's not abortion how can you call it abortion if it's birth. All the Supreme Court jurisprudence up to date beginning with Roe had only contemplated one thing. The language is unmistakable and that is 'in utero destruction of the fetus.'

The AFA and like-minded organizations appear to be gaining ground in this area after a series of early defeats. The ballot initiative that failed in Washington State went on the ballot as a "Partial Birth Infanticide" ban. Fahling acknowledge that the name itself may have had something to do with the narrow defeat of the measure. However, the AFA and organizations including the Family Research Council, have had success in convincing legislatures to pass similar bans, and getting initiatives on the ballot in states that fail to do so. In September 1999, Missouri and Virginia passed partial birth bans after intense lobbying from conservative groups, with Missouri's Democratic controlled House and Senate overriding the veto of its Democratic governor. (Family Research Council 1999) Despite these victories, partial birth bans do not appear to withstand judicial
scrutiny when challenged in court. To date, ten state laws have been challenged and all have lost in the initial stages of litigation. (Family Research Council 1999) During its 1999-2000 term, the Supreme Court considered the State of Nebraska’s ban on partial birth procedures. A bare majority struck down that law as an undue burden on the abortion right.

4.6.2 Litigation Trends

Instances in which the AFA-CLP has participated in litigation demonstrate that the organization remains true to its mission to defend believers’ rights in society, to litigate issues affecting the American family and to effect policy changes of a limited jurisdictional scope. As with the ACLJ, the issue areas in which the AFA-CLP primarily litigates change over time. For example, the organization was involved in a long string of litigation in the area of family policy (See Table 4.4). From 1989 through 1994, the AFA-CLP litigated at least one family policy case, and did so five times in 1992; the highest single case total for any issue area in any year. However, beginning in 1994, and with very little overlap from one emphasis to another, the Center began to litigate in the area of church/state, and especially in the area of abortion protestation (I explore these changes in more detail below).

These changes appear to be the result of legal environmental factors and the concerns of AFA supporters rather than any abrupt change in underlying goals. Legal environmental factors, or the flow of cases out of social conflicts and into the court
system, have influenced the kinds of cases the AFA-CLP pursues. Early in its history, the Wildmon organization began to perceive threats to the protest activities of pro-life activists as a salient area of activity when moving to defend believers' rights. The AFA has a long history of supporting and defending street preaching ministries. Moving to defend public protestation against abortion naturally extended its long established interests into an area of increasing concern to its supporters -- the rash of abortion protestation arrests in the early 1990s. The AFA-CLP's commitment to abortion protest litigation was especially influenced by the AFA-CLP's success in the trilogy of FACE cases in Connecticut. In effect, the AFA-CLP has served as the litigation team for Operation Rescue National (ORN) from the mid-1990s until it unceremoniously severed connections with that group in late 1997. On the other hand, while the AFA has not litigated a family policy case since 1996, it continues to pursue issues of importance to the American family, particular in the area of public education. Thus, it would be difficult to conclude that changes in emphases across issue areas are attributable to changes in the goals of the organization. The AFA-CLP continues to litigate in ways that reflect its underlying mission.

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27 The AFA-CLP continued to represent ORN leaders Flip Benham and John Reyes in their trial and appeals on charges of trespass in 1999. See Reyes & Benham v. Virginia, unpublished opinion.
4.6.3 Frequency of Resort to the Courts

Table 4.1 reveals the frequency of the AFA-CLP's litigation involvement overtime and by jurisdiction. Row totals show the raw amount of AFA-CLP litigation, or the number of times the AFA has participated in litigation for each year of its existence. The AFA-CLP's use of the courts appears to hit a high point from 1994-1996, while declining in 1997 and 1998. However, no clear trend emerges in the frequency of the AFA-CLP's litigation efforts, and its litigation participation in each year remains relatively low. There are various explanations for this. First, the AFA-CLP claims to litigate primarily in trial courts. Decisions rendered by trial-level courts tend to be published and reported to case law databases with less regularity than decisions rendered by appellate courts. It is possible that data for AFA-CLP participation at lower court levels are missing and its participation is under-reported. However, while the AFA-CLP appears not to have compiled a list of all its litigation participation, it offers an explanation of its own for the low number of reported instances that it has participated in litigation. This explanation, developed above, regards the vastly greater number of instances that it resolves matters out of court as opposed to participating in an adjudicated resolution through a full trial. Although the number of litigated cases remains low for the AFA-CLP, it resorts to litigation quite frequently as a means toward resolving disputes outside the judicial process.

Table 4.1 also shows instances of AFA-CLP litigation by jurisdiction. Here again, the claims of the AFA-CLP are not revealed in the data. While the AFA is organized as a
trial-oriented law firm, the largest single number of instances in which the AFA participated in litigation fall within United States Courts of Appeal. Excluding those Supreme Court cases in which the AFA participated under Peggy Coleman's tenure, more than 59% of all cases litigated by the AFA-CLP were filed in appellate courts. The AFA-CLP's claims to litigate primarily in federal courts are sustained by the data, with almost 73% of all cases falling in either federal district courts or federal courts of appeal.

4.6.4 AFA-CLP Litigation Participation

In Tables 4.2 and 4.3 I explore AFA-CLP litigation by type of participation over time, and type of participation in various issue areas by jurisdiction. Group options for participation are developed in Chapter 2. These include case sponsorship, participation as Amicus curiae and intermediate participation as counsel on brief. Table 4.2 shows that the primary and preferred method of participation by the AFA-CLP is case sponsorship. In almost 55% of the recorded instances of AFA-CLP litigation participation, the Center participated as case sponsor. Moreover, Table 4.3 shows that the bulk of instances in which the AFA-CLP participated as sponsor occurred in federal court cases - 10 in U.S. Courts of Appeal and 10 in U.S. District Courts. Thus, the mission of the AFA-CLP to affect policy changes where it is able, particularly regional policy, is revealed in the actions it takes to bring its goals to the courts.

The AFA-CLP engaged in other types of participation. Table 4.2 reveals that the Center has participated as amicus, particularly in early stages of its existence. However,
while the center has consistently engaged in case sponsorship since 1992. Instances of
Amicus curiae participation have declined since 1995. This is consistent with Green's
account of AFA-CLP preferences in carrying its message to the courts. As stated above.
Green noted that the AFA-CLP declines to participate as amicus even where it is invited.
or that is its only option. Thus, amicus participation was a major component of AFA-CLP
work, but declined even as the amount of case sponsorship increased over time. Finally,
the AFA-CLP has participated as Counsel on Brief on only two occasions. This form of
participation has little appeal for the AFA-CLP, which prefers to maintain control of the
case itself, and rarely works with other organizations.

4.6.5 Trends in Participation Rates across Issue Areas

Tables 4.3 and 4.4 examine AFA participation in various issue categories. Once
again, issue categories were constructed using an inductive process. I employ no decision
rule for creating categories. Categories were created based on the overall importance of
issues to the litigation agenda of AFA-CLP. Comments from staff concerning the
relevance of certain issues and the cases themselves contributed to the decisions to create
categories. The categories developed in the previous chapter map onto the cases
involving AFA-CLP participation quite well, and so are largely employed in this chapter.
Only a few differences emerge. First, bankruptcy is not a significant issue area for the
AFA-CLP. No recorded instances of AFA-CLP participation involved a bankruptcy
proceeding. Thus, the category was eliminated from consideration. Second, inclusion of
cases in which the AFA was a party posed a problem for categorization. Since these cases involved important policy questions (and each case fit clearly into one category), I have included them in the analysis. These cases boost the number of instances where the AFA-CLP acted as case sponsor and add to the family policy category. However, since defending the parent organization in court is a significant component of the AFA-CLP's mission, to exclude these cases would limit the analysis significantly.

In this discussion of Tables 4.3 and 4.4, I examine category (column) totals, trends in issue participation across jurisdictions and over time, and other characteristics of AFA-CLP issue involvement. Table 4.3 shows AFA-CLP issue participation over time. Column totals demonstrate where the AFA invests its energy and resources, and which issue areas are most crucial to fulfilling the mission of the organization. Clearly, Abortion, Protest and Family Policy issue areas are most significant, followed by both Church State issues. The AFA-CLP has not litigated an abortion rights case since Peggy Coleman filed amicus briefs in three Supreme Court cases. Finally, while both Green and Fahling list legal conflicts over sexual orientation among the issues that most concern their supporters, the AFA has no established record of participation in bringing those concerns to the courts.

An examination of row totals, i.e., of issue area importance over time, yields a richer sense of the significance of issues to the AFA-CLP. Although Family Policy provides the highest category total, the AFA appears to be litigating less and less in this issue area. Early years of the organization's existence show it litigating a significant number of family policy cases each year. Yet, in 1994 and 1995 emphasis begins to shift
to the Church/State issue areas and to Abortion: Protestation. The most current years show that the AFA has ceased to litigate directly on behalf of the American family, preferring instead to take a role in formulating policies such as the anti-pornography and Partial-Birth Infanticide provisions described above. However, that the AFA-CLP is currently involved in no family policy litigation is a most surprising finding, given the emphasis on pro-family policies within the parent organization and the stated goal of the AFA-CLP to protect the parent organization in court. When the AFA has been threatened with litigation, its efforts to influence policy in the area of family values have provoked those conflicts. Obviously, the AFA is no longer threatened regularly with suits that end in a trial. One might argue that the Center has served its initial purpose of discouraging lawsuits against the Wildmon organization and has now moved on to other issues.

Finally, the AFA-CLP is most consistently in court to represent the interests of abortion protesters, and less consistently there over Church State issues, while other issue areas represent less centrally important issues. The AFA-CLP's participation in litigating the Isaiah Brown case, and Green's comments that the organization would continue to seek precedent setting Free Exercise cases, suggests that it would litigate more regularly in the issue area. However, while it continues to find cases in which to participate, the Center is not as consistent in making its policy goals known in court. It should also be noted that many cases in all of the most central AFA-CLP issue areas are settled outside of a courtroom. The example discussed above illustrates the AFA-CLP's commitment to resolving disputes out of court. The California local church zoning ordinance challenged by the AFA-CLP did not end with a judicial decision on the merits of the immigrant
church's claim. However, the AFA-CLP was particularly active in effecting a changed policy in that community - behavior which does not appear as an instance of litigation participation on the part of the AFA-CLP.

Table 4.4 examines only the 40 instances in which the AFA-CLP participated in federal court cases. These 40 instances represent 91% of all recorded AFA-CLP litigation participation. The Table divides these instances by jurisdiction, and each jurisdiction is examined according to participation type and issue area. Comparison of row totals (participation type) across jurisdictions shows that (excluding the early Supreme Court amicus work) case sponsorship is the AFA-CLP’s preferred method for litigating. Furthermore, the overwhelming majority of all sponsored cases (23 of 24 total) occurred in federal court. The AFA-CLP sponsored almost as many cases at the appellate level as it did in federal district courts. Explanations for the large number of appellate participation instances have been put forward above, however, the fact that 45% of all AFA sponsored cases occur at the appellate level, and that these cases make up 25% of all instances of AFA-CLP litigation participation is a significant finding. The AFA-CLP is more involved in appellate work than even its chief counsel conceived. Thus, the goal of effecting precedent may carry almost the same weight as defending believers' rights through trial-level litigation.

Trends in preferred issue areas emerging out of the analysis of Table 4.3 continue here, although there is a much more even distribution among the major categories at the appellate level. Family Policy and Abortion: Protest are the most significant categories at the district court level, with each accounting for 40% of the AFA-CLP’s federal trial level
litigation. The combined Church/State categories account for only 20% of the AFA district court workload. At the Appellate level, these trends are reversed. The organization's interest in litigating Church/State issues emerges and its interest in defending abortion protesters is greatly diminished. Together the Church/State categories now account for more than 40% of the AFA's appellate litigation and Abortion: Protest accounts for only 17%. The AFA's work in the Family Policy issue area is also diminished at the appellate level.

Very few cases represent AFA continuing participation, defined here as participation in both the trial and appeals process of a case. The AFA has made several appearances in appeals of specific aspects of a trial case, most notably in the Connecticut FACE trilogy cases. However, these decisions were remanded to the district courts for further action, and no appeal on the merits emerged out of any of the 15 federal district court cases in which the AFA participated. While case sponsorship accounts for almost 65% of the AFA's federal appellate participation, the organization did not participate at the trial-level in any of these cases. Thus, the AFA's most profound appellate victory, in Brown v. Woodland Joint ISD, did not provide the AFA with the opportunity to control or contribute to the court record at trial, since the AFA did not participate.

4.7 Conclusion: Organizational Life & Change

The present research examines two central expectations for interest group behavior as a result of initial organizational goals and developments in organizational
resources over time. This section outlines some initial conclusions about how well these expectations explain organizational behavior from the above observations of AFA-CLP organizational life and development. The analysis of the AFA-CLP's goals, resources and behavior provides limited support for the central expectations of the study for group litigation participation given the AFA-CLP's resource development and goals for pursuing litigation.

The expectation relating resources to behavior is found in Chapter 2 (see Section 2.3.3). This expectation states that changes in the amount of litigation participation are related to changes in the amount of resources that a group can muster for to participate. It posits that as resources increase, the raw number of times a group resorts to litigation will increase. The above discussion reveals that AFA-CLP monetary and staff resources have increased moderately over time, suggesting that the frequency of AFA-CLP litigation participation should increase steadily as well. However, the analysis reveals little change in frequency of litigation participation. The raw number of instances that the AFA-CLP becomes involved in litigation shows no upward trend in recorded instances of litigation participation. There are several possible explanations for this result that, taken separately or together, may confound the analysis. First, as suggested above, the amount of work the firm does is underestimated by available data due to its practice of seeking out of court settlements where it may. Furthermore, the type of litigation that the AFA-CLP practices (its trial-level focus) is traditionally under-reported.

Second, the organization is deeply involved in several policy areas related to its agenda, but which do not involve litigation – crafting zoning ordinances for
municipalities that wish to regulate sex-related business and partial-birth abortion initiatives. Recent evidence suggests that this second explanation may have some merit. Shortly after he was interviewed, Bruce Green departed the AFA-CLP to become Chief Counsel for the Alliance Defense Fund. Amid the reordering of duties and the appointment of a new Chief Counsel, the firm reorganized, changing its name to The American Family Association Center for Law and Policy. Fahling states that the new moniker more accurately depicts the goals of the firm.

The second expectation for group behavior (see Section 2.3.4) relates group goals to a group’s litigation agenda. It posits that as resources increase, the kind of litigation a group does will remain consistent with its overall goals. It may branch out into other kinds of activities, but the core of its litigation agenda will remain consistent with the stated objectives of the organization. The analysis reveals that the AFA-CLP has established goals for influencing court-crafted policy (building up precedent or obtaining a favorable interpretation of its position) and increasing its reputation. Its primary method for accomplishing both these goals has been case sponsorship, a behavior associated with a deep commitment to effecting policy change through litigation. Like the ACLJ, the AFA-CLP has moved into various issue areas as these become increasingly important to its supporters. Furthermore, while this research posits that concern for reputation will encourage a group to litigate broadly, emphasizing such behaviors as amicus curiae participation, the AFA-CLP has remained committed to case sponsorship as a way to fulfill its concern for reputation. It justifies its behavior in light of its goals, and giving reputation a definition not considered here — concern for reputation within the courts.
However, despite almost unlimited resources, a steadily growing monetary base and increased staff support, the AFA-CLP is not involved in aspects of a case sponsorship strategy that would indicate a deep involvement in litigation, nor is it increasing its levels of involvement over time. First, the AFA-CLP rarely shepherds cases through the courts from trial-level to appellate levels. This may be a function of the Supreme Court’s denial of the AFA-CLP’s petitions for certiorari review. However, if the firm were committed to a long-term appeals process, an analysis of its involvement in litigation would show that it had appealed some of those cases that it had sponsored at the trial-level. Such occurrences were rare. Furthermore, the AFA-CLP had not been involved in the trial-level proceedings of the three appeals court cases it petitioned the Supreme Court to review. However, even though the AFA-CLP did not increase its number of instances of litigation participation over time (though this research predicted it should have done so as its resources increased) the AFA-CLP remained relatively constant in the kinds of cases it pursued and the manner in which it litigated those cases. In all, there is moderate evidence supporting the central expectations of this study, and the AFA-CLP’s behavior is somewhat confounding.
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**Table 4.1: AFA Litigation by Year & Jurisdiction**

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**Table 4.2: AFA Litigation by Year and Type**

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**Table 4.3** AFA Litigation by Year & Issue Area  
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**U.S. District Court Participation**

**Table 4.4: AFA-CLP Federal Court Litigation by Type & Issue Area**

(continued)
Table 4.4, Continued: AFA-CLP Federal Court Litigation by Type and Issue Area

**Source**: Searches conducted on the Lexis/Nexis database

**Coding rules**,

- **Sponsorship**: Name of AFA-CLP or attorney employed by the AFA-CLP listed as attorney of record within the published court opinion
- **Counsel on Brief**: Name of AFA-CLP or attorney employed by the AFA-CLP listed as On Brief within the published court opinion
- **Amicus curiae**: Name of AFA-CLP or attorney employed by the AFA-CLP listed as amicus, or preparer of amicus brief (e.g., for another organization) within the published court opinion
CHAPTER 5

WORKING FOR EQUAL ACCESS: MATHEW STAYER AND
THE LIBERTY COUNSEL

5.1 Introduction

Mathew Staver is perhaps the most educated among those who lead the litigating organizations of the Religious Right. He holds a Master's degree in theology, a juris doctorate from the University of Kentucky Law School (where he was captain of the National Moot Court Team), and is fluent in four ancient languages. He has published numerous times in the areas of Workers' Compensation and First Amendment litigation. These publications include a series entitled "Faith and Freedom: A Complete Guide to Defending your Religious Rights," a book entitled Equal Access: Guidelines for Student Groups on Public School Campuses," and a law journal article entitled "Injunctive Relief and the Madsen Test." (Staver 1995) He is uniquely qualified to write on the subject of Madsen, as he argued that case before the Supreme Court of the United States.
While his business interests extend into areas of law not related to Civil Rights litigation\textsuperscript{23}, and into areas not at all related to law\textsuperscript{24}, he has also founded one of the leading Conservative Christian litigating organizations in the nation - The Liberty Counsel. The Liberty Counsel (hereinafter "the LC"), describing itself as a "civil liberties education and legal defense organization," has litigated cases throughout the United States, and especially in the Southeast. The firm handles first amendment cases almost exclusively, and is especially drawn to disputes involving abortion protestation and church/state issues in public schools. The LC has enjoyed considerable success in litigating issues on the Religious Right's agenda, especially before appellate courts. Staver has managed to do all this on his own, without any support from a parent organization, or the benefit of partners among whom to divide tasks. He has built the Liberty Counsel from the ground up to become the conservative Christian litigating arm of the Southeast. He has also taken on a very public role as a representative of the movement. Staver is the subject of frequent interviews and has discussed his positions on abortion protestation and religious expression on national television programs, including \textit{Nightline}, \textit{The Lehrer News Hour} and \textit{Politically Incorrect}.

Staver is among those Christian attorneys that pioneered the First Amendment defense in Religious Establishment cases during the late-1980's. As a leader in the development of what is surely the most significant legal contribution of the new breed Christian litigators, Staver takes an approach to litigation very similar to that of Jay

\textsuperscript{23} Staver is the founder of a successful Workers' Compensation practice in Florida. Staver and Associates

\textsuperscript{24} He is President of Staver Air.
Sekulow and the ACLJ. He also has embraced a set of goals founded on a willingness to play the policy game as courts have defined it -- respect for common law precedent and providing courts with the legal rationale that will serve their efforts to develop policy incrementally. However, Staver's LC differs from the ACLJ in important respects, including differences in mission, organization and resources. In particular, the LC's central goal is to educate both its membership and public officials about the role of religion in public life. Thus, the LC is much slower to resort to litigation than other groups, and it has a slightly different vision for the role litigation plays in public policy-making.

Like Sekulow, Staver attempts to apply a liberal view of expressive freedoms in a variety of contexts. For example, he has opposed a flag-burning amendment to the U.S. Constitution. While litigating several cases involving student-initiated prayer in Florida schools, he publicly opposed the 1995 Florida State School Prayer Bill, provoking harsh criticism from the American Family Association. (Pinsky 1995). He has argued for free expression within public schools, including student advocacy of atheism, secular humanism, and gay marriage, as well as Christianity. His views on expressive freedoms have at times made him the unlikely ally of the ACLU. Additionally, he has expanded his notion of the appropriateness of such expression into the context of the workplace, stating that "religious discrimination is the forgotten discrimination. It's something that's often overlooked in the workplace." (Jacobs 1995). He has gone so far as to praise the Clinton Administration for its presidential directive clarifying federal policy on public religious expression, calling it "a very positive step forward." (Thomas 1995)
Staver, the voice of the Religious Right in the courts of the Southeast, has had a pronounced effect on court-crafted policy. He was among those young Christian attorneys that refined the approach of the Religious Right in the courts. His particular approach to creating and funding his own litigating organization has provided him with the flexibility and independence to pursue sophisticated litigation methods. This chapter is dedicated to exploring the influence of Mathew Staver on Christian litigation in the 1990s, and how he has worked to influence court-crafted policy through his organization, the Liberty Counsel.

5.2 Mat Staver: Out of the Ministry and into the Law

After receiving his Bachelor and Master's degrees in theology, Staver began his career pastoring a Seventh-Day Adventist church in Lexington, Kentucky. He states that the law was of no concern to him at that time, nor had he envisioned a career as a litigator, to say nothing of the appellate specialist he has become. The events that brought about such drastic changes occurred while attending a local ministerial meeting where he was shown a film on abortion.\textsuperscript{30} Staver notes that he had not given much thought to the issue before then.

\begin{quote}
At the time I really had no conviction one way or another on abortion. If you asked me I probably would have been more in favor of it than against it. [The ministerial association] showed this video. I was pretty shocked by it. They obviously mentioned \textit{Roe v. Wade} in the video. So I began going to an organization called Central Kentucky Right To Life to
\end{quote}

\textsuperscript{30} The film was most probably "Silent Scream," which was widely disseminated among churches during the early 1980's.
get information from them. They gave me the *Roe v. Wade* opinion, and I began to read it. So I began gaining interest in some of the legal aspects of the issue. (Staver, 1998)\(^\text{31}\)

Staver noted two other factors, which contributed to his decision to drop out of the ministry and attend law school.

> [During that time] our church was becoming more involved in the community, more activist oriented. And I began to realize that there were different laws that either allowed you or prohibited you from engaging in religious expression. Also, for the previous two to three years, every time the Christmas season would roll around, I would read another headline about government being sued. It seemed to be very big back then, suing the government over nativity scenes. And I would look at that and become frustrated about the whole situation. I felt the need to go into law school, so I applied. I was pretty naïve actually. I didn’t even take the LSAT prep course. I took the test, applied to law school and I only applied to the University of Kentucky, which is close by. I was accepted.

Staver's ideas about the very issues that prompted him to attend law school have changed radically. "Going to law school has not changed my view of religious freedom, but I have radically changed my idea of free speech." (Curriden 1994) On various occasions, Staver has compared his early views on expression to his current notions, stating that "[w]hen I was a pastor in Kentucky, I favored censoring 'The Last Temptation of Christ' because I thought it was blasphemous. Christians and the liberals fall into the same hole -- free speech is great as long as it is something we agree with." (Curriden, 1994) In fact, Staver's ideas about free expression did not completely evolve during law school -- one of his first cases after founding the LC was a lawsuit filed to block

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\(^{31}\) From this point forward, all quotations, unless otherwise noted, are from an interview with Mat Staver conducted in December, 1998.
Seminole Community College from showing that very film to its students, a suit he regrets filing. "Now, I would not advocate that they ban it. Clearly, that is one of those areas where my First Amendment free speech understanding has evolved." (Pinsky 1995)

In 1987, during his third year in law school, Staver was approached by Patrick Monaghan, at that time general counsel for the Christian litigating group Free Speech Advocates. "Monaghan needed an able assistant in defending abortion picketers from prosecution in California. Staver, already interested in Constitutional Law, got his first taste of religious liberty litigation and brief writing outside of moot court sessions in law school. He was hooked, and began planning a way to, as he says, "combine aspects of both my careers." Graduating from law school, he moved to Orlando, Florida, began working for a private firm specializing in Workers' Compensation and representing abortion protesters on the side. Two years later, and after tangling with ACLU National in a suit against the City of St. Cloud, Minnesota over a religious symbol attached to a public water tower, Staver resigned. He started his own Workers' Compensation practice, and founded the Liberty Counsel six months later.

5.3 Founding the Liberty Counsel

5.3.1 Splitting Time: The Downside of Self-funded First Amendment Litigation

Staver stepped into Workers' Compensation private practice with no clients, but with a desire to assist the Religious Right in Florida and the Southeast. Six months after

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32 Monaghan is now Senior Counsel with the ACLU
starting his private practice, Staver founded the public interest law firm, Liberty Counsel, to do pro-life litigation almost exclusively. Because of the demands of Staver’s supporters and his own broad interest in religious liberties, the Liberty Counsel has developed into a First Amendment public interest law firm, taking a variety of cases involving public expressions of religious conviction.

