

SOCIAL SCIENCE Quarterly

ISSN 00038-4941

Volume 64, Number 2

June 1983

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SEX AND THE SUPREME COURT: AN ANALYSIS OF JUDICIAL SUPPORT FOR GENDER-BASED CLAIMS¹

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During the 1970s, the United States Supreme Court handed down 68 full opinion decisions involving gender-based claims. In this study we examined the Court's and the Individual Justices' support for those making claims of gender-based discrimination. We concluded not only that the Court has been receptive to these claims but that most Justices are more supportive of gender- than of race-based claims.

Since the early 1970s, the United States Supreme Court has handed down numerous decisions involving claims of gender-based discrimination. Women, like other "disadvantaged groups" including blacks (Cortner, 1968:297), regularly turn to the courts in an effort to seek redress of their grievances.

While several scholars have examined the United States Supreme Court's and individual Justices' support (or nonsupport) of claims brought on behalf of black interests or civil liberties claimants (Schubert, 1960; Rohde and Spaeth, 1976; Spaeth, 1979; Heck, 1981; Ulmer and Thomson, 1981), gender-based claims have yet to be examined in the same context. Given the failure of the Equal Rights Amendment ratification effort, an increase in gender-based discrimination litigation is likely. Thus, it is timely to examine how supportive both the Court and the individual Justices have been of women's rights.

Research Method

All 68 full opinion cases involving gender-based discrimination decided by the United States Supreme Court during its 1969 to 1981 terms were included in this analysis.² Gender-based cases were defined as those where claims were made alleging differential treatment based on sex or where reproductive freedom issues were at stake.

Support scores were calculated for the Court and for the individual

¹The authors would like to thank Thomas G. Walker for helpful comments on an earlier draft.

²A list of these cases is available upon request from the authors, Department of Political Science, Emory University, Atlanta, Ga. 30322.

justices. These scores were derived by calculating the percentage of cases in which the Court and each justice voted in favor of a gender-based claim. Support scores ranged from 0 (no support) to 100 percent (full support).

Findings

As indicated in Table 1, the Burger Court supported gender-based claims in 58.8 percent of the 68 cases. The Court's relatively high support for gender-based claims can be directly contrasted to its relatively low support for claims based on race. Ulmer and Thomson (1981:449), for example, found that the Burger Court supported black litigants in only 41.5 percent of the 65 cases decided during the 1972 through 1976 terms. During this same period, the Court supported women's rights in 58.6 percent of the 29 cases.

This finding is surprising given that during the same period of time, the Court articulated a lesser standard of review for claims involving gender-based discrimination.³ Thus, while only an intermediate standard of review was applied to most gender-based claims, the Court was more favorable toward women's rights.

The Court's high support for women's rights was reflected in the individual justices' support scores as also revealed in Table 1. Six justices currently on the Court—Brennan, Marshall, O'Connor, Blackmun, White, and Stevens—supported women's rights in more than 50 percent of the cases.

TABLE 1
Justices' Support for Gender-Based Claims, 1969-81 Terms

Justice	Percentage Support for Gender-Based Claims	N
Brennan	92.5%	67
Marshall	91.2	68
O'Connor	66.7	6
Blackmun	65.1	66
White	60.3	68
Stevens	57.1	49
Powell	46.8	64
Burger	25.0	68
Rehnquist	15.6	64
Court	58.8	68

³While classifications based on race can be justified only by a showing of "compelling" state interest, gender-based discrimination will be upheld if a state proves an "important governmental objective." See, generally, Gunther (1980).

Not surprisingly, the four justices most often noted for their rigid ideological positions were at opposite ends of the spectrum: Justices Brennan and Marshall were the most supportive of women's rights while Justices Burger and Rehnquist were the least supportive. Interestingly, though, the two conservative justices' support for women's rights claims was lower than their support for black rights. For example, Ulmer and Thomson (1981:449) found that during the 1972 through 1976 terms of the Court, Justices Burger and Rehnquist supported black litigants in 33.8 ($n = 65$) and 28.1 percent ($n = 64$) of the cases, respectively. During that same time period, Justices Burger and Rehnquist voted in favor of sexual equality in 24.1 ($n = 29$) and 6.9 percent ($n = 29$) of the cases, respectively.

