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

I
n the September 1985 issue of Judi-
cature, 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 judges were quite rece-
tive to such claims, supporting
the women's rights position in about 58
per cent of the 63 disputes resolved between
the 1980 and 1989 terms.2

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

• Becoming a repeat player. Women's
rights groups seem to have learned to
litigate, participating in 75 per cent
(n=46) of the 63 cases. In addition, the
leading role, the Women's Rights
Projects of the ACLU, provided a
great deal of expertise.

• Cooperating with like-minded
organizations. Women's rights groups
not only litigated on their own, but also
with other groups, which increased the
chances of success.3

• Benefiting from low levels of orga-
nized opposition. Women's rights
cases did not attract much opposition in
the courtroom as they did in the legisla-
tive 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 because they were
able to win enough in the 1970s, to
disrupt the balance in the Supreme Court.3

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 Rea-
gan'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.4 By the same token, some
women's rights advocates opposed two of
Rehnquist's other nominees—Anthony
Kennedy and Antonin Scalia—on sev-
eral grounds, including the perception
that they should never have been
appointed.5

Potentially, then, women's rights
groups may have sought to avoid the newly
categorized Reagan Court. At the very least,
it seems reasonable to suspect that they
did not participate as much in the 1980s
as in the 1970s.

We also question whether women's
rights groups, if present, were as cohe-
sive in the 1980s as O'Connor and Epstein
reported for the 1970s. As gender-based
discrimination is decided on the basis of
questions of basic equality (e.g., should
men be favored over women in the selec-
tion of estate administrators?) to those
involving "special" or "preferential"
treatment (e.g., should employers be
required to provide unpaid leave of
absence to women disabled from preg-
nancy?), women's groups apparently
did face a difficult time remaining uni-
ded.6 On preferential treatment for preg-
nant women, for instance, some advo-
cates—e.g., the American Civil Liberties
Union (ACLU)—argue that "it is inher-
ently wrong to single out pregnant
women for protection when it was fair to
all societal groups or those that required
special treatment."7 Others, including
forming NOW president, Betty Fried-
an, argue that the适合tion of the
women from, and there has to be a concept of
equality that includes that women are the ones who have babies.8

In short, as the issues became more com-
plex and inherently more dissent-
provoking, the potential for disagreem-
ent correspondingly increased.9

If the Court had been as liberal as
O'Connor and Epstein asserted that
women's rights groups benefi-
ted from the low level of organized
opposition to their claims. But, again,
changing times suggest that this no
longer may be the case. We know from
other scholarly and journalistic accounts
that the Reagan administration was far less
hostile to claims of gender discrimination,
generally speaking, than were its prede-
cessors. For example, two bureaucrats in the
Justice Department were reported to go
as far as to actively oppose them in Court.10
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 judi-
cial forums. The Pacific Legal Foun-
dation, the Chamber of Commerce, and
others began using the courts with in-
creasing frequency, believing that their
claims—many of which challenged any
form of preferential treatment—would
find a receptive audience.11

In short, O'Connor and Epstein found
emerging: that the effects of women's events,
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
and support from their clients, they won
most of the major cases of 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 "Rehnquistian" Court,
they became increasingly divided over
second-generation gender-based issues,
and they faced a growing level of organ-
ized opposition.

If these perceptions accurately de-
pcritized the litigation environment of
the 1980s, then we might expect to find that
the Court was far less hospitable to claims of gender-based discrimination
than its critics charge, and that 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.

Between 1981 and 1990, the Court adopted the pro-rights position in 72 per
cent (n=30) of the 42 cases decided with

We are left with something of a
puzzle. Is it the case that scholarly
and journalistic accounts of gender
rights litigators (and of the environment
surrounding them) are just that—impress-
ations, and, in fact, groups have con-
cluded along the path blazed in the 1970s?
Or, is it the case that the discursive lita-
ture is accurate and that other factors
now influence the success of women's cases?
It was not possible for us to tell what
was going on. To accomplish this, we examined all
gender-based discrimination cases de-
lected by the Court between the 1980
term. In defining "gender-based discrimina-
tion," we adopted the same
approach as O'Connor and Epstein: we
included all full opinion cases that had
repercussions on women's rights includ-
ing those where reproductive freedom
issues were at stake. A women's rights
issue was the primary issue presented..."12 All in all, between the 1981 and 1989 terms, the Court decided 42 cases presenting gender-based discrimination issues.

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

• What groups have been involved?

• What strategies have they employed?

• What kinds of external opposition

They then considered how the answers
to those questions related to the succes-
s of women's rights litigators. Our exam-
ination follows suit.

