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

by Karen O’Connor and Lee Epstein

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.

W
hile women’s rights groups have been able to attain some of their goals in the legislative sphere, their inability to secure ratification of highly visible objectives including the Equal Rights Amendment and other important “rights” legislation through conventional lobbying, allows them to be classi-

fied as “disadvantaged.” According to Richard C. Corrrner, “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


7. Freeman, supra n. 2 and Gelb and Palley, Women and Interest Group Politics, 5 AM. POL. Q. 351-352 (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. Corrrner, supra n. 5 at 287. 

Disadvantaged groups and the court

Writing in 1968, Corrrner 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.
Notable and well studied examples of disadvantaged groups that have relied on litigation include the NAACP and the independent NAACP Legal Defense Fund (LDF), the Jehovah's Witnesses and the American Jewish Congress. 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.

Support from and cooperation with other groups is another factor offered for the success of disadvantaged litigants. 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, "(r)each...without mass interest group backing, neither side of the Gobitski (flag salute) litigation could have stayed in court for long."

Another factor that played a role in the success 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.

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. While most groups recognized the potential importance of litigation, 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, it was unable to create a working legal defense fund until 1977. NOW's initial litigation efforts were hampered by several factors: first, internal disenchantment over the addition of employment discrimination cases led some NOW attorneys to find their own group, Human Rights for Women (HRW). This defection left NOW without experienced litigators. Second, NOW's leadership was divided as to the form a legal defense fund should take. Third, the battle for the chair 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 perceived in gender-based litigation. By this time, the Women's Equity Action League (WEAL) had also begun negotiations with the Ford Foundation to secure funding for its Women's Rights Project. The two organizations then merged.


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'Connoll, supra n. 71, 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, Educational Rights Advocates, Federally Employed Women, the National Federation of Business and Professional Women's Clubs, the National Women's Political Caucus and Universalia Unitarian Women each participated in four cases. Human Rights for Women, the Women's Law Project of the American Civil Liberties Union, the Women's Law Fund of the Women's Law Project each appeared in three cases. Participating two times were the American Women's Law and Education Association, Association for Women in Psychology, Center for Women's Policy Studies, Coalition of Labor Union Women, Federation of Organization Women, National Center on Women and Family Law, National Women's Health Network, National Women's Rights Organization, Professional Women of the Americas, the Women's Center for American Women, Women's Rights Litigation Clinic, and the Young Lawyers Association.

11. Vose, supra n. 6, at 156,138.
15. Wink, supra n. 11, at 111.
16. Beyond, supra n. 11, at 240.
18. Freeman, supra n. 2, at 181.
20. O'Conor, supra n. 17, at 105-109.
21. Freeman, supra n. 17, at 155.
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. 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. 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) and later the Reproductive Freedom Project (RFP) 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. 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. By the mid-1970s, then, most groups were willing to defer to the expertise of the ACLU. Consequently, 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 at the Supreme Court level, it did so at the request of the City Attorney, who took primary responsibility for preparation of the brief. 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.

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 created special funds to litigate, WLDF initially was created in 1971 to "provide pro bono legal assistance to women," 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. Collectively, they have been involved in 75 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, Frontier v. Richardson, and Weinberger v. Wiesenfeld, the ACLU represented parties claiming that gender-based discrimination violated constitutional principles of equal protection or due process. While 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.

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.

The amicus curiae can be 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.

As indicated by Table 1, several women’s groups regularly supported each other’s efforts. 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 nature, have little in common. 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 .485. More specifically, most groups support the ACLU through submission of amicus curiae briefs.

### External opposition

When women’s rights groups lobby state or federal legislatures they face opposition from several sources including other women’s groups, business interests, and conservative organizations. 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 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. Yet, no women’s group challenged the claims of women’s rights groups seeking expanded employment rights. This finding is not surprising given the near unanimous agreement among women about the importance of equal job opportunities. 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. In contrast to cases involving employment discrimination, however, some women’s groups opposed the expansion of women’s 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 legislators, 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.

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

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. 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 65 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.

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 Dotthard v. Rawlinson its amicus curiae brief provided the Court with a full 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.

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. Shear.

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 systemic fashion. Second, we discovered that while the ACLU prefers the direct sponsorship tactic, other women’s rights groups often appear as amici 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.

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.

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

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Supreme Court terms


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

KAREN O’CONNOR is an associate professor of political science and an adjunct professor of law at Emory University.
LEE EPESTEIN is a visiting assistant professor of political science at Emory University.