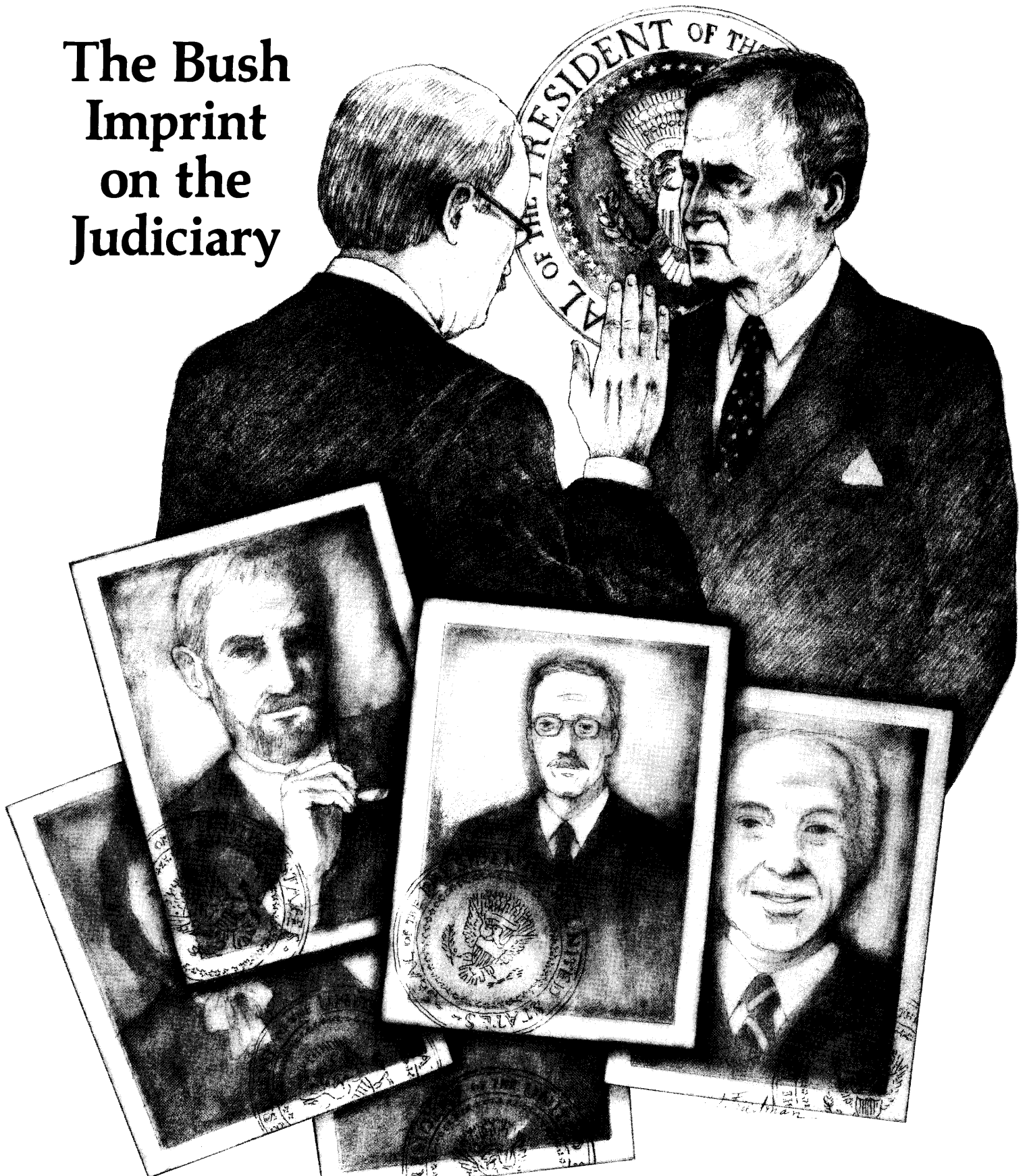


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The Bush Imprint on the Judiciary



Women's rights litigation in the 1980s: more of the same?

In the 1980s, women's rights groups continued to seek redress in the legal system in ever-increasing numbers. And, despite increased opposition, they remained generally successful.

by Tracey E. George and Lee Epstein

In the September 1983 issue of *Judicature*, Karen O'Connor and Lee Epstein published the results of their examination of the fate of gender-based cases in the U.S. Supreme Court during the 1970s.¹ Overall, they found that the justices were quite receptive to such claims, supporting the women's rights position in about 58 per cent of the 63 disputes resolved between the 1969 and 1980 terms.²

O'Connor and Epstein offered three interrelated explanations for this finding, all of which flow from literature explicating how groups can maximize their chances of legal success.

• *Becoming a repeat player.*³ Women's rights groups were very active in this litigation, participating in 73 per cent (n=46) of the 63 cases. In addition, the leading participant, the Women's Rights Project of the ACLU, provided a great deal of expertise.

• *Cooperating with like-minded organizations.*⁴ Women's rights groups not only participated with great frequency, but they did so in a relatively cohesive fashion. As O'Connor and Epstein wrote, "women's rights litigation efforts reveal a high degree of inter-group support.... More specifically, most groups support the ACLU through the submission of amicus curiae briefs."⁵

• *Benefiting from low levels of organized opposition.*⁶ Women's rights groups did not meet as much opposition in the courtroom as they did in the legislative arena. Hence, the absence of competing

claims, O'Connor and Epstein argued, increased their chances of success in legal battles.

O'Connor and Epstein's explanations and overall conclusion—that women's rights groups should continue to seek refuge in judicial arenas—made sense in light of their data, gender-based discrimination cases resolved in the 1970s. For several reasons, though, we wonder whether their explanations (and, ultimately, their conclusion) continued to characterize the litigation efforts of women's rights groups in the following decade, the 1980s. For one, some have suggested that women's rights groups were not as anxious in the 1980s, as they were in the 1970s, to have their disputes resolved in the Supreme Court.⁷ This is hardly surprising since many of those organizations viewed President Reagan's appointees (with the possible exception of O'Connor) as somewhat insensitive to

claims of gender-based discrimination. Surely epitomizing this new and far less receptive judicial environment was Reagan's elevation of William Rehnquist to the chief justiceship. Of all those sitting on the Court between 1969 and 1981, Rehnquist was by far the least likely to support gender claims, opposing them in 84 per cent of the 64 cases in which he participated.⁸ By the same token, some women's rights advocates opposed two of Reagan's other nominees—Anthony



We thank Jeffrey Segal for providing us with some of the data used in this article and the anonymous reviewers of *JUDICATURE* for their helpful comments.

