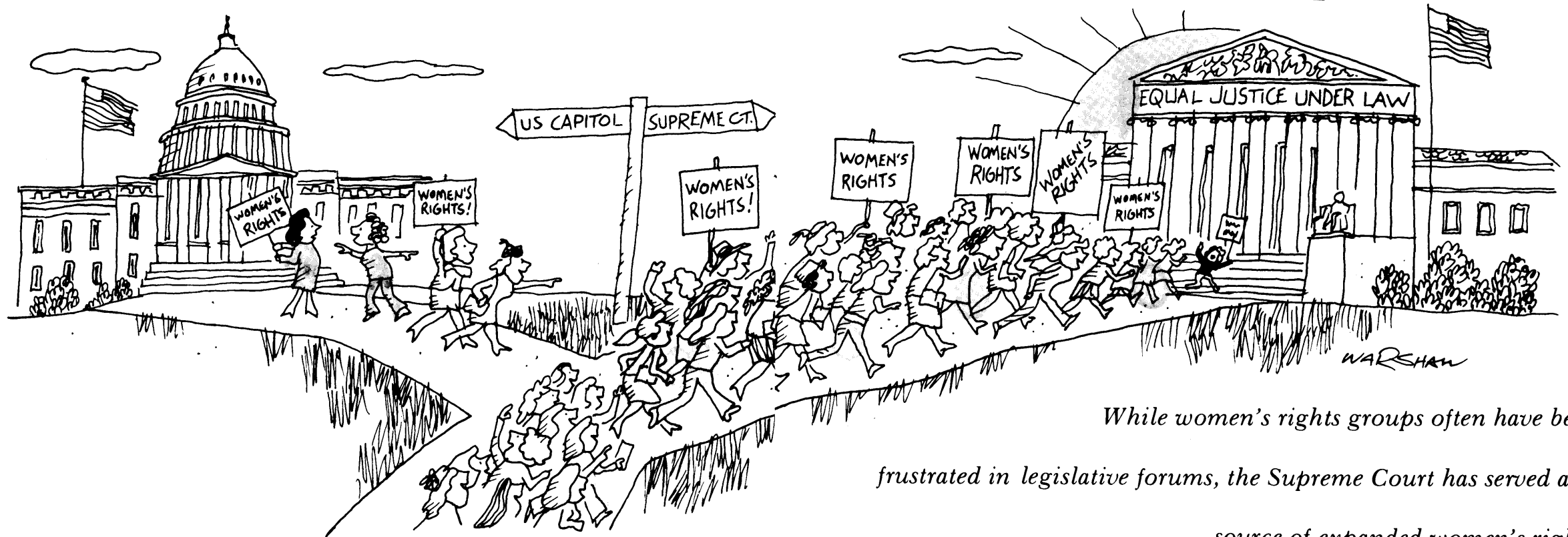


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Beyond legislative lobbying: women's rights groups and the Supreme Court



While women's rights groups often have been frustrated in legislative forums, the Supreme Court has served as a source of expanded women's rights.

by Karen O'Connor and Lee Epstein

While women's rights groups¹ have been able to attain some of their goals in the legislative sphere,² their inability to secure ratification of highly visible objectives including the Equal Rights Amendment³ and other important "rights" legislation through conventional lobbying,⁴ allows them to be classi-

fied as "disadvantaged."⁵ According to Richard C. Cortner, "disadvantaged" groups are wise to pursue their goals through judicial lobbying. The National Association for the Advancement of Colored People (NAACP), for example, initially used the courts to achieve its

University Press, 1982); Freeman, *THE POLITICS OF WOMEN'S LIBERATION* (New York: David McKay, 1975); and Murphy, *PUBLIC POLICY ON THE STATUS OF WOMEN* (Lexington, Mass.: Lexington Books, 1973).

3. Boles, *THE POLITICS OF THE EQUAL RIGHTS AMENDMENT* (New York: Longman, 1979) and *Building Support for the ERA; A Case of 'Too Much, Too Late'*, XV PS 572-577 (Fall 1982).

4. Andre, *HOMEMAKERS: THE FORGOTTEN WORKERS* (Chicago: University of Chicago Press, 1981) and Rubin, *ABORTION, POLITICS AND COURTS* (Westport, Conn.: Greenwood Press, 1982).

5. Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. PUB. L. 287-307 (1968).

objectives.⁶ In contrast, women's rights groups generally have relied heavily on legislative as opposed to judicial lobbying to achieve their goals,⁷ even though the Burger Court is receptive to claims of gender-based discrimination.⁸

To assess whether litigation may provide an additional political strategy, this article examines the results of gender-based discrim-

6. Vose, *CAUCASIANS ONLY* (Berkeley: University of California Press, 1959) and Greenberg, *JUDICIAL PROCESS AND SOCIAL CHANGE* (St. Paul, Minn.: West Publishing Co., 1977).