According to LC Staff Attorney, Nicole Arfanas-Kerr, the LC is distinct from other Christian public interest law firms in that it is not sponsored or supported by any particular parent organization or foundation. She states that "the firm [Staver's private practice] is the closest thing to that." (Arfanas-Kerr, 1998) Staver has used his private practice to make up the funding deficiencies that the LC has had since its inception. As late as 1994, the LC took in just over $200,000 in donations. Staver's private practice made up the over $1 million dollars per year extra required to conduct the litigation on the LC’s agenda. Through 1999, all employees working on LC-related litigation were paid fully by Staver and Associates. Staver's private practice, and 100% of their time was designated for work in the LC. Furthermore, many of the assets of the LC are donated by the private practice -- the two entities share office space, computer systems and personnel. Neither Staver, nor any of his staff attorneys or LC Board members, receives any compensation directly through the LC. All act either in a volunteer capacity or are designated employees of the private practice. Such a complicated financial arrangement has its benefits. The LC is not beholden to any outside party or foundation, and its initial goals formed apart from the influence of a parent organization. Staver maintains complete control over the organization's focus and direction, and has complete discretion.
over the LC's litigation agenda. Staver has a degree of freedom that only a few leaders within the Religious Right enjoy.

On the other hand, this kind of arrangement has negative consequences for both firms. The demands of running a full time private practice and conducting complex First Amendment litigation have taken their toll on Staver. While the private practice is crucial to the LC and funding its litigation efforts, Staver has found that the amount of time he dedicates to the LC has declined significantly over time. He notes his frustration with the arrangement, and his plans to change his involvement in both practices.

[Since establishing the LC] I have been doing both a for-profit law firm and Liberty Counsel, and developing Liberty Counsel over time. By the end of 1999 I'm totally closing out the law firm aspect -- I'm actually going to be giving that up, letting someone else take it over and going full time with Liberty Counsel. The amount of time I spend on each has changed over years. It's been different percentages at different times, and of course it's different at any given time, depending on the cases. The thing that has been more of a frustration to me is that the law firm has become so time-consuming that over the last couple of years it's probably been 80% law firm and 20% Liberty Counsel. It's hard to say it wouldn't be eighty percent of an eight-hour workday. I worked a lot of hours to be able to do both because it's basically like full-time jobs on both. But in terms of the time I am able to spend in each one it will probably be eighty/twenty-eighty law-firm, twenty Liberty Counsel.

According to Staver, in January of 1999, he began the process of selling his practice to another party, shifting the burden of his Workers' Compensation practice over to the new owner slowly, and taking on more of the work necessary to implement the agenda he developed for the LC. As of this writing, the process of closing out his participation in the private practice has proceeded much more slowly than Staver had planned. The process of sale was completed at the end of the first quarter of 2000. Furthermore, Staver is now in negotiations with Rev. Jerry Falwell to become the litigating arm of his enterprise. In
approaching Falwell, Staver seeks the type of arrangement that the ACLJ has with Rev. Pat Robertson. At this writing, it appears that Staver and Falwell have reached an agreement for extensive funding of the LC.

Several questions arise involving concerns that are central to this research -- if there are changes developing at the LC, how do these changes impact the goals and behavior of the organization? Staver hopes his increased involvement with the LC will change the amount of litigation the organization takes on (and so it has). However, will the mission and goals of the organization change as well? Does Staver plan to take the LC in a new direction: different from the course he has plotted for it while developing his private practice? These questions, addressed below, will provide insight into an organization at a crucial stage in its development. It already has a proven litigation strategy and a well-developed set of goals. An examination of organizational life and change as its resource base develops may provide the most sensitive test of the central expectations of this research.

5.3.2 Pioneering First Amendment Claims in Establishment Clause Cases

Staver's experiences in law school and as a young lawyer added to the concern for religious liberties that he experienced as a pastor. He began to perceive that the issue of religious expression was becoming clouded by the way the central questions in such cases were framed -- as state sponsorship of religion, or as a negative right rather than a positive grant of personal freedom. Through his early litigation experiences, he came to
the personal realization that government endorsement of religious beliefs was not really at issue, but that a lack of tolerance of free speech rights existed on all sides of the debate. As a result of this personal revelation, and in collaboration with his fellow Christian litigators, Staver helped develop a philosophy for litigating Religious Establishment cases based on a heightened tolerance of speech. This new philosophy is characterized by various attributes that encourage and support use of the courts to achieve policy aims. Religious Right practitioners are willing to chip away at unfavorable precedent, to change policy slowly, and to forego pursuing every conflict into the court system. Finally, they are willing to make arguments defending all faith-based speech, including points of view that are not associated with the Christian religion. This new philosophy appears to have particular currency with Staver.

Many Christian attorneys fought its adoption as a litigation strategy, because it meant defending views that were odious to them. Staver forged ahead. As Jay Sekulow has noted "Mat has not been one of those who resisted it kicking and screaming. He saw the strategy, he understands and has implemented it." (Pinsky 1995) Staver notes the significance of this new litigation strategy, the importance of picking the right cases, the benefits of an incremental strategy for effecting policy change, and how many in the Religious Right initially resisted such an approach.

Sometimes the law has been pretty much set against you. We would prefer to negotiate a reasonable resolution without going to court, instead of going to court on a particular issue. Sometimes it is better to resolve something than to litigate it, or even to litigate a small area of an issue. Instead we try an incremental approach, because you can only eat the elephant one bite at a time. Sometimes people think because they can’t swallow the elephant whole they don’t want to have any of it.
Staver followed his new-found view of the First Amendment into conflicts over religious expression in a variety of context. He has been at the forefront of Christian litigation to test the tension between religious establishment and free expression rights. Currently, a large segment of the LC's litigation agenda is composed of cases involving religious expression in public schools. Among these is Adler v. Duval County School District II, a case involving student-led prayer at state-sponsored public school events that is likely to be accepted for Supreme Court review. Thus, Staver may be on the cusp of the Court's clarification of religious expression in public schools. Staver's most prominent cases have been in an area where Christian litigators have made related expressive freedom arguments -- abortion protestation. He points to his performance before the U.S. Supreme Court in Madsen v. Women's Health Clinic as the defining case for the LC. Although Madsen was a significant setback for the Religious Right, Staver's arguments for protecting the free speech interests of abortion protesters did not deviate from the core rationale that has become the hallmark of Christian litigation.

On the other hand, Staver takes a very activist stance where the policy goals of the Religious Right are not supported by the Supreme Court. After the Supreme Court rendered its decision in Madsen, Staver accused the Court publicly of turning zones around abortion clinics "into a type of Tiananmen Square." (Abortion Report. 1994) "This is the McCarthyism of the nineties," he went on to state. "where speech is censored before it can be spoken, where peaceful protests must first be permitted by those of the opposing viewpoint." (Kennedy 1994) As acerbic as these responses were to the Court's decision in the case he argued, Staver's views on the First Amendment appear to be
consistently applied across political or ideological positions. Like the ACLJ, the LC is
dedicated to defending the free speech rights of all those holding religious beliefs.
Commenting more broadly on the increasing role that Christian litigators play in the
courts, Staver ties the emerging Christian litigating corps to the political activism among
Christians in the 1980's, stating that that "[t]he political awakening in the 1980's turned
into the judicial activity of the 90's. Once conservatives and Christians began to see that
the political arena was not addressing their concerns and that their legislation was being
struck down in the judicial arena, then it was time to get involved." (Niebuhr 1995) He is
also less than jubilant about the state of religious liberties in the United States.

Yet, Staver is certainly not in the same category as other Christian attorneys that
see their litigation activity as front-line guerilla warfare against the forces of a godless
society. He appears to recognize a general tension in society over religious expression.
and is frustrated by it. But, unlike his compatriots. Staver has not made the leap from the
specific instances of intolerance he cites to a more comprehensive view of socially
endemic religious oppression. This attitude is best exemplified in the LC's commitment to
education as part of its mission. The LC defines this goal as providing information about
current policies on religious expression to all sides in a dispute. Thus, for the LC the goal
of education extends to its supporters and to the public officials who may be the root
cause of actions taken adversely against Christians in public places. Below, I explore the
primacy of education as an organizational goal for the LC. However, it is important to
note that the educational mission of the LC is an extension of its view of the relationship
between social policy and Christians' free speech claims.
5.4 Developing Goals for the LC

5.4.1 A One Man Army for Equal Access

Like the ACLJ, the LC exists for the purposes influencing policy and building up precedent favorable to faith-based expression in social, political and cultural contexts. When asked to describe the reasons why the LC litigates, and what goals it has identified for that litigation Staver responded.

Our goal is not to be a leader in litigation or develop a reputation in that respect. Our goal is to be able to change policy and to create good interpretations of existing law, favorable judicial interpretations of present policy. Our goal is to be able to change policy and create good case law and convince courts to render favorable interpretations of policy that is already there. In the process of having that affect, it ultimately helps you to be recognized as a leader or a good litigator. That’s why we want to do everything we can to the best of our ability and in a high quality fashion. But that’s not my goal -- to be recognized as somebody in that area who’s a leader from a litigation standpoint. Our real goal is to be able to change that policy.

At first glance, it appears that there is very little difference between the goals of the ACLJ and the LC. Both identify policy change as primarily important, and recognition as a leader or expert in litigation as a secondary and unintended consequence of accomplishing its primary goal. The goal of drawing attention to the Religious Right, or using the media to further the interests of the movement, remains rarely mentioned, or not at all. However, there are some significant differences between the two groups, particularly regarding the way in which they go about obtaining this goal of policy influence. In this respect, the LC has a slightly less defined policy mission.

Staver describes the mission of the LC as an effort to acquire equal access to public places and institutions for all persons of faith. However, Staver defines the
primary vehicle for achieving equal access as education, not litigation. The LC is an organization committed to educating the public and public officials about the rights of people of faith to express their beliefs in public contexts. Only when efforts to mediate conflicts through education have failed will the LC resort to litigation to achieve their policy aims. Thus, the LC is significantly slower than the ACLJ or other Christian litigating groups to "pull the trigger" on litigation. Nicole Arfaras-Kerr describes the importance of education as an organizational goal.

I would say that education is the primary goal. We have an education mandate to correct misconceptions about things like Separation of Church and State. We want to provide adequate information to people. Our goal is to solve problems and education is the best tool for doing that. Usually [the cause of the conflict] is just misinformation about what the law is. For example, I have a call in to the Human Resources director of a [Orlando, Florida] company that restricted people from reading their bibles and discussing in the lunchroom. I said 'this is a form of discrimination. I would be happy to send you a statute or some court decisions outlining the state of policy in this area.' That usually solves the problem. That is the most efficient approach. If this does not resolve things, then we will resort to litigation. Only then.

As the following excerpt demonstrates, Staver even thinks of litigation in terms of its educational impact.

We look at litigation as an extension of our educational mission. Education resolves ninety-five percent of the situations that we are involved with, and litigation has an educational aspect to it -- the printed cases or the media presentation of a particular situation. That's an educational aspect [to litigation]. Basically our goal is to be able to provide education rather than purely litigation. This could be through printed materials or through having to litigate something . . . That's why we called it Liberty Counsel, not Council. And the reason is that most of our cases evolve through education. We don't go into the courtroom all the time, nor should we. In those five percent of cases that don't resolve, either someone has a latent hostility to a religious viewpoint, or they have dug their heels in because the have set themselves in a particular direction. Even then, we try to settle them out, and its through education, not
litigation. We are not afraid to litigate and we will litigate if we have to. But, we prefer to give somebody the opportunity to see if it's an information problem or something else.

Thus, the LC, while focused on litigating for policy change, also focuses on resolving tensions associated with those policies, providing informational resources where those resources might mean the difference between tolerance and suppression of public expressions of faith.

In addition to its emphasis on education over litigation, the LC also has a decidedly regional focus. While Staver is active in bringing cases in state and federal courts across the country, half of the total number of instances where Staver has argued on appeal has been before the 11th Federal Circuit. Additionally, a majority of the LC's participation in litigation has been in Florida Federal District courts. There are notable exceptions, but at the time of this writing, the majority of cases on the LC's agenda with the most potential for influencing precedent have developed out of Florida or other Southern states. Additionally, the vast number of requests for assistance in resolving disputes come from Florida, particularly the Orlando area. The LC remains constantly busy attending to church/state disputes arising out of public school districts in Dade, Seminole and Brevard Counties. Furthermore, the LC has represented Jews For Jesus, Inc. in disputes with the Tampa, Orlando and Fort Lauderdale airports. Thus, while the LC has a definite mission to influence policy of national scope, the pool of disputes from which the LC draws cases to have that influence remains primarily Southern and Floridian.
The LC, while accepting the broad mandate to represent the interests of Christians in the home, school and workplace, has experienced shifts in the kinds of disputes that are brought to it by its supporters. Staver noted that over the years the number of cases arising from abortion protestation has dropped compared to the steady number of Church State cases arising out of disputes over religion in public schools. Both Staver and Arfaras-Kerr noted that disputes over gay rights or discrimination ordinances are on the rise. Arfaras-Kerr referred to these disputes as a "growth industry" for the LC -- an area in which its supporters are expressing greater concern. LC Staff Attorney Erik Stanley also noted that the incidents of litigation over gay rights issues continue to climb for the LC. (Stanley 1999) All of these comments reflect the general trends established by other groups in this study.

Thus, the LC, like the ACLJ and AFA, is attentive to the interests and shifting concerns of its membership and supporters. As in the case of the ACLJ, the shift in cases brought to the LC represent changes in the particular concerns of supporters, and not changes in the LC's strategy or goals. Berry (1977) notes that when examining organizational emphases, membership has a particular and defined influence on the shape of interest group litigation. The influence of group membership is largely felt when groups determine issue preferences, i.e. those issues that a group will emphasize and elevate to the point of litigation. However, group leadership determines the specific strategies and tactics used by the group to articulate the policy preferences of its supporters to government. These choices are the result, not of membership influences, but of the conversion of resources available to entrepreneurs, and the policy objectives of
those same entrepreneurs. The actual modes of articulating policy preferences take the form of strategic behaviors. The examination of these three groups appears to lend support to this hypothesis.

In the case of the LC, Staver, Arfaras-Kerr and Stanley note that the goals of the organization, and strategies for carrying those goals forward, remain constant, while its emphasis on issues has developed and changed according to the needs of its supporters. Arfaras-Kerr plainly states the connection of the LC's overall goals to the needs and interests of its supporters.

"I don't think we take cases to make headlines. A lot of what we do is an attempt to be responsive to what is in the culture. The abortion protest cases just emerged out of conflicts in the culture. The gay-rights issue is emerging as an issue because of the mandatory sensitivity issues these ordinances raise for Christians and other citizens. It seems like a lot of our agenda is what is going on in the culture. We are always going to have First Amendment cases and school issues. And I think we are just trying to be here to address those concerns."

5.4.2 Long-term Plans & Their Effect on the LC's Goals

The LC has undergone (and continues to undergo) extensive changes in resource levels, sources of support and the amount of time its General Counsel spends attending to its business. While changing patterns of resources, resource acquisitions, and organizational growth are treated separately below, it is important to address the possibility that these extensive changes also represent a change in the LC’s organizational mission and focus. When queried about the effect of upcoming changes on the LC’s goals, Staver clarified their implications for the LC’s future direction.
[The changes] do not reflect a change in our mission statement or in our direction. Basically, what it will be for me is a freedom. Freedom to be able to do more of what we've been doing, and on a grander scale - so that I can have full-time involvement rather than a little involvement. If I am able to develop [the organization] full-time, it will not change what we do or how we do it. It will change how much we do. I think we'll see a substantial increase in activity because I will be able to give more time [to the LC] rather than having to ride two horses at the same time. It's very difficult to do that and do a good job at both.

Arfaras-Kerr agreed with this perception of the LC's direction. While noting that the amount of litigation on the LC's agenda was a product of its limited resources, she agreed that the LC would pursue many more of the same kinds of cases given an increase in its resource base. "[Resources] have limited the task. We could do a lot more, and we would need a lot more to do it. In a sense, we have been able to accomplish what we have because of the resources we've had . . . [a]t this point the extent to which we pursue our goals is tailored to the resources we can obtain. You do what you can do." (Arfaras-Kerr 1998)

5.5 The LC's Organizational Structure and Resources

The LC appears to do more with fewer resources than any of the other groups examined in this research. Of the three organizations, it has the smallest budget and the fewest attorneys. Yet, the LC has managed to leave an indelible mark on court-crafted policy on a national level, and in its regional sphere of influence. The fact that the LC achieved its current status as a leading Christian litigating organization before it began its serious efforts to develop and grow is important to note. How can an organization with a
relatively small budget and no parent organization for tangible support manage to become one of the leading litigation specialists for the Religious Right? In this section I explore the current state of the LC's internal organizational structure. I explore those resources that have demonstrated impact on a litigation organization's efficiency, capabilities and maturation over time. Additionally, I explore Staver's future plans for litigating civil liberty cases and the changes in the methods used to acquire resources he is currently implementing at the LC.

5.5.1 Organizational Structure

The LC is distinguished from other leading Christian litigating firms by its relative lack of organizational complexity. For years, the firm conducted business from the office that it shares with Staver's private practice in Orlando. The LC relies heavily on its General Counsel to litigate all the cases on its agenda. Its few staff attorneys process the between twelve and fifteen thousand requests for information and intervention in First Amendment related disputes per year. Furthermore, all of the LC's other projects are conducted from its Orlando office, including Staver's radio program and publication of the LC's monthly newsletter, The Liberator. All attorneys and office staff assigned to work on LC related matters are officially in the employ of Staver's private practice. For tax purposes, 100 percent of their time is loaned to the LC. The private practice and the LC have until recently maintained a symbiotic relationship, sharing all vital resources including staff attorneys.
The LC has employed various associate counsel over the course of its life, but the number of those junior attorneys has never exceeded three at any time. As of this writing, the LC staffs only one other attorney besides Staver, and another attorney will join the firm during the first quarter of 2000. That attorney is Anita Staver, Mat Staver's spouse, who is currently completing law school and working as the LC's accountant. While Staver has long-term plans to add more attorneys as the LC grows, the number of LC attorneys will remain at three until the sale and transition of the private practice is complete.

The LC does maintain a network of volunteer attorneys and will refer disputes to them where the probability of litigation is low. However, Staver and his staff attorneys keep tight control over the actions of volunteer attorneys. No LC volunteer has ever litigated a referred case alone. This type of centralized control over the litigation agenda places a heavy burden on the attorneys working for the LC. Arfaras-Kerr notes the effect of this arrangement on the LC's litigation methods.

Some of the other groups have regional offices, or cooperate with attorneys from around the country. We are lead counsel in all our cases and we litigate them from here [in Orlando]. We do have affiliates who help us, and serve as local counsel when we have not been admitted to a particular district . . . but, they would never be considered lead attorneys in a case, unlike the Rutherford Institute that gives a case to one of its volunteers. So, our litigation agenda is much more centralized than, say, Rutherford. (Arfaras-Kerr 1998)

Thus, the LC uses its corps of volunteer attorneys in much the same manner as the other groups in this study. Volunteer attorneys serve as local counsel, assist in preparation of briefs and depositions, handle filing documents, assist in preparation for trial or oral argument, and provide a base of operations within a court's jurisdiction. At no time has
Staver allowed a volunteer to serve as lead counsel in a matter, nor has he hired a volunteer attorney to a staff position within the LC.

5.5.2 Acquiring Resources: Doing What Can Be Done

While acquiring resources is a vital concern for any litigating interest, it is of particular importance to the LC, an organization with limited time and energy to devote to litigation, let alone acquiring resources from private sources. Like other Christian litigating groups, the LC attempts to balance its fund raising activities with more crucial mission-oriented activities. To do so, it has hired a private firm to manage grassroots donor campaigns, and has slotted office staff support to work on fundraising and mass-mailings. The LC is a donor-supported organization. Its private contributions come from its membership and those who respond to direct-mail solicitations for contributions. The average contribution from these private sources is approximately $17.

However, direct-mail contributions are not the LC’s only, or even primary, source of financial support. The LC pursues a mixture of sources including foundational grants and contributions, donations from churches, and court-ordered compensation of fees incurred through litigation. Over the last several years, as Staver has positioned the organization for changes in his own level of participation, he has also pursued these various other methods of acquiring resources. Arfars-Kerr commented on the recent changes in the LC’s sources of monetary support.

Until recently [the balance of funding] was much more toward grassroots fundraising. Now, we work with the Alliance Defense Fund to acquire
funding from other sources. It has been a nice benefit and very helpful working with them to acquire alternate sources of support. We certainly get more from foundations now than before, but our grassroots support has grown at a constant rate. A greater proportion from foundational support, but a growing and steady grassroots base.

Staver notes that he has not spent as much time focusing on fundraising as he would like. The demands of running the private practice and conducting the LC’s business monopolize his time. As the following excerpt indicates, there is another important reason why Staver has not made fundraising a priority.

In terms of my time, fundraising is very little [of a priority], extremely little. The reason for that is that I'm conscious of the role that the [private practice] plays. We just don't have time to do it, and from my standpoint if something needed to be done, then we didn't need to rely on the Liberty Counsel funds alone to do it. This is because we can use some of the resources from the [private practice]. Because of that I haven't really been required to focus on fundraising. But, as of 1999 I will no longer have the workers' compensation practice to fall back on. That will be a big change in 1999 -- to be able to focus on fundraising.

Thus, Staver has been able to use his private practice as a financial safety net for the LC, dipping into his own personal assets and using the firm to hire and pay extra staff.

According to estimates (Pinsky 1994), Staver's private practice has provided approximately $1 million in support each year. Staver notes that the support provided by the private practice was steady and growing each year as the work of the LC expanded. However, the proportion of the LC's budget for which the support of the private law firm accounted was relatively steady.

Staver notes the effects of resource limitations on the work of the LC. Compared to the other groups included in this study, the LC has to make many more choices about which cases it can afford to take given its limited resource base.
It has been frustrating in certain situations where there aren't the resources. We have never turned away anybody that we feel has a legitimate case. We try to help them, and we have never actually neglected to take a case that we feel should be taken. But, there are situations where there is just more to do than you will have time and resources to do. And that's just a hard reality. We have found ourselves with situations that are emergencies. You have to figure out which one of, say, these three emergency situations are we going to take. We've never had to really turn away somebody but we haven't been able to do everything we wanted to do.

Arfaras-Kerr notes that, while Staver has never refused to help an individual with an issue to resolve, often he has to refer potential clients to other organizations because the LC's agenda is overloaded. Significantly, when faced with a potentially significant case that would overwhelm the staff and other resources of the firm, the LC will pass because "We just don't have a huge battalion of attorneys to do that kind of research." (Arfaras-Kerr 1998)

Available data on LC resource growth is displayed in Table 5.1. It shows a significant jump in revenue from 1993 to 1994, and several peaks in revenue gathering through tax year 1998. Two important findings are revealed in the data displayed in Table 5.1. First, the data support Staver's contention that he has spent relatively little time attending to the business of fundraising. There is no recognizable trend in resource acquisition across the years analyzed. This may be attributable to an unfocused approach to fundraising occurring within the organization, and to the fact that Staver, while relying on the support of his own private practice, remained relatively unconcerned about efforts to obtain resources through fundraising efforts.

Second, in 1994 external funding of the LC increased almost four and one-half times. Documents submitted by the LC show that personal donations make up the
majority of this increase, while the initiation of a program to distribute merchandise (including sales of Staver's book) account for a smaller percentage of the increase. What could account for such a massive increase in funding from sources outside the LC and Staver's private practice? The most obvious answer is the attention that Staver garnered for his central role in *Madsen v. Women's Health Services*, a case he argued before the Supreme Court during the 1994 term. The case brought him notoriety with the Religious Right and drew considerable media attention to the LC. It is small wonder, then, that Staver chose this time to initiate several new fundraising projects, or that donations would flood into the LC's coffers in any event.

5.5.3 Allied for Defense: The LC's Relationship with the Alliance Defense Fund

Staver notes that one of the important factors (although by no means the sole factor) in his decision to go full-time with the LC is the availability of financial support for organizations like the LC through the Alliance Defense Fund. Staver has had a continuing association with the ADF - the major fund-raising organization for Christian litigating firms. Like Jay Sekulow and Bruce Green, he serves on the grant review committee, but does not vote on funding decisions concerning the LC's grant proposals. However, the LC has benefited from its membership in the ADF, and Staver places the acquisition of resources from the ADF through its grant review process high among his list of new funding priorities. Currently, the LC is receiving the majority of its foundation support as a result of participation in the ADF.
LC staff attorney, Erik Stanley, noted the importance of grant money to the LC and Staver's efforts to foster the reputation that the LC is a "good risk" for receiving ADF grants. Where the LC is able to recoup the cost of litigation through court-ordered restitution of legal fees, Staver makes a point of returning that amount of the grant money provided by the ADF. Stanley notes that to do otherwise would be to "double-dip" on the amount of financial support garnered by the LC. However, Stanley suggested another motivation -- that returning grant money to the ADF increases the chance the LC will receive more money in the future because of its frugality. Furthermore, ADF grant rules allow the LC to return unused portions of grant awards to the ADF, increasing the perception of the LC as a safe bet in the future. While this places short-term limitations on the amount of money the LC is acquiring for use in future litigation, both Staver and Stanley note that the long-term effect of a good reputation for effective and efficient use of resources is a higher priority. Here again, the LC views reputation as a tool to achieve its litigation aims, rather than an organizational goal of the first priority.