1. O'Connor and Epstein, *Beyond legislative lobbying: women's rights groups and the Supreme Court*, 67 *JUDICATURE* 134-143 (1983).

2. This figure is particularly impressive compared with the success of black litigants. Between the 1972 and 1976 terms, the Court supported them in only 41.5 per cent of their 65 cases; the figure for women, during the same period was 58.6 per cent (N=29). See Ulmer and Thomson, *Supreme Court Support for Black Litigants*, in Ulmer, ed. *COURTS, LAW AND JUDICIAL PROCESSES* (N.Y.: Free Press, 1981).

3. See, generally, Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of the Legal Change*, 9 *LAW & SOC'Y REV.* 95-160 (1974).

4. See, generally, Sorauf, *THE WALL OF SEPARATION: CONSTITUTIONAL POLITICS OF CHURCH AND STATE* (Princeton, N.J.: Princeton University Press, 1976).

5. O'Connor and Epstein, *supra* n. 1, at 140.

6. See, generally, Vose, *CONSTITUTIONAL CHANGE* (Lexington, MA: Lexington Books, 1972).

7. See, for example, Nemy, *Feminists, Set Back, to Stress Politics*, *NEW YORK TIMES*, July 7, 1980, at sec. B, p.29 in which many leaders of women's rights organizations criticize the Court and suggest a return to Congress, state legislatures, and "electoral strategies." See also, Estrich and Kerr, *Sexual Justice*, in Dorsen, ed. *OUR ENDANGERED RIGHTS* (N.Y.: Pantheon Books, 1984) in which they review problems with emerging doctrine.

8. O'Connor and Epstein, *Sex and the Supreme Court*, 64 *SOC. SCI. Q.* 327-331 (1983).

Kennedy and Antonin Scalia—on several grounds, including the perception that they opposed affirmative action. Potentially, then, women's rights groups may have sought to avoid the newly configured Reagan Court. At the very least, it seems reasonable to suspect that they may not have participated with the same vigor as they did in the 1970s.⁹

We also question whether women's rights groups, if present, were as cohesive in the 1980s as O'Connor and Epstein reported for the 1970s. As gender-based doctrine evolved from first generation questions of basic equality (e.g., should men be favored over women in the selection of estate administrators?)¹⁰ to those involving "special" or "preferential" treatment (e.g., should employers be required to provide unpaid leaves of absence to women disabled from pregnancy?),¹¹ women's groups apparently faced a difficult time remaining unified.¹² On preferential treatment for pregnant women, for instance, some advocates [e.g., the American Civil Liberties Union (ACLU)] argue that "it is inherently wrong to single out pregnant women for special treatment, even favorable special treatment."¹³ Others, including former NOW president, Betty Friedan, aver that "women are different from men, and there has to be a concept of equality that takes into account that women are the ones who have babies."¹⁴ In short, as the issues became more complex and inherently more dissent-provoking, the potential for disagreement correspondingly increased.¹⁵

Finally, O'Connor and Epstein asserted that women's rights groups benefited from the low level of organized opposition to their claims. But, again,

9. In this article, we deal exclusively with the U.S. Supreme Court. But, the same could hold true for the "Reaganized" lower federal courts, as well. See, Alumbaugh and Rowland, *The links between platform-based appointment criteria and trial judges' abortion judgments*, 74 *JUDICATURE* 153 (1990) and Schwartz, *PACKING THE COURTS* (N.Y.: Charles Scribner's Sons, 1988).

10. *Reed v. Reed*, 400 U.S. 71 (1971).

11. *California Federal Savings & Loan Association v. Guerra*, 107 S.Ct. 683 (1987).

12. This is reflected in both scholarly and journalistic accounts. See, for example, Gibson, *Child-bearing and Child rearing: Feminists and Reform*, 73 *V.A. L. REV.* 1145 (1987); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 325 (1984-1985); and, Lewin, *Maternity-Leave Suit has Divided Feminists*, *NEW YORK TIMES*, June 28, 1986, at sec. 1, p.52.

13. Quoted in Lewin, *supra* n. 12, at 52.

14. *Id.*

changing times suggest that this no longer may be the case. We know from scholarly and journalistic accounts that the Reagan administration was far less hospitable to claims of discrimination, generally speaking, than were its predecessors: his Justice Department went so far as to actively oppose them in Court.¹⁶ So too, the 1980s ushered in a new era of optimism among business interests and conservative public interest law firms about their likelihood of success in judicial forums. The Pacific Legal Foundation, the Chamber of Commerce, and others began using the courts with increasing frequency, believing that their claims—many of which challenged any form of preferential treatment—would find a receptive audience.¹⁷

In short, O'Connor and Epstein found that the efforts of women's rights groups (and the environment surrounding those efforts) in the 1970s evinced many of the characteristics important for litigation success: groups participated frequently and with growing levels of acumen, they coordinated their activities, and they benefited from a low level of opposition to their claims. It was no surprise, then, that they won the majority of their cases in the 1970s. Discursive literature of a more recent vintage, however, suggests that those factors may not have been operative in the 1980s and, in fact, that the reverse may have held true: groups sought to avoid the "Reaganized" Court, they became increasingly divided over second-generation gender-based issues, and they faced a growing level of organized opposition.

If these perceptions accurately depicted the litigation environment of the 1980s, then we might expect to find that

15. It is true, for example, that the growing complexity surrounding racially based discrimination cases in the 1980s affected the ability of key organizations to conduct "model" litigation campaigns. See Wasby, *Civil rights litigation by organizations: constraints and choices*, 68 *JUDICATURE* 337-352 (1985); Wasby, *How Planned is "Planned" Litigation?*, 1984 *AM. BAR FOUNDATION RESEARCH J.* 83-138 (1984).

16. See, for example, Segal, *Courts, Executives, and Legislatures*, in Johnson and Gates, eds. *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* (Washington, D.C.: CQ Press, 1990); Segal and Reedy, *The Supreme Court and Sex Discrimination: The Role of the Solicitor General*, 41 *W. POL. Q.* 553-568; Caplan, *THE TENTH JUSTICE* (N.Y.: Vintage Books, 1987).