7. Freeman, *supra* n. 2 and Gelb and Palley, *Women and Interest Group Politics*, 5 AM. POL. Q. 331-352 (July 1977).

8. O'Connor and Epstein, *Sex and the Supreme Court: An Analysis of Judicial Support for Gender Based Claims*, 64 SOC. SCI. Q. (June 1983).

9. A list of these cases is available from the authors.

10. Cortner, *supra* n. 5 at 287.

ination cases brought by women's rights groups in the 1970s. More specifically, we examine all 63 gender-based cases decided during the 1969 to 1980 terms of the United States Supreme Court and the groups that participated in those cases.⁹

Disadvantaged groups and the court

Writing in 1968, Cortner claimed there were numerous disadvantaged groups that:

are highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals they are almost compelled to resort to litigation.¹⁰

Notable and well studied examples of disadvantaged groups that have relied on litigation include the NAACP and the independent NAACP Legal Defense Fund (LDF),¹¹ the Jehovah's Witnesses¹² and the American Jewish Congress.¹³

Additionally, while many scholars have agreed on the utility of litigation, they have also offered similar reasons for the success of these groups. For example, control over the course of litigation, generally in the form of group sponsorship of test cases—facilitated by the presence of only one major organization—often has been noted as critical to the NAACP LDF's victories in several issue areas.¹⁴

Support from and cooperation with other groups is another factor offered for the success of disadvantaged litigators. This kind of assistance, generally in the form of "compatible" amicus curiae briefs, is welcomed by most disadvantaged groups. In fact, David Manwaring noted that, "(I)ndeed, without massive interest group backing, neither side of the Gobitis (flag salute) litigation could have stayed in court for long."¹⁵

Another factor that played a role in the successes of disadvantaged groups including the NAACP LDF and the Jehovah's Witnesses was the relative absence of organized opposition. While individual and loosely organized groups opposed their various efforts, no major interest groups appeared to challenge their respective arguments in Court.¹⁶

Thus, for most disadvantaged groups, control of litigation, cooperation with other groups and absence of organized opposition played a major role in their successes. Most important, however, was their initial recognition of the utility of litigation as a political mechanism.

Women's groups and litigation

As has been noted, however, women's rights organizations did not initially rely heavily on litigation.¹⁷ While most groups recognized the potential importance of litigation,¹⁸ initial efforts to lobby the courts in a systematic fashion were fraught with internal organizational problems and intergroup conflicts. For example, although the National Organization for Women (NOW), the first major

women's rights organization, tried to model itself after the NAACP as early as 1966,¹⁹ it was unable to create a working legal defense fund until 1977.²⁰

NOW's initial litigation efforts were hampered by several factors: first, internal dissension over the conduct of employment discrimination cases led some NOW attorneys to found their own group, Human Rights for Women (HRW).²¹ This defection left NOW without experienced litigators. Second, NOW's leadership was divided as to the form a legal defense fund should take.²² Third, the battle for the ERA and other types of anti-discrimination legislation led NOW to concentrate its efforts in those areas—to the detriment of litigation. Finally, by 1972, other groups, particularly the American Civil Liberties Union (ACLU), were beginning to attack gender-based discrimination through litigation.

In 1972, the ACLU created a Women's Rights Project (WRP) to fill the void it per-

11. Vose, *supra* n. 6; Kluger, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICANS' STRUGGLE FOR EQUALITY* (New York: Alfred A. Knopf, 1976); Shields and Spector, *Opening Up the Suburbs: Notes on a Movement for Social Change*, 2 *YALE REV. OF L. AND SOC. ACTION* 300-333 (1972); Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 *VAND. L. REV.* 905 (1978); Wasby, *Interest Groups in Court: Race Relations Litigation*, in Cigler and Loomis, eds., *INTEREST GROUP POLITICS* (Washington, D.C.: Congressional Quarterly Press, 1983); and Meltsner, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (New York: Random House, 1973).

12. Manwaring, *RENDER UNTO CAESAR* (Chicago: University of Chicago Press, 1962).

13. Sorauf, *THE WALL OF SEPARATION* (Princeton: Princeton University Press, 1976); and Pfeffer, *Amici in Church-State Litigation*, 44 *LAW & CONTEMP. PROBS.* 83-110 (1981).

14. Belton, *supra* n. 11; Westin, *Someone Has to Translate Rights into Realities*, 2 *CIV. LIBERTIES REV.* 104-128 (1975); and Wasby, *supra* n. 11.