Participation in the 1980s

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

3. O'Connor and Epstein, supra n. 1, at 100.
5. O'Connor and Epstein, supra n. 1, at 100.
12. Id. at 331}

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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 percent of the 68 cases. The second was that the leading litigator—the Women's Rights Project (WRP) of the ACLU—and also the one with the greatest expertise. Though the WRP was quite resourceful in the 1970s, "the ACLU was more than a half century old. Therefore, the WRP enjoyed from its creation the experience of a seasoned litigation with sufficient staff and resources." 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. The importance of the ACLU's involvement was evident when it participated, the chance for success for a gender-based claim increased by 16 percent.

do these twin patterns hold for the 1980s? Though we had some reasons to expect that the WRP might avoid the "Bсанномinated" 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.

First, and most obviously, at least one women's rights group participated as a direct sponsor or as an amicus curiae in 79 percent (n=35) 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 "expansion," though, is in the number of groups actively participating in this area. During the 1970s, the five organizations—ACLU, NOW, Women's Equal Action League (WEAL), Women's Legal Defense Fund (WDLF), and Center for Constitutional Rights (CCR)—dominated litigation, each participating in more than 20 percent of the cases in which at least one women's rights group's participation was reported. As we illustrate in Figure 1, in the 1980s nine groups met that 20 percent threshold for all 42 cases (and not just those 35 containing the presence of at least one women's rights litigation).

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

<table>
<thead>
<tr>
<th>Group</th>
<th>1970s</th>
<th>1980s</th>
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<tbody>
<tr>
<td>ACLU</td>
<td>70%</td>
<td>70%</td>
</tr>
<tr>
<td>CCR</td>
<td>64%</td>
<td>64%</td>
</tr>
<tr>
<td>WDLF</td>
<td>64%</td>
<td>64%</td>
</tr>
<tr>
<td>WEAL</td>
<td>73%</td>
<td>73%</td>
</tr>
<tr>
<td>NOW</td>
<td>70%</td>
<td>70%</td>
</tr>
<tr>
<td>WEAL</td>
<td>78%</td>
<td>78%</td>
</tr>
<tr>
<td>WLP</td>
<td>79%</td>
<td>79%</td>
</tr>
</tbody>
</table>

20 O'Connor, Women's Organisations: Use of Legal Strategies. 21 1969. 22 1972. 23 1977. 24 These 20 percent figures are derived from the legal case database. 25 These 20 percent figures are derived from the legal case database. 26 These 20 percent figures are derived from the legal case database. 27 These 20 percent figures are derived from the legal case database. 28 These 20 percent figures are derived from the legal case database. 29 These 20 percent figures are derived from the legal case database. 30 These 20 percent figures are derived from the legal case database. 31 These 20 percent figures are derived from the legal case database. 32 These 20 percent figures are derived from the legal case database. 33 These 20 percent figures are derived from the legal case database. 34 These 20 percent figures are derived from the legal case database. 35 These 20 percent figures are derived from the legal case database. 36 These 20 percent figures are derived from the legal case database. 37 These 20 percent figures are derived from the legal case database. 38 These 20 percent figures are derived from the legal case database. 39 These 20 percent figures are derived from the legal case database. 40 These 20 percent figures are derived from the legal case database. 41 These 20 percent figures are derived from the legal case database. 42 These 20 percent figures are derived from the legal case database. 43 These 20 percent figures are derived from the legal case database. 44 These 20 percent figures are derived from the legal case database. 45 These 20 percent figures are derived from the legal case database. 46 These 20 percent figures are derived from the legal case database. 47 These 20 percent figures are derived from the legal case database. 48 These 20 percent figures are derived from the legal case database. 49 These 20 percent figures are derived from the legal case database. 50 These 20 percent figures are derived from the legal case database.
by all groups at a much higher rate, a phenomenon occurring largely because many of the players were increasingly involved in CCR's main reproductive freedom cases. Furthermore (and consistent with previous research), the central role the ACLU played. Not only did it continue to fund its expert which participated in less than 20 per cent of the 1970s cases ("newcomers" to the modern era of litigation) entered the fray, but they also entered in some variation with or apart from the original groups ("oldtimers"). What the data indicate is that these newcomers, however traditional in ideological orientation, have coalesced with the oldtimers, however radical. The nature of the ACLU's involvement in the Civil Rights Movement, and its relationship to the "oldtimers," is a complex one that has been the subject of much scholarly debate. However, what is clear is that the ACLU's involvement in the Civil Rights Movement was not limited to its traditional role as a defender of constitutional rights. It also played a key role in the development of new legal strategies and approaches, and in the training of new lawyers and legal thinkers.