17. See Epstein, *CONSERVATIVES IN COURT* (Knoxville, TN: University of Tennessee Press, 1985).

18. O'Connor and Epstein, *supra* n. 1, at 137.

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

the Court was far less hospitable to claims of gender-based discrimination than it was during the 1970s. Surely, this was the lesson of the O'Connor and Epstein study. As it turns out, though, such claims fared quite well in the past decade, even better than in the 1970s. Between 1981 and 1990, the Court adopted the pro-rights position in 72 per cent (n=30) of the 42 cases it decided with full opinion.

Thus, we are left with something of a puzzle. Is it the case that scholarly and journalistic impressions of women's rights litigators (and of the environment surrounding them) are just that—impressions—and, in fact, groups have continued along the path blazed in the 1970s? Or, is it the case that the discursive literature is accurate and that other factors now explain their success? In either event, it seems a significant and timely task to *update* and *replicate* O'Connor and Epstein's examination of the 1970s for the 1980s. Doing so not only may tell us something about the litigation activities of women's rights advocates, but also might reveal a good deal about those factors we typically associate with legal success.

To accomplish this, we examined all gender-based discrimination cases decided by the Supreme Court after the 1980 term. In defining "gender-based discrimination," we adopted the same approach as O'Connor and Epstein: we included *all full opinion* cases "that had ramifications on women's rights including those where reproductive freedom issues were at stake. A women's rights issue did not have to be the primary issue presented...."¹⁸ All in all, between the 1981 and 1989 terms, the Court decided 42 cases presenting such issues.¹⁹

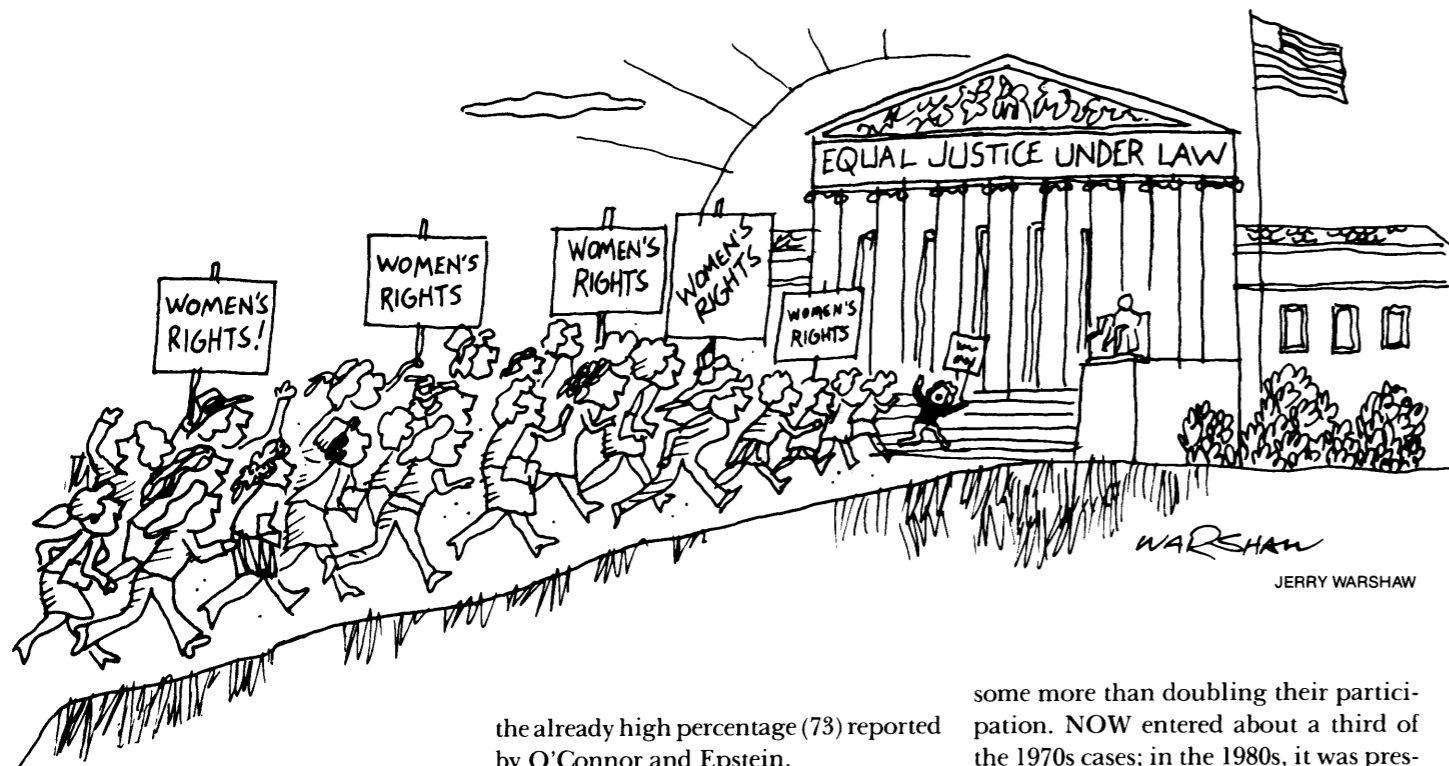
In analyzing their cases, O'Connor and Epstein initially addressed three questions:

- Which groups have been involved?
- What strategies have they employed?
- What kinds of external opposition have they faced?

They then considered how the answers to those questions related to the success of women's rights litigators. Our examination follows suit.

Participation in the 1980s

O'Connor and Epstein found two aspects of the participation of women's rights groups significant explanations



for the success of gender-based claims in the 1970s. The first simply was that they appeared before the Court with great frequency, participating in 73 per cent of the 63 cases. The second was that the leading litigator—the Women's Rights Project (WRP) of the ACLU—also was the one with the greatest expertise. Though the WRP was quite young in the 1970s, "the ACLU was more than a half century old. Therefore, the WRP enjoyed from its creation the experience of a seasoned litigator" with sufficient staff and resources.²⁰ Moreover, in the 1970s, the WRP was headed by Ruth Bader Ginsburg, the leading architect of ground-breaking victories in this area of the law.²¹ The importance of the ACLU's involvement was evident: when it participated, the chances of success for a gender-based claim increased by 16 per cent.