5.5.4 Organizational Growth

As previous sections demonstrate, the LC has not experienced a trend of growth over time, but also appears to have benefited significantly from Staver's involvement in an important Supreme Court case. When examining all of the traditional indicators of organizational growth, one finds very little development of the LC over time. The organization's budget has fluctuated, it has continued to make up budget shortfalls by
relying on funds from Staver's private practice, it has not employed more than three Staff attorneys at any time, and it has not developed a structured network of affiliated offices. According to Arfaras-Kerr, the only area in which the LC has consistently grown over time has been in the addition and retention of office staff support. This staff support includes legal assistants, who manage the office work of the firm and assist with the drafting of pleadings, and office support staff, who are involved in fundraising logistics and mass-mailings. Arfaras-Kerr notes that "There has been growth in office staff support over the years. As we branch out, do more media things, and more people know about us, we have needed more support staff. And we have hired them." (Arfaras-Kerr 1998)

However, Staver has begun implementing plans that will change this apparent cycle of stagnation in the acquisition of resources by the LC. Noting that there is plenty of work to keep him and several attorneys occupied full-time with LC related litigation, Staver has moved ahead with a comprehensive plan to grow the resources of the LC and that allows him to focus full-time on First Amendment litigation. In this section, I will discuss Staver's plans for the future. Most importantly, in this section I use the current transitional state of the LC to explore linkages between group goals, resources and behavior. Here, I attempt to explore Staver's perceptions of the impact of resources on his plans for developing the work of the LC.

When asked about the possibilities for filling the eighty-percent of his time taken up by his private practice, Staver responded that "[t]here's enough to go [full-time]. So, I wouldn't have any problem filling in the time. The key obviously is making sure that you have enough funding to be able to go the rest of the time and be able to have a fully
viable organization. So, the demand is never the problem. The funding is always the challenge." Thus, identifying funding sources and acquiring funds will become a top priority for Staver as he transitions into his new full-time role. Staver has outlined short-term and long-term plans for expansion at the LC, and these plans largely reflect the increased emphasis on obtaining funding. Short-term plans include expanding the radio program that Staver hosts, and developing a television program. Staver will continue and increase his attention to writing books and informational pamphlets. These projects are designed to convey information and encourage donations from patrons.

All of these new projects reflect Staver's conviction that the most important growth area for the LC is in funding. Additional evidence that the LC is retooling to focus on its funding its new efforts came from Staver's comments about changes on the LC Board of Directors. Beginning in 1999, the LC has brought several new members onto the Board. Staver notes the change in the composition of the Board, from a regional focus to national and international.11

Right now, the Board is more local in character, but in 1999 it will take on more of a broader base. We've got someone that will be on the Board from London, from out West. So, more of a broad base in the U.S., and then an international base . . . They will add some aspects of funding. A person from Minnesota will be adding to our funding possibilities. So, the composition of the Board will reflect the changes that occur within the Liberty Counsel as well.

As noted above, in the area of litigation. Staver plans to take on much more of the same kinds of cases that the LC has been litigating for a decade. However, his long-term plans for the organization recognize the potential for not simply new funding sources, but
new markets in which to litigate. Staver plans to expand the LC into the European Union within the next five years. He notes the congruence of this long-term plan with the overall goals of the organization.

Our mission is to preserve religious freedom --to have the ability to litigate for people to be able to express themselves based on their religious conviction. This is not simply a national concern. This is an international issue. So we have a vision to expand over in London and open an office in Switzerland, and then start branching around in different areas. For example, I have a pastor who is a friend in London. In London you can convert a church into a warehouse, but you can’t convert a warehouse into a church. You have situations in France right now, this year, where the government is moving against the Jehovah Witness. France looks at Campus Crusade for Christ as a cult or Baptist as a cult. The religious freedom that we enjoy here is not necessarily the religious freedom that people enjoy in other countries. So, that fits into our ultimate mission -- to be able the help maintain religious liberties, you go in to those countries to be able to assist people who may not only need education, but litigation help.

The current transitional state of the LC provides a unique opportunity to examine the interaction between organizational goals and resources, a central concern of this research. A previous chapter (see Chapter 2) sets out expectations for the relative influence of group goals and resources on group behavior. This research hypothesizes that goals have the predominant impact on the kinds of behaviors groups pursue, while resources determine the overall amount of litigation a group will attempt. Staver recognizes the importance of developing and improving his resource base as he implements new plans for expanding the work of the LC. He also recognizes the strain that the transition to new work and funding arrangements will place on the LC and upon

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13 As a condition of the new arrangement between Staver’s LC and Rev. Falwell, Falwell will occupy a spot on the LC’s board of directors.
himself as its leader. After reflecting on the changes that he envisions for the LC and on the consistency of the organization's goals over time, Staver addressed the importance of funding in the transitional stage.

Basically I am stepping out in front of the funding, and then going after it. In other words it's not like this is all paid for and I know that we got the funding. I'm going there before the fact. The funds are not already laid out. But I know that the funding will come once I have the opportunity to devote full time to it and be able to go out raise the kind of funding necessary. So it's pretty much a step out on faith, basically taking away the safety net of the firm. It's sink or swim.

Thus, Staver is implementing plans to further the goals of the organization before he has obtained the funds necessary to carry on his full-time work.

Over time, the goals of the organization and its litigation behavior have remained stable and consistent. However, according to Staver, the amount of litigation on the LC's agenda will increase. Staver realizes that the plans he has made to pursue those goals more fully demand a higher level of resources than the LC has yet acquired. It appears that these observations lend support to the hypothesis that group goals are the primary influences on what kinds of behaviors a group will pursue to fulfill its goals, and that resources are necessary, but not sufficient, for developing a litigation agenda. There can be little doubt that, in the case of the LC, the goals of the organization have determined the kind of litigation activities it pursues (although following sections will explore this contention more fully), and have preceded the recognition and acquisition of the resources necessary for carrying out those activities.
5.5.5 Coordinating Litigation

A final resource that has bearing on the ability of groups to implement a litigation agenda is coordination of their litigation efforts with like-minded sister organizations. Groups are able to limit the amount of resources they expend on litigation by sharing the burdens of cost among several organizations. Both of the other groups examined have stated that coordination of litigation is not a significant part of what they do, and the ACLJ explicitly stated that when it does coordinate, defraying the costs of litigation is not a motivation for doing so. However, the LC has a rather small resource base when compared to the other two, and this may place it in a position where coordination among sister groups might bring it some financial benefit. In this section I explore the LC's attempts to coordinate litigation among sister organizations, and its motivations for doing so.

More than any other group included in this research, members of the LC provided evidence that they worked closely with sister organizations in coordinated efforts to shape the course of litigation. Both Staver and Arfuras-Kerr noted that the founding of the ADF has had an impact on how Christian litigators interact. During the Spring of 1998, all of the Christian litigators who participate in the ADF met together in Arizona to discuss strategy and coordination among the groups. This meeting was so successful in developing closer ties among like-minded Christian litigating firms that Staver believes there will be many more such meetings.

The LC has a history of coordinating efforts with the ACLJ, the Christian Legal Aid Society, Americans United for Life and the American Family Association. While
there is not an explicit effort to defray the costs of litigation through coordination.

Arfaras-Kerr noted the financial benefit of not "reinventing the wheel" whenever it litigates an issue. She describes the process that brings the LC to call on other groups for assistance almost as one of expediency. "I'm in the middle of a case, and I want to present a motion. I usually ask myself 'Who has already done this kind of thing?'" (Arfaras-Kerr 1998) The acceptance of *Madsen* for review by the Supreme Court created a stir in the LC, and brought it to issue a general call for assistance, but that has changed in recent years. "In the *Madsen* case we were actually soliciting for help among our sister organizations, but lately others have been coming to us. Who we participate with is really based on what the question is and who has experience in the area." (Arfaras-Kerr 1998)

Finally, Staver noted the informal nature of many inquiries from other organizations to the LC, stating that formal coordination with other organizations occurs in only about 5% of the cases on the LC's agenda. However, he cites many instances of informal requests for information or examples of pleadings he has drafted in related cases. These requests are becoming more common, and, as illustrated above, the LC is more likely to make similar requests from other organizations. More formal requests for assistance appear to be reserved for higher profile cases during the appeals process. Staver himself will usually not solicit assistance in preparation for a case until it is accepted for review by the Supreme Court.
5.6 Strategizing for Equal Access: The LC's Litigation Agenda

In this section, as in previous chapters, I employ two dependent variables as concepts for exploring the behavior of groups that litigate. The first concept, Frequency of Litigation Behavior, is applied to explore the change in the raw amount of litigation per year. The number of times a group has resorted to litigation at any court level in any jurisdiction in any year is used to analyze trends in the frequency that a group resorts to the courts over time. The second concept, Scope of Litigation Activity, refers to the degree to which organizations become involved in the cases they litigate through sponsorship and by carrying cases through the courts on appeal. The Scope of Litigation Activity is analyzed using two constructs of group involvement -- depth and breadth of litigation involvement. This is undertaken in an effort to construct the indicators that will later allow analysis of the relative impacts of group goals and group resources on group behavior.

In this section I turn to a discussion of the LC's litigation agenda, i.e., the specific actions taken by the LC to pursue its policy goals in the courts through litigation. I begin with a broad overview of the LC's litigation agenda. First, I consider the various areas in which the LC has been actively litigating issues, specific and important cases in which the LC participated, and its overall approach to litigation as a means for achieving policy aims. In later sections, I turn to an in-depth analysis of the LC's litigation participation -- the frequency of LC participation in litigation, and the depth and breadth of its litigation involvement.
5.6.1 Overview of the LC's Litigation Agenda

The LC defines itself as a "religious civil liberties education and legal defense organization dedicated to preserve religious freedom." (Liberty Counsel 1997) As such, it has become involved in a wide array of cases and disputes, ranging from abortion protestation to religious discrimination in the workplace. While Staver began the LC with the intention of providing legal support to Pro-Life elements in Florida, he has branched out into other areas, and counts many of the important religious issues of the day among the LC's primary concerns. The LC is most clearly involved in religious liberties cases (public places and public schools) as well as cases involving abortion protestation and rights. A new and expanding area of concern to the LC's supporters is the Gay Rights issue. The LC is currently moderating or litigating several important gay rights disputes. Below, I outline the LC's litigation agenda. I provide a general summary of its litigation-related activities and emphases and an overview of its approach to litigation. Further, I explore specific cases that provide examples of the LC's influence on policy through litigation.

The LC's general approach to litigation is to avoid entering the courts where possible. The primary reasons for it to avoid litigating disputes are twofold - the LC exercises care in selecting cases it will bring up through the courts, and it prefers to use education as a tool to identify and target institutions particularly resistant to respecting religious liberty. As noted above, the LC does not actively pursue litigation in cases it knows it can settle through mediation and education. However, while the LC cites education as one of its primary goals, Staver also employs it as a means for identifying
those parties that require a more combative approach. Stanley noted that in recent months the LC has encountered more resistance to its effort to mediate disputes, particularly from public schools. Counsel for public schools have been active in exploiting the information the LC provides by using that information in legal pleadings to counter LC arguments. Such subterfuge has convinced the LC to pursue its goal of education in initial attempts at dispute resolution, but to move toward litigation more quickly where parties demonstrate little desire for a negotiated settlement. Still, Stanley notes education and mediation remain the initial method for dealing with conflict. (Stanley, 1999) Thus, the LC does not differ significantly from other groups in this study that also identify mediation, or “staying out of court” as a much preferred method for solving disputes.

This approach works in favor of the LC given its limited resource base. The LC is a litigation-driven organization with a limited capacity to pursue that litigation. While its agenda spans a number of issue areas, its relative lack of resources and the desire to foster legal precedent favorable to religious liberties have encouraged Staver to exercise care when selecting cases to litigate.

No matter how big you get you have to limit some of the cases you take. Because you can’t simply take everything, nor do you want to take everything, especially things that just simply shouldn’t be in court. There are the cases that you may want to take, but because of resources . . . you are unable to take them. The Rutherford Institute has a motto that they take anything. Well, the ACLJ doesn’t take anything, nor do we take anything and we don’t intend to. If you take everything you’re going to make bad precedent. You’ve got to select the cases that are going to make the good precedent.

While the LC settles the vast majority of the disputes brought to it by its supporters before they reach the courts, Staver scans these potential cases for those that are best
suited to achieving the LC’s goals for effecting policy change. Staver described what he looks for when selecting a case from the pool of disputes that are brought to the LC.

By and large what we do is look for a situation that has good facts, that would either reaffirm existing law, would clarify or push the envelope on law to expand some area of liberty. And we look at the fact pattern. It’s hard to explain what that would involve but we look for something that would develop good clean facts where the issues can be presented. For example, there are certain things you would like the Supreme Court to clarify.

Thus, it appears that the LC exercises considerable care when selecting cases to litigate. This care is the product of its commitment to the goal of establishing favorable precedent, and the extraordinary limitations placed on the organization by its relative lack of resources. The LC has neither the time nor the resources to devote to cases with anything less than case facts unclouded by extraneous factors and clear legal arguments.

While resource limitations have an influence on the cases the LC pursues, its mission precludes it from pursuing litigation in other kinds of disputes brought to it by supporters. Arfaras-Kerr noted that individuals involved in divorce proceedings or child custody battles now regularly bring family law disputes to the attention of the LC. Religious concerns are tangentially a part of these proceedings. Yet, domestic law disputes are outside of the LC’s mission, and it cannot afford to move into an area not involving First Amendment claims.

[S]omeone needs to take these cases. where people are in custody disputes. It involves domestic law, and it is not within the purview of what we do. But, someone needs to do these things. Someone should form an organization to help them. So, we generally refer these cases to other attorneys. (Arfaras-Kerr 1998)
The LC's litigation agenda bears certain characteristics that distinguish it as a litigating group. Like the ACLJ (and unlike the AFALC), the LC's litigation agenda is an accurate reflection of its entire body of work. The LC pursues no public policy initiatives outside of litigating in the courts or mediating legal disputes. Municipalities do not regularly consult the LC concerning public policy initiatives, nor does the LC assist in drafting those initiatives. However, it does work to support policies of government at any level that affirms a religious liberties position when those governments are threatened with litigation.

The LC has intervened at times on behalf of a government threatened with litigation. Examples of such intervention abound. In 1997, the LC agreed to advise the Ozaukee (Florida) County Board on the legality of its official Good Friday holiday, and represented it free of charge in a suit brought by Freedom From Religion Foundation. That same year, Staver join Florida Attorney General Robert Butterworth in defending the Women’s Right To Know Act, the Florida abortion consent law. The LC filed a Motion for Intervention on behalf of two women, a Christian pregnancy care center and a fictitious Jane Doe representing the women of the State of Florida. Most recently, in 1999, the LC represented the city of Marshfield, Wisconsin in a suit brought by the Freedom From Religion Foundation. The city maintained a public park on which stood a statue of Christ. The statue had been donated to the city 40 years previous to the filing. After the LC intervened, the city deeded the public property to a private group that has agreed to maintain the statue for a period of time. At trial, the LC obtained a Summary Judgment in favor of the city, and the Association appealed to the 7th federal Circuit.
Stanley notes that this case, depending of course on the reasoning of the court of appeals, represents a significant threat to religion in public places and may involve an appeal to the Supreme Court. Thus, the LC has participated in some significant litigation in which it attempted to assert itself on behalf of government in ways that the ACLJ and AFA do not often attempt.

5.6.2 Equal Access in Public Schools

Like the ACLJ, the LC is deeply involved in litigation involving free expression of religious views in public schools. As stated above, Staver did not begin the LC with the intent to act on behalf of students attempting to represent their religious views in the context of public schools. However, he has been called on time and again to defend students holding religious views and Christian students in particular, from actions by school administrators deemed to adversely effect free expression. Arfaras-Kerr noted that equal access cases involving public school students are very common and find their way onto the LC's agenda with regularity. Ironically, in its most promising case in this policy area to date, the LC has intervened on behalf of public schools students and in support of a school board policy. This case is discussed below.

The LC has litigated several recent cases that have the potential to result in Supreme Court review. The most prominent of these is Adler v. Duvall County School District II (1999), a case that has experienced a multitude of procedural twists and turns. This case, like the first Adler case that was dismissed for mootness, involves a dispute
over the graduation message policy of the Duval County School Board. The Board initiated a policy allowing graduating seniors to vote to have a two-minute pre- or post-graduation message, and to select a member from their own graduating class to deliver that message. The school board agreed not to censor that message, regardless of its sacred or secular content. The ACLU, representing a student who objected to the potential religious content of the class message, sued the School Board on grounds that the policy violated the First Amendment prohibition of state sponsorship of religion.

In both Adler cases, the ACLU argued that the graduating senior delivering the message was acting as an agent of the state, that the School Board should only censor the religious content of such a message, and that religious leaders should be excluded from delivering graduation messages. When queried by the trial judge, the ACLU applied its rationale to exclude religious leaders such as Billy Graham and Jerry Falwell because, based on their occupations, they were likely to say something religious. On the other hand, they ACLU would permit the school board to invite Jane Fonda (the example supplied by the judge) because “it is likely Jane Fonda would not say something religious.” (Liberty Counsel, 1999)

The LC intervened on behalf of the students of Duval County, participated in both Adler cases, and prevailed at every stage, until May 1999. On appeal, a three judge panel of the 11th Circuit overturned the trial court’s decision, declaring the policy unconstitutional on grounds that students participating in the graduation ceremony and delivering the disputed message acted as agents of the state. Any religious content to the message would violate the First Amendment’s prohibition against state sponsorship of
religion. Shortly thereafter, the 11th Circuit overturned this decision and agreed to a
rehearing _en banc._

As of this date, the decision of the court on rehearing has not been released. However, Staver noted that regardless of the court's decision, whichever party loses _Adler_ will appeal to the Supreme Court. _Adler_ is the logical next step in testing the bounds of student religious expression in public schools after the Court's decisions in _Lee v. Weisman_ and _Westside Community Schools v. Mergens_. In _Weisman_ the Court struck down a policy allowing school officials to offer prayer at school sponsored activities. However, the Court in _Mergens_ refused to distinguished student-led religious organizations as state sponsorship of religion. The question presented in _Adler_ represents a concern the Supreme Court has not addressed in the collision between these two kinds of student participation.

As Staver notes above, he would like to see the Court clarify the legality of student-initiated religious messages, and _Adler_ appears to present the purest factual situation among those cases presently in the courts. Although the LC is participating as intervenor in this case on behalf of the respondent-appellees and not those bringing the suit. Staver has been particularly aggressive in shepherding _Adler_ through the courts and managing the lower court record. Among the four cases involving student initiated graduation messages presently before various federal courts of appeal, the _Adler_ cases have been in the courts the longest. Furthermore, the school board's policy is unencumbered by extraneous legal concerns and presents the court with a clear legal dispute. There is a minimum of involvement by school officials in the process of
selecting and presenting the message. School officials do not review or censor the message before it is presented, and there are no content restrictions of any kind placed on the student selected to present. As presented in this case, the policy represents a pure form of neutrality on the part of a school board toward the presentation of a potentially religious message. The neutrality of the policy is exactly the element that Staver values most in *Adler* as a test case. Thus, regardless of outcome, Staver has an interest in seeing *Adler* accepted for review by the Supreme Court.

Another example of LC litigation in the policy area of religion and public schooling is a highly publicized case involving a student-led Christian club. This case has brought the LC into conflict with school districts in Florida and around the country. Early in 1999, Staver began a campaign aimed at school districts that refused to knuckle under after repeated attempts to mediate disputes over equal access for Christian clubs. In January 1999, the LC was joined by the Florida ACLU in bringing a lawsuit against the Manatee School District under the Equal Access Act of 1984. The school district refused to allow a Christian student-led club to meet on school grounds and utilize other school resources available to other student-led clubs. Staver filed the lawsuit and called a press conference in Tallahassee. In a statement widely reported in the press, he blasted the school district, and put others on notice that the LC was planning much more aggressive litigation. "This is the first in a series of lawsuits that we’ll be doing around the state of Florida and the Country," said Staver. "If you have one student club on campus, you must treat all student groups equally. Schools do not have the right to
restrict clubs because of their message or content. They are not trying to disrupt the school. They are just trying to meet.” (Hauserman, 1999)

Staver followed up with a press release entitled “Florida High School, School Board and Principal Sued for Discrimination against Christian Student Club; Liberty Counsel States, ‘All Schools Are On Notice.’” In it, Staver is quoted as saying

We have run out of patience with schools refusing to comply with the law on this issue . . . For years, when we were contacted about Equal Access issues we would contact school personnel, give them the benefit of the doubt, and offer to resolve the situation short of litigation. Those days are gone . . . we will no longer hesitate to file suit when violations arise. This suit marks the beginning of a national campaign by Liberty Counsel to ensure public schools abide by the Equal Access Act.

The school district settled with the LC in April 1999 and has now revised its policy on equal access.

The LC continues to pursue its campaign to litigate against public schools that are slow to respond to equal access demands. Many of these cases are settled out of court, but others make their way onto the LC’s litigation agenda. These include some egregious examples of Equal Access Act violations. Cases like Hall v. Seminole County School Board34, and the Hinderly case currently in Ohio federal district court35 are part of the LC’s current campaign. Clearly, the LC is targeting the worst offenders. Yet, these cases are what Arfaras-Kerr refers to as mopping-up operations. The policy in the area of equal access for student-led religious clubs is fairly settled. The LC is litigating

34 This case was brought by the LC on behalf of a student-led Christian group excluded from school-wide diversity celebrations.

35 A case filed by the LC under the Protection of Pupil Rights Act. It challenges the use of student questionnaires on hot button issues from sexuality to racism without parental consent or consultation.
to achieve compliance with the law by school districts, and is not aiming to innovate new policy concerns. However, these cases remain a significant part of the LC’s mission.

5.6.3 Equal Access in Public Places

As the case involving Manatee High School was winding down, Staver’s erstwhile comrades, the Florida ACLU, filed suit in federal court against the same school district in an attempt to evict churches that rented school buildings for Sunday worship services. The LC intervened on behalf of the approximately ten churches that rent facilities from Manatee County School District. This case emphasizes the impermanence of the LC’s place in coalitions with organizations outside the Religious Right. Furthermore, it points to the LC’s commitment to promote equal access in public places. Staver’s first case, as a third-year law student, involved a dispute over display of a religious symbol in public, and the LC continues to take cases involving expression in public places.

The LC has represented Jews For Jesus in disputes over literature distribution in a variety of cases. Notably, the LC has litigated disputes over distribution at Florida airports, including Tampa International Airport in 1995. (Jews For Jesus v. Hillsborough County Aviation Authority 1995) The Aviation Authority had banned any and all distribution of pamphlets by groups seeking to proselytize. This dispute garnered some publicity for the LC, and Staver was quoted as saying “This one here is pretty
elementary. Tampa simply can’t do what they’re doing.” (Vielmetti 1995) As in similar suits against the Fort Lauderdale and Orlando airports, the LC prevailed and obtained compensation for legal costs. In 1998, the LC filed suit against the National Football League on behalf of Jews For Jesus. The League had restricted movement of Jews For Jesus and other groups around the site of Super Bowl XXXII in the City of San Diego. (Alvord 1998) Invoking a clause included in the City’s contract, the NFL restricted non-ticket holders to a small area on one side of the stadium. After filing an emergency motion to enjoin the city from restricting free speech activities, the LC forced the city and the NFL to set up free speech zones that allowed more effective access to ticket holders.

Perhaps the most celebrated Equal Access in Public Places case brought by the LC is Christ’s Bride Ministries v Southern Pennsylvania Transit Authority. The case blurs the lines distinguishing abortion policy and equal access in public places. Here, a Christian Pro-Life organization purchased advertising from the transit system. Its ads noted a recent medical study establishing a link between abortion procedures and breast cancer, and were placed on the sides of city buses. After fielding a large numbers of complaints from the public and Pro-Choice groups, the city removed the signs from its buses. The LC filed suit in federal district court alleging that the city violated the right to free expression by censoring the content of the advertisement. The district court ruled in favor of the transit authority, and the LC appealed. In 1998, the 3rd Circuit Court of Appeal ruled in favor of Christ’s Bride Ministries, stating that the transit authority had allowed pro-abortion speech to be displayed in ads placed on its buses. Thus, the actions
of the transit authority constituted viewpoint discrimination. The city appealed to the Supreme Court, but its petition for certiorari review was denied. In mediation, the transit authority agreed to reimburse Christ’s Bride Ministries for all legal costs and place the ads back on city buses.