15. Manwaring, *supra* n. 12, at 249.

16. Vose, *supra* n. 6.

17. O'Connor, *WOMEN'S ORGANIZATIONS' USE OF THE COURTS* (Lexington, Mass.: Lexington Books, 1980).

18. Freeman, *supra* n. 2, at 181.

19. Papachristou, *WOMEN TOGETHER: A HISTORY IN DOCUMENTS OF THE WOMEN'S MOVEMENT IN THE UNITED STATES* 220 (N.Y.: Alfred A. Knopf, 1976).

20. O'Connor, *supra* n. 17, at 103-104.

21. Freeman, *supra* n. 2, at 155.

22. Greenwald, "Litigation for Social Change," unpublished manuscript.

ceived in gender-based litigation.²³ By this time, the Women's Equity Action League (WEAL) had also begun negotiations with the Ford Foundation to secure funding for its

23. Cortner, *THE SUPREME COURT AND CIVIL LIBERTIES POLICY* 183-212 (Palo Alto, Calif.: Mayfield Publishing Co., 1975), and Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 *COLUM. HUM. RTS. L. REV.* 373-412 (1976).

24. Later, an internal WEAL dispute led to the founding of the Women's Law Fund, which like the NOW-HRW split earlier, hampered WEAL's initial attempts to litigate. O'Connor, *supra* n. 17, at 106-107.

25. Yet, many of these efforts were unsuccessful. For example, the U.S. Congress has yet to enact numerous pieces of legislation supported by NOW including the Homemakers' Bill of Rights, additional federal funding of day care centers, and many of the provisions contained in the Women's Economic Equity Act. On the state level, NOW also has attempted to secure bills specifically outlawing domestic violence and the revision of criminal laws to recognize the problems of battered women.

26. NOW, for example, has created several political action committees to support candidates for national and state offices who back NOW's positions.

27. The *National League of Women Voters* participated in five cases. The American Association of University Women, Equal Rights Advocates, Federally Employed Women, the National Federation of Business and Professional Women's Clubs, the National Women's Political Caucus and Universalist Unitarian Women each participated in four cases. Human Rights for Women, the National Women's Conference of the American Ethical Union, the Women's Law Fund and the Women's Law Project each appeared in three cases. Participating twice were the American Nurses Association, Association for Women in Psychology, Center for Women's Policy Studies, Coalition of Labor Union Women, Federation of Organizations for Professional Women, National Center on Women and Family Law, National Women's Health Network, National Women's Rights Organization, Professional Women's Caucus, Rural American Women, Women's Rights Litigation Clinic, and the Young Women's Christian Association.

Action for Former Military Wives, Antioch Women's Rights Clinic, Association of Women in Science, Coalition of Medical Rights for Women, Comparable Worth Project, Department of Church Women, Elizabeth Blackwell Health Center for Women, Institute for Women Today, Mexican-American Women's National Association, Michigan Women's Group, National Coalition of American Nurses, National Council of Jewish Women, National Federation of Temple Sisterhood, National Hook-up of Black Women, National Women's Student Group, North West Women's Center, Older Women's League, Organization for Pan Asian American Women, Rochester Women Against Violence Against Women, Sociologists for Women, Union Wage, Wisconsin Women's Network, Women Employed, Women Lawyer's Bar Association, Women Lawyers of Los Angeles, Women in Mathematics, Women's Action Alliance, Women's Bar Association of the District of Columbia, Women's Health Services, Women's Justice Center, Women's Lawyers of Santa Barbara, Women's Lobby, and the Women's Network each participated in only one case.

own legal defense fund.²⁴ Thus, during the early 1970s, numerous other groups interested in litigation allowed NOW to concentrate its efforts in the legislative forum.²⁵

In the wake of the recent defeat of the ERA, many women's rights groups now are reevaluating their strategies,²⁶ and many are considering increased resort to litigation. Given the kinds of problems that have traditionally hampered women's rights groups in the legislative sphere, litigation may, in fact, provide a more expedient political mechanism for the expansion of women's rights as it has also done for other disadvantaged groups.

Women's groups and the Court

To assess how litigation may be used by women's rights groups in the future, we examine their past performance in the U.S. Supreme Court. More specifically, we address the following questions:

- Which groups have been involved;
- What strategies have they employed;
- What kind of external opposition have they faced; and,
- How successful have women's rights groups been.

To address these questions, we identified 63 cases that the Supreme Court decided between its 1969 to 1980 terms, which involved gender-based discrimination. Gender-based cases were defined as those that had ramifications on women's rights including those where reproductive freedom issues were at stake. A women's rights issue, however, did not have to be the primary issue presented to the Court to be included in this analysis.