Do these twin patterns hold for the 1980s? Though we had some reasons (e.g., groups sought to avoid the "Reorganized" Court) to believe that they would not, the data reveal otherwise; in fact, the pressure group environment (i.e., pro-women's rights) surrounding gender-based cases exploded on a number of dimensions.²² First, and most obvious, at least one women's rights group participated as a direct sponsor or as an amicus curiae in 79 per cent (n=33) of the 42 cases decided between 1981 and 1990, representing a slight increase from

the already high percentage (73) reported by O'Connor and Epstein.

Where we see the "explosion," though, is in the number of groups actively participating in this area. During the 1970s, five organizations—ACLU, NOW, Women's Equity Action League (WEAL), Women's Legal Defense Fund (WLDF), and Center for Constitutional Rights (CCR)—dominated litigation, each participating in more than 20 per cent of the cases in which at least one women's rights group participated. As we illustrate in Figure 1,²³ in the 1980s nine groups met that 20 per cent threshold for all 42 cases (and not just those 33 containing the presence of at least one women's rights litigator).²⁴

Several other aspects of Figure 1 merit attention. First, virtually all of the major advocates of the 1970s evinced higher involvement rates in the 1980s, with

20. O'Connor, *WOMEN'S ORGANIZATIONS' USE OF THE COURTS* 126 (Lexington, MA: Lexington Books, 1980).

21. Ginsburg's brief in *Reed v. Reed* served as the blueprint for first generation gender-based litigation, leading some to call it the "Grandmother brief." As Greenberg, *THE JUDICIAL PROCESS AND SOCIAL CHANGE* 381 (St Paul, Minn.: West Publishing, 1977) noted, "Its approach [was] seminal: pressing the Court for 'strict scrutiny equal protection standard' while arguing for a lesser [one] in the alternative."

For more on the WRP and/or Ginsburg, see Cowan, *Women's Rights through Litigation*, 8 *COLUM. HUM. RTS. L. REV.* 373-412 (1976); Cortner, *THE SUPREME COURT AND CIVIL LIBERTIES POLICY* 183 (Palo Alto, CA: Mayfield, 1975); and Berger, "Litigation on Behalf of Women," (NY: Ford Foundation) mimeo (1979).

22. We obtained data on the participation of

some more than doubling their participation. NOW entered about a third of the 1970s cases; in the 1980s, it was present in well over half. Even more dramatic were the efforts of the WLDF, a group created in 1971 to provide *pro bono* assistance to women. During its early years, it filed or cosigned amicus curiae briefs in less than 25 per cent of the cases; by the 1980s, that figure skyrocketed to almost 50 per cent. And, the most successful litigator of the 1970s—the ACLU—maintained its position as the leading advocate of women's rights in the judicial arena, participating in an almost identical percentage of cases during both decades.

A second finding is that groups previously less involved in litigation became active participants in the 1980s. The American Association of University Women (AAUW), Equal Rights Advocates (ERA), League of Women Voters

interest group litigators from the microfiche records of briefs filed in the cases.

23. In their figure depicting participation rates, O'Connor and Epstein distinguished between the filing of amicus curiae briefs and sponsorship. What their figure indicated was that very few groups, other than the ACLU, sponsored cases. Our findings parallel theirs, with only the ACLU sponsoring a notable amount of litigation (n=7). See *infra*, p. 318.

24. If we consider only those 33 cases, the number of groups which meet the 20 per cent minimum rises to 16. The six additional groups are: California Women Lawyers, Employment Law Center, National Bar Association—Women's Division, Northwest Women's Law Center, Women Employed, and Women Lawyers Association of Los Angeles. Moreover, CCR meets the threshold requirement if we only look at this subgroup of cases.

(LWV), and Women's Law Project (WLP), were not Court novices—they had made a limited number of appearances in the 1970s. By the 1980s, however, they became regular players.²⁵

We see the continued involvement of groups such as NOW and the ACLU as important: as the literature indicates, their long-term involvement in and commitment to litigation allowed them to accrue "repeat player" status, with all its attendant advantages.²⁶ Yet, the entrance of new groups may be of equal significance. In the 1970s, the Court heard largely from those organizations—WRP, NOW, WEAL, WLDF—created in the wake of the women's movement of the 1960s and 1970s. Today, however, the range has widened to encompass some of the older ones—the League of Women Voters and the American Association of University Women—whose names carry a symbol of "traditionalism," not "radicalism." Hence, pressure on the Court from women's rights groups not only has increased in degree,²⁷ but also in kind.

Participation by women's rights advocates also has increased in depth. Although O'Connor and Epstein did not report the average number of amicus curiae briefs filed in their cases, we could estimate that figure to be around two to three briefs per case.²⁸ If we exclude three abortion cases,²⁹ which generated an unusually high degree of participation,³⁰ we find that an average gender-rights case decided in the 1980s attracted about four briefs supporting the pro-rights side. That figure increases to nearly five briefs per case if we omit those cases (n=4) in which no amici were present on either side. In sum, women not only are participating at greater rates in the 1980s

25. The remaining newcomer, the National Women's Law Center (NWLC), was founded in 1981 and thus was absent from 1970s litigation.

26. See Galanter, *supra* n. 3.

27. There is at least one other indication of the proliferation of women's rights interests. In their note 27, O'Connor and Epstein listed nearly 60 organizations that participated as an amicus curiae in at least one case. If we exclude Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989), which generated an extraordinary amount of attention from women's rights groups, the number of organizations participating in 1 to 5 cases (decided in the 1980s) is close to 90. For a list of these groups, contact the authors.

28. See O'Connor and Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation*, 16 *LAW & SOC'Y REV.* 311-320 (1981-82).

29. Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989); Ohio v. Akron Center for Reproductive Health Services, 110 S.Ct. 2972 (1990), and Hodgson v. Minnesota, 110 S.Ct. 2926 (1990).

Table 1 Inter-group support: a comparison of the 1970s and 1980s*

Group	ACLU		CCR		Support for... NOW		WEAL		WLDF	
	70s	80s	70s	80s	70s	80s	70s	80s	70s	80s
ACLU**	—	—	—	.42	—	.69	—	.42	—	.58
CCR	.78	.71	—	—	.44	1.00	.11	.57	.33	.86
NOW	.79	.75	.21	.29	—	—	.42	.54	.58	.79
WEAL	.64	.73	.09	.27	.73	.87	—	—	.55	.93
WLDF	.54	.71	.23	.29	.85	.91	.46	.67	—	—

*We measured inter-group support in the same way as O'Connor and Epstein, that is, as the number of cases in which both groups were present divided by number of cases the first group entered. Hence, support = $\frac{n}{\text{total cases entered}}$

For example, in the 1980s, the CCR supported the ACLU in 71 per cent of the cases CCR attorneys entered. **O'Connor and Epstein did not report data for the ACLU's support of other groups.

than in the 1970s, but they also are filing more amicus curiae briefs per case than ever before.