In contrast, Justices White's and Blackmun's support for gender-based claims was substantially higher than their support for blacks. Ulmer and Thomson found that Justices Blackmun and White supported black claims in 44.6 percent ($n = 65$) and 43.8 percent ($n = 64$) of the cases, respectively, decided during the 1972 through 1976 terms of the Court (1981:449-450).⁴ During the same time period, these two justices supported women's rights in 57.2 ($n = 28$) and 62.1 percent ($n = 29$) of the cases, respectively.

Similar to Justices White and Blackmun, Justice Stevens generally voted in favor of the gender-based claim. Justice Stevens's support, however, was slightly lower than that of either Justice Blackmun or White. While Ulmer and Thomson's study examined only the 1972 through 1976 terms, analyses of the justices' more general support of civil liberties claims have revealed that Justice Stevens was among the most liberal justices on the Court (Heck, 1981:197; Goldman, 1982:542).

In contrast, Justice Powell's support for women's rights was higher than his support for other civil liberties issues generally, and black rights more specifically. Heck (1981:197), for example, found that Justice Powell supported civil liberties claims in 31.7 percent of the 208 cases during the 1975 through 1978 terms. Similarly, Ulmer and Thomson (1981:449) found that Justice Powell supported race claims in only 32.3 percent of the cases ($n = 62$) decided between the 1972 and 1976 terms. In sharp contrast, during that same period, he supported women's rights in 58.6 percent ($n = 29$) of the cases.

While it is too early to foresee a pattern to Justice O'Connor's support for women's rights, the six gender-based discrimination cases decided by the Court during its 1981 term may provide some indication as to her future pattern of support. Since her appointment to the

⁴It should be noted that Justices Blackmun's and White's support scores closely approximated each other, but their support for gender-based claims varied significantly by case type. In cases involving reproductive freedom issues, Justice Blackmun consistently adopted a pro-women's rights position, whereas Justice White adopted an anti-abortion position in every case. In contrast, Justice White generally supported the gender-based position when employment discrimination was alleged. Justice Blackmun, however, regularly voted against gender-based claims in those kinds of cases.

Supreme Court, Justice O'Connor supported women's rights in four of the six cases in which she participated. In two of those cases, *Sumitomo Shoji America, Inc. v. Avigliano* (1982) and *Zipes v. TransWorld Airlines* (1982), the Court unanimously adopted a pro-women's rights position. In each, the Court expanded interpretation of Title VII of the Civil Rights Act of 1964. Additionally in *North Haven Board of Education v. Bell* (1982) Justice O'Connor sided with the majority who interpreted Title IX to include protections against employment discrimination in academia.

Perhaps more significant, however, was her vote in *Mississippi v. Hogan* (1982). In *Hogan*, which was the only gender-based case decided by the Court involving constitutional rather than statutory claims, Justice O'Connor's opinion for the majority found that a state-run nursing school's refusal to admit male students violated the equal protection clause of the Fourteenth Amendment. Additionally, and perhaps more interestingly, Justice O'Connor's language in *Hogan* revealed a strong personal sensitivity toward gender-based discrimination. Thus, given the findings of this study, Justice O'Connor's vote may continue to be significant to the Court's adoption of gender-based claims.

Conclusion

In concluding their study of justices' support for race claims, Ulmer and Thomson noted that blacks should perhaps seek rights in other more amenable political forums. This conclusion was appropriate given their findings. In this study, however, we found that the Court has generally supported gender-based claims. Thus it seems reasonable to conclude that women, unlike blacks, particularly in the absence of the Equal Rights Amendment, may find the courts to be a useful forum for furthering their interests.

Any conclusions of this sort, however, must be tentative. While the Burger Court has been more receptive to gender-based claims than to those involving race, this difference may be due at least in part to the nature of the claims themselves rather than to the justices' support of women's rights per se. The race-based cases included in Ulmer and Thomson's analysis, for example, often involved complicated issues of intent and/or proof. The Court is no longer faced with "first generation" race discrimination cases involving easy applications of precedent. In contrast, several of the gender-based claims heard by the Court through 1976 involved policies or statutes that discriminated on their face. Only within the last few years has the Court been presented with more complex issues of gender-based discrimination including pregnancy-based discrimination and comparable worth. Thus, it remains to be seen if the Burger Court will continue to be generally supportive of gender-based claims. SSQ

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