Only full opinion cases were considered because accurate information concerning group participation in those cases are available on microfiche. Group participation was identified by reading briefs of direct sponsors and amicus curiae in all 63 cases. Women's rights groups participated in 73 per cent (n=46) of these cases.

Participation

As revealed in Figure 1, several women's rights groups participated in Supreme Court litigation. The ACLU, however, clearly emerged as "the" representative of women

before the Court, with NOW, WEAL, and the Women's Legal Defense Fund (WLDF), entering more than 20 per cent of the cases in which at least one women's group participated.²⁷ Additionally, the Center for Constitutional Rights (CCR), a New York-based radical public interest law firm, whose female attorneys are specifically interested in women's rights, participated in nine cases.²⁸

The ACLU's early commitment to gender-based discrimination litigation increased throughout the decade as indicated in Figure 2. Over the 12 term period, it participated in 66 per cent (n=42) of the 63 gender-based discrimination cases decided by the Supreme Court. In fact, it was involved in all but four of the cases in which at least one women's rights organization was present. It is interesting to note that even though the remarkably linear trend of the ACLU was somewhat disturbed when the other groups became more active, the aggregated level of its activity still increased.

Its continued commitment to litigation can be attributed to several factors: first, the

Women's Rights Project (WRP)²⁹ and later the Reproductive Freedom Project (RFP)³⁰ were established at a time when ACLU leaders recognized that the Court was willing to expand interpretations of the Constitution. Thus, the ACLU acted quickly to take full advantage of a favorable judicial climate. Second, establishment of the projects allowed lawyers to specialize in gender-based discrimination litigation and to develop their expertise.³¹ Third, while funds for women's rights litigation were scarce, the ACLU could draw upon its own resources and its own experience in seeking outside funding.³² By the mid-1970s, then, most groups were willing to defer to the expertise of the ACLU. Conse-

28. O'Connor, *supra* n. 17, at 111-112.

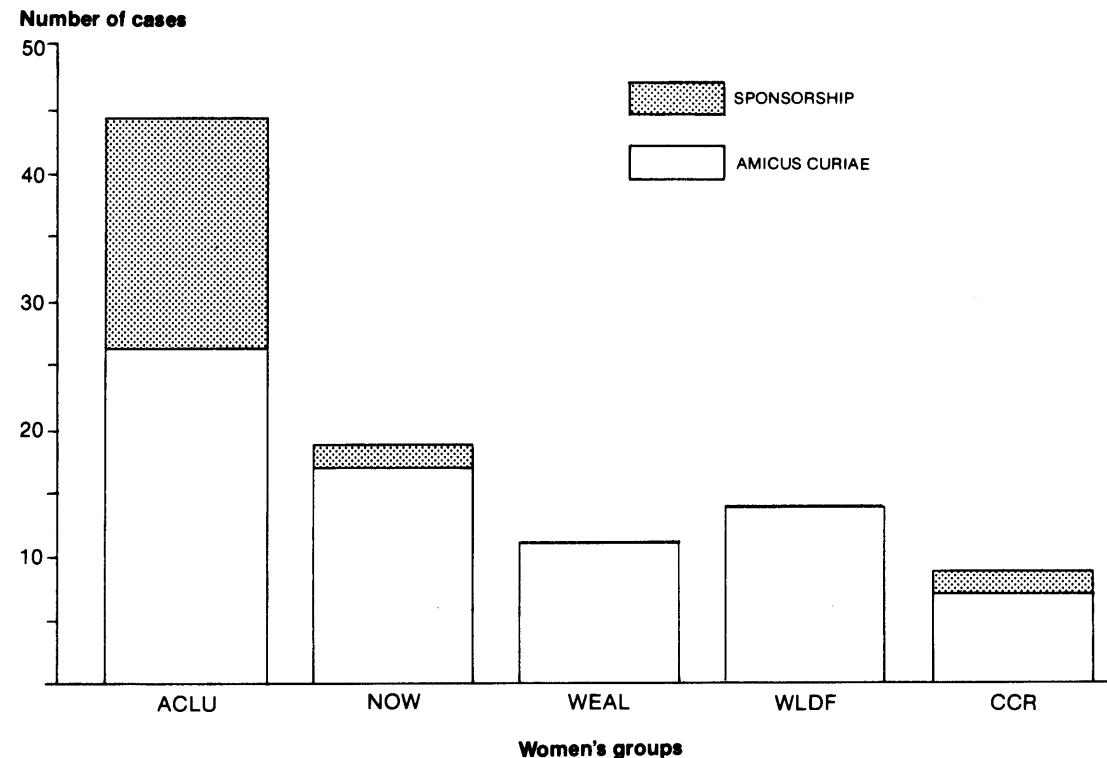
29. Cowan, *supra* n. 23.