Strategies in the 1980s

Cooperation among like-minded interests is an important ingredient for litigation success, one O'Connor and Epstein found particularly relevant to the efforts of women's rights groups. In fact, in describing their findings on the strategies used by women's groups in the 1970s, they wrote that their "litigation efforts reveal a high degree of intergroup support... more specifically most groups support the ACLU through the submission of amicus curiae briefs."³¹ Certainly, their data, which took the form of support scores,³² attest to this: all organizations—from the more "radical" Center for Constitutional Rights (CCR) to the more "traditional" Women's Equity Action League (WEAL)—filed amicus curiae briefs with or in support of the ACLU in over 50 per cent of the cases in which they entered. Moreover, with but one notable exception—the CCR—the major litigators regularly allied with each other.³³ Indeed, the average support score reported by O'Connor and Epstein for the

1970s was nearly .50 among all groups.

Two factors help explain the high levels of cooperation between the leading groups in the 1970s. First, Ginsburg and the ACLU's WRP actively attempted to organize and coordinate the legal efforts of women's organizations so as to address the Court with one potent voice. Second and concomitant, the issues around which the groups rallied were of the most basic type—first generation cases involving core equality issues on which agreement readily existed.

In contrast, the cases of the 1980s were generally more complex and multifaceted, presenting a new generation of issues, such as preferential treatment. Thus, the question becomes whether diverse sorts of women's groups could continue to present the Court with a unified front as the issues became inherently divisive. We address this in Tables 1 and 2, which depict the extent to which the most active advocates allied with one another.

Let us first consider Table 1 in which we compare patterns of support among the five leading groups in the 1970s to those in the 1980s. Overall, we see increases in inter-agreement scores; for example, between 1970 and 1980, NOW supported WEAL in 42 per cent of the cases and received its support in 73 per cent. As we depict, the relationship has grown stronger in both directions. This is a particularly interesting finding given that WEAL and NOW are not without their share of previous disagreements. Indeed, members of NOW, who were dissatisfied over its support of abortion and other issues at the center of the more controversial cases of the 1980s, created WEAL in 1968. Yet today the two are concurring more than ever. Even CCR, which was something of a solitary player during the 1970s, became part of the "team." It supported (and was supported

by) all groups at a much higher rate, a phenomenon occurring largely because many of the players were increasingly involved in CCR's main legal game—reproductive freedom cases. Furthermore (and consistent with previous research), is the central role the ACLU played. Not only did it continue to lend its expertise

which participated in less than 20 per cent of the 1970s cases ("newcomers" to the modern era of litigation) entered the fray, whether in cooperation with or apart from the original groups ("oldtimers"). What the data indicate is that these newcomers, however traditional in ideological orientation, have coalesced

tion" issues. Consider, *California Savings & Loan v. Guerra*,³⁵ a case which could have created a great deal of dissension among the groups. In *Guerra*, Lillian Garland—a woman employed by the petitioner—took a pregnancy disability leave. When she returned three months later, the bank informed her that it had filled her position. Garland then filed a complaint with Guerra (Director of the Department of Fair Employment and Housing), who in turn charged the bank with violating the state's Fair Employment and Housing Act (FEHA). Under this Act, employers must provide female employees with an unpaid pregnancy disability leave (of up to four months) and, generally, reinstate them upon their return.

Before hearings on this charge commenced, the bank (and several other business interests) brought suit in federal court, alleging that the relevant section of FEHA³⁶ was "inconsistent with and was preempted" by Title VII of the Civil Rights Act of 1964. In a summary judgment, the district court held for the bank, asserting that state employers who comply with the law "are subject to reverse discrimination suits under Title VII brought by temporarily disabled males who do not receive the same treatment as female employee disabled by pregnancy..."³⁷ As such, Title VII preempted the state's law. The U.S. Court of Appeals for the Ninth Circuit reversed that judgment, largely on the grounds that the district court "flout[ed]" Title VII and the Pregnancy Discrimination Act (PDA) of 1978. In its view Congress enacted the PDA "to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."³⁸ Thus, it held that the state law was compatible with Title VII as amended by the PDA.

Certainly, the centerpiece of *Guerra*—the issue of preferential treatment for pregnant women—is something over which women's rights groups are divided. And, quite as clearly, once the Supreme Court decided to hear the dis-

pute they could have carried that debate into the courtroom, going so far as to align themselves with competing parties. But they did not do so; rather, each participating group generally supported the respondent, while arguing from its distinct perspective. Some unequivocally backed the state; for example, in a brief filed for nearly 40 groups and individuals (including Betty Friedan),³⁹ the Coalition for Reproductive Equality in the Workplace argued that the state law remedied "the discriminatory burden that inadequate leave policies place on working women's right to procreative choice." It also noted that the law constituted neither "protective" legislation nor affected "the rights of male employees."

In its amicus curiae brief, the ACLU (on behalf of four other organizations)⁴⁰ made a rather different claim; indeed, it went so far as to suggest that the law was protective in nature and, as such, reflected "stereotypical assumptions and unnecessarily rel[ie]d on invidious distinctions." Still, it did not ask the Court to strike the law or find that it was preempted by Title VII. Rather, it argued that employers would violate the federal law if they complied with the state statute "by providing leaves of absence with job security to women temporarily incapacitated by pregnancy without providing the same benefit to other employees similar in their ability or inability to work." In other words, the "remedial intentions of the law should not apply exclusively to pregnant women."

In a brief for five organizations,⁴¹ NOW presented yet another perspective. It suggested that the PDA did not preempt the California law because the two "can be read as imposing mutual and complementary obligations...." How-

ever, it asserted that the Court ought to uphold the California law in such a way that requires employers "to comply with both it and the PDA by providing unpaid disability leave to all employees...." If the Court failed to construe it as such, NOW et al. argued that the California law conflicts with the PDA. Clearly, such divergence of opinion among usual allies is not ideal; still, it is surely preferable to out-and-out organizational division. Put somewhat differently, given the divisive nature of issues of preferential treatment, groups could have aligned themselves with competing sides. That they did not do so, choosing instead to harmonize their opinions as best they could, reveals their interest in keeping such debates out of Court.

