Litigation as Lobbying

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Women in the Workforce and the Labor Movement

This book employs a case study approach to illustrate the dynamics of interest group litigation, using the 1991 U.S. Supreme Court case of *UA W v. Johnson Controls* as the illustrative case to show how interests mobilize through the various available policy arenas and carry their agendas (and adversaries) into litigation. The goal is to illuminate not only the complexities of that particular litigation effort but also to highlight important issues of group dynamics and interest representation that such efforts implicate.

In order to paint a sufficiently detailed picture of this case that culminated in the early 1990s, however, it is necessary to reach back into the nineteenth century to trace the emergence of the precursor issues and actors that would come to bear on this modern litigation. Only then can one fully appreciate how modern group litigation has evolved into a complex alternative form of lobbying. While the *Johnson Controls* case represents a high-profile civil lawsuit over a particular late-twentieth-century form of employer personnel practices, it had its roots in the battles over women’s protective labor laws of the nineteenth and early twentieth centuries, the emergence and eventual convergence of the labor and women’s movements, the growth of the federal regulatory apparatus, and the rise in “litigation as a form of pressure group activity” (Vose 1958). This chapter describes the involvement of the key organized interests in the legislative, regulatory, and litigation battles that have accompanied women’s entry into the paid labor force, and how these various precursor issues set the stage for the *Johnson Controls* case.
Employer policies and public laws restricting employment capacities for women have a long history in the United States, dating from the nineteenth century and continuing in various forms through the present. Also, women’s experiences with and within organized labor reach back into the 1800s. The two have in fact been closely interrelated, for the established U.S. trade and industrial unions historically supported special “protective legislation” for women, even though it contradicted labor’s philosophical and practical opposition to government regulation of terms of employment. It was not until relatively recently that unions’ stance toward protective measures that restricted employment opportunities for women changed.

Fetal protection policies are only the most recent manifestation of exclusionary policies aimed at women in employment. Since their entry into the labor force in the United States, women have been subject to ostensibly protective measures that have limited their employment opportunities (Baer 1978; Hill 1979; Lehrer 1987). While ostensibly adopted for benevolent purposes such as protecting women themselves and their offspring, the effects of such policies and laws generally have been more restrictive than protective. They have limited the number of hours women could work and the types of jobs that they could hold. Modern fetal protection policies, instituted by industrial firms and designed to bar women of childbearing age from jobs involving toxic exposure, have had the same effect. The common theme of restrictive labor laws and policies for women has been society’s interest in protecting the health of future generations; thus the health of women, as bearers of children, was seen as a legitimate interest of the state, and of the employer who is regulated by the state. As described by feminist scholar Joan Hoff-Wilson, “history has shown that favorable treatment can have unfavorable results when it is rationalized in the name of ‘women’s special procreational capacity.’ If history repeats itself, pregnant workers of the 1980s and 1990s might find themselves right back where their ancestors were in the era of protective legislation following Muller v. Oregon in 1908” (Hoff-Wilson 1987).

In 1836 the Committee on Female Labor of the National Trades’ Union reported that “the physical organization, the natural responsibilities, and the moral sensibilities of woman prove conclusively that her labors should be only of a domestic nature” (quoted in Kenneally 1978). In the late 1800s, women were beginning to gain some representation in and recognition by...
the American Federation of Labor (AFL), which was becoming the dominant national union organization (eclipsing the Knights of Labor). But in the 1890s, the AFL was urging special legislation for women, advocating limits on hours and types of machinery that women could operate. In 1898 the organization introduced a resolution at its national convention that would “remove all women from government employment, and thereby encourage their removal from the everyday walks of life and relegate them to the home” (quoted in Berch 1982). Samuel Gompers, president of the AFL, published in 1906 a position paper on working women, in which he stated that “the wife or mother, attending to the duties of the home, makes the greatest contribution to the support of the family . . . there is no necessity for the wife contributing to the support of the family by working—that is . . . by wage labor . . . the wife as a wage-earner is a disadvantage economically considered, and socially is unnecessary” (also quoted in Berch 1982). Women thus had to struggle on two fronts, battling “management exploitation and recurring union sexism” (Kenneally 1978). “Historically, the record of the organized labor movement in representing working women has been poor. It has included the exclusion of women from male unions and male occupations, and a lack of support for organizing those employed in female occupations. Such tactics have reinforced the sex segregation of the work force and the marginalization of women workers” (Blum 1991). Further hindering women’s progress was a reticence toward unionization displayed by many working women themselves, which may have prevented them from influencing union policy from within.