The table below shows the participation of women's rights organizations in the 1970s and 1980s.

<table>
<thead>
<tr>
<th>Table 2</th>
<th>Inter-group support: Newcomers support for &quot;oldtimers&quot; in the 1980s</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newcomers</td>
<td>CCR</td>
</tr>
<tr>
<td>AALU</td>
<td>87</td>
</tr>
<tr>
<td>EWA</td>
<td>88</td>
</tr>
<tr>
<td>MLAU</td>
<td>97</td>
</tr>
<tr>
<td>NOW</td>
<td>75</td>
</tr>
<tr>
<td>WEALD</td>
<td>43</td>
</tr>
</tbody>
</table>

*These data indicate the degree to which "newcomers" supported "oldtimers." Support, again, is defined as giving financial or legal resources.*

The table shows that the support provided by the new organizations to the established women's rights organizations varied widely. However, it is clear that there was a significant amount of support provided, indicating a growing sense of solidarity and shared purpose among women's rights activists.

Opposition in the 1980s

A final factor to consider is the opposition that the PDA faced. It was challenged in court, and by other advocacy organizations. However, the court's decision in favor of the PDA was a significant victory for the rights movement.

In conclusion, the involvement of the ACLU and other organizations in the Women's Rights Movement was not limited to their traditional role as defenders of constitutional rights. They also played a key role in the development of new legal strategies and approaches, and in the training of new lawyers and legal thinkers. Although opposition to their work was significant, the ACLU and other organizations were able to overcome it and achieve significant victories for the rights movement.
per cent of those disputes (n=9). More-never, we see that activism has mushroomed within those areas; for instance, in the major abortion case of the 1970s, Roe v. Wade, 37 seven groups filed or cosigned amicus curiae briefs in support of the state. In Webster v. Reproductive Health Services, that figure was over 80. 

On the one hand, then, opposition to gender-based claims evinces more of the same activism observed by O'Connor and Epstein. On the other, we observe new entrants into the gender-based arena, specifically controversial public interest law firms (CPLIFs). By the end of the decade, regional legal foundations, such as the Pacific (PLF) and Mountain States (MSLF) Legal Foundations, 38 had begun countering the claims of women's rights advocates in the courts. At least one CPLIF was present in six cases, all of which involved employment discrimination. In general, their participation took the form of amicus curiae submissions; however, the MSLF sponsored an abortion Rights Action Network Agency, Santa Clara County, 39 arguing that the state should not give women preference over men in promotions and pay. 

Another source of activism, as we argued in the Office of the U.S. Solicitor General, was the U.S. Solicitor General, which appeared in various capacities, including as an amicus curiae, in 26 of the cases. In these cases, the solicitor general represented the position of the federal government, the state, or the plaintiff or defendant in a case. In many of these cases, the solicitor general successfully argued its position, and in some cases, the solicitor general was able to persuade the court to rule in favor of the solicitor general's position.

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 through the 1980s. In this era, despite the high rate of success, the claims of women's rights groups have continued to be met with resistance. The solicitor general and the federal government have been successful in countering the claims of women's rights groups in many cases. In fact, the solicitor general has been able to persuade the court to rule in favor of the solicitor general's position in many cases. The solicitor general is able to successfully arguing its position, and in some cases, the solicitor general is able to persuade the court to rule in favor of the solicitor general's position.

In conclusion, after examining the outcomes of the 1970s gender-based cases, O'Connor and Epstein's observations of the past may continue to find significance in the present. As we have already indicated, in fact, women's rights advocates have fared better in the 1980s than they did in the 1970s. Between 1981 and 1986, the solicitor general's position in 72 percent of the cases and the opposing position in 28 percent of the cases. Moreover, we do not observe the significant decline in success after Rehnquist ascended to the chief justiceship prior to 1986, the Court adopted the women's position in 77 percent (N=29) after 1986, in 68 percent (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 cases, the Court took the pro-women's rights side in 75 percent, 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 (65 percent). Moreover, if we focus on other parts of the law, the data presented in the table shows that the solicitor general's position was adopted in 27 percent of the cases. In 1981 and 1989, it won 77 percent (N=28) of its 26 cases.

Given that we have already presented these findings, this data indicates that the new pluralism surrounding claims of gender-based rights may still significantly affect the success of women's rights advocates at least through the 1980s. The Court has continued to support its position in the past and to accede to the solicitor general's position in many cases. In fact, the solicitor general has been able to persuade the court to rule in favor of the solicitor general's position in many cases. The solicitor general is able to successfully arguing its position, and in some cases, the solicitor general is able to persuade the court to rule in favor of the solicitor general's position.

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