In general, then, what can we conclude about the strategies of women's rights advocates in gender-based cases? On some level, the data indicate that organizations, representing a range of interests, are cooperating more than ever to present the Court with a unified front. On another, though, they are divided over complex second-generation issues, a fact which *Guerra* amply demonstrates. Even so, they have sought to overcome these divisions by stressing the commonalities of their perspectives, rather than the differences.

Opposition in the 1980s

A final factor offered by O'Connor and Epstein to explain the success of gender-based claims was that such cases failed to attract significant opposition in Court. In direct and marked contrast to their legislative efforts, in which substantial numbers of opponents coalesced to fight against efforts to ratify the Equal Rights Amendment, women's rights advocates faced no

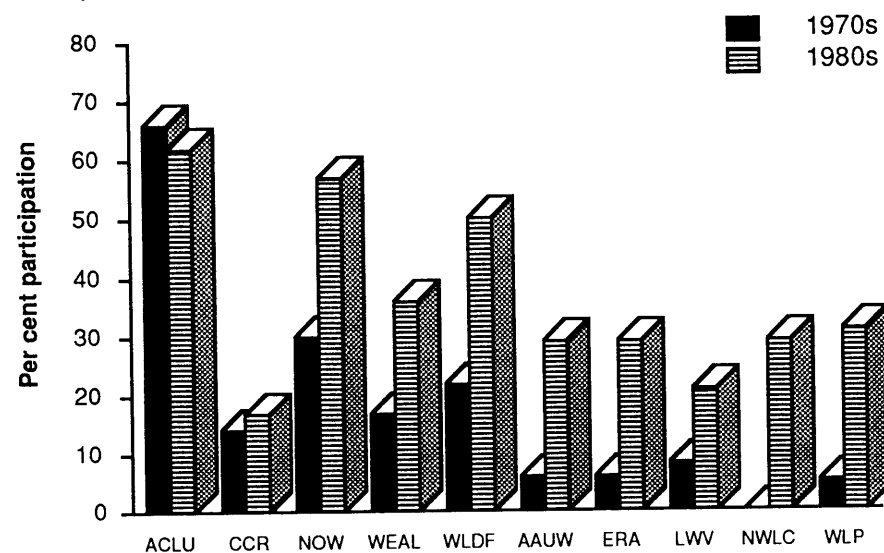
major foes in their legal battles. In barely half of the cases did organized interests file amicus curiae briefs at odds with the gender-based claim. And those organizations that did tended to have a financial stake in case outcomes (e.g., the Chamber of Commerce), rather than the more ideologically based concerns of those groups present in legislative forums.

Moreover, one of the most influential Courtroom players—the Office of the U.S. Solicitor General—did not present a threat to rights groups by countering their claims. Indeed, the various presidential administrations of the 1970s generally either remained out of the fray or provided needed and welcomed support. For example, President Carter's Solicitor General, Wade McCree, filed pro-civil rights amicus curiae briefs in 87.5 per cent of the 32 cases in which he participated.⁴² Given the reputation of the Office of the Solicitor General as a most successful Court player, such support clearly enhanced the chances of victory.⁴³

Did the same patterns hold in the 1980s? Or, as we might predict, did organized interests and/or governments counter the claims of women's rights litigators in Court? Indeed, they did: just as we discovered an increase in the amount of pressure activity from women's groups on the pro-rights side, so too we noted a proliferation of groups actively opposing gender-based claims. Of the 33 cases in which a women's rights group participated, organized interests filed opposition amicus curiae briefs in 76.9 per cent, up from 58.6 per cent in the 1970s. The average case decided in the 1980s generated about two opposing friend-of-the-court briefs.⁴⁴

To some extent, those numbers reflect heightened levels of opposition from the same sources found by O'Connor and Epstein. For example, in the 1970s business interests filed amicus curiae briefs in 69.2 per cent (n=9) of the 13 cases involving employment discrimination; in the 1980s, the Court heard an identical number of such cases, but the frequency of opposition rose to 84.6 per cent (n=11). Activity among pro-life groups also skyrocketed: in the 1970s, organizations such as Americans United for Life and the U.S. Catholic Conference filed briefs in 75 per cent of the decade's 12 reproductive freedom cases (n=9); in the 1980s, these sorts of interests were present in 89

Figure 1
Participation of women's rights organizations:
a comparison of the 1970s and 1980s*



*Groups listed here are: the American Civil Liberties Union (ACLU), the Center for Constitutional Rights (CCR), the National Organization for Women (NOW), the Women's Equity Action League (WEAL), the Women's Legal Defense Fund (WLDF), the American Association of University Women (AAUW), Equal Rights Advocates (ERA), the League of Women Voters (LWV), the National Women's Law Center (NWLC), and the Women's Law Project (WLP).

Table 2 Inter-group support: "newcomers" support for "oldtimers" in the 1980s*

Newcomers	Support for oldtimers...				
	ACLU	CCR	NOW	WEAL	WLDF
AAUW	.67	.25	.92	.67	.83
ERA	.92	.33	.92	.75	.92
LWV	.89	.33	.89	.67	.89
NWLC	.75	.25	.92	.83	1.00
WLP	.77	.39	1.00	.54	.69

*These data indicate the degree to which "newcomers" supported "oldtimers." Support, again, is defined as: n of supportive cases

total cases entered
For example, AAUW supported the ACLU in 67 per cent of the cases in which it participated.

to the majority of gender-based cases, but it also still garnered support from organizations as diverse as the CCR and the League of Women Voters. Of the seven cases sponsored by the ACLU, six attracted supporting amicus curiae briefs filed by one or more of the groups illustrated in Figure 1.³⁴

Table 2 depicts how those groups

with the oldtimers, however radical. The average level of support reported in Table 2 is an astonishing 72 per cent.

The data in Tables 1 and 2 certainly bear out the conclusion that women's rights groups continue to present the Court with a unified front. What is perhaps more interesting is that they have done so on complex, "second-genera-

34. The one exception was *Patsy v. Board of Regents of Florida*, 102 S.Ct. 2557, in which several civil rights, but no women's rights, groups filed supporting briefs.