When protective labor laws for women first emerged in the late 1800s, trade unions and many women’s movement activists actually agreed that they were needed. They shared a common view that women possessed special qualities and virtues related to the domestic sphere, and that these qualities must be protected when women had to enter the harsh, male world of paid labor. This conception of women’s roles provided justification for state regulation of the health of women workers. The unions supported such regulation both because of their beliefs about the social role of women and in order to limit competition for jobs (Kessler-Harris 1984). Because working conditions for women during this era were extremely dismal, many women saw these protective measures as a benefit, notwithstanding their exclusive application to women. For these women at this time, relief from brutal working conditions was a greater imperative than formal gender equality.

Thus, even in the laissez-faire era of the turn of the century, when the Supreme Court in *Lochner v. New York* struck down a maximum hours
law for (male) bakers on the grounds that it interfered with freedom of contract, the same Court three years later in Muller v. Oregon upheld a maximum hours law for women based on the belief that women were inherently the weaker sex. Muller explicitly did not overrule Lochner—it did not need to, because women were regarded as a special class of workers due to their capacity to bear children. The language of the Muller decision is instructive, for it articulates how women were viewed at the time—as childbearers first and only secondarily, if at all, as wage earners.

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Muller v. Oregon provided the legal (and social) justification for restricting women’s employment for years to come. The Supreme Court went on to uphold prohibitions on women holding night jobs and serving as bartenders and validated a state minimum wage law for women only. Restating the Muller rationale, the Court again asserted that women’s health was a matter of public interest warranting special protection. The overall effect of all of these “protective” measures was that they eliminated some competition for men and perpetuated sex segregation in the workforce (Hill 1979).

As protective laws and court cases upholding them became more frequent, however, some women became wary of the authority that the state was asserting over an ever-widening range of employment opportunities. While trade unions in general opposed state regulation of male workers (as protection from the government could obviate the need for workers to organize), they favored such regulation of women. Organized labor was able to justify this apparent inconsistency by adhering to the notion of women as a “special class” of more vulnerable workers. When some trade union men asserted that they too might enjoy some of the protections being afforded women, the AFL’s Gompers objected on the grounds that “an 8-hour day established by law is enforced by government agents. The workers’ welfare is taken from under their immediate control . . .” (quoted in Berch 1982).

At the same time, many women workers favored protective legislation precisely because they were having considerable difficulty gaining support
for their needs from organized labor. Thus unions fostered the proliferation of protective labor laws for women directly and indirectly, by forcing women to turn to such laws themselves as a result of union indifference. Even the National Women’s Trade Union League (NWTUL), which formed as a result of this very indifference, favored protective legislation. But the result was that women workers were relegated to marginal status in the labor movement, in spite of the fact that their earnings were not luxuries but often vitally necessary. “The ideology of protection seems only to have reinforced the difficulties working women faced. It left women isolated from the trade union movement” (Berch 1982, 50).

During World War I, many women in the United States entered defense industries to replace men who had been called into military service. As a result, male workers became alarmed, as they feared that women would lower wages, impede unionization, and displace men in these occupations (Brito 1987). During this era, the notion still prevailed that female workers needed special protection for themselves and for future generations. Male-dominated unions found this a convenient rationale to continue to support state regulation of women’s employment, despite their ideological opposition to government intervention in regulating labor. The unions’ practical concerns with limiting competition thus superseded their aversion to state intervention in labor regulation.

**Suffrage through the Early Post–World War II Period**

The cleavages over protective labor legislation were not simply between unionized male workers and women seeking their place within labor’s ranks. The issue of protective labor laws for women was in fact one of the major issues that divided the women’s movement itself in the early twentieth century. Advocates of pure equality of the sexes opposed such measures as restrictive of women’s individual rights and opportunities. Many trade union women, however, favored these laws and the benefits they derived from them. When the Equal Rights Amendment (ERA) was first proposed in 1923, many women opposed it precisely because it would nullify the protective labor laws that they favored. When the Supreme Court struck down a women’s minimum wage law in 1923 in *Adkins v. Children’s Hospital,* reasoning that women’s attainment of suffrage three years earlier invalidated the “unique status of women” argument used in *Muller v. Oregon,* the NWTUL and the AFL responded with a renewed call for the unionization of women and for collective bargaining (Kenneally 1978).

Women’s fortunes in the labor movement began to shift slowly in the interwar years. The industrial unions that broke with the AFL in 1937 to
form the Congress of Industrial Organizations (CIO) were more conducive to women’s advancement, as several of them, including the Amalgamated Clothing Workers Union and the International Ladies Garment Workers Union (ILGWU), had a large proportion of female members. John L. Lewis, the CIO’s first president, had long been supportive of women in the labor force. Throughout the 1940s, CIO conventions were more sympathetic to the concerns of women than were those of the AFL.