30. Epstein, "Interest Groups, Controversy and the Court: An Analysis of Abortion Litigation," unpublished M.A. Thesis, Emory University, 1982.

31. Cowan, *supra* n. 23.

32. Berger, "Litigation on Behalf of Women: An Assessment," (N.Y.: Ford Foundation) mimeo (1979) and O'Connor, *supra* n. 17, at 123-131.

Figure 1 Women's groups' participation in Supreme Court litigation, 1969-1980



quently, the ACLU's prominence in this area has gone unchallenged.

While the ACLU's dominance cannot be disputed, other groups, particularly since the late 1970s, also have litigated for expanded rights. As indicated in Figure 2, NOW, WEAL, and WLDF have played increasingly important roles in gender-based discrimination litigation. Although NOW participated in seven cases during the 1969 to 1977 terms, its participation was largely reactive, and not part of a planned strategy. For example, while NOW co-sponsored *Pittsburgh Press v. Pittsburgh Commission on Human Relations*³³ at the Supreme Court level, it did so at the request of the City Attorney, who took primary responsibility for preparation of the brief.³⁴ Beginning in 1977, however, NOW began to turn to the courts in a more systematic fashion. At that time, funds finally were allocated for a lawyer, whose addition to the staff allowed NOW belatedly to initiate litigation, or at least to be sufficiently informed to file important amicus curiae briefs.³⁵

WEAL also began participating before the Supreme Court with greater frequency in the late 1970s. While it created a legal defense fund in 1972, funding problems hampered its own litigation activities. Additionally, in 1974 the Center for Law and Social Policy's Women's Rights Project began to handle cases on WEAL's behalf.

In contrast to NOW and WEAL, which cre-

33. 413 U.S. 376 (1973).

34. O'Connor, *supra* n. 17, at 104-105.

35. Greenwald, *supra* n. 22.

36. Brief Amicus Curiae submitted by the American Civil Liberties Union in *County of Washington v. Gunther*, 1981.

37. Other groups that have participated on behalf of women's rights although they are not included in our definition of women's rights groups include the International Union of Electrical, Radio and Machine Workers (IUE) (n=7), the NAACP LDF (n=4), and the Southern Poverty Law Center (n=4).

38. 400 U.S. 71 (1971).

39. 411 U.S. 677 (1973).

40. 420 U.S. 636 (1975).

41. Cowan, *supra* n. 23.

42. NOW co-sponsored *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 413 U.S. 375 (1973). CCR co-sponsored *Harris v. McRae*, 448 U.S. 297 (1981) with Planned Parenthood and the ACLU. In addition, the Women's Law Fund sponsored *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1973).

ated special funds to litigate, WLDF initially was created in 1971 to "provide *pro bono* legal assistance to women,"³⁶ particularly to those who had suffered employment discrimination. Since 1978, WLDF has played an increasingly visible role in gender-based discrimination litigation, often soliciting the participation of, or representing, other women's rights groups before the U.S. Supreme Court.

While other groups have participated in gender-based discrimination litigation, these four organizations—ACLU, NOW, WEAL, WLDF—have been the major women's rights participants in this area.³⁷ Collectively, they have been involved in 73 per cent (N=46) of the 63 cases.

Strategies

Interest group participation in U.S. Supreme Court litigation can take several forms, with direct sponsorship or submission of amicus curiae briefs among the most common. As indicated in Figure 1, only one women's rights group has regularly sponsored litigation at the Supreme Court level. The ACLU sponsored 25.4 per cent (n=16) of the 63 gender-based cases. Its greatest concentration, however, occurred in cases involving challenges to facially discriminatory governmental programs or laws. For example, in *Reed v. Reed*,³⁸ *Frontiero v. Richardson*,³⁹ and *Weinberger v. Wiesenfeld*,⁴⁰ the ACLU represented parties claiming that gender-based discrimination violated constitutional principles of equal protection or due process. During the 1970s, the ACLU also sponsored test cases dealing with expanded abortion rights and jury discrimination. Thus, like other disadvantaged groups, ACLU attorneys saw the utility in controlling litigation, particularly when constitutional issues were involved.⁴¹

In contrast, NOW, WEAL, WLDF and CCR have generally limited their participation to that of amicus curiae, as also indicated in Figure 1. While NOW and CCR each sponsored one case, women's groups' limited resources and deference to the ACLU have led them to opt for the amicus curiae strategy.⁴²

The amicus curiae can be a particularly effective strategy when used in cooperation with direct sponsors or with other amicus

Opposition in the Court has been far less intense than opposition in the legislature.