35. 107 S.Ct. 683 (1987).

36. §12945 (b)(2).

37. 34 FEP Cases 562 at 568 (1983).

38. 758 F.2d 390, at 395 (1985).

39. Interest groups cosigning this brief were: International Ladies' Garment Workers Union, AFL-CIO; 9 to 5, National Association of Working Women; Planned Parenthood Federation of America, Inc.; California School Employees Association; American Federation of State, County and Municipal Employees, District Council 36; California Federation of Teachers; Coalition of Labor Union Women, Los Angeles Chapter; Union of Food and Commercial Workers, Local 770; Utility Workers Union of America, AFL-CIO, Local 132; Orange County Central Labor Council; American Association of University Women, California State Division; Women For; Los Angeles City Commission on the Status of Women; Comision Femeneil de Los Angeles; American Jewish Congress—Pacific Southwest Region; Mexican American Bar Association of Los Angeles County; Hispanic Women's Council; Lawyer's Club of San Diego; Women Lawyers of Alameda County; Women Lawyers of

San Luis Obispo County; Inland Counties Women at Law; Queen's Bench; and, Los Angeles Feminist Legal Scholars.

40. The League of Women Voters of the United States; the League of Women Voters of California; the National Women's Political Caucus; and, the Coal Employment Project.

41. NOW Legal Defense and Education Fund; National Bar Association, Women's Lawyers Division, Washington Area Chapter; National Women's Law Center; Women's Law Project; and, Women's Legal Defense Fund. The brief was filed "in support of neither party."

42. O'Connor, *The amicus curiae role of the U.S. solicitor general in Supreme Court litigation*, 66 JUDICATURE 257, 263 (1983).

43. This is particularly true in gender-based cases. See Segal and Reedy, *supra* n. 16.

44. This figure does not include the three abortion cases, which would have skewed the results.

per cent of those disputes (n=9).⁴⁵ Moreover, we see that activity has mushroomed within those areas; for instance, in the major abortion case of the 1970s, *Roe v. Wade*,⁴⁶ seven groups filed or cosigned amicus curiae briefs in support of the state. In *Webster v. Reproductive Health Services*, that figure was over 80.⁴⁷

On one hand, then, opposition to gender-based claims evinces more of the same activity observed by O'Connor and Epstein. On the other, we observe new entrants into the gender-based arena, specifically conservative public interest law firms (CPILFs).⁴⁸ By the onset of the decade, regional legal foundations, such as the Pacific (PLF) and Mountain States (MSLF) Legal Foundations,⁴⁹ had begun countering the claims of women's rights advocates in the courts. At least one CPILF was present in six cases, all of which involved claims of employment discrimination. In general, their participation took the form of amicus curiae submissions; however, the MSLF sponsored one suit, *Johnson v. Transportation Agency, Santa Clara County*,⁵⁰ arguing that the state should not give women preference over men in promotions. Its position was supported by amicus curiae briefs filed by both the Pacific and Mid-Atlantic Legal Foundations.

Another source of active opposition was the Office of the U.S. Solicitor General. We suspected that the Reagan administration would bring to the justices a more limited interpretation of equal protection guarantees and of privacy. In the context of gender-based claims, we were not disappointed. As we indicate in Figure 2, of the 16 cases in which the solicitors general serving under Reagan and Bush chose (or were invited) to participate as amicus curiae, they filed against the women's rights position in 82 per cent (n=13).⁵¹ And, though it was the participation of Reagan's (and Bush's) solicitors general in abortion cases that received a good deal of media attention, they did not limit their opposition to that issue. The administration filed briefs opposing affirmative action for women, preferential treatment for pregnant women, and so forth. In short, the Reagan administration initiated a break from the previous administration's tradition of supporting women's rights groups in Court.⁵²

As a result of the proliferation of

organized interests on both sides of gender-based suits, pluralism now abounds in women's rights litigation. Consider Table 3 in which we depict amicus curiae briefs filed in *Price Waterhouse v. Hopkins*.⁵³ As noted, various legal associations, women's groups, and employee organizations filed in support of Hopkins. This, of course, is not at all surprising; the brief submitted by NOW Legal Defense and Education Fund, et al., in particular, represents a continuation of the trend depicted by O'Connor and Epstein. What we find in the 1980s, though, is that they are now being countered. In *Hopkins*, the United States and the Equal Employment Advisory Council filed in support of the accounting

firm; in other cases, particularly those involving reproductive freedom, the number of interests filing against the rights position has actually surpassed those in support of it.

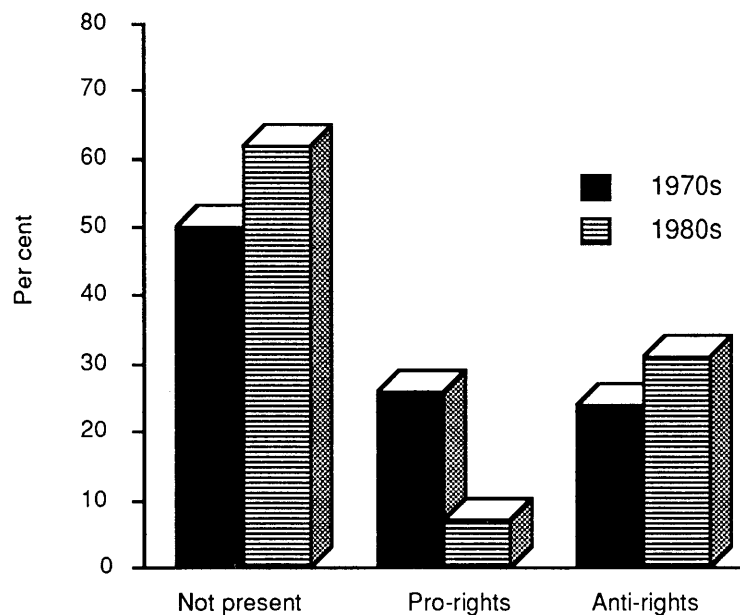
Success in the 1980s

In the introduction to this article, we noted the high rate of success by women's rights groups found by O'Connor and Epstein and we summarized the three explanations they offered for those rates. We also noted that the claims of women's rights advocates have continued to fare well in the 1980s. This left us with a puzzle that we have largely solved. That is, despite journalistic and scholarly impressions, two of the factors noted by

solicitor general and CPILFs, we have yet to observe the entry of conservative women-member organizations into the courts. Groups, such as the Eagle Forum, rarely allow arguments by feminist groups to go uncountered in legislative forums; thus, we were surprised to find that they have yet to make their presence known in the judiciary, all but eschewing it. The one exception are single-issue pro-life organizations, including Feminists for Life, which regularly filed on behalf of governmental interests in reproductive freedom cases.