5.6.4 Abortion Rights & Protestation

While Staver’s initial vision for the LC revolved around litigation in the area of abortion rights, LC activity in other areas have eclipsed abortion policy litigation in importance on the its overall agenda. However, the LC continues to litigate abortion rights and protestation cases, and remains involved in supporting governmental policy making in the area. Significantly, when asked to point out the single case that defined the LC, both Staver and Arfaras-Kerr noted Staver’s participation in Madsen v. Women’s Health Clinic as a pivotal case for the LC. Abortion policy, then, is a significant component of the LC’s litigation agenda. Below, I describe the impact of the LC in this policy area, and note significant cases it has litigated.

The LC has a long history of interest and impact in the area of abortion. However, while the LC has defended abortion picketers since the late 1980s, it did not go to court in an effort to shape abortion policy until 1993. In that year, as a result of an injunction issued by a Florida Circuit Court judge, Staver launched challenges to such restraints in both state and federal court. In Operation Rescue v. Women’s Health Center (1993), Staver asked the Florida Supreme Court to overturn the ruling of Florida Circuit Judge
Robert McGregor. McGregor had issued an order restraining abortion protesters from coming with 36 feet of abortion clinics in the counties of Brevard and Seminole. Thus began the long involvement of the LC in the case that ultimately became *Madsen v. Women’s Health Clinic* (1994). In federal court, Staver filed suit against McGregor, challenging the same injunction as a violation of the First Amendment’s Free Speech clause. (*Cheffer v. McGregor* 1993) Staver’s tactic of filing in state and federal court paid off when the 11th Circuit Court of Appeals struck down the use of buffer zones as an unconstitutional abridgement of free expression, while the Florida Supreme Court sustained the injunction. As a result of the inconsistency across jurisdictions, the Supreme Court consolidated these cases and accepted Staver’s petition for certiorari review from the Florida Supreme Court. (*Madsen v. Women’s Health Clinic* 1994)

In oral argument, Staver adopted the position that limitations on the activities of Pro-Life protesters based on a perceived governmental interest are inconsistent with the First Amendment’s guarantee of freedom of speech. The Court dispensed with Staver’s argument that the injunction censored anti-abortion speech and not criminal activity, deferring to the findings of the state court that activity around the clinics demanded many (but not all) of the limitations imposed. The Court’s decision turned on the nature of an injunction and how narrowly the state judge tailored provisions of the injunction at issue to achieve governmental objectives, rather than free expression concerns.

Interestingly, Staver’s client, Judy Madsen, had never appeared on an anti-abortion picket line at the clinics in question. However, as Staver noted, if she did happen
to appear after this decision, her speech would be curtailed under the provisions of the injunction upheld by the Court. While Staver did win on several points (the consent provision for personal interaction, the image-observable provision and the restrictions on picketing around workers homes were all struck down as overreaching legitimate governmental objectives), the overall result of Madsen was seen as damaging to the Pro-Life position. Furthermore, the Madsen case is still in the courts on remand from the Supreme Court. Revisions to the injunction consistent with the Madsen decision are ongoing.

In spite of the loss in Madsen, the LC has been extraordinarily successful in defending Pro-Life organizations in the courts. Staver’s efforts have been in defense of protesters arrested under court-ordered injunctions, as well as challenging municipalities that sought to limit protest through licensing and other bureaucratic means. Other cases have involved related issues. For example, in 1996 the LC represented a Pro-Life organization in a dispute with the Florida Health and Rehabilitation Services Department. (True Life Centers v. HRS 1996) The Department had issued a ruling prohibiting pro-life groups from engaging in adoption counseling. Staver garnered a victory in federal court, and full reimbursement of his $105,000 legal fees from the state. (Long 1996) Thus.

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These interests were defined as stopping violent protest, protecting access of clients to clinics and the health of those persons using abortion facilities.
while the LC does not litigate as much in the area of abortion policy, it has handled significant cases and achieved major victories for the Pro-Life movement in the Southeast.

5.6.5 Emerging Issue Areas: Gay Rights & Religion in the Workplace

As noted above, the LC is responsive to the issues brought to them by supporters, and has added issues to its list of policy concerns when the interests of religious rights and free expression demand. Both Arifas-Kerr and Staver note the emergence of gay rights and religion in the workplace issues on the LC's agenda. These two new areas of conflict over religious rights are not as fully developed as the core areas of LC policy influence. Yet, the increasing number of instances in which the LC has become involved in efforts to resolve disputes warrants some interest. Below, I attempt to outline the policy concerns of the LC regarding these two issue areas, and explore a few instances of conflict in which the LC has become involved.

Gay rights policies that create conflicts with Christian groups, as well as rank-and-file sentiment, involve three related issues—partner health insurance ordinances like the one passed by the City of Gainesville, anti-discrimination ordinances and mandatory on-the-job sensitivity training. Anti-discrimination ordinances directed at businesses and public institutions contain a latent threat of criminal penalties for churches and private individuals that discriminate against gays based on personal moral concerns over homosexuality. One of the most significant disputes in the area of gay rights currently on
the LC’s agenda involves an anti-discrimination ordinance put into effect in Dade County. Arfaras-Kerr commented on the significance of the dispute and the LC’s involvement.

We just became involved last week with challenging the Dade County discrimination ordinance. We have been approached about what kind of response we should make. The challenge may go to litigation, but we try to work through the system in other ways – referendums, etc. Those tactics usually work because average citizens are against such ordinances. There is a possibility of taking Dade County to court because the ordinances contains no provision protecting individuals. It exempts religious organizations, but it doesn’t religious individuals. So, if you are a private citizen, and you don’t want to rent your apartment to individuals, gay couples, couples living together, you do not have that option. You have no protection under those circumstances [in Dade County].

Thus, the primary concern among Religious Right groups is not that such ordinances perpetuate a social harm through the legitimization of homosexual conduct (which, of course, is also their concern). Such groups and the individuals that support them are mainly concerned that those who dissent for reasons of moral conviction may find themselves punished under the law. Arfaras-Kerr commented on that possibility under the Dade County ordinance.

There is a lot of unhappiness and concern about its effect on individuals, because Dade County is such a tolerant and progressive place. There is a Gay Chamber of Commerce there. There is not much discrimination. There is a fear that the ordinance will be used as a weapon against the ideological opponents of some more radical gay activists, as they have done in California and New Jersey in the Boy scout cases. (Arfaras-Kerr, 1998)

Gay rights issues also crop up in religion in the workplace disputes through mandatory sensitivity training or diversity training seminars put into place by employers. The Equal Employment Opportunity Commission (EEOC), rather than federal or state courts, adjudicate these cases, and the LC has been involved in such disputes, most
notably a claim of religious discrimination brought against Wal-Mart that was ultimately settled after the EEOC filed suit in federal court. However, the LC has also become involved in or commented publicly on cases of religious discrimination in the workplace. Staver has drawn attention to the issue through comments made in the press that "religious discrimination is the forgotten discrimination . . . often overlooked in the workplace." (Jacobs 1995)

Furthermore, as a highly sought-after Workers' Compensation attorney, Staver has been called on to explain workplace issues. His comments on EEOC requirements for "reasonable accommodation" of religious beliefs, while not creating an "undue hardship" for a company, explore employer and employee responsibilities. Noting that "one thing we've learned from the [disabilities law] is that other employees' perception is not the basis of [what determines] undue hardship," he distinguished deference to religious practice from proselytizing on the job. "Employees do not have any more right not to do their work because of religious [preaching] than do others because of gossiping. If it creates a disturbance, then it's harassment, and, in this case, employee reaction may be the basis for not accommodating." (Pouliot 1996) Ultimately, the LC sees workplace issues becoming more important as a part of their agenda in keeping with the national trend of increasing religious discrimination charges made by workers to state and federal agencies. (Pouliot 1996)
5.6.6 Frequency of Resort to the Courts

Table 5.2 displays the extent of LC litigation involvement defined here as frequency of group participation in litigation. Column totals for this table represent the raw amount of litigation conducted by the LC in each year. Raw amount of litigation refers to the number of instances that the LC was involved in litigation without regard to jurisdiction, issue area or type of participation. The data show the same lack of a clear pattern or trend demonstrated when examining the LC’s resource growth in Table 5.1. However, several observations can be made. First, although the LC has existed since 1989, Staver did not begin to implement his litigation agenda in earnest until the 1993 term. It was during that term that the LC filed the lawsuits in both state and federal court that ultimately converged on the Supreme Court as *Madsen v. Women’s Health Clinic* in 1994. Of the nine cases in which the LC participated during that term, five of them were part of the challenge to the injunction issued by the Florida Circuit Court against Operation Rescue and Judy Madsen.

Second, in 1995 (the term following its participation in *Madsen v. Women’s Health Clinic*), the LC’s litigation activity increased significantly, mirroring the increase in revenue experienced by the LC in 1994. Thus, there was a quite normal one-term lag from the time that the LC acquired significantly more resources to the time that it brought those resources to bear in the form of an expanded litigation agenda. In the analysis below, I explore this initial enlargement of the LC’s agenda – did any changes occur in kinds of cases in which the LC participated in 1995, or in the form its participation took?
It appears that the data for the 1995 provide an important test for central expectations of this research.

Additionally, the column totals for Table 5.2 display instances of LC litigation by jurisdiction. Staver’s interest in influencing policy on a national scale is borne out by the data. The 46 instances of LC litigation participation include 40 cases filed in federal courts. However, the LC has been unable to overcome the bottleneck presented by Federal Courts of Appeal. In three instances, the Supreme Court rejected the LC’s petition for certiorari review. Additionally, in a fourth instance, the LC opposed a grant of certiorari review. All of these cert denials occurred after the landmark Madsen v. Women’s Health Clinic (1994). Clearly, Staver and the LC have made a commitment to provide federal courts with arguments supporting the policy positions of the Religious Right, and that commitment is supported by a desire to influence policy of national scope. However, the LC is plainly working toward achieving that goal, but has not realized it yet.

5.6.7 The LC’s Litigation Participation

Tables 5.3 displays litigation conducted by the LC according to year of participation and type. Here, I examine category totals for type of participation, trends in type of participation over time, and other characteristics of LC litigation involvement. As the column totals of Table 5.3 show, the overwhelming preference of the LC in litigation participation

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participation is case sponsorship. The organization served as case sponsor in close to 90% of the 46 recorded instances of LC litigation participation. Instances of participation as Counsel on Brief or Amicus curiae account for just over 10% of all participation. An examination of instances of case sponsorship by year reveals that, beyond the expansion of the LC's litigation agenda in 1995, there is no clear trend of increasing use of case sponsorship. Rather, levels of sponsorship decline significantly after 1995. Turning briefly to Table 5.4, an examination of row totals for instances of case sponsorship reveal that the large bulk of these occur in cases filed in federal court - 1 being a Supreme Court case, 12 cases in Courts of Appeal, and 24 in District Courts. These data support the finding that the LC's mission is clearly to effect court-crafted policy at the national level, but this mission has not been fully developed or pursued in the courts.

A closer examination of instances of LC case sponsorship will assist in uncovering variations in the LC's use of its newly acquired resources through the expansion of its litigation agenda after the 1994 term. Table 5.3 reveals that all 15 instances of litigation participation during the 1995 term involved case sponsorship. Furthermore, this was not a significant departure for the LC in type of litigation participation -- the LC had participated exclusively as case sponsor in the 1993 and 1994 terms, before the acquisition of significant monetary contributions from supporters. While resources appear to influence the amount of litigation taken on by the LC, the acquisition of greater resources does not appear to influence the type of LC litigation participation. It is important to note that the LC's monetary resources have not stabilized over time, and in fact are currently in flux. This lack of resource stability is revealed in
the lack of an upward or stable trend in litigation participation by the LC after 1995. In fact, litigation participation declines significantly after 1995, even while the LC’s overall emphasis on case sponsorship remained consistent.

5.6.8 Trends in Participation Across Issue Areas

Tables 5.4. and 5.5 examine LC participation by separating instances of litigation participation into issue area categories. Once again, categories developed in previous chapters map onto the cases involving LC participation quite well. They are largely employed in this chapter, with only a few revisions. There are no recorded instances of LC participation in bankruptcy proceedings or cases involving sexual orientation (although, as noted above, the LC is close to litigating several disputes in this issue area). Furthermore, LC staff attorney, Nicole Arfaras-Kerr, noted that matters of family policy fall largely outside the mission of the LC. These three categories have been removed from consideration. Each represents a null category for the LC.

Throughout the discussion of Tables 5.4 and 5.5, I examine category (column) totals, trends in issue participation over time and across jurisdictions, as well as other characteristics of LC issue involvement. Table 5.5 reveals issue participation over time. Column totals provide a glimpse of where the LC chooses to invest its time, resources and energy. The data support the finding (discussed above) that the LC, while initially established to support Pro-Life groups, has branched into other issues areas. Moreover, the Church/State issue areas appear to have overwhelmed abortion as an organizational
emphasis. Church/State: Public Schools and Church/State: Public Places represent the top two column totals respectively, while sixty-three percent of all LC cases involved disputes in those issue areas. Abortion disputes made up only 33% of all LC litigation participation. This disparity becomes greater when one considers that of the eleven Abortion: Protest disputes litigated by the LC, 5 of these were related to the same case, either across jurisdictions or appeals of the cases that ultimately culminated in Madsen v. Women's Health Clinic (1994).

Staver and Arfaras-Kerr do not downplay the importance of Church State-related disputes on the agenda of the LC. The organization is aware that its issue emphases shifted relatively early in its existence. Finally, Church State disputes, particularly regarding Public Schools, remain a consistent fixture on the LC’s agenda over time. The majority of LC Abortion litigation occurred between the years of 1993 and 1996. Thus, the LC is an organization that has consistently invested its time and resources in Church/State disputes, allowing it to refine its Free Expression approach to Church State litigation over time. Abortion served to establish the early reputation of the LC as a leading litigating organization for the Religious Right, and faded in importance as abortion became less significant to its supporters and in the social milieu.

The discussion above attempts to provide a more precise examination of the raw amount of LC litigation over time, broken out by type of participation. Table 3.4 provides a more complete sense of the significance of each issue category in light of jurisdiction and type of participation. Table 5.4 examines only instances of LC litigation in federal courts. LC federal court participation accounts for the vast majority of all LC litigation.
participation (as noted above). This table allows for the comparison of the significance of issue areas and participation type across federal jurisdiction.

Comparison of row totals (i.e., participation type) across jurisdictions demonstrates that (naturally) case sponsorship is the LC’s preferred method of participation. To put a finer point on this finding, the LC participated as amicus in only one case outside of its Supreme Court participation and not at all as Counsel on Brief. Plainly, the LC does not countenance alternative modes of participation in lower courts and largely participates in an intermediate role to express its views to the Supreme Court. When comparing LC participation in federal district courts and federal courts of appeal, one finds that trends revealed in Table 5.5 continue here with only minor differences.

While the analysis of Table 5.5 showed that the LC emphasized Church State issue areas and the Public Schools issue in particular, Table 5.4 reveals a slightly different picture. In Church State disputes, the LC actually participates at the trial stage more often in cases involving disputes over religion in public places than in those involving public schools. However, at the appellate level, this emphasis is reversed. Almost one-half of all LC participation in Courts of Appeal litigation is in the area of Church State: Public Schools. Moreover, in four of the five instances of appellate participation as case sponsor in that issue area, the LC had participated at the trial-level, either appealing the federal district court decision, or defending its victory at the trial-level. Thus, despite slightly more participation in Church/State: Public Places litigation at the trial-level, the LC is deeply committed to influencing policy on religious expression in public schools.
5.6.9 Deep Influences on Equal Access

The above analysis reveals that the LC's litigation participation is directed primarily at federal courts. Moreover, the analysis illuminates trends in LC litigation participation and issue area emphases across jurisdictions. In exploring these trends, the analysis touched on the scope of LC litigation participation, noting that the LC is deeply committed to influencing policy in the Church/State: Public Schools issue area through participation across federal jurisdictions. Table 5.6 attempts to treat scope of litigation participation in a systematic fashion, exploring the depth of LC participation in federal and state courts. While the LC's emphasis on case sponsorship indicates that it might emphasize depth of involvement, an examination of LC continuing participation across jurisdictional levels will reveal how deeply the LC hopes to effect court-crafted policy.

The LC's commitment to depth of litigation participation is noteworthy. Of the 46 instances of LC litigation participation examined, twenty-two, or 48%, were part of continuing participation across jurisdictional levels. These 22 instances are examined in Table 3.6. They represent LC participation at different jurisdictional levels in nine separate cases. Of these nine cases, the LC participated in two that moved from a state or federal trial court to the Supreme Court. Five of the 9 cases ended in a U.S. Court of Appeal after the LC participated at the trial- and appellate-levels. In two of these 5

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58 They were both consolidated into the same case. Madsen v. Women's Health Clinic. See discussion of LC participation in that case, above.

cases the Supreme Court denied certiorari review. One other case will most likely involve a petition to the Supreme Court for certiorari review. One case ended in a state appellate court after LC participation at both the trial- and appellate-levels. Finally one case involved a multiple appearance before a federal court of appeal.

These data reflect the formative stage of the LC’s litigation agenda - it has made a strong commitment to deep policy influence, and has worked to effect national policy. However, its goals have yet to be fully implemented in the form of its litigation agenda. For example, while Staver exercises great care in selecting appropriate cases with good case facts and clients willing to sustain litigation through the appeals process, the LC has been relatively unsuccessful in bringing its most important cases to the Supreme Court. Instead, the LC’s policy influence has been limited largely to federal circuit and state court decisions. On the other hand, the LC demonstrates a strong commitment, not simply to litigation, but to sustained litigation efforts through its participation in the appellate process. This participation demonstrates the LC’s potential for exerting a lasting impact on policy formulation.

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42 Jews for Jesus v. Hillsborough County Aviation Authority (1995)
5.7 Conclusion: The Liberty Counsel Grows into its Future

This study puts forward two expectations for interest group behavior based on the formulation of initial organizational goals and the development of organizational resources over time. The data analyzed in this chapter provide an initial test for these expectations. This section is dedicated to drawing some conclusions about the effectiveness of those expectations for explaining organizational behavior from observations of the LC's organizational life and development. Generally, the discussion of LC goals, resources and behavior provide at least minimal support for these two central expectations.

The first expectation relates resources to behavior, stating that changes in litigation behavior are produced by changes in resource levels and stability. As resources increase, the raw number of times a group resorts to litigation will increase. In the instant case study, the LC's resources have not achieved stability, nor has there been a trend toward increasing resources over time. However, in the one instance that resources increased significantly, there was a substantial increase in the raw amount of litigation participation by the LC. Overall, the instability of the LC's resource base appears to have produced instability in the amount of litigation the LC pursues, providing a kind of support to this central expectation. Resource levels and stability appear to be related to litigation participation trends. Furthermore, Staver provided support for the notion that increasing and stable resources will allow him to expand the litigation participation of the LC, producing the relationship hypothesized to exist between resources and litigation participation.
The second expectation for group behavior relates group goals to a group’s litigation agenda. It posits that as resources increase, the type of litigation participation a group pursues will remain consistent with its overall goals. The group may develop a concern with other related issue areas, but the core of its litigation agenda will remain focused on achieving its established goals and objectives. The discussion of the LC's goals reveals that it has firm objectives for influencing court-crafted policy and building up precedent favorable to its position. The LC is dedicated to the twin goals of education and influencing policy outcomes through litigation. Its primary method for achieving this last goal has been case sponsorship, a behavior associated with an organizational goal to impact policy deeply. Here, there is support for this expectation. Despite fluctuations and instability in its limited resource base, the LC has remained committed to case sponsorship as a method of litigation participation.

Furthermore, the LC has an established pattern of shepherding cases through the courts, participating in a case from its inception through to its final disposition before a court of last resort or denial of review by a higher court. Its commitment to deep litigation involvement to achieve a lasting effect on policy has remained consistent, if not fully realized through its litigation agenda, and it has remained focused on its goal of representing the Religious Right in the courts. Overall, this examination of the LC provides some support for the central expectations of the study.
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**Table 5.1: LC Resource Growth over Time**

Source: IRS Form 990 for tax years 1994-1998, provided by The Liberty Counsel, Inc.
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Table 5.2: LC Litigation by Year and Jurisdiction

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SSC: State Supreme Court
USCA: United States Court of Appeal
USDC: United States District Court
SCA: State Court of Appeals
SCO: State Court of Origin
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**Table 5.3: LC Litigation by year and Type**

Source: Searches conducted on the Lexis Nexis database
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Table 5.4: LC Federal Court Participation by Type and Issue Area (continued)
Table 5.4, Continued: 1.C Federal Court Participation by Type and Issue Area

Source: Searches conducted on the Lexis/Nexis database

Coding Rules:

Sponsorship: Name of ACLU or attorney employed by the ACLU listed as Attorney of Record within the published court opinion

Counsel on Brief: Name of ACLU or attorney employed by the ACLU listed as On Brief within the published court opinion

Amicus curiae: Name of ACLU or attorney employed by the ACLU listed as amicus, or preparer of amicus brief (e.g., for another organization) within the published court opinion

<p>| Table 5.4, Continued: 1.C Federal Court Participation by Type and Issue Area |
| Source: Searches conducted on the Lexis/Nexis database |
| Coding Rules: |
| Sponsorship: Name of ACLU or attorney employed by the ACLU listed as Attorney of Record within the published court opinion |
| Counsel on Brief: Name of ACLU or attorney employed by the ACLU listed as On Brief within the published court opinion |
| Amicus curiae: Name of ACLU or attorney employed by the ACLU listed as amicus, or preparer of amicus brief (e.g., for another organization) within the published court opinion |</p>
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**Table 5.5: LC Participation by Year and Issue Area**

Source: Searches conducted on the Lexis/Nexis database
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**Table 5.6: LC Participation Across Jurisdictions by Year and Jurisdiction**

*Source: Searches conducted on the Lexis Nexis database*
6.1 Introduction

In this chapter, I make general comparisons among The American Center for Law and Justice, the American Family Association – Center for Law and Policy and the Liberty Counsel. These comparisons are based on variables developed in previous chapters, and include evaluating differences in group goals, resources and litigation behavior. Further, I address the impact of goal selection and resource acquisition on the litigation behavior of each group. Thus, I seek to uncover differences in behavioral emphases among the groups, and to explore the relative influences of goals and resources on those behavioral choices. I accomplish these aims by using the expectations developed in Chapter 2 to analyze and compare group behavior. These expectations suggest that group goals determine how deeply a group will become involved in litigation. Using the typology of litigation behavior (which categorizes behavioral options based on the concept of depth) I make associations between stated goals and patterns of involvement in litigation, and compare these associations across groups.
Because of minimal variation in the goals of the groups, this analysis will not provide a complete test of the expectations. However, it makes several important contributions despite its limitations. First, comparison of standard-bearing groups within the Religious Right will enrich our knowledge of conservative Christian litigating interests. Second, although there is little variation in group goals, these three groups have taken divergent approaches to litigation that are not explained by (indeed, are counter-factual to) conventional definitions of resource variations and group goals. Thus, in later stages of this chapter, I explore instances of variation in group litigation behavior where conventional wisdom on interest group litigation suggests that there should be none.

In identifying this unexpected pattern, I offer an explanation for the puzzle of Christian litigation behavior. That explanation lies in the distinction between “principled” and “pragmatic” orientations of interest group elites to policy influence. A pragmatic orientation to policy influence is characterized by willingness to depart from religious-ideological principles and play by the rules of policy-makers in the courts. In contrast, a principled orientation is characterized by a distinct lack of such willingness. The distinction between these two policy orientations is important for understanding conservative Christian litigation behavior, but it also has theoretical implications for the study of interest groups generally. It may help in explaining patterns of behavior in other public interest groups where a divergence in approach to policy influence exists. Thus, I seek to contribute to theory building on the forces that shape the behavior of elite interest group leadership and the behavior of groups in the litigation process. Further, I seek to
enhance what we know about the set of conservative Christian litigators that are playing an increasingly active role in the courts.

This analysis can be divided into two parts. The first half, encompassing sections 6.2 and 6.3, focuses on general comparisons among the groups. The second half, beginning in section 6.4, explores explanations for the unexpected pattern of behavior emerging from the first half of the analysis. In the first half, I begin with a comparison of group goals and resources in section 6.2. Here, I bring together data developed in Chapters 3 through 5 to compare group goals for litigation, and how groups acquire and use resources. Next, I explore the relationships between group goals, resources and behavior by testing expectations set out in Chapter 2. In section 6.3.1. I compare frequency of litigation participation by year, and explore how litigation participation rates have changed as the groups’ resources have waxed and waned. In section 6.3.2, I compare depth of group involvement in litigation, focusing on group emphases among the types of behavioral choices open to them. I conclude the first half of the analysis in section 6.3.3 by addressing the relative influences of resources and goals in determining the behavioral choices of groups. In the second half of the analysis, I examine orientation to policy influence to explain why variation occurs in litigation behavior among groups with similar goals. In section 6.4, I develop the theoretical implications of the new explanation. In section 6.5, I attempt to uncover the role of religious ideological influences within the groups, and the impact of religious ideology on each groups’ orientation to policy influence. In section 6.6, I outline expectations for the impact of policy orientation on group behavior, and explore the behavioral differences in light of
these expectations. Finally, in section 6.7, I investigate how policy orientation may impact another related facet of group litigation behavior, namely the characteristics of the legal arguments they put before courts.