Table 1 Intergroup support

Group	Support for the ACLU	Directional support
NOW	.789	→ .421 → NOW WEAL ← .727 ←
WEAL	.636	→ .578 → NOW WLDF ← .846 ←
WLDF	.538	→ .210 → NOW CCR ← .444 ←
CCR	.777	→ .545 → WEAL WLDF ← .461 ←
		→ .090 → WEAL CCR ← .111 ←
		→ .230 → WLDF CCR ← .333 ←

curiae.⁴³ As indicated by Table 1, several women's groups regularly supported each other's efforts.⁴⁴ For example, NOW regularly supported the ACLU. In 78.9 per cent of the cases in which NOW participated, it either filed an amicus curiae brief with or in support of the ACLU. Most women's rights groups, in fact, revealed very high support for the ACLU.

The support that most groups lent to the ACLU, however, was not uniformly revealed in their support of other women's rights groups. For example, CCR, the most radical of these groups and WEAL, generally regarded as somewhat traditional in nature⁴⁵ have little in common.⁴⁶ Not surprisingly, therefore, they were not supportive of each other's litigation activities.

In general, though, women's groups' litigation efforts reveal a high degree of intergroup support. The average support score between any two groups was .483. More specifically, most groups support the ACLU through submission of amicus curiae briefs.

External opposition

When women's rights groups lobby state or national legislatures they face opposition from several sources including other women's groups, business interests, and conservative organizations.⁴⁷ While women's rights groups'

legislative lobbying efforts generally have attracted opposition across issue areas, their judicial lobbying efforts have not met consistent opposition. In general, women's rights groups faced organized third party opposition in 58.6 per cent (n=27) of their cases. Similar to the opposition faced in the legislative arena, opposition in Court came from women's groups, business interests, and conservative organizations. Yet, the intensity, the scope and the sources of this opposition varied considerably by the nature of the issue(s) at stake.

For example, women's rights groups faced substantial opposition when discriminatory employment practices were alleged. In the 13 employment discrimination cases in which a women's rights group participated, they faced third party opposition in 69.2 per cent (n=9) with conservative groups and business interests accounting for 100 per cent.⁴⁸ Yet, no women's group challenged the claims of women's rights organizations seeking expanded employment rights. This finding is

47. Brady and Tedin, *Ladies in Pink: Religion and Political Ideology in the Anti-ERA Movement*, 56 Soc. Sci. Q. 564-575 (1976); Crowell, *Four Days in Houston*, 10 CIV. LIBERTIES DIG. 2-13 (1978); Babcock, et al., *SEX DISCRIMINATION AND THE LAW* 181-184 (Boston: Little, Brown and Co., 1975); Murphy, *supra* n. 2; Boles, *supra* n. 3; and Freeman, *supra* n. 2, at 220-221.

48. See generally, Greenwald, "Women's Rights, Courts and Congress: Conflict Over Pregnancy Disability Compensation Policies," paper delivered at the annual meeting of the American Political Science Association, New York City, New York, September 1978. Two organizations, in particular, the Chamber of Commerce of the United States of America and the Equal Employment Advisory Council, regularly filed amicus curiae briefs urging the Court to rule in favor of employer interests. Large businesses and corporations also regularly opposed women's claims. For example, in *General Electric Co. v. Gilbert* (1976), 22 airlines filed a joint amicus curiae brief urging the Court to rule that pregnancy-related disabilities did not have to be covered by employer health benefit plans.

49. Felsenthal, *THE SWEETHEART OF THE SILENT MAJORITY—THE BIOGRAPHY OF PHYLLIS SCHLAFLY* (Garden City, N.Y.: Doubleday & Co., 1981).

50. Balides, et al., *The Abortion Issue: Major Groups, Organizations and Funding Sources*, in Osofsky and Osofsky, eds. *THE ABORTION EXPERIENCE* (Hagerstown, Md.: Harper and Row, 1973).

51. See generally, Merton, *ENEMIES OF CHOICE* (Boston: Beacon Press, 1981) and Rubin, *supra* n. 4.

52. 453 U.S. 210 (1981).

53. In *McCarty*, seven servicemen's organizations urged the Court not to award any part of *McCarty's* pension to his ex-wife.

not surprising given the near unanimous agreement among women about the importance of equal job opportunity.⁴⁹ Thus, women's rights groups have faced vigorous opposition from business interests, but those interests have an economic stake in the outcome of the cases and are not necessarily opposed to expanded women's rights *per se*.