53. 109 S. Ct. 1775 (1989). At issue here were "the respective burdens of proof of a defendant and plaintiff in a suit under Title VII" when it already has been demonstrated that the employer's decision (in this instance, the refusal to repropose a woman for partnership in an accounting firm) was the result of "legitimate and illegitimate" motives.

Figure 2
Participation of the Office of the U.S. Solicitor General as an amicus curiae: a comparison of the 1970s and 1980s*



*This figure indicates the percentage of cases in which solicitors general filed no briefs, filed amicus curiae briefs supporting the women's rights position, and filed briefs opposing it. We thank Jeffrey Segal for providing us with some of the data used to generate this figure.

Table 3 Amicus Curiae Briefs filed in *Price Waterhouse v. Hopkins**

In Support of Price Waterhouse	In Support of Hopkins
1. United States	1. American Psychological Association
2. Equal Employment Advisory Council	2. NOW Legal Defense and Education Fund; ACLU; Women's Legal Defense Fund; American Association of University Women; Employment Law Center; Equal Rights Advocates; Greater Washington Area Chapter, Women Lawyers Division, National Bar Association; Nadine Taub; National Coalition for Women's Mental Health; National Conference of Women's Bar Associations; National Organization for Women; National Women's Law Center; Northwest Women's Law Center; Organization of Pan Asian-American Women; San Francisco Women Lawyers Alliance; Women Employed; Women's Bar Association of Massachusetts; Women's Bar Association of the District of Columbia; and Women's Equity Action League.
	3. Committees on Civil Rights, Labor and Employment Law, and Sex and Law of the Association of the Bar of the City of New York.
	4. AFL-CIO

*Data obtained from Congressional Information Service, U.S. Supreme Court Records and Briefs, Docket No. 87-1167.

O'Connor and Epstein—the participation of women's rights groups and the degree of cooperation among like-minded interests—we found to hold for the 1980s. But, the third—the lack of organized opposition—was not present in the 1980s; rather, women's rights groups were opposed on all fronts by a wide range of groups, business interests, and the federal government.

Did increased opposition to the claims of women's rights groups affect their success rate? The simple answer is no. As we already indicated, in fact, women's rights advocates fared better in the 1980s than they did in the 1970s. Between 1981 and 1990, the Court took the pro-rights position in 72 per cent (n=30) and the opposing posture in 24 per cent (n=10).⁵⁴ Moreover, we do not see a significant decline in success after Rehnquist

54. Two cases, *Planned Parenthood v. Ashcroft* [103 S.Ct. 2517 (1983)] and *Grove City College v. Bell* [104 S.Ct. 1211 (1984)], resulted in somewhat mixed outcomes.

55. O'Connor and Epstein, *supra* n. 1, at 143.

ascended to the chief justiceship: prior to 1986, the Court adopted the women's position in 77 per cent (N=29); after 1986, in 69 (N=13).

What is more, this success rate actually increases if we look only at those 33 cases in which at least one women's rights litigator participated. In such disputes, the Court took the pro-women's rights side in 75 per cent, a figure that not only compares favorably to the overall rate, but is even somewhat higher than that reported by O'Connor and Epstein for the 1970s (63 per cent). Moreover, if no feminist organization was present, the gender-based claim succeeded in only 55.6 per cent (n=5) of the cases. It also is true that the premiere litigator of the 1970s—the ACLU—actually performed better in the 1980s. When it entered litigation (n=42) between 1970 and 1980, the Court adopted its position in 66 per cent of the cases. Between 1981 and 1990, it won 77 per cent (n=20) of its 26 cases.

Given the data we already have presented, these findings are less than surprising. We would expect the ACLU, in particular, to have been successful: its experience in the 1970s helped it to accrue repeat player status, a status of which it took full advantage by continuing to litigate in the 1980s. By the same logic, though, we supposed that federal opposition to claims of gender-based discrimination would have negatively affected the success of women's rights advocates; after all, the solicitor general is akin to a "tenth Justice," typically able to exert a high degree of influence on the justices. Yet we found that administration opposition did not significantly damage the feminist cause: of the 13 cases in which Reagan's (and Bush's) solicitors general filed opposing amicus curiae briefs, they met with success in 31 per cent (n=4). In contrast, when they filed in support of the women's rights position (n=3), they ended up on the winning side in every case.

Conclusion

After completing their examination of 1970s gender-based cases, O'Connor and Epstein concluded "that women's rights groups... may continue to find that the Court is receptive to their arguments because thus far, unlike the legislative forum, women have faced minimal opposi-

tion. 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."⁵⁵

Despite some speculation to the contrary, O'Connor and Epstein's observations of the 1970s were largely borne out in the 1980s. Women's rights groups have continued to seek redress in the legal system in ever-increasing numbers and have done so in a relatively unified fashion. In some measure, though, their conclusion failed to foresee increasing use of the Court by competing interests. Unlike the 1970s, feminist organizations now can expect to find their legal claims countered by divergent and varied organizational interests and by the federal government. Seen in this light, today's courts are no less contentious than legislative arenas.

Yet, our data indicate that the new pluralism surrounding claims of gender-based discrimination has not significantly affected the success of women's rights advocates: at least through the 1980s, the Court has generally supported their claims. We view this as an important finding in a number of regards. Substantively, it leads us to echo recommendations of the past: despite increased opposition, women's rights groups may still attain important policy objectives through the courts. On a more theoretical note, though, it leaves us with some unaddressed questions. Most important is this: what explains the inability of organizations and the U.S. government to counter successfully the claims of women's rights groups? A number of answers exist, some of which might negate our above recommendation. For example, it may be the case that groups, like the Pacific and Mountain States Legal Foundations, are just beginning to learn how to litigate gender-based claims, and that eventually they will prove to be a significant counter force. If this occurs, then we might expect to find women's rights advocates facing new challenges as the Court continues to resolve disputes into the 1990s. □

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