6.2 Comparisons of Group Goals, Resources and Behavior

6.2.1 Comparison of Group Goals

A comparison of the three groups included for analysis reveals that all give primary emphasis to policy influence over any other categories of goals I define. The ACLJ emphasizes policy-oriented goals, while noting that increased reputation is a byproduct of policy influence. It does not emphasize litigation for purposes of developing a reputation as a specialist in First Amendment litigation. However, the ACLJ does enjoy a good reputation as a result of its strong policy-oriented goals, and its success before the Supreme Court. The LC also emphasizes policy-oriented goals, while putting a particular emphasis on educating policy-implementing elites. Like the ACLJ, the LC enjoys a solid reputation as a premier litigator for the Religious Right, but this reputation is incidental to the primary goal of the organization – litigation for policy influence. The AFA-CLP also emphasizes policy-oriented goals, but notes a pronounced interest in increasing its reputation among sister organizations and before courts. The AFA-CLP does not view increased reputation as a byproduct of its litigation efforts, but as a real asset in approaching courts and working with sister organizations. It strives to improve its
standing in the courts and within the movement, and to gain a reputation as a zealous representative of its clients’ interests.

Thus, all three groups single out policy influence as their primary organizational goal. Further, all three identify increased reputation as a secondary goal, with one group placing a decided accent on the importance to reputation for its organizational goals. The similarities in organizational goals and emphases pose difficulties for a full test of the central expectations for this analysis. Admittedly, the lack of variation within this independent variable limits my capacity to provide a complete test of these expectations. However, lack of variation in goal selection among the groups suggests that the litigation emphases of the groups should be relatively similar.

6.2.2 Comparison of Group Resources

In comparing resource acquisitions, I explore differences in monetary resources and numbers of staff attorneys. I develop comparisons by exploring the development of resources over time. Clearly, the ACLJ is the best funded organization of the three, with the AFA-CLP a distant second, and the LC receiving only a minimal level of monetary resources with which to conduct a full litigation agenda. The ACLJ also has the greatest number of staff attorneys, as well as the most developed resource base and strategy for acquiring more money and attorneys. Further, the proportionate growth of the ACLJ’s monetary resources and acquisition of legal talent dwarfs that of the AFA-CLP and the LC.
An exploration of monetary resource levels reveals significant differences among the groups. The ACLJ boasts a $12 million budget. Over its life, its budget has grown significantly, doubling after seven years. Beginning in 1993, the ACLJ’s annual budget of $6 million grew by $2 million each year until reaching a stable $12 million a year in 1997. The organization has begun an active program to recruit large donors and instituted an endowment to secure and stabilize its financial position. In contrast, the AFA-CLP has a significantly smaller budget (approximately one-tenth that of the ACLJ), but has always enjoyed stable monetary resources provided by its parent organization. In this respect, the AFA-CLP has a long history of more financial stability, while the ACLJ has only begun to solidify its financial position in recent years (through establishing its endowment, etc.).

The AFA-CLP’s budget has remained a generous 15% of its parent organization’s own budget. The little direct evidence that documents the AFA-CLP’s budget suggests that it has been growing steadily in proportion to the parent organization’s own financial resource acquisitions. The AFA-CLP appears to have traded decision-making autonomy and control of its litigation agenda for stable financial resources. Further, the AFA-CLP expends little effort to acquire that money. The ACLJ, despite the notion that it has Rev. Pat Robertson to fall back on, raises its money completely independent of its founder’s other enterprises, and must expend its own energy to acquire the $12 million a year that makes up its operating budget.

In contrast to both the AFA and ACLJ, the LC is in a very unstable monetary position. It has been unable to acquire the stable resource base that characterizes the other two organizations. Its yearly budget has fluctuated dramatically, and it has relied on the
private practice of its founder to make up its yearly budgetary shortfalls. Furthermore, it is currently undergoing significant changes in how it acquires resources. Plainly, the LC is attempting to acquire the stable resource base of its counterparts, and Mat Staver is developing the grassroots and foundational support that are consistent with the LC’s significant role as a major public interest law firm for the Religious Right.

Several implications for the study of conservative Christian litigators emerge from this comparative analysis. First, financial stability, perhaps even more than the growth of financial resources, is a concern for these litigating firms. Each has made efforts to stabilize their financial and budgetary pictures by hiring fund-raising and direct mail agencies (or, in the case of the AFA-CLP, relying on a parent organization that uses these fundraising techniques). Second, each has gone about acquiring resources in very different ways. The ACLJ has used its association with Rev. Robertson to leverage its reputation as a top-flight litigation firm into a huge annual budget and stable financial situation. The AFA relies wholly on the financial fortunes of the Wildmon organization. Finally, the LC has taken no clear approach to acquiring financial resources until recently.

Comparative analysis of staff attorney resources shows much the same picture. The ACLJ has acquired a team of litigation specialists over the years, and has developed a procedure for bringing new attorneys into the organization. Reflecting its great monetary resources, the number of ACLJ staff attorneys has more than doubled since its initial move to acquire legal talent in 1993. The number of AFA-CLP attorneys has remained fixed by its parent organization at six attorneys. The LC maintains one staff
attorney besides Staver, but has developed plans to bring more attorneys into the organization as its other resources develop.

6.3 Expectations

6.3.1 Expectation A: Frequency of Litigation Participation

In Section 6.2.2, I discussed the resources of each group in comparative perspective. I determined that financial stability is a significant concern to each organization. Further, I show that the ACLJ and AFA-CLP’s budgets have grown over time. The ACLJ’s budget has grown significantly over time, while the AFA-CLP has experienced steady growth proportionate with its parent organization’s conservative fiscal policies. Finally, the LC has seen only sporadic growth in its budget, and experienced wild swings in the amount of monetary resources it has acquired over time.

Expectation A suggests that growth in resources will translate into growth in frequency of litigation participation. I include this expectation in order to develop a more complete picture of each group’s litigation agenda. Here, I compare changes in litigation rates among the groups for the purpose of understanding how groups utilize their resources over time. Clearly, I would expect the litigation rates of the ACLJ and AFA-CLP to rise over time, while the LC would experience large swings in rates of participation. Table 6.4 examines changes in the frequency of litigation participation among the groups. The table shows the raw frequency of litigation in each term for each group.
Table 6.1 shows a relatively steady increase in the ACLJ’s litigation participation. The group increased its involvement during the early 1990s. Beginning in 1995, its litigation participation leveled off, just as its monetary resources reached a similar plateau. The AFA-CLP’s litigation participation has remained relatively constant, despite a gradual increase in funding by the parent organization. As noted in Chapter 4, in comparison to the other two groups, a much larger amount of the AFA-CLP’s work consists of representation that does not end in litigation. According to the group, the amount of work it does in resolving disputes outside a courtroom has increased significantly. Thus, while its litigation participation has remained steady, the AFA-CLP’s increased resources have been channeled into other kinds of behavior. As predicted, the LC has experienced dramatic swings in the amount of litigation it takes on. No clear pattern of involvement emerges when considering frequency of litigation participation. This finding reflects the generally unstable nature of the LC’s funding and resource base.

6.3.2 Expectations B1-B3: Depth of Litigation Participation

In this section, I consider the concept of depth of litigation participation. I define depth as degree of involvement of a group in litigation. Groups have various behavioral options open to them for participating in litigation (see Chapter 2, Section 2.3.2 where I define a series of behavioral options and a method for classifying behavior according to the concept of depth). Some behavioral options demand considerable involvement from a group. For example, to sponsor a case, a group must invest a considerable amount of time
and resources. It must commit to managing many aspects of the case, prepare and submit pleadings, respond to the submissions of opposing counsel, research points of law, develop legal arguments, and appear in court. If the group wishes to pursue a test case strategy, it must commit to doing all of the things noted above throughout an appeals process. Pursuing a test case strategy significantly increases the amount of resources expended by a group through participation in a case. Other behavioral options exist that require less involvement from a group. For example, a group may participate as Counsel on Brief, lending its expertise to other organizations, perhaps even taking over certain aspects of a case. However, a group acting as Counsel on Brief does not commit to managing a case, bearing all the associated costs of litigation or appearing in court. A group may also participate as Amicus curiae. This form of participation requires the least degree of involvement from a group. An amicus curiae brief may be prepared and submitted for only a small proportion of what it costs to participate as case sponsor.

I expect that a group's depth of involvement in litigation will vary according to the goals it sets for entering the courts. Expectations B1 - B3 explore the influence of group goals on litigation behavior. These expectations suggest that goals determine how deeply groups must participate in litigation. Different goals require various degrees of involvement from the group. Thus, Expectation B1 suggests that, for a group to achieve its goal of policy influence, it must engage in certain kinds of litigation behavior (namely case sponsorship and a test case strategy), or it will not be in a position to exert much influence on the policy output of courts. Expectation B2 suggests that a group seeking to develop its reputation can do so without as great a degree of participation. It will litigate
some cases as sponsor, utilizing intermediate behavioral options, like “one-shot” case sponsorship and joining other groups as Counsel on Brief. Finally, Expectation B3 suggests that groups seeking broader influence within the society will develop media-oriented goals. This goal requires the least degree of commitment from groups. Thus, they will prefer behavioral options that require only a minimal amount of participation. As noted above, the three groups included in this analysis define similar goals for litigation -- each has noted that it has established policy-oriented goals. Thus, I expect that the litigation behavior of these groups will not vary significantly, and that they will emphasize case sponsorship and test case strategies, i.e., those behaviors that require a greater degree of depth, over other behavioral options.

Table 6.2 displays group behavioral emphases according to type of litigation participation. The number of recorded instances each group engaged in litigation as amicus curiae, Counsel on Brief and case sponsor are noted. Additionally, case sponsorship is broken out into two categories. The first, “one-shot” case sponsorship, is divided into sub-categories. These include single instances of sponsorship occurring at the trial court and appellate court levels. The second, entitled “Test Case,” represents all those instances where the groups have participated across jurisdictional levels in the same case. By definition, this category includes appellate participation, but may or may not
include trial court participation in the same case. The table also includes the percentage of total litigation participation that each number represents. From this table we see that all three groups are fairly committed to sponsorship as their preferred method for litigating. Combining all the categories of Case Sponsorship together, we see that the LC litigates the greatest percentage of cases as sponsor (89%), followed by the ACLJ (60%) and the AFA-CLP (57%). The ACLJ participates most as Counsel on Brief. However, as noted in Chapter 3, it has not developed a pattern of participation using this behavioral option. Notably, the AFA-CLP, which emphasizes increased reputation as a secondary goal, does not use this intermediate behavioral option at all. This is unusual, given its desire to increase its reputation among sister organizations. Participation as Counsel on Brief would be one logical way to gain that reputation among its peers, yet it has avoided doing so altogether. It does appear that the AFA-CLP devotes more resources to amicus participation than its General Counsel realizes. Perhaps the AFA-CLP has substituted amicus participation for a defined Counsel on Brief strategy as a means to gain credibility. Table 6.2 reconfirms the findings of a multitude of interest group litigation studies that those groups litigating for policy influence prefer to participate as case sponsors.

Table 6.2 does display something unusual about the behavioral emphases of the three groups, revealed in a comparison of the “Test Case” and “One-Shot” categories.

\[\text{See Table 2.1 for a full list of possible participation as case sponsor. The category “Test Case” in Table 6.2 combines the categories Full Test Case Strategy, Case Sponsorship - intermediate appellate to court of last resort, Case Sponsorship - trial to intermediate appellate level with cert. Denial, and Case Sponsorship - trial to intermediate appellate level with no cert petition.}\]
According to the typology of group litigation behavior developed in Chapter 2, when groups sponsor cases across jurisdictions, pursuing what is traditionally called a “test case strategy,” they participate much more deeply in the process of litigation. This involvement is classified as deeper than simple “one-shot” case sponsorship, defined here as litigating as sponsor in a case without participation in an appeals process. Expectation B1 suggests that those groups pursuing a policy-oriented strategy will emphasize a test case strategy over “one-shot” case sponsorship in their litigation agendas. All three groups state that their primary goal is to influence policy. Thus, we should expect that all would emphasize a test case strategy over “one shot” case sponsorship. Table 6.2 reveals that both the ACLJ and the LC exhibit a commitment to using the test case strategy as a significant part of their overall litigation agenda, but the AFA-CLP has no apparent strategy for effecting policy through the appellate process. Almost one-half of all the LC’s litigation involved participation throughout an appeals process, while use of a test case strategy accounts for 34% of all ACLJ litigation participation. Only two instances of AFA-CLP participation have involved an appeals process. This difference in litigation strategies among the groups is somewhat confounding, as all the groups emphasize policy influence. Later stages of the analysis in this chapter will address this unexplained variation in group litigation behavior.

Table 6.3 displays only those instances of litigation participation falling within the “Test Case” category of Table 6.2. Here, the test case category is broken out into categories representing the most amount of involvement in an appellate process to the least. Thus, the categories include case sponsor at the trial-level through to a ruling by a
court of last resort, and sponsorship at the trial-level including an appeal to an
intermediate court, but no further. This last category is divided into two sub-categories -
those involving a petition for review by a higher court that was denied, and those where
no petition for higher review was made. Finally, Table 6.3 includes the category of
Multiple Appearances – the number of times an organization appeared before the same
court to argue separate but related issues in the same case. To resolve these related issues,
courts often publish a separate opinion. This category is included to distinguish such
instances from a true process of appeal for higher court review. The first number in each
cell displays the number of actual cases associated with each category, while the number
in parentheses displays the number of recorded instances in which a group appeared
before a court as sponsor in those cases.44 I address each group in turn, below.

Table 6.2 revealed that for the ACLJ, a test case strategy is a significant part of its
overall litigation agenda. Table 6.3 reveals that it has participated deeply in cases on
appeal. The ACLJ has participated in 12 cases before the Supreme Court. Six of those
cases involved ACLJ participation as sponsor at the trial- and or appellate-levels. Fully
one-third (i.e., 33) of all instances of participation involved shepherding a case through
an appeals process. These instances reflect participation in 13 separate court cases. Of
those thirteen, the ACLJ participated in three that moved from U.S. District court to the

44 A group could, of course, make numerous appearances before courts while litigating the same case.
Including the number of actual cases litigated (the first number in each cell) provides a slightly different
picture of litigation than simply providing the number of instances (the second number in each cell) in
which the group made an appearance. For definitions and indicators of group litigation behavior, see Table
2.3.

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Supreme Court,\textsuperscript{15} two in which its participation began upon appeal and then moved to the Supreme Court.\textsuperscript{40} and one that moved from state trial court to the Supreme Court.\textsuperscript{47} In another five cases, ACLJ participation began at the trial level and ended in a U.S. Court of Appeal. The ACLJ petitioned for certiorari review in two of these cases (which petition was denied).\textsuperscript{48} Finally, ACLJ participation in two cases represents a multiple appearance before an intermediate appellate court when the ACLJ returned to litigate separate, but related matters in the same case. In neither of those cases did the ACLJ participate at the trial-level.

In the case of the AFA-CLP, use of the test case strategy is nonexistent. At no time did the AFA-CLP appeal a case from an intermediate court of appeal to a court of last resort. The organization has petitioned the Supreme Court for certiorari review in two cases. However, it did not participate in either one of these cases at trial, and they do not appear within Table 6.3. Indeed, the AFA-CLP did not pursue an appeal on the merits in any of the 15 federal district court cases in which it participated as sponsor. Further, while case sponsorship accounts for 65\(^o\) of the AFA-CLP's federal appellate

\textsuperscript{15} They are Board of Education of Westside Community Schools v. Mergens, NOW v. Schlesler and Lamb's Chapel v. Center Moriches School District.

\textsuperscript{40} They are United States v. Kokinda and United States v. Schenck.

\textsuperscript{47} Hill v. Colorado.

\textsuperscript{48} They are Edwards and Hoffman v. Hunt. The other three cases, not involving a petition for certiorari review, are Strout and Full Gospel Tabernacle v. Community School District #27 and In re Hodge, a tax court case reviewed in Federal District court.
participation, the organization did not participate at the trial-level in any of its intermediate appellate court cases. Thus, while previous analyses revealed that the AFA-CLP prefers case sponsorship over other forms of litigation involvement, and that the AFA-CLP is before appellate courts almost 50% of the time, this organization has little in the way of a well-developed agenda for long-term policy impact. It does little to engage the courts through an appeals process. Consequently, the AFA-CLP is not able to control many aspects of its litigation agenda, even where it has been successful. For example, the AFA-CLP’s most profound appellate victory (in Brown v. Woodland Joint ISD, a Religious Establishment case) did not provide it with the opportunity to control or contribute to the court record at trial. Despite almost unlimited resources, the AFA-CLP is not involved in aspects of a case sponsorship strategy that would indicate a deep involvement in litigation, nor is it increasing levels of involvement over time. It remains relatively uninterested in pursuing cases through an appeals process.

An examination of the LC’s continuing participation reveals an organization that is attempting to develop its policy influence through increasing the depth of its litigation involvement. The 22 instances of LC continuing participation, noted in Table 6.3, represent LC participation in nine separate cases. Thus, approximately 48% of all LC litigation involved participation across jurisdictions through an appeals process. Of these nine cases, the LC participated in two that moved from a state or federal trial court to the Supreme Court. However, it is noteworthy that both of these cases arrived at the Supreme Court together, and were consolidated into the Madsen case. Six cases ended in an
intermediate appellate court after LC participation at both the trial and appellate level.\textsuperscript{49} Five of these six ended in federal appellate court, and one ended in a state appellate court. Finally, one case involved a multiple appearance by the LC before a federal court of appeal. These data reflect the formative stages of the LC’s litigation agenda - it has made a strong commitment to influencing policy, and is developing its depth of litigation involvement to achieve that goal. However, it has not yet fully implemented its goals in the form of its litigation agenda.

In conclusion, this analysis compared groups’ depth of litigation participation. It reveals that there is considerable variation in the groups’ agendas on the dimension of depth. The ACLJ maintains the deepest level of commitment to litigation, devoting a considerable amount of its litigation agenda to implementing a test case strategy. The LC also displays depth in its commitment to litigation participation. However, this group appears to be in the process of implementing its appellate strategy. It has shown a willingness to participate in an appeals process by bringing cases up through the courts. It has also encountered a significant bottleneck at the intermediate appellate level. Reasons for the LC’s inability to overcome barriers to a full implementation of its strategy remain unexplored. However, the LC’s limited monetary and staff resources may account for the nascent quality of its litigation efforts. Finally, the AFA-CLP demonstrates the least depth in its choice of behavioral options. It prefers case sponsorship to other kinds of participation, but it has little use for continuing that sponsorship through an appeals

\textsuperscript{49} Currently, the LC is in the process of appealing one of these cases to the Supreme Court. That case is Adler v. Duvall County School District II.
process. It has not developed a strategy for effecting judicial policy-making through a test case strategy.

6.3.3 Expectation C: Relative Impact of Resources and Goals

This expectation is designed to explore the relative influences of goals and resources on litigation behavior. It suggests that resources are a necessary condition for carrying out a litigation program, but resource variables are not sufficient indicators of what behavioral options a group will select when approaching the courts. Instead, an analysis of group goals is required. Group goals are the preeminent variables explaining these selections. Thus, to frame this expectation in the terms used to address litigation behavior in this research, goals determine how deeply a group will become involved in litigation. A group will always engage in behavioral options that are consistent with its goals, regardless of fluctuations in its resource base.

A full test of this expectation is not readily available here, since evidence supporting this expectation is limited by the lack of variation in group goals. However, some general inferences can be made from the evidence available. Clearly, the ACLJ's history of litigation supports the contention that goals determine behavioral options over available resources. The ACLJ was developed with a set of well-defined organizational goals. Over time, the ACLJ has increased the frequency of its involvement in litigation. However, it has always preferred case sponsorship as the primary strategy for entering
the courts. Additionally, Sekulow has implemented a strategy of test case sponsorship since 1988, guiding cases through the appeals process in pursuit of policy influence.

The AFA-CLP provides limited evidence in support of this expectation. The goals of the group are dictated (at least in part) by the goals of the parent organization. Don Wildmon’s vision was for a grass-roots law firm, and he provides resources specifically for implementing that goal. Furthermore, the law center is limited by the influence of the parent – it will not consider media-oriented goals given the Wildmon organization’s interest in that area. Since the goals of the AFA-CLP are not determined within the law center, it cannot provide a clear test of the expectation.

The LC provides the clearest support for this expectation. It has struggled to obtain a stable resource base, and the amount of litigation it has pursued over time has fluctuated significantly. However, the organization has remained constant in its pursuit of policy influence, despite its relative lack of resources and inconsistency in its resource base over the years. Staver began implementing his strategy for test case sponsorship rather late in the game. However, since 1993, the LC has consistently pursued a test case strategy in the courts, even though that strategy is somewhat limited.

6.4 Explaining the Unexpected Variation in Behavior

The surprising finding which emerges from this research is that three organizations with similar goals pursue such diverse litigation agendas. Of particular significance is the lack of commitment to depth of litigation involvement exhibited by the
AFA-CLP. This group, with vastly greater resources than the LC, has rarely become involved in long-term appellate litigation. Instead, the majority of its work is split between one-time only trial and appellate-level litigation and legal support services for grass-roots AFA membership. However, both the ACLJ and LC also intervene in situations involving grass-roots supporters (all prefer the so-called “demand letter” approach to resolving religious discrimination). The LC even states that its primary mission is not to litigate, but to educate. Yet, both the ACLJ and the LC have developed long-term strategies for influencing policy of regional and national scope, whereas the AFA-CLP has not done so.

What explains the relative lack of interest within the AFA-CLP for long-term policy influence? The organization defines itself as a trial-oriented public interest law firm. Its General Counsel notes that it hires attorneys who are skilled in protracted trial-level litigation, and has not hired “motion attorneys.” or those who specialize in appellate litigation. On the other hand, analysis of the AFA-CLP’s jurisdictional emphases show that it appears before appellate courts approximately 46% of the time. Thus, from an examination of its litigation record, places greater emphasis on appellate work than its general counsel admits. The AFA-CLP has a clear preference for case sponsorship over other behavioral options, supporting its goal of policy influence. However, analysis of its litigation agenda also reveals that it is substantially less deeply involved in litigation than its two compatriots are. It has no established record of pursuing a test case strategy – it has not continued its participation as case sponsor through an appeals process.
The above discussion and analyses have revealed profound differences in the litigation agendas of the ACLJ, AFA-CLP and LC. This variation in litigation behavior exists where little is expected, and is not explained by appeal to primary independent variables included in this analysis. Little variation exists among the groups in the goals they identify for litigating. All three groups identify policy influence as their primary goal, followed by increased reputation. Significant differences exist among the groups in resource levels and acquisitions over time. However, the analysis shows that resources tend to influence the amount of litigation produced by a group. Variation in resource levels does not exert influence on the groups' decisions to emphasize one behavioral option over others. Clearly, the groups have taken different approaches to litigation that cannot be fully explained by variation in resources or group goals. These variables appear to provide only a limited explanation for group decisions on behavioral emphases.

In this section, I propose that other factors must be introduced into the study of conservative Christian litigators as determinants of litigation behavior. These factors are the orientation of interest group elites to policy influence and religious ideology. I explore evidence that differences in orientation to policy influence and religious ideology may explain differences in litigation strategies for which traditional research cannot account. In his work comparing Evangelical and Catholic litigating firms, Kevin den Dulk notes that an examination of religious litigating firms must consider normative influences, such as religious ideology. These concerns impact the capacity of groups to engage the legal system for policy influence. Thus, when conservative Christian litigators have "[d]ifferent understandings of how to be 'in the world but not of it' . . ." conflicts
can emerge in... approaches to engaging the ‘world’ through legal advocacy.” (Den Dulk, 2000) In this section, I seek to explore different understandings of what it means to be a conservative Christian litigator. These different understandings ultimately influence how groups perceive their capacity to influence policy, and what they define as appropriate behavior for exerting influence on court policy decisions.

The previous analysis revealed differences in depth of litigation participation across groups. Below, I explore the influence of orientation to policy influence and religious ideology on groups’ depth of commitment to litigation as a tool for policy change. In later portions of the analysis, I also explore the influence of these two factors on another element of group behavior, one that until now, this research has not addressed. This element of group behavior involves exploring the types of arguments groups present to courts. As a byproduct of this research, I have observed significant differences in the types of legal arguments groups are willing to present to courts. Below, I suggest that religious ideological influences on each group’s orientation to policy influence also determine the essential quality of legal arguments made by groups in court.