Opposition to women's rights claims also was evident in cases involving reproductive freedom. In the 12 reproductive freedom cases in which women's rights groups participated, they faced opposition from organized anti-abortion or religious groups in 75 per cent (n=9). Like groups involved in employment discrimination cases, organizations including Americans United for Life and the United States Catholic Conference opposed expanded abortion rights based on moral grounds and *not* upon general opposition to equality for women.⁵⁰ In contrast to cases involving employment discrimination, however, some women's groups opposed expanded abortion rights. In three cases, women's groups, including Feminists for Life and Women for the Unborn, filed amicus curiae briefs urging the Court to uphold the constitutionality of restrictive state abortion or consent laws. Thus, similar to legislatures, the Court has been the target of competing women's groups. But, the intensity of this opposition has been far less emotional and extensive than women's rights groups encountered in the legislative sphere.⁵¹

In contrast to litigation involving abortion or employment discrimination, cases alleging discrimination in the distribution of or qualifications for government benefits generated minimal opposition to women's rights groups' claims. In only one case, *McCarty v. McCarty*,⁵² involving a divorced woman's claim to a share of her former husband's military pension, did any organized group oppose her claims.⁵³

The absence of opposition from other organized interests, especially from conservative women, is exceptionally interesting given the nature of the cases in this area. Many involved challenges to traditional assumptions about women's roles in society. When the same kinds of changes are proposed in the legislative sphere—alimony, child support or

custody, for example—conservative women's groups turn out in large numbers to lobby against any proposed changes in the traditional family relationship.⁵⁴ When these same issues are addressed through litigation, no conservative women's groups appeared. Litigation in this area then may be particularly attractive and amenable to the purposes of women's rights groups because of the absence of opposition.

Thus, unlike the situation in the legislative sphere, conservative women's groups generally *do not* oppose expanded rights for women before the U.S. Supreme Court. Almost all the opposition that women's rights groups have faced has come from pro-business interests that have an economic stake in the outcome of the litigation or from anti-abortion groups that are morally opposed to expanded abortion rights. Therefore, particularly in cases involving the distribution of benefits, the absence of opposition makes the Court an attractive forum for women's rights groups to use to attain expanded rights.

Success

Whether participating as direct sponsors or as

amicus curiae, women's rights organizations were successful. They won 63 per cent (n=29) of their 46 cases. A major reason for this high success rate has been the consistent efforts of the ACLU. In fact, the ACLU's presence in a case increased the chances of success for a gender-based claim by 16 per cent.⁵⁵

Even when the ACLU's participation met with only mixed results, its presence before the Court tended to minimize losses—which can be considered another facet of success. For example, in *Dothard v. Rawlinson*⁵⁶ its amicus curiae brief provided the Court with a fall back position if the Court was to uphold Alabama's refusal to hire women as prison guards. In noting that the state's prisons were among the worst in the nation, the ACLU gave the Court the "out" to construe narrowly the bona fide occupational qualification exception to Title VII.⁵⁷

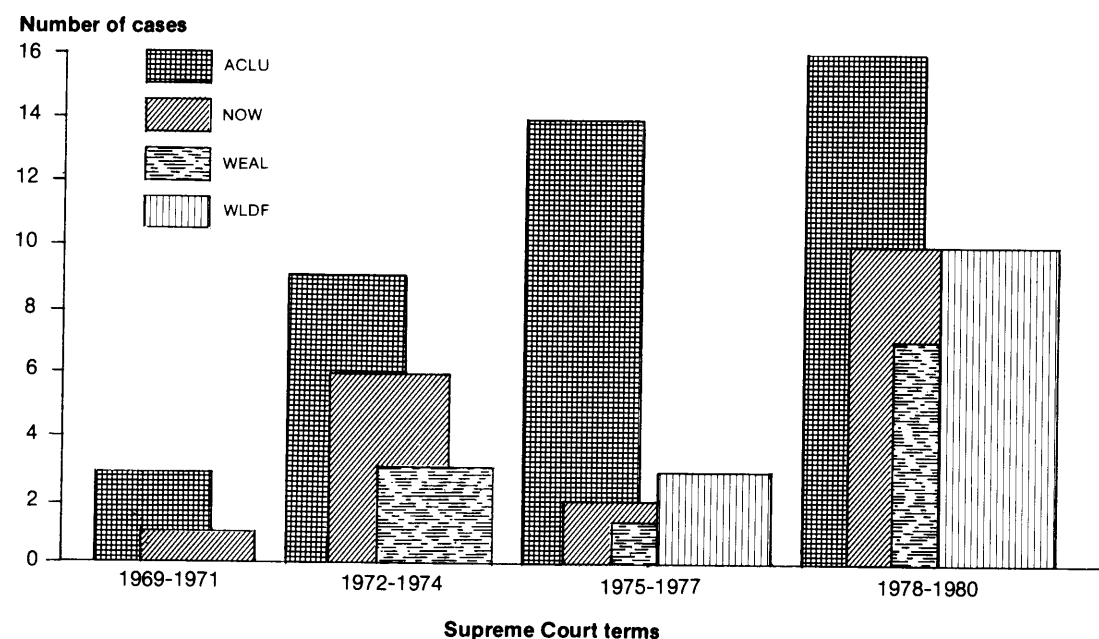
54. Andre, *supra* n. 4, at 164-287 and McGlen and O'Connor, *WOMEN'S RIGHTS* (New York: Praeger, 1983).