I begin this section by developing theoretical bases for exploring the impact of religious ideology on interest group behavior. While particularly relevant to conservative Christian litigating interests, exploration of this distinction may help refine our approach to the study of forces influencing interest group litigation generally. Next, I explore the influence of religious ideology among the groups, paying close attention to the effect of religious ideology on group orientation to policy influence. Further, I explore how group orientation to policy influence assists in explaining the variation in groups’ depth of
commitment to litigation participation. Finally, I explore how religious ideology and orientation to policy influence impact other aspects of group litigation behavior, namely the legal arguments groups provide courts.

6.4.1 Theory Building: Interest Group Behavior, Religious Ideology and Orientation to Policy Influence

The explanation I offer for the unexpected variation of group litigation behavior lies in a distinction between groups' orientation to policy influence. Orientation to policy influence refers to how groups use litigation to achieve policy goals, i.e., their willingness to engage in various kinds of litigation behavior to influence the development of court-crafted policy. I base distinctions between orientations to policy influence on the interaction between groups' religious beliefs and views on litigation as a tool for policy change. Conservative Christian groups share a relatively similar set of core religious beliefs. These beliefs suggest adherence to ideological principles as well as religious dogma. Thus, conservative Christian litigating firms generally agree on matters including abortion, religion in public places and schools, homosexuality, and other hot button issues. However, the impact of religious-ideological beliefs on orientation to policy influence differs significantly across the groups.

Group orientation to policy influence diverges between “principled” and “pragmatic” approaches. These orientations are based on how groups perceive the role of religious principle in their efforts to influence policy through litigation. A pragmatic
approach to policy influence is characterized by a willingness to depart from the strict principles dictated by religious-ideological beliefs and "play by the rules," i.e., by the norms of policy makers in the courts. This is accomplished with little internal dissonance - there is no internal notion that the groups have compromised their faith. Pragmatic groups do not see religious principle as the sole source of structure for policy-making. Thus, they are not constrained by purely ideological goals. A principled approach is characterized by a lack of such willingness. Principled groups are unwilling to depart from their religious and ideological beliefs for the sake of policy influence. To do so would be to compromise, not only the principles, but also the core of the Christian faith. Thus, for one set of groups religious ideology exerts significant influence on what they are willing to do to achieve policy influence. For the other set, religious-ideological principles can be set aside in favor of effecting the outcome of cases dealing with some limited aspect of an issue area.

As a result of the interaction between religious ideology and orientation to policy influence, I expect that groups will differ in their compatibility with the institutional norms of courts. I expect that differences in policy orientation produce differences in the ability of groups to respond to, in fact take strategic advantage of, courts institutional and professional norms. This observation may have special significance for the compatibility of conservative Christian litigators with appellate courts. Two norms of appellate litigation are important for this discussion. First, appellate courts exhibit a decided preference for legal arguments advocating limited or incremental policy adjustments. Various studies point to the importance of providing appellate courts with reasoned
arguments supporting this kind of institutional approach to policy development. (Vose 1959, Sorauf 1976, O'Connor 1980) Here, I suggest groups that differ in orientation to policy influence may also differ in capacity to present courts with this kind of legal argument. For groups taking a principled approach, advocating a particular legal position may conflict with principles that guide their interaction with the courts. Engaging in behavior that is suited for advocating incremental adjustments in policy would require a departure from strict principle for the sake of influencing court policy outcomes. This is something principled groups are unwilling to do. Thus, principled groups may lack the capacity to adopt institutional norms because of religious-ideological adherence – adherence to principle renders these groups less compatible with the institutional norms of courts.

The second norm of appellate litigation applies to public interest law firms—a preference for the test case strategy of case sponsorship. Various scholars have demonstrated that public interest law firms seeking policy influence prefer this strategy because it is the most efficacious means for exerting long-term influence on judicial policy outcomes. This litigation strategy is so effective because it takes advantage of appellate courts’ own preferences for incremental policy change. Where interest groups have used test case strategies effectively, they have generally brought a series of cases up through the courts, returning to appellate courts repeatedly to present them with new concerns, or to ask for clarification of previous rulings. Where a group maintains a pragmatic approach to policy influence, it is reasonable to assume that its compatibility with court norms would encourage it to make full use of the legal system and implement
a test case strategy. Such a strategy would afford it the maximum expectation of influencing court policy output.

However, where orientation to policy influence renders a group less compatible with the courts’ preference for this kind of policy development, it is reasonable to conclude that the group will be less willing to expend resources developing a litigation agenda that includes a test case strategy. A group taking a principled approach to policy influence has little expectation that it can impact court policy output in a legal environment defined by the institutional norm of incremental policy development. This norm requires that groups accept previous policy developments and argue for limited policy change. For a principled group to implement a test case strategy, it must accept the norm of limited policy adjustment and forego asking courts to revise policy along the lines of the principles it advocates. A principled group that does so runs the risk of compromising the very principles that define it. Therefore, it is reasonable to expect that where a principled group senses a lack of compatibility with courts, it will alter its litigation behavior accordingly. These alterations may take various forms. A principled group may accept cases that allow a trial court to apply more settled legal doctrines corresponding with the group’s own principled position. Such cases may have limited chances for appeal. Or, it may avoid approaching appellate courts - courts that it knows are less than willing to consider principled arguments.

Emerging from this consideration of institutional compatibility and strategy preferences is an explanation for the observed differences in groups’ depth of commitment to litigation participation. Differences in institutional compatibility
produced by orientation to policy influence may explain why groups with similar goals pursue such varied litigation agendas, and why their agendas differ so greatly in depth of involvement. In effect, policy orientation shapes the goals of the groups for policy influence, determining whether some behavioral options are realistic investments of time, energy and resources. In what follows, I explore indicators of orientation to policy influence that may assist in determining the influence of religious-ideology on litigation behavior. Specifically, I use orientation to policy influence to explain the revealed differences among the groups in depth of commitment to litigation. First, I consider the groups' own statements about the role of religious principles and political doctrine in determining the approach they will take to policy influence. Next, I explore the connection between orientation to policy influence and differences among the groups in depth of litigation participation. I consider what limitations are placed on group litigation agendas when adopting either a pragmatic or principled policy orientation, and how these limitations impact depth of litigation participation.

6.5 Religious Ideology Among the Groups

I turn now to a discussion of the influence of religious ideology on group orientation to policy influence. Religious ideology can be defined as a particular “worldview” or normative code that helps individuals or groups establish interpretations of social reality. Religious ideology may be part of an ethical belief system that guides behavioral choices for those who adhere to it. Thus, religious ideology may limit the
sphere of possible alternatives for behavior, and help determine what actions are appropriate in various contexts. Here, I explore the importance of religious ideology for each group’s approach to policy influence. Plainly, all three groups share common religious and ethical belief systems. However, it is the interaction of these belief systems with group orientation to policy influence that I wish to uncover. Specifically, I examine what role religious ideology plays in groups’ perceptions of the efficacy of litigation in achieving policy aims.

The ACLJ is strongly committed to furthering the role of the church in society. However, Jay Sekulow does not work to overrun secular society, or returning to a place where policy choices were guided on the whole by considerations of Judeo-Christian ethics. Instead, Sekulow has a distinct vision for his work as a litigator for the conservative Christian Right. He hopes to secure a role for the church in social life. Consider Sekulow’s statement concerning the interaction between religious conviction and social policy.

Abraham Kuyper, and a couple of others [write] that politics is very important... but as important as politics is, politics never raised anyone from the dead. We’re not going to carry the day on the culture with politics alone. It’s got to be salt and light [a reference to the New Testament]. Our job is to keep [the] avenues open, make sure the church can be the church. ... We’re there to make sure the church’s voice can be heard. Somebody said once we’re Jesus’ lawyer. Jesus doesn’t need a lawyer. Jesus doesn’t need Jay Sekulow, [or] the ACLJ. But the church does. I believe the church needs organizations that will defend the integrity of Christians in the public square.

Thus, the ACLJ approaches litigation with the notion that religious convictions are entirely appropriate for social discourse, and that religion should be welcomed as one perspective among many within a pluralistic society.
Joel Thornton, Sekulow’s lieutenant, reinforced this notion when reflecting on the status of religious freedoms in the United States. Specifically, he had this to say about a case in which the ACLJ had become involved—the arrest of a group of high school students during the National Day of Prayer in 1994. This case did not result in litigation (only the threat of an ACLJ lawsuit), and ended with a formal apology issued by the school district to the young people involved.

The arrests at the flagpole are not indicative of what is generally done in America, but it happened. We are not asking that the state make people come to Bible studies, or to pray on campus. All we are asking is that the opportunity exist for people to do so, that we can be heard.” (Thornton 1998)

Thornton provided another more general example of the role religious ideology plays at the ACLJ. When queried about traditional conservative themes, such as a break down in the moral fabric of the nation, he responded as follows.

We don’t live in a Christian nation. We are not a Christian nation, and never have been one. It is not what was intended for us. I don’t think God is too upset about that, and I differ with other Christians on this. (Thornton 1998)

Clearly, religious ideology plays a role in the ACLJ’s approach to litigation for policy influence – Sekulow hopes to use the courts to advance the role of the church in society. But, the perspective of ACLJ leaders on religion in public life supports a pragmatic policy orientation centered mainly on how the ACLJ defines success for itself. The ACLJ defines victory in the courts by a measure different than complete validation of its core religious and ideological beliefs. Sekulow’s organization has adopted another standard, defined by its “place at the table organizational philosophy, which is quite compatible with the institutional norms of courts. For the ACLJ to realize its goals for
policy influence, courts do not have to adopt its particular religious and ideological views. They simply must endorse an interpretation of civil rights that tolerates religious expression in public forums, and allows the church to pursue its goals of evangelism, protest and social criticism. This twist on religion in public life supports the role of courts as protectors of civil freedoms and policy developers. To support conservative Christian legal claims, courts are not required to endorse Judeo-Christian principles as important for making judicial determinations. But, they can support an idea that is congruent with mainstream constitutional doctrines. By striking down policies that Sekulow brands as viewpoint discriminatory, courts endorse doctrines of liberty, individuality and democratic participation – they fulfill their role as instruments for preserving an atmosphere of expressive freedom.

The AFA-CLP is just as strongly committed to securing a role for the church in public life. Yet, this organization makes what appears to be a polar opposite connection between its religious-ideological positions and its orientation to policy influence. This connection calls the AFA-CLP to pursue a broad overhaul in legal principles centered on Judeo-Christian ethics. The role it envisions for the church is not as one perspective among many, but as the only perspective. Consider this statement from Brian Fahling, the AFA-CLP’s Chief Litigation Specialist, on the proper place of ethical principles in the practice of law.

The laws of nature are those laws that Blackstone says man in his unbalanced state, were he to view and see the imprimatur of God's hand on it, he would understand it perfectly. To the degree that we can operate there and understand the laws of nature we must do so. But, wherever there appears to be a contradiction between the laws of nature and the laws of nature's god, which is revealed in the written word of God, then the
scripture always prevails. There is a check. We are not left to our own devices. Nature would tell us a lot of things. Nature today would tell us if you walked down Bourbon Street that homosexuality is fine. That’s the law of nature as it is presently being worked out.

For the AFA-CLP the only proper interpretation of the Constitution is a view of law and society that recognizes Judeo-Christian ethics as the core of judicial determinations of social policy. The AFA-CLP’s concept of the interaction between religious belief and social construction places God’s law at the center of any role courts would play in social construction. Consider this statement from Brian Fahling on the proper basis for determining what civil rights the Constitution can (or should) support.

You have to go back and prove what rights are for the individual. What has happened of late is that that has been taken out of the picture. Now, the fundamental rights have been endowed by man, so to speak, or by government. That has been skewed. That is why we can now have fundamental rights that are different from, or contrary to, those rights that are endowed by God. We’ve replaced the creator with government.

Thus, the AFA-CLP relies strictly on principle when approaching the courts for policy influence. For the AFA-CLP, any other method for advancing the influence of the church in society is flawed, or worse. The AFA-CLP’s principled approach is at odds with the more pragmatic views of litigation groups such as the ACLJ. The differences sometimes promote tension within the ranks of Christian litigators. The AFA-CLP is aware of this tension, as both Green and Fahling are aware. Consider this remark on relationships between Christian litigators, and tensions over the implications of a pragmatic orientation.
Other groups, and you’ll be talking to one soon, are dead wrong on this issue. They are using the law as an instrument, a means to an end. Christians need to recapture the high ground, you’ve got to behave in a principled fashion. Why are we doing this? We are not thinking. Christian lawyers don’t understand worldview, they don’t understand the law. I heard one [Christian] lawyer make an argument for stopping a particular activity based on the Commerce Clause, and he justified this with the argument that ‘we’ve been doing it for years.’ That kind of thinking will lead us straight to hell. You’ve got to have some principled opposition. Just because the end sounds good, you’ve got to ask the questions ‘is it appropriate, is it proper, is it a legitimate means to an end.’ [If we don’t] we cease to be lawyers. We need to ask things faithfully and truly and not go along with it because it seems like a good idea. (Fahling 1998)

The difficulty with this principled orientation to policy influence is its lack of congruence with institutional norms of courts. For the AFA-CLP to realize its goal of policy influence, courts must adopt its view of the proper justification for law and policy. However, appellate courts are generally unwilling to jettison precedent (and the reasons supporting developments in policy based on precedent) for the sake of a particular philosophic view of law and society. This fundamental disagreement over legitimate bases for policy may limit the influence of the AFA-CLP in the courts. Policy influence appears to be a zero-sum game, one that the AFA-CLP can only win if it achieves absolute victory both on the issues and the jurisprudence. In appellate courts that emphasize incremental changes in policy, these kind of absolute victories are few and far between.

Much like the ACLJ, the LC is committed to finding a role for the church in a pluralistic society. Staver frames his interests in a slightly different manner than Sekulow, emphasizing equal access and education over litigation. These emphases are consistent

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50 A reference to the ACLJ
with the LC’s primary litigation interests of religion in public schools and public places. However, in contrast to the other two groups and their leaders, Staver is neither as exuberant about the state of religious liberties in this country, nor as suspicious of secularism and the law. While leaning strongly toward the ACLJ’s perspective on religion in society, the LC falls between the ACLJ and the AFA-CLP in its orientation to policy influence.

As Chapter 5 reveals, Staver was part of the group of young attorneys that pioneered the Free Speech approach to arguing Establishment cases, and is among those who adopt civil rights era rhetoric to explain the emergence of the new-breed Christian Right attorneys. However, his views on the potential for acceptance of religious views in society are slightly less optimistic than Sekulow’s. When asked how he felt about being Protestant in the United States today, he was less than jubilant.

It depends on where you put yourselves historically. If I compare this country to the rest of the world, it’s a great place to be. If I compare where we are [now] to the rest of the century, we’ve lost ground. If I look at for example, the religious liberty aspects of situations now in 1998 versus thirty years ago there are huge changes. In 1968, you are not going to have students who are told ‘you cannot bring your Bible to school.’ [These problems] just seem to be proliferating around the country. [In 1968] you wouldn’t have equal access issues where students are told you can’t have a bible club on campus, or if you do it has to be after hours that the other clubs meet during the day. So, in comparison to that there has been a tremendous shift in America, and that trend is something that I resist and attempt to maintain liberty.

This may be the response of a tired Christian warrior dealing with a large litigation agenda on his own, and fighting the same equal access battles over and over again. But, it seems more typical of the LC’s general approach to litigation in recent years. Lately, Staver has taken a more aggressive stance toward public schools that deny Christian
students equal access. Setting aside his goal of education for a time, he declared war on public school districts in the Southeast that refused to comply with court decisions on religion in public schools, or abused his efforts to bring educational information to their attention. This reflects a general feeling that there are those who resist his efforts to ensure that a Christian perspective on social issues is at least tolerated and not thrust to the fringes.

6.6 Orientation and its Impact on Depth of Litigation Participation

In this section I consider how orientation to policy influence impacts group litigation behavior. I suggest that orientation to policy influence determines how groups view litigation as a tool for achieving policy influence, i.e. what specific options for litigation behavior they consider appropriate as a result of a pragmatic or principled approach to policy influence. First, I consider what differences we can expect to find in behavior when groups take different approaches to policy influence. Second, I explore how differences in policy orientation affect the litigation behavior of the three groups included for analysis, investigating how approach to policy influence may explain the puzzle of differences in depth of litigation participation.
6.6.1 Expectations for the Impact of Policy Orientation on Group Behavior

I have said that differences in orientation to policy influence may produce differences in litigation behavior. These differences emerge out of the interaction between the policy orientation of interest groups and the institutional norms of courts. Where group and court norms are not in conflict, groups may feel free to pursue certain kinds of behavior for policy influence. For example, where a group takes a pragmatic approach to policy influence, its core values suggest that pursuing limited policy change is an appropriate behavior. Since courts themselves seek to develop the law incrementally, and avoid harsh or abrupt policy changes, pragmatic groups may feel unconstrained in their pursuit of policy influence. Thus, they may take full advantage of the behavioral options open to them, developing a strategy for long-term policy influence that includes a test case strategy, or participation in the same case throughout an appeals process. The result is that pragmatic groups will exhibit a deep commitment to litigation participation.

On the other hand, groups holding a principled orientation to policy influence see the institutional norm of incremental policy development as a barrier to influence. They are subsequently less likely to take actions that lead them into conflict with courts, not simply over points of law, but over the process of judicial decision itself. They may limit their behavior to one-time appearances before courts, may emphasize trial-level participation, and may be unwilling to invest significant resources in pursuing a test case strategy. Such a strategy would most likely be unprofitable since these groups expect that courts are naturally biased against principled arguments demanding vast policy
overhauls. Therefore, principled groups will exhibit significantly less depth of involvement in litigation participation than pragmatic groups exhibit.

Below, I examine empirical manifestations of policy orientations' impact on group litigation behavior. I undertake this examination through further analysis of trends in participation exhibited in Table 6.2. A return to the data displayed in Table 6.2 will allow us to compare groups' commitments to depth of participation, and to explore the impact of orientation to policy influence on depth of litigation behavior. Analysis of groups' participation as case sponsor is particularly critical for determining if policy orientation has any tangible impact on behavior.

Expectations for the behavior of pragmatic groups are relatively straightforward. I expect that pragmatic groups will take full advantage of their strategic options in bringing cases to trial and appellate courts. Because of their compatibility with courts (and particularly appellate courts), pragmatic groups will demonstrate a great degree of depth in their litigation participation. On the other hand, a principled approach to policy influence may impact behavior in several ways. I have theorized that appellate courts prefer arguments in support of incremental policy changes. Since these are exactly the kinds of arguments that principled groups see as illegitimate for policy influence, they may avoid litigating before appellate courts altogether. Thus, principled groups may avoid implementing a test case strategy, and they may prefer trial-oriented litigation over any kind of appellate participation. I now examine each group in turn, analyzing the impact of policy orientation on depth of involvement.
6.6.2 The ACLJ, Policy Orientation and Depth of Participation

Previous analysis of the ACLJ revealed that its leaders use the courts to achieve the aim of religious toleration. This religious ideological aim has a particular quality – it can coexist with the fundamental role of courts in society to preserve expressive freedoms. Thus, the ACLJ's pragmatic policy orientation accounts for the depth of its involvement in litigation. Its brand of policy influence harmonizes with the institutional norms of courts. Such a congruency between the norms of engaging the legal system and the policy orientation of the ACLJ would suggest that this organization is well placed to take advantage of all possible behavioral alternatives for policy influence. Table 6.2 demonstrates that the ACLJ does exactly that – it makes full use of behavioral options for influencing court-crafted policy by emphasizing case sponsorship and pursuing a highly developed test case strategy. This strategy has brought it before courts with policy influence very often. Although the ACLJ is not always successful in persuading courts to adopt its policy positions, it is consistently in a position to do so. By bringing test cases up through the courts, the ACLJ makes use of every opportunity to present its arguments to courts, and perhaps persuade judges to alter policies in line with their own expectations.

Sekulow's attitude toward courts reflects how the ACLJ's pragmatic orientation to policy influence has influenced its litigation agenda. Sekulow is straightforward about how he wants to use the courts, how he wants to win cases and how he would like to lose them. He states that “nobody takes a case without the idea that you want to win the case, or if you are going to lose the case, lose it in a way that gives you good wiggle room for
the next case." Finally, recall Sekulow's comment that it is ultimately courts that decide policy in matters of religious liberties. (See Chapter 3, Section 3.4) Significantly missing from this notion of the courts' role is any mention of divine law, or for that matter divine influence. The ACLJ takes the courts' policy role seriously, and it works to position itself to influence courts' policy decisions. The ACLJ's litigation agenda and behavioral emphases are congruent with this view of the function of courts.

6.6.3 The AFA-CLP, Policy Orientation and Depth

The analysis of religious ideology in Section 6.5 shows a profound harmony between AFA-CLP belief and argument. The AFA-CLP is committed to a form of legal discourse that emphasizes the congruency between means and ends. Applying this traditional form of Christian ethics to litigation behavior, the AFA-CLP limits the range of litigation behaviors that it can employ in pursuit of policy influence. Table 6.2 reveals that the AFA-CLP places some emphasis on trial-level litigation behavior, and that it prefers "one-shot" appearances over a test case strategy. However, the AFA-CLP finds itself before appellate level courts very often. Below, I explore facets of AFA-CLP litigation agenda emphases, and explore possible explanations for the AFA-CLP's extensive appellate litigation.

Table 6.2 shows that the organization does not implement a test case strategy, even though it has ample resources for pursuing such a strategy aggressively. Further, it does emphasize one-shot case sponsorship over other kinds of involvement. Its
preference for case sponsorship reflects its goal of policy influence, but the AFA-CLP does not take full advantage of its strategic options for influencing judicial policy-making. This finding corresponds with expectations for the behavior of a group with a principled orientation to policy influence. Pursuing a test case strategy would require that the AFA-CLP advocate incremental policy changes rather than adhere strictly to religious dogma and the political principles that follow from it.

However, Table 6.2 also shows that the AFA-CLP is before appellate courts a substantial amount of time. Examining the Case Sponsorship, "One-Shot" Appellate Only category, we see that the AFA-CLP surpasses the ACLJ in the amount of one-time appellate only litigation it conducts. This type of litigation makes up 29% of the AFA-CLP’s overall litigation agenda, its second largest category. This finding is out of line with previously stated expectations for the behavior of groups with principled orientations to policy influence. Not only does the AFA-CLP litigate before appellate courts, but it does so frequently. Why does the AFA-CLP, an organization that prefers to make principled arguments in court, appear so often before courts that, on the whole, prefer not to consider principled arguments in their policy determinations?

Several explanations present themselves. First, the AFA-CLP may simply avoid implementing a test case strategy, rather than avoiding appellate courts because of institutional incompatibility. It may avoid implementing a test case strategy because it has decided to invest its resources in other types of behavior, or it has decided it can fill a niche within the conservative movement. Perhaps, as Matthew Moen has argued with respect to conservative groups that lobby Congress, conservative litigators have
developed different emphases out of practicality. (Moen, 1992) According to this explanation, groups develop emphases based on the needs of the movement, rather than some ingenious plan to attack their opponents on multiple fronts, to create “interlocking directorates,” or because of ideological predispositions. They parcel out jobs to balance the division of labor, and avoid duplication of efforts within the movement. Such duplication of effort would waste valuable resources. Thus, the AFA-CLP may be willing to expend some resources participating in selected “one-shot” appellate litigation, but it does not implement a test case strategy because other groups fill this niche. Instead, it develops its expertise in grass-roots legal services, trial-level litigation and some appellate litigation. This explanation would indicate that the AFA-CLP’s principled policy orientation does not impact its behavior. The lack of depth it exhibits in litigation participation is attributed to the broader needs of the movement, rather than to internal notions of principle and ideology.

Second, the AFA-CLP may not simply avoid appellate courts, but may avoid them when its arguments are not well received. Some types of cases may allow the AFA-CLP to enter appellate courts and achieve a degree of policy influence. These cases may have particular qualities or characteristics that create a greater degree of congruence between the arguments the AFA-CLP makes and those arguments appellate courts prefer to hear. These cases might include areas in which constitutional doctrine is more clearly defined. This explanation lends support to the expectation that policy orientation influences group litigation behavior. The AFA-CLP’s behavior may be effected by its principled policy orientation even though it appears before appellate courts quite often.
Further questioning of AFA-CLP attorneys lends support to this second option. Chief Trial Specialist Brian Fahling notes (and the data confirms) that the majority of AFA-CLP “one-shot” appellate only participation occurs in areas where appellate courts are “solicitous” of principled arguments – namely, in free expression and abortion protestation cases. Here, Fahling notes that the courts have provided what he calls a “sound constitutional jurisprudence. These are areas in which the Supreme Court has preserved principles within a constitutional tradition.” (Fahling, 2000) In other areas, the AFA-CLP has been reluctant to develop a full appellate litigation agenda because it perceives that courts are unwilling to preserve constitutional principles.

For example, the AFA-CLP argued one of two cases challenging the constitutionality of the Freedom of Access to Clinic Entrances Act (FACE). The case allowed Fahling to make what he calls a “pure Commerce Clause argument in the tradition of genuine Joseph Story/John Marshall-style federalism.” Fahling was quick to point out that he believes the courts have eroded the principle embodied in the Commerce Clause, he also stated that the AFA-CLP initially saw this as “an area where we can have an effect.” (Fahling, 2000) He now understands that this is not so – the 7th Circuit was adamant, almost hostile, in explicitly rejecting the AFA-CLP’s argument that Congress was abusing its Commerce Clause powers. This case is also an excellent example of how appellate litigation develops for the organization. The AFA-CLP did not participate at trial in the FACE Act challenge. According to Fahling, he received an unsolicited phone call requesting that the AFA-CLP take over sponsorship of the case on appeal. The AFA-

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51 The other challenge to FACE was brought by the ACLJ
CLP ultimately lost in the 7th Circuit. Uncharacteristically, it filed an appeal for certiorari review by the Supreme Court.52

Fahling also mentioned City of Boerne v. Flores (1997) as a principled response by the Supreme Court to an abuse of congressional power. Although the AFA-CLP did not participate in this case, it was very vocal in its support of the Court's decision to strike down the Religious Freedom Restoration Act. In an effort to head off grass-roots supporters' condemnation of the Court, Fahling authored, and the AFA distributed, a press release stating that the Court had appropriately "restored balance to the principle of Separation of Powers." (AFA, 1997) However, the lack of participation by the AFA-CLP is telling. It did not participate in any form, including filing an amicus curiae brief in support of Flores. The perception within the organization was that it could not waste its time and resources on a case in which its position would likely fail to persuade the Court.

Thus, the AFA-CLP has been particularly active before appellate courts where it believes it can have a positive effect on outcomes by advocating principled jurisprudential positions. These areas have included abortion protestation, Commerce clause jurisprudence, and one landmark Free Exercise case53 From this discussion, one might conclude that the AFA-CLP holds to a rigid or absolutist position when making principled arguments based on its ideas about federalism. Such a position is most commonly associated with an Intensionalist interpretation of core Constitutional

52 The appeal was denied. The case, U.S. v. Wilson, 73 F3d 675 (1995) is one of two cases appealed to the Supreme Court by the AFA-CLP.

53 Brown v. Woodland Independent School District
provisions. However, Fahling explicitly rejected extreme interpretations of the Constitution based on federalism arguments. Instead, he characterized the AFA-CLP’s position as “interpretivist.” Citing Joseph Story, he stated that . . .

“[the Constitution was intended] to endure for the ages. This requires that courts preserve as much principle as they can when interpreting the document. But, they must preserve these principles in a transcendent context. So, for example, the Commerce Clause— it will appear different when kneaded into today’s cultural reality. Changes in cultural reality may even seem to obscure the principle. But, it is still there in some form.”

In summary, the AFA-CLP will appear before appellate courts when it knows it has the principled high ground— where the substance of a case allows it to make arguments based on principle that a court cannot ignore. Bruce Green mentioned the AFA-CLP’s role in Brown v. Woodland I.S.D., a free exercise case in which the AFA-CLP participated on appeal, as a significant victory for the firm. Further, he noted that the AFA-CLP would much prefer to develop precedent using this clause, than to participate in the legal twists that Sekulow and Staver have developed— he would rather stand on a defined set of principles that are congruent with his religious beliefs. Other than these cases with highly ideological bases for legal action, the AFA-CLP refuses to participate in the series of precedent-setting cases brought by other groups over the past decade. Instead, it concentrates on the second-tier of conservative Christian litigation— those disputes that are resolved through a demand letter approach or the threat of litigation. Thus, the AFA-CLP’s principled approach to policy influence limits its capacity to interact with courts in a way that would achieve greater policy influence.
6.6.4 The LC, Policy Orientation and Depth

Finally, I consider the influence of policy orientation on the litigation behavior of the LC. In Section 6.5, I placed the LC in between the ACLJ and AFA-CLP in terms of policy orientation. Staver appears to take a pragmatic view of using the courts for policy change, but in recent years he has become disillusioned with continued efforts of public schools to circumvent the efforts of Christian litigators to preserve toleration of Christianity in public discourse. This discouragement does not appear to have affected the choices of the LC when strategizing for policy influence. Staver makes very sophisticated use of the courts, and carefully plans litigation for precedent-setting effect. He works within the norms of appellate courts to impact judicial policy making.

Staver is particularly careful to bring cases up through the courts that have pure case facts and the greatest potential for policy influence. This care does not preclude a fast response when necessary. Staver was quick to file suit in state and federal court challenging the court injunction that ultimately concluded in the Supreme Court’s review of Madsen v. Women’s Health Clinic. However, on other issues he is careful to select the case with the best chance of reaching the High Court.

The Supreme Court has never addressed student initiated graduation messages that would include a prayer or religious aspect. So we look for different cases that have a good fact pattern that would bring that situation to the Supreme Court. I’ve got cases generically here and there, especially the Adler case currently on appeal in the federal courts. But the Supreme Court has never addressed it. I would like the Supreme Court to sometime address it and so that is one formal area that we look at when selecting cases. The Supreme Court should address it, clarify that issue once and for all. We would like to be able to select the kinds of cases necessary to have them do that.
Thus, the LC contrives to take full advantage of the congruence between its approach to policy influence and the norms of courts. Despite its general lack of resources, it takes great care to sponsor cases that force courts to develop or clarify policy.

6.7 Other Influences: Orientation & Legal Argumentation

Below, I consider the influence of religious ideology and orientation to policy influence on an aspect of group behavior not previously discussed or systematically analyzed by this research. Specifically, I examine the legal arguments groups present to courts. This is an aspect of group behavior that I have only touched on in the previous analyses (see Section 6.4.1), and never with any degree of specificity. My analysis of group legal arguments has developed inductively from general observations of the groups. The in-depth analysis of group litigation behavior that is the centerpiece of this research has also afforded a close examination of the groups' legal rationale when pressing their claims before courts. In exploring determinants of depth of commitment to litigation participation, it became evident that other behavioral differences among the groups might be explained (or at least clarified) through an appeal to religious ideology and orientation to policy influence. Comparison of group characteristics revealed other differences in group behavior. However, the most striking example to emerge, beyond differences in depth of litigation behavior, was a difference in legal argumentation.

If a litigation agenda is the tool that interest groups use to influence judicial policy, then legal arguments are the fine cutting edge used to persuade courts to
implement their policy preferences. Groups not only prefer particular strategies for litigation, and develop distinguishable litigation agendas, but they carefully select the arguments they present to courts. In previous sections, I explore the influence of religious ideology and orientation to policy influence on the agendas of conservative Christian litigators. I use these concepts to explain behavioral differences among groups in the area of depth of litigation participation. I note that pragmatic and principled orientations predispose groups to emphasize or avoid certain kinds of behavioral options.

The discussion of religious ideology, policy orientation and litigation behavior above partially considers the importance of legal argumentation. For example, some groups feel constrained by religious ideology against advocating limited policy revisions, or even particular policy positions. Thus, in examining influences on groups' litigation behavior, I have tacitly considered the legal arguments proffered by conservative Christians to courts. In this section, I undertake a more systematic examination of a connection between religious-ideology, policy orientation and the legal arguments of conservative Christian litigators. I explore how orientation impacts the kinds of arguments presented to courts, offer a general sense of the timbre of each groups' rhetorical style and emphases and relate specific evidence of legal argumentation that supports these general impressions. I conclude that a pragmatic orientation to policy influence increases the sophistication of groups' legal arguments, supporting efforts to exert influence on court-crafted policy outcomes. Furthermore, a principled approach is accompanied by legal rhetoric supporting religious-ideological principle. Below, I consider the quality of each groups' legal arguments in turn.
The primary vehicle for carrying the ACLJ’s goals to the courts has been Sekulow’s pioneering success in making a free speech defense in cases involving establishment clause claims. He has exploited a tension between the Free Exercise and Establishment clauses of the First Amendment, and offers courts a rationale for resolving disputes arising under them. The central logic of Sekulow’s argument is that the free exercise of religion often involves an expression of faith, and that expression is constitutionally protected speech. He has applied this argument in Church State cases, bringing the Free Speech and Free Exercise clauses to bear on governmental claims that its actions are consistent with the First Amendment prohibition of an establishment of religion. Where Sekulow has redefined free exercise of religion as protected speech, the courts have appeared willing to resolve conflicts involving some government entanglement with religion in favor of those making the free speech claims.

According to Sekulow, this interpretation of core First Amendment clauses reflects a desire to correct the excesses of what he calls the Supreme Court’s “militant neutrality,” and to carve out a role for religion in public life. He has written that “… in many cases, the [First] amendment’s guarantee of free exercise of religion clearly outweighs petty worries about the seeds of a state religion.” (Sekulow 1990) That statement would surely give church and state separationists considerable pause. However, Sekulow goes on to qualify how he envisions the role of religious expression in American life. “I believe that in our society, the gospel message will win and carry the day. I don’t have to be there thumping anybody with a Bible. I’ve just got to make sure we have equal access to the playing field. Nothing more, but nothing less.” (Sekulow 1997)
Sekulow is so adroit at convincing judges to adopt his position that even his fiercest foes take note of his genius. When it comes to the topic of his own rhetorical abilities, Sekulow does not mince words. “Well, the guys that are against me in this will tell you, or you’ve read the articles. Usually they’re very complimentary, and they say ‘if Jay gets to frame the issue first, Jay wins.’ So my job is to frame the issue first so Jay wins.” Sekulow’s litigation methods draw heavily on civil rights era tactics of the NAACP and ACLU. His methods are the hallmark of the new generation Christian litigators -- tolerant of slow, reasoned policy changes, content to “chip-away” at unfavorable precedent, or weigh-in with the courts on unresolved policy questions.

Sekulow’s 1997 trip to the Supreme Court, defending abortion protestors in *Schenck v. Pro-Choice Network* (1997) provides an example of this sophistication. It was not a case Sekulow would have chosen to bring up to the high court. It involved, as he states, “...horrible facts for our side. This was aggressive civil disobedience, this wasn’t Mom and Pop out carrying a pamphlet.” And yet, he managed to win by focusing on a single issue, conceding others and successfully shifting the focus of the case before the justices. In *Schenck*, a district court judge restricted the activities of abortion protestors by implementing “floating bubble-zones,” or a space around patrons accessing an abortion clinic. Within this space, defined by the judge as 15 feet, speech was restricted. Additionally, the judge’s Restraining Order required protestors to obey fixed bubble zones, which the Supreme Court had upheld in *Madsen v. Alexandria Women’s Health Clinic* (1994). Four protestors were arrested and prosecuted for violating the judge’s order. In preparing for oral argument, Sekulow focused entirely on the issue of the
floating bubble zones, conceding the issue of fixed zones (although the ACLJ brief contained arguments for holding fixed bubble zones unconstitutional).

Transcripts of oral argument show Sekulow only arguing against fixed bubble zones as applied to abortion protestors along with the floating zones, and only when asked to address the issue by Justice Ginsburg (Schenck v. Pro-Choice Network, transcripts of oral argument 1997). Sekulow notes that his strategy limited his influence on the outcome, but maximized the impact of his arguments in one policy area.

[Justice] Scalia said we didn’t go far enough, we should have done more. He’s right except for the fact that as a litigator you go up and you say ‘what can I accomplish through this case?’ There was no way we were going to win the fixed zone . . . [Opposing counsel] got irritated because the Washington Times, the Washington Post and the National Law Journal said we won. And she did win the fixed zone. The Court held it constitutional. As far as I was concerned, they could have fixed zones all day and all night.

In effect, Sekulow applied the strategy of incrementalism to a situation in which his side had much to lose. By conceding one issue (on which the Court had already ruled against him), he maximized the chances that the Court would pay attention when he argued the other issue.

The previous section demonstrated a congruency between AFA-CLP belief and argument. I found that the AFA-CLP is committed to a form of legal discourse that emphasizes the congruency between means and ends. In a traditional form of Christian ethics, the AFA-CLP refuses to make policy arguments for the sake of influence – the means it uses (its legal arguments) must be as pure as the ends (its goals for policy influence) that it pursues. It is wholly committed to conveying the fullness of its religious and ideological beliefs in the legal context. Below, I examine how the AFA-CLP’s
principled policy orientation influences characteristics of the arguments it presents to courts.

While the ACLJ’s pragmatic orientation to policy influence produces a level of sophistication in the arguments it makes in court, the AFA-CLP’s principled approach to policy influence attenuates its influence on policy outcomes. It is important to note that the AFA-CLP’s litigation agenda is well developed. It has a clearly defined mission, a myriad of cases from which to choose and a loyal following of supporters. It has spent considerable time developing a strategy for using the courts, and its leaders can articulate a philosophy behind this strategy with a great deal of precision. The AFA-CLP could hardly be called “unsophisticated” in this sense. When compared to the ACLJ, the AFA-CLP does not lack skills for self-reflection and goal setting. However, the core of its orientation to policy influence places it at odds with important institutional norms of the legal system, and attenuates its influence on policy outcomes. Thus, its strategy for using litigation as a tool for policy influence is unsophisticated in comparison to the ACLJ’s strategy for litigating.

In the same way, the arguments of the AFA-CLP are suited for primarily an ideological use of the courts. As discussed above, the interaction between the AFA-CLP’s religious ideology and orientation to policy influence is a congruency of belief and argument. A need for this congruency directly impacts the arguments the AFA-CLP is willing to make in court. Consider this statement from Brian Fahling on the influence of the AFA-CLP’s principled orientation on how it approaches litigation.

We will not compromise principles just to win a case. When we present an argument to the court it is because we truly believe that the Constitution
and the laws of the United States are properly interpreted according to the merit of that document [the Bible]. . . It is a Biblical worldview that informs our jurisprudence. We all happen to be of the reformed faith, and we are heavily influenced by it. I don’t think that you can get from here to there without a principled approach. (Fahling 1998)

There is some tangible evidence that arguments made by the AFA-CLP have placed it at odds with judicial decision-makers. These few instances occur in the most ideological of cases – the challenge to the FACE act on Commerce Clause grounds, and several involving church-state issues. However, as noted, these are exactly the kinds of cases that the AFA-CLP is most likely to litigate. Thus, the arguments that the AFA-CLP supplies to courts have been restricted to those that most closely support its religious-ideological views and the proper exercise of judicial policy making. As appellate courts have not been particularly receptive to principled arguments from Christian attorneys in the past, it is difficult to imagine that the AFA-CLP will ever consider its efforts successful, even if it does exert some influence on policy outcomes.

Finally, I consider the influence of policy orientation on the arguments presented by the LC. Much like the ACLJ, the LC takes a pragmatic approach to policy influence. This pragmatic orientation is revealed in the legal arguments it makes to courts. For example, in Mergens, Staver attempted to adapt free expression arguments to the use of court ordered injunctions. Ultimately, he failed to win on all counts, but Staver’s line of argument was very much in line with those arguments Sekulow and the ACLJ had been making in other cases. On the other hand, the LC’s efforts to pursue its goal of equal access are often accompanied by rather harsh rhetoric. Staver’s public comments after the Madsen case were full of scathing language aimed at the Court. His frustration with
public schools for noncompliance with Supreme Court decisions suggests that equal access is a value approaching the level of ideology within the LC. Consider Staver’s remarks concerning equal access. Writing in “The Liberator,” the LC’s monthly newsletter, Staver sums up the LC’s equal access argument.

The basic constitutional principle is simple. If a public institution opens up its facilities to use or rent by outside secular organizations, the same institution must open its facilities to religious organizations on a nondiscriminatory basis. Any discrimination whatsoever violates the constitutional guarantee to freedom of speech. The concept can be summed up in two words: Equal Access. Equal access means equal treatment. Any discrimination is unconstitutional. Religion is not a disability. (Staver 1999a)

The following statement, taken from an interview with LC Staff Attorney, Nicole Arfas-Kerr, demonstrates the place of the LC relative to the AFA-CLP. It also contrasts the rhetorical styles of the two organizations. Arfas-Kerr comments on the Supreme Court’s decision in Romer v. Evans.

The Court said that 53% of the voters in Colorado are bigots, those who voted for the amendment. That is arrogance in the extreme. However, you saw recently what happened in Cincinnati. Cincinnati passed an ordinance saying no special protection based on sexual orientation. And the 6th Circuit upheld it, even after Romer. They said the ordinance in Cincinnati was not as broad. The Colorado ordinance said that there could not be any statute, law or public policy – anything! Not even, for example, a special law enforcement unit to deal with gay-motivated crime.

Contrasting this statement with that of the AFA-CLP on Romer’s outcome, we see just as much incredulity. However, while the AFA-CLP went on to discuss the impact of this reasoning on Christian orthodoxy, Arfas-Kerr was more pragmatic. She turned to a discussion of how an anti-gay rights ordinance could be crafted to pass muster with the
The contrast between the AFA-CLP and LC in approach and style is significant for understanding the influence of religious ideology on the legal arguments of each group.

The above statements are not more or less severe than those issued to ACLJ supporters in Sekulow’s newsletter. However, considering the overall picture of how the LC uses litigation as a tool, one might find a bit more adherence to religious ideology and a slightly greater tendency to stand on principle rather than approach courts with a pragmatic sense of what the group can accomplish. Ultimately, the LC acts and argues much more like the ACLJ than AFA-CLP. The differences between the ACLJ and LC’s litigation agendas are a difference of degree and not kind, and this discussion points to a subtle difference in approach to policy influence and resultant effects on the LC’s legal arguments.

6.8 Conclusion

This analysis has centered on unexpected differences in litigation agendas among conservative Christian groups pursuing relatively similar goals. These groups, which purportedly make use of the courts with the goal of influencing policy, engage in very different forms of litigation behavior. To develop our understanding of conservative Christian litigators, I have explored group adherence to religious ideology, its impact on orientation to policy influence and the interaction between orientation and groups’

[54] Interestingly, no ACLJ attorney commented on the outcome of Romer v. Evans.
litigation agendas. Further, I explore how orientation to policy influence impacts a related concept – legal argumentation. I develop these concepts in an effort to increase our understanding of what factors influence the litigation behavior of conservative Christian litigators, and to address theoretical implications for our understanding of interest group motivations in general.

Adherence to religious ideological goals may account for differences in approach to policy influence and differences in litigation behavior. It may limit the possible behavioral options open to a group and structure the way in which groups approach the courts, even influencing what cases a group will consider when planning its litigation agenda and what arguments it will present to courts in those cases. Future research into the motivations of religiously or ideologically driven interest groups should consider differences in adherence to principle as guiding values for interaction with courts. In the case of conservative Christian litigators, researchers might develop a typology of religious-ideology, distinguishing categories of groups. Further analysis might also explore how ideology and religious principle function to define not simply how groups use the courts, but also how their views of the broader society may impact their use of the courts for policy influence.
<table>
<thead>
<tr>
<th>Year</th>
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<th>AFA</th>
<th>LC</th>
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</tr>
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</tr>
<tr>
<td>Totals</td>
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<td>42</td>
<td>46</td>
</tr>
</tbody>
</table>

**Table 6.1:** Comparing ACLJ, AFA-CLP and LC Frequency of Litigation Participation

305
| Group | "Test Case" | | "One Shot" | | | | | | | | | | On Brief | Amicus | Other | Totals |
|-------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
|       | (Trial & Appellate) | Appellate Only | Trial Only | | | | | | | | | | | | | |
| ACLJ  | 33 | (34) | 11 | (11) | 16 | (16) | 10 | (10) | 26 | (26) | 2 | (2) | 98 | (99) |
| AFA   | 2 | (5) | 12 | (29) | 10 | (24) | 0 | (0) | 14 | (33) | 4 | (10) | 42 | (100) |
| LC    | 22 | (48) | 3 | (7) | 16 | (35) | 3 | (7) | 2 | (4) | 0 | (0) | 46 | (100) |

**Table 6.2:** Type of Participation as percentage of Overall Litigation Agenda
### Table 6.3: Instances of Participation as Case Sponsor throughout an Appellate Process

<table>
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<th>Int. App. to CLR</th>
<th>Trial to appellate court*</th>
<th>Trial to appellate court†</th>
<th>Multiple Appearances</th>
<th>N*</th>
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<td>2 (4)</td>
<td>3 (6)</td>
<td>2 (4)</td>
<td>13 (33)</td>
</tr>
<tr>
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<td>0 (0)</td>
<td>0 (0)</td>
<td>1 (2)</td>
<td>1 (2)</td>
</tr>
<tr>
<td>LC</td>
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<td>0 (0)</td>
<td>2 (6)</td>
<td>4 (8)</td>
<td>1 (2)</td>
<td>9 (22)</td>
</tr>
</tbody>
</table>

**Key:**
- *First number equals number of actual cases. Number in parenthesis equals number of instances of litigation by the group in those cases.*
- **CLR** Court of Last Resort (state or federal)
- **Int. App.** Intermediate Appellate Court
- *Group petitioned for certiorari review, which petition was denied.*
- †Group did not petition for certiorari review after appellate court decided the case
- **multiple appearances** cases in which the group appeared more than once before the same court in related matters that were decided with separate opinions.
7.1 Introduction

In analyzing conservative Christian law firms, I have addressed three primary goals and contributions that this research makes to the study of interest groups. First, I seek to develop a framework that allows us to understand interest group characteristics and the motivations of elite leadership in identifying organizational goals. Second, I develop typologies of group goals and litigation behavior that may contribute to a deeper understanding of how groups act to achieve their goals over time. Finally, I examine an unexpected phenomenon emerging from this analysis that incited a search for an explanation. The explanation that I develop may contribute to the development of theories of interest group behavior and elite leadership.

In this chapter, I provide a summary of findings from the previous analyses. Here, by focusing on the three contributions noted above, I consider the implications of my findings for our understanding of interest group litigation. Next, I explore the significance of ideology for understanding interest group motivations, and provide some initial ideas concerning how to integrate ideology into existing theories of interest group participation. I then turn to the implications of this analysis for our understanding of the Religious
Right. I argue that religious ideological convictions tend to marginalize the influence of those religious interests that take a strict principled approach to policy influence. This should lessen fear that groups driven by purely ideological motives can exert strong influence on courts. Furthermore, those religious groups that do exert influence on courts have begun to adopt tolerant attitudes, and work within the "policy stream." Their litigation efforts are characterized by pragmatism and a revealed respect for rights doctrine. These are characteristics that could define any public interest litigator, and should reduce our skepticism that conservative religious values are incompatible with a liberal tradition of rights. Finally, I consider the future of Christian litigation, and what future research is necessary and appropriate for continuing to refine our understanding of conservatives in court.

7.2 Summary of Findings and Implications for Interest Group Theory

As noted above, this research made three contributions to the study of interest groups generally, and Christian litigating interests specifically. First, I applied a framework for a deeper understanding of interest group characteristics, development and behavior. I developed this framework by carefully separating group goals from group behavior. I did this so that I can more fully define the relationships between the goals groups set and the behavior they undertake to fulfill those goals. Additional, separating goals from behavior provided conceptual clarity, and allowed me to examine how organizations develop over time. For example, having conceptualized goals as distinct
from behavior, I undertook a rigorous analysis of how the ACLJ, AFA-CLP and LC establish organizational goals. I explored how goals motivate these organizations and define their missions. Further, I explored how other classes of variables interact with group goals to influence behavior. Specifically, I examined how groups acquire and utilize resources like monetary support, expert legal staff, and support staff. I then tested expectations for how group goals and resources interact to influence group litigation. This framework provided a defined structure for qualitative analyses by increasing the depth of treatment and analysis. Ultimately, it is this depth of analysis upon which I rely to develop explanations for the "surprising and striking" result that groups with similar goals exhibit very different litigation emphases.

A second and related goal is the development of group behavior and goal typologies. These typologies may assist scholars in classifying and separating behavior and goals as distinct aspects of group characteristics. The typology of group goals I developed is distinct from the strategies groups employ to achieve their goals. I adopted three broad categories of goals that characterize the litigation activities of interest groups. Groups may litigate to influence policy outcomes and build up favorable precedent, to develop a reputation as an expert in a particular legal issue area, or to focus media and public attention on their particular cause. The typology of litigation behavior orders behavioral options according to the amount of involvement (in time and resources) required for participation. I used the term depth to refer to ever increasing levels of involvement required in this typology of behavioral options. Using these typologies, I articulated expectations for the influence of goals and resources on litigation behavior.
Underlying the analysis based on these expectations is an assumption that is common in the interest group literature. I assume that groups selecting certain goals will exhibit different behavioral emphases, i.e., groups with dissimilar goals will have dissimilar litigation agendas. Furthermore, groups with similar goals will have similar litigation strategies.