55. Of the 63 cases, 66 per cent were held for the women's rights' position when the ACLU participated, whereas only 50 per cent were decided similarly when the ACLU chose not to participate.

56. 433 U.S. 321 (1977).

57. O'Connor, *supra* n. 17, at 113-114.

Figure 2 Participation of women's groups in Supreme Court litigation



While the ACLU is a very successful litigator, its initial efforts might have been even more successful if it had been supported by other women's groups. For example, *Kahn v. Shevin*,⁵⁸ a case sponsored by the ACLU, resulted in a major doctrinal loss when a majority of the Court upheld the constitutionality of benign discrimination. In *Kahn*, no women's rights groups filed amicus curiae briefs in support of the ACLU; amicus curiae briefs could have shown the Court that women were uniformly opposed to such benign forms of discrimination. Thus, the absence of support in this and other cases, may have made crucial differences in the outcome of litigation.⁵⁹

In recent years, then, the increased interest of women's rights groups in litigation, as illustrated by Figure 2, has undoubtedly aided the cause of equal rights. For example, in *County of Washington v. Gunther*,⁶⁰ a case that few commentators predicted would result in such a resounding victory for women's rights forces,⁶¹ the Court adopted the position advocated by 16 women's rights groups.⁶² This was particularly significant given the tremendous business opposition to the concept of equal pay for comparable work and the potential ramifications of *Gunther*. Thus, while women's rights groups generally have been successful, greater cooperation and participation could have a positive impact on the Court's disposition of future cases.

Conclusion

Women's rights groups have been unable to secure all or even most of their goals in the legislative forum. To assess whether women's

58. 416 U.S. 351 (1974).

59. Another case in which support may have helped the ACLU was *Matthews v. de Castro*, 429 U.S. 181 (1976). While the Women's Rights Litigation Clinic at Rutgers University co-sponsored the case along with the ACLU, no women's rights groups participated as amicus curiae.

60. 452 U.S. 161 (1981).

61. See, for example, Wermeil, *Business Starts Pushing More at High Court*, WALL STREET JOURNAL, April 23, 1982, sec. 2, p. 29.

62. These groups were: ACLU, NOW, WLDF, League of Women Voters, Women Employed, Comparable Worth Project, American Nurses Association, Wisconsin Women's Network, Women's Network, National Hook-up of Black Women, Federally Employed Women, Antioch Women's Rights Clinic, National Women's Political Caucus, Coalition of Labor Union Women, WEAL and the Women's Bar Association of the District of Columbia.

rights groups, like other disadvantaged groups, would be better served by increased reliance on litigation, we examined their efforts in the Supreme Court during the 1970s. More specifically, we analyzed four aspects of that activity. First, we found that the ACLU was a major participant. Other women's rights groups have only recently begun to use litigation in a systematic fashion. Second, we discovered that while the ACLU prefers the direct sponsorship tactic, other women's rights groups often appear as amicus curiae. Most of those amicus curiae efforts, however, have been in support of ACLU arguments. Third, we discovered that both the intensity and the sources of opposition to women's rights groups' claims differed from those in the legislative forum. In general, groups opposed women's rights groups claims on economic or moral grounds and not because they opposed the expansion of women's rights, *per se*. Finally, we found that women's rights groups have been very successful before the United States Supreme Court.

Thus, we conclude that women's rights groups, like other disadvantaged groups, may continue to find that the Court is receptive to their arguments because thus far, unlike the legislative forum, women have faced relatively minimal opposition in Court. And, the nature of this opposition, given the constraints of the judicial forum, is less emotional and less highly charged than the opposition in the legislative forum. Perhaps more important, however, the ACLU's emergence as "the" spokesperson of women's interests has influenced the Court, particularly when its efforts have been supported by other groups.

Thus, while women's groups' efforts often have been frustrated in legislative forums, the Supreme Court has served as a source of expanded women's rights. Women's rights groups have used this forum effectively in the past. Based on this study, continued efforts in this forum would appear likely to result in further success. □

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