The final contribution of this research was to challenge this underlying theoretical assumption. In analyzing the groups, I uncovered a counter-factual that cannot be explained through an appeal to traditional variables used to explain interest group behavior. My observations reveal that the three groups I analyzed approach litigation very differently, and have developed very different litigation agendas. However, the goals of the three groups are very similar. In this instance, similar goals have led to dissimilar litigation agendas. This is, to borrow the phrase, a "problematic qualitative observation." (Barton and Lazarsfeld 1955) Where our expectations are not met, or we uncover results we could not have predicted, we are forced to look for explanations. A vast majority of the interest group research suggests that where groups seek policy influence, they almost universally use the test-case strategy. This strategy provides the greatest possible effect on court-crafted policy. However, while all three groups purported to seek policy influence, each used the courts differently, and one group seemed to eschew using the test-case strategy altogether. I turned back to the groups themselves to seek an explanation for this behavior running counter to accepted interest group scholarship.
7.3 Integrating (Religious) Ideology into Theory of Interest Group Behavior

In seeking an explanation for the diversity of approaches exhibited among the groups, I explore the influence of religious ideology on litigation behavior. Relying on the inductive and qualitative methodology I have employed throughout, I queried the groups on the role of religious principle in determining how they approach the courts. I defined approach to the courts as either pragmatic or principled. A pragmatic approach is characterized by adherence to the institutional norms of courts for incremental policy change. A principled approach is characterized by an unwillingness to depart from religious ideological principle to adhere to court norms and obtain policy influence. I developed expectations for the influence of religious ideology on behavior, noting that religious ideology may limit what a group defines as a legitimate approach to policy influence, and thus limit what behavioral options are feasible and efficacious.

Here, I provide a brief description of expectations for how religious ideology influences approach to policy influence. Some groups take a pragmatic approach to policy influence. This kind of group adheres to religious beliefs, but is willing to depart from those beliefs to obtain policy influence. Thus, its compatibility with the norms of appellate courts will encourage it to engage in long term litigation using a test-case strategy. For a "pragmatic" group, the disconnection between religious ideology and approach to the courts makes a long-term litigation strategy a realistic and efficacious use of its time and resources. Some groups taking a principled approach adhere to religious beliefs, and are unwilling to depart from those beliefs. These groups will find it less efficacious to approach the courts through long term litigation using a test case
strategy. This is so, in part, because the group will find courts less than willing to consider its “principled” stance on policy. Religious ideology as it affects orientation to policy influence may produce incompatibility between the norms of courts and the principles of litigating interests. Thus, institutional incompatibility may produce variation in litigation behavior.

Further, I explored how religious ideology and approach to policy influence may account for other differences among the groups such as differences in legal argumentation. I find that these factors also account for differences in arguments a group is willing to present to the courts. Pragmatic groups use sophisticated legal arguments to obtain influence on policy, while a principled approach is accompanied by strong rhetoric supporting the religious principles of the group.

I found that, while the ACLJ, AFA-CLP and LC adhere to religious ideological principles we commonly associate with the Religious Right, there are differences in how religious ideological beliefs influenced their understanding of litigation as a legitimate tool for influencing policy. For the AFA-CLP in particular, religious ideology limited its capacity to achieve the goal of influencing court-crafted policy outcomes. It is unwilling to compromise its principled positions to make arguments that courts want to hear. Thus, it found the use of a test case strategy of limited value in achieve the aim of policy influence. For both the ACLJ and LC, internal norms reinforced the notion that it is better to exert some influence on courts rather than little or none at all. Both organizations were willing to depart from strict adherence to religious principle to “play the courts’ game.” Both made much fuller use of those behavioral options that have proven value in
persuading courts to move policy closer toward their optimum policy goals. Thus, all
three groups exhibited distinct rationale for selecting among behavioral and strategic
options.

The concepts of Religious Ideology and Approach to Policy Influence may have
broader implications for the study of interest groups because they suggest that
categorization and classification schemes may be flawed. The significant finding of this
research is that religious ideological beliefs may influence how some groups approach the
courts to obtain their goals. In the past, interest group scholars who have not separated
goals from the behavior those goals reveal, have used behavior (in part) to categorize
litigating interests. This study raises the possibility that previous research may have
incorrectly identified the goals of some ideologically motivated groups, and thus
categorized them incorrectly. At the very least, some researchers may have
misunderstood the reasons why some groups are involved in litigation, i.e., mistaken the
motivations of these groups for engaging the courts.

It seems reasonable to conclude that groups employing the test-case strategy
should be viewed as policy-maximizers, rather than reputation-builders or cause-
supporters. However, as to those groups that do not employ the test case strategy as their
primary litigating tool, we cannot assume that they have selected organizational goals
other than policy influence. Other factors may intervene to make a long-term litigation
strategy unprofitable or undesirable for those groups. I have identified one such factor
here, as it applies to religiously motivated litigating interests.
In considering the question of how we integrate ideology as a variable influencing litigation behavior into existing theories of interest group litigation, I offer some initial reflections and suggestions. First, the significance of this variable means that theories of interest group behavior may require a more sensitive system for creating categories of groups. In categorizing groups as public interest litigation firms, we may want to consider ideology as a sub-category within that category. Public interest litigation firms that are ideologically driven may induce researchers to create postulates that take ideological constraints into account. In reference to the groups presently under study, separating religiously motivated groups from, for example, the ACLU in our categorization schema seems reasonable as a first step in sorting out ideological influences. A more sophisticated categorization scheme may assist in developing further understanding of religious interest groups, and comparing those groups to other kinds of public interest litigators. We might find that a rigorous treatment of religious ideology may lead us to rethink how we categorize other public interest litigators. We may find that other types of groups experience similar influences, even where the variable influencing behavior is simply “ideology” rather than “religious ideology.”

Secondly, it seems apparent that future research must take greater care in considering classification schemes based on goals and behavior. Classifying groups as goal-seekers based on their behavior is a flawed system that may lead to significant errors in our understanding of group goals and motivations for behavior. This research has offered one method for separating goals from behavior, and classifying groups according to goals rather than the behaviors said to reveal goals. It also offers a more rigorous
method for relating types of litigation behavior to each other. Thus, the research suggests that we reconsider how we view groups, and create typologies of group goals and behavior that can be applied across groups. While this is surely a matter of conceptual clarity, rather than an overhaul of major proportions, the present analysis suggests that conceptual clarity is lacking and can lead to errors both in specification of theory and categorization of interest groups.

Finally, this research suggests that, as a requisite part of studying litigating interest groups, researchers must query groups about their objectives when litigating. An intimate knowledge of interest group goals provides an understanding of elite group leadership motives and a broader understanding of groups, their perceptions and characteristics. While this research employs case study analysis, a close familiarity with group leaders and their activities is compatible with a variety of methodologies. To gain a clear comprehension of how interests hope to influence the courts, it is important to undertake such close encounters with the objects of our study.

7.4 Implications for Understanding Religious Litigation and the Religious Right

While there is much concern over the entry of conservative Christians into the courts, and the resultant influence their particular perspective has on the development of law, this research offers a different view of conservative Christian litigation. In this section I lay out the implications of this research for our understanding of the Religious Right’s impact on the courts. I suggest that manipulation of the judicial process by
conservative Christian litigators is not inherently illegitimate, or ill conceived. Conservative Christian litigators use the courts in much the same way that other public interest litigators do. This research notes a strong overlap between the strategies and tactics of liberal social interests and conservative Christian litigators. While conservative Christians offer arguments that reflect their perspective on American law and courts, they attempt to influence court outcomes in the same ways that other ideologically motivated public interest law firms do. In short, conservative Christian litigators behave in very much the way we should expect them to behave, given the legal context of adversarialness and the political context of interest group politics.

As this research demonstrates, where conservative Christian litigators are unwilling to accept the parameters of the legal-political context, they find that their influence in court is limited. In effect, the judicial system acts as a self-correcting mechanism. The norms, traditions and accepted practices of courts demand that conflicts within society be translated into legally recognizable claims. (Smith, 1997) Where parties, or the interests that represent them, are incapable of framing their legal claims in terms that courts find understandable and recognizable under law, their capacity to influence outcomes is significantly reduced.

All three groups included in this study demonstrate the capacity to make legal claims that courts recognize as legitimately framed under law. One group (the AFA-CLP) significantly limits the kinds of cases it will take and the arguments it will make in court. It does so because of its adherence to religious ideological principles. Regardless of the political efficacy of such restrictions, they do exist. They eliminate the possibility that
one potential perspective will be considered a legitimate policy alternative by courts in certain issue areas. Admittedly, courts consider the policy positions of some conservative Christian groups as radical. Furthermore, the process of litigating discourages these groups from articulating perspectives that they know will be discounted by judges. This act of "weeding out" particular perspectives should reduce fear that such groups exert pressure on courts, or influence policy inordinately.

On the other hand, some conservative Christian groups have managed to overcome religious ideological barriers and enter the courts as actors offering policy alternatives that judges will consider. The cases brought to the courts, and the arguments made by the ACLJ and the LC are from a defined perspective – these are Christian law firms claiming recognition for religious practices we associate with a conservative Christian tradition. However, although courts have sided with them under some circumstances, we cannot conclude that conservative Christians have breached the courts and are now using them to craft law reflecting only a Protestant and conservative Christian moral and social doctrine.

Quite to the contrary, this research suggests that conservative Christian groups have adopted attitudes and practices that conform to the norms of courts. These attitudes and practices are associated with a liberal tradition of tolerance of perspectives and respect for rights doctrine. Thus, the ACLJ and the LC do not make claims solely on a Biblical worldview. To side with these organizations, judges do not have to adopt their particular religious perspective. Instead, these organizations endorse a liberal and pluralist definition of civil and social interaction.
The clearest example of liberal influences on conservative Christian legal philosophy is the ACLJ’s “Place at the Table” perspective. The ACLJ argues that society should a civic forum for the expression of a multitude of ideas. This multitude should include various religious perspectives. Where religion is excluded from the table of ideas and perspectives, the ACLJ has argued for a broad interpretation of the Free Expression clause of the First Amendment to encompass religious freedom.

On another level, the ACLJ and LC have adopted the virtue of pragmatism - a quality that is particularly useful in approaching appellate courts. Unlike the AFA-CLP, the ACLJ and LC are willing to make arguments for incremental policy change, and willingly accept past precedents that courts refuse to reconsider. For example, the ACLJ participated in Schenck, a case involving abortion protestation. On appeal, the ACLJ stipulated that the abortion clinic had a legitimate interest in functioning and maintaining a safe clinical environment. This is an extraordinary and striking admission for a conservative Christian law firm. The ACLJ admitted that the right to an abortion was beyond the scope of the particular case, and stipulated that service providers had an interest in providing abortions to clients. It is also worth noting that this is exactly the type of pragmatic response to the realities of litigating social issues that keeps the AFA-CLP from engaging courts in some instances. The AFA-CLP, by its own admission, will not make such stipulations because they violate religious principle. Thus, it is just as legitimate to conclude that modern liberal notions of tolerance and openness have breached religious conservatism (at least within this set of interests) as it is to argue that
conservative Christians have found a way to manipulate courts into endorsing their particular views.

7.5 The Future of Conservative Christian Litigation

The 1999 term of the U.S. Supreme Court included several high profile cases involving core conservative Christian issues. In *Hill v. Colorado*\(^{53}\), the Court reconsidered use of floating bubble zones to quell violent demonstration around abortion clinics\(^{56}\). It took on prayer at non-curricular public school events in *Santa Fe Independent School District v. Doe*\(^{47}\) (120 S. Ct. 2266). In a case considered the progeny of *Rosenberger*, the Court considered the use of student fees by universities to fund student organizations that some students find objectionable (*Southworth v. The University of Wisconsin*\(^{15}\)). Finally, the Court considered whether the state could stop the exclusion of a gay leader by the Boy Scouts in *Boy Scouts of America v. Dale*\(^{59}\). In each of these cases, with the exception of *Dale*, conservative Christian litigators met with defeat at the hands of a supposedly sympathetic Supreme Court.

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\(^{53}\) This case was brought to the Supreme Court by the ACLJ.

\(^{56}\) This time, the Court considered the practice of imposing a floating bubble zone-like restriction mandated by a state legislature, and not through a court-imposed Restraining Order, as it did in *Madsen*

\(^{47}\) This case was brought to the Supreme Court by the ACLJ.

\(^{15}\) *Southworth* was brought to the Supreme Court by the Northstar Law Center, and funded primarily by the Alliance Defense Fund.

\(^{59}\) *All three of the groups considered in this study submitted briefs amicus curiae in support of the Boy Scouts of America.*
Several of these defeats were devastating. Sekulow, who appeared before the Court twice during the term, may have made his first crucial error in rushing the Santa Fe case up to the Court.69 Of more concern is the tenor of the arguments made by conservative Christian litigators. They reflected an “us versus them” quality that has been absent in previous terms. In the past, conservative Christian litigators had fought to overturn limitations on religious expression, to counter state action against religious protestors, or to gain access to public forums. In this term, they argued cases that seemed to indicate a return to past practices of exclusion (Dale), separation (Southworth) and cultural domination (Santa Fe). Additionally, they failed in their efforts to limit the ability of the state to restrain abortion protestors.

During the 1999 term, the Court acted to restrain what could be considered the religious ideological influences of conservative Christian litigators. The elite leadership of these interest groups appeared eager to test the boundaries of courts’ willingness to accept their logic, pushing the envelope of that logic in recent cases. Their willingness to do so raises some important concerns about just how “mainstreamed” conservative litigators have become. Whether the 1999 term heralds a change in the tolerant policies of groups like the ACLJ remains to be seen. However, the results from this term should convince conservative Christian litigators that they can exert much more influence over

69 Other cases, including one handled by the LC, contained purer case facts supporting student-led expressions of any kind at non-curricular functions. In bringing the Santa Fe case to the Court before these others, Sekulow may have erred. Other cases may have allowed the Court to introduce policy developments that recognized the students’ role in selecting public expressions before sponsored events. However, the Court’s opinion in Santa Fe suggests that under no circumstances could a student body select a religious message or prayer before an event.
court outcomes if they follow their established pattern of influence. That pattern allows them to experience significantly more success when they bring cases through the courts that cast Christians as a minority to be protected, not a majority exerting its will in the public square.

7.6 The Future of Research on Religious Litigation

Future research into Christian litigation must focus on three important and related goals. First, researchers must continue to emphasize and explore the role of religious ideology as a factor influencing litigation behavior. Second, researchers should explore differences between types of Christian litigators. Finally, researchers should explore differences among Christian litigators and the broader set of public interest litigators that may also be influenced by ideological concerns.

The role of religious ideology appears to frame the litigation behavior and other activities of conservative Christian groups in ways not addressed by this analysis. Here, religious ideology emerges from an inductive process of discovery as an explanation for a puzzling phenomenon. The next step in addressing the influence of religious ideology on litigation behavior is to examine it systematically, to integrate it into the framework established for understanding litigation behavior, and to uncover the nature and scope of its influence. There are hints that religious ideology may have broader influence on interest group behavior. Importantly, field research has revealed distinct differences in the language used by conservative Christian groups when approaching grass roots.
supporters versus courts. A future analysis focused on religious ideological influences may uncover patterns of language and approach across litigation and other key intermediate functions of litigating interests.

Future research might also analyze differences among types of Christian litigation firms. Various sects have established litigating firms within the last five years. Researchers may consider mining the wealth of differences in goals and behavior that exist among Catholic, Protestant-Fundamentalist and Evangelical litigating firms. Based on recent trends, differences among groups may be emerging at the denominational level as schisms within the movement and increased monetary resources produce a diversity of interests and patterns of involvement. Analyses of the influence of religious ideology might center on differences between these sects and factions, or compare the set of groups representing conservative Christians to those “High Church” Protestant litigation firms that are set decidedly in the liberal camp.

Finally, as I allude to above, future research must create finer distinctions in categorizing public interest law firms. Analyses comparing conservative Christian litigators to other types of public interest may assist in this process. Here, the main goal is to understand if religious ideology accounts for differences between conservative Christian and other types of public interest litigators. Further, analyses comparing sets of public interest litigators might explore if characteristics exist that are common across organizational types where groups are influenced by ideological concerns.

Overall, this research indicates a need for further refinement in our understanding of influences on interest group litigation behavior, and for further analysis of the
conservative Christian litigation phenomenon. The case study method employed here has
garnered important insight into the motivations of conservative Christian litigators, and
suggested possible influences for a broader set of interest groups. This method of analysis
is profitable, and it may be extended to a larger set of groups and still yield important
information about the nature of interest group litigation. Yet, the primary contribution of
this analysis has been in the realm of theory building and refinement. Further analyses of
interest groups that litigate (and especially of public interest litigators) may properly
explore the influence of ideological motivations on groups strategic behavior.
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Board of Regents of the University of Wisconsin v. Southworth 120 S.Ct. 1346 (2000)


City of Boerne v. Flores. 521 U.S. 507 (1997)

Engel v. Vitale, 370 U.S. 421 (1962)

Everson v. Board of Education, 300 U.S. 1 (1947)

Harris v. McRae, 448 U.S. 297 (1980)


Jews for Jesus v. Hillsborough County Aviation Authority. 162 F. 3d 627 (1995)


Lee v. Weisman, 505 U.S. 577 (1992)

Lemon v. Jurtzman, 403 U.S. 602 (1971)


Operation Rescue v. Women's Health Clinic, 644 So. 2d 86 (1994)


Roe v. Wade, 410 U.S. 113 (1973)


Roth v. United States 354 U.S. 476 (1957)


United States v. Miller, 874 F.2d 1255 (1989)


APPENDIX A

ACLJ LITIGATION

Cases in which the American Center for Law and Justice participated, through the 1998-1999 court term:


Madsen v. Women's Health Clinic, 512 U.S. 753 (1994)


Lee v. Wiesman, 505 U.S. 577 (1992)


Cruzan v. Director, 497 U.S. 261 (1990)


Denver Area ETC, Inc. v. FCC. 518 U.S. 727 (1996)


Board of Westside Community Schools v. Mergens. 496 U.S. 226 (1990)


Ex parte State ex rel James v. ACLU of Alabama. 711 So. 2d 952 (1998)


In re Inquiry Concerning a Judge. 345 N.C. 632; 482 S.E. 2d 540 (1997)

State ex rel Angela M.W. v. Kruzicki. 209 Wis. 2d 112; 561 N.W. 2d 729 (1997)

State ex rel. Thompson v. Jackson. 199 Wis. 2d 714; 546 N.W. 2d 140 (1996)

NOW v. Schiedler. 968 F. 2d 612 (1992)

Lamb's Chapel v. Center Moriches School District. 959 F. 2d 829 (1992)


Mergens v. Board. 867 F. 2d 1076 (1989)


Lutheran Church - Missouri Synod v. FCC. 154 F. 3d 487 (1998)
Lutheran Church - Missouri Synod v. FCC, 141 F. 3d 344 (1998)


Edwards v. City of Santa Barbara, 150 F. 3d 1213 (1998)


Subelko v. City of Phoenix, 120 F. 3d 161 (1997)

Mahoney v. Babbitt, 113 F. 3d 219 (1997)


Church v. City of Albuquerque, 84 F. 3d 1273 (1996)


Dong v. Slattery, 84 F 3d 82 (1996)

Black v. City of Atlanta, 35 F. 3d 510 (1994)

Black v. City of Atlanta, 61 F. 3d 27 (1995)


Ellis v. City of La Mesa, 990 F 2d 1518 (1993)


In re Hodge, 200 Bankr. 884 (1996)
APPENDIX B

AFA-CLP LITIGATION

Cases in which the American Family Association – Center for Law and Policy participated, through the 1998-1999 court term:


*Sable Communications of California, Inc. v. FCC.* 492 U.S. 115 (1989)


*Osborne v. Ohio.* 495 U.S. 103 (1990)


*Operation Rescue v. Women's Health Clinic.* 644 So. 2d 86 (1994)

*In re Advisory Opinion to the AG.* 632 So. 2d 1018 (1994)


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Channel Four Television Co. Ltd. v. Wildmon & AFA, (1992)


Barnes v. Glen Theatre, Inc., 501 U.S. 560


Action for Children’s TV v FCC, 11 F3d 170 (1993)


Berger v. Rensselaer Center School Corporation. 982 F. 2d 1160 (1993)


Equality Foundation of Greater Cincinnati v. City of Cincinnati. 54 F. 3d 261 (1995)


McKusick v. City of Melbourne, 96 F 3d 478 (1996)
*United States v. Thomas*, 74 F. 3d 701 (1996)


*Tennison v. Paulus*, 144 F. 3d 1285 (1999)

APPENDIX C

LC LITIGATION

Cases in which the Liberty Counsel participated, through the 1998-1999 court term:


*Operation Rescue v. Women's Health Center*, 626 So.2d 664 (1993)

*Jackson v. Benson*, 218 Wis. 2d 835 (1998)


*Hsu v. Roslyn Union*, 85 F.3d 1530 (1996)


Beach v. Leon County School Board, (1993)


Connor v. Palm Beach County, (1995)


Knutson v. Milwaukee Public Schools, (1997)

Libertad v. Welch, 53 F.3d 428 (1993)


Morris v. City of West Palm Beach, (1994)


Snyder v. Greater Orlando Aviation Authority, (1993)

Teens For Life v. Flagler County School Board, (1995)

Victory Outreach Ministries v. Tallahasee Housing Ath., (1994)


Wright v. Okaloosa County Sch. Dist., (1997)


Jackson v. Benson. 213 Wis. 2d 1 (1997)

American Bible College v. State Board of Ind. Colleges. 653 So. 2d 1034 (1995)

(A) Establishing Group Goals

(A1) Tell me a bit about how the law center was founded, the circumstances of its founding (why it was initially founded, and who was involved in its founding?)

(A2) Tell me a bit about your current litigation program. Generally speaking, what kinds of things have you done over the last year or two? What are some of your major accomplishments?

(A2) (Follow-up) What kinds of things do you hope to accomplish within the next year or two?

(A3) Groups like yours litigate for various reasons: to change legal doctrine, get a favorable interpretation of existing doctrine, to make the voice of their constituents heard, or for other reasons. Generally, what does this group hope to accomplish through its litigation?

(D1) Do you care about influencing public attitudes and perceptions, for example? How about building membership, or other concerns?

(D1) (Follow-up) How important is that with relation to these other important goals?
(A3) (Follow-up) Have these reason for litigating been established by your group for some time, or might they have changed in recent memory?

(A3) (Follow-up) Are you concerned about the reputation or standing of this group with the courts and other like-minded organizations?

(A3) (Follow-up) Since you have identified a number of goals for your litigation program, do you feel that one might be more important than the others?

(A4) Where do you see the law center (and its parent organization) moving within the next five years? Do you anticipate any broad changes in the reasons behind your litigation program, or will you initiate any new litigation activities to advance some of the things you've identified as important?

(B) Frequency of Litigation Participation

(B1) It takes considerable resources to accomplish these goals – money, expert attorneys, physical resources, etc. Do you feel that your resources have been adequate to the task?

(B1) (Follow-up) In what ways have you had to limit your what you do in litigation because of resource constraints?

(B1) (Follow-up) Has your present situation with resources always been the case, or have you had more or less to work with in the past?

(B1) (Follow-up) Do you expect your budget, or the sources of your support (donations, etc.) to change significantly over the next several years?

(B2) Many interest groups seek resources from private foundations and large private donors. Others seek small donations from supporters who receive educational material or updates in return. Still other organizations mix these various means for acquiring resources. How does this group come by its resources?
(B2) (Follow-up) Have these sources and types of support changed in recent memory?

(B2) (Follow-up) Do you expect these sources and types of support to change in the near future?

(B3) I know that you have a network of volunteer attorneys that assist you in bringing cases up through the courts. Can you describe your network and what it is like to work with volunteer attorneys?

(B3) (Follow-up) How do members of your support staff assist you?

(B3) (Follow-up) How do your arrangements with your staff and your attorney network compare to that of several years ago? For example, has staff size changed over the years?

(B4) Many organizations like to work with other organizations when litigating certain cases. Does your group actively work with other groups? Describe what this is like.

(B4) (Follow-up) In what percentage of cases would you say you actively work with other groups? What groups do you work with the most?

(B4) (Follow-up) How does this participation differ now from participation several years ago?
(C) Group Behavior

- (C1) Describe some of the things that this group does besides litigation?

- (C1) (Follow-up) How much of what you do is related to your litigation program, and how much to these other things?

- (C2) How would you characterize this group’s commitment to litigation over other strategies of changing policy? (Taking all the activities of the parent organizations into account. For example, litigation versus all of what Don Wildmon or Pat Robertson does)

- (C2) (Follow-up) Has this commitment changed from several years ago?

- (C2) (Follow-up) Do you see litigation becoming more or less important to the parent organization over the next several years?

- (C3) Thinking about the litigation program you’ve developed, and all the different ways your group participates in litigation (different jurisdictions, types of cases you’re involved in, the number of things you do, and whether you sponsor or participate as amicus), has your group’s participation in litigation changed recently?

- (C3) (Follow-up) Do you anticipate any changes in participation within the next several years?

- (C3) (Follow-up) Why would these changes occur?

(D) Scope of Litigation Participation

- (D1) Let’s talk just about amicus participation for a moment. Groups participate as amicus for various reasons. One is to aid other like-minded organizations that are involved by strengthening their position. Another is to give judges legal reasons for making a decision in your favor. Which is most important to you?