Women’s experiences in the formation and development of the United Auto Workers (UAW), a CIO member union, are especially pertinent. Their involvement began through auxiliaries of wives, daughters, and female employees, but by the mid-1940s a woman had become the vice president and then president of a UAW local.

Responding to the needs of their female members, unions began to bargain collectively to eliminate wage differentials. . . . Albeit motivated chiefly by a desire to protect men’s wages, the UAW was usually solicitous of its women, studying and responding to their needs, and in 1945 warning locals that women’s seniority rights must have the same backing and protection as men’s. As early as 1941 the UAW began advocating the inclusion of sex and age provisions in the nondiscriminatory clause of Executive Orders dealing with fair employment, and a few years later at its fourteenth convention, pledged that pay, hiring, promotions, and seniority rights would be equal. (Kenneally 1978, 175)

Despite the progressivism of the UAW, unions’ overall resistance to the elimination of protective treatment for women workers persisted through the middle of the twentieth century. For example, in 1944 the Democratic Party included support for the ERA in its platform even though organized labor was still opposed to it. The division persisted within the women’s movement concerning pure equality versus special treatment. The side of the debate led by Alice Paul and the National Woman’s Party, proponents of the ERA, favored the eradication of protective labor laws aimed at women, believing that they limited women’s opportunities in the labor market.

Following World War II, women began to enter and remain in the workforce full time in increasing numbers, largely due to economic necessity. As their financial security was increasingly linked to their own work outside the home, women began to put greater pressure on unions to secure equal opportunities and benefits; this included removing the barriers created by outmoded protective laws. At first the unions resisted, in part due to lingering notions of women’s “proper” role as being in the home rather than in the factory. But the tremendous influx of women into the
labor force during this war did not reverse itself upon cessation of hostilities—this time women were entering the world of paid work to stay.

Another related issue that signaled both the emergence of women’s voices within organized labor and unions’ evolution toward working for women’s interests has been the movement for pay equity, or comparable worth. The notion was first advanced by women trade unionists during World War II, but it was not until the late 1970s and early 1980s that the issue reemerged with any true momentum (Blum 1991). By this time organized labor had undergone a significant shift in its stance toward employed women, and like gender- or pregnancy-based job limitations, pay equity represented an issue on which women’s and labor activists united.

While the specific goals of the movements for comparable worth and the elimination of sex-based exclusionary policies are technically different, the two issues clearly are substantially related. One important common element is a recognition of the high degree of gender segregation in the labor force. The push for comparable worth is premised on this recognition and seeks to value “women’s work” as highly as work traditionally performed by men. As was noted in chapter 1, many observers have noted the conspicuous absence of fetal protection policies in occupations dominated by women. This has been interpreted as an indication that these policies were largely adopted in order to perpetuate gender segregation in industry. Thus it is perhaps no surprise that these two issues represent areas in which feminists and labor unions have joined forces to advocate and litigate.

THE MODERN ERA

Breakthrough Legislation and Early Implementation

Slowly, organized labor began to come to terms with the reality of women’s permanent presence in the paid labor force. In 1961 Esther Peterson, head of the Labor Department’s Women’s Bureau, persuaded President Kennedy to establish the President’s Commission on the Status of Women. At the Commission’s first meeting, the President called achieving equal pay for women “essential” (Kenneally 1978). Legislation was introduced and, during the hearings in 1962, one finds early foreshadowing of the lines of cleavage that would persist in subsequent policy skirmishes over women and employment: the Chamber of Commerce opposed the measure, while the AFL-CIO and the ACLU voiced their support. When it passed, the Equal Pay Act of 1963 amended the Fair Labor Standards Act of 1938; it was extended in 1972 and 1974 to cover most of the U.S. workforce.
The 1964 Civil Rights Act was the next major federal step taken to eliminate employment discrimination against women. The primary intent of the act was to alleviate racial discrimination in public accommodations, employment, education, and housing. The amendment to add sex in addition to race, color, religion, and national origin as prohibited classifications in employment was offered on the House floor by Representative Howard Smith of Virginia, Chair of the House Rules Committee, as a ploy to make the legislation seem absurd and thus ensure its defeat. Title VII of the act, the portion concerning discrimination in employment, had been controversial anyway. Many lawmakers, although in favor of granting additional rights to African Americans, were unsure about legislating in the area of employment decisions made by private employers. They were also wary of creating a new federal agency (the EEOC) to enforce such a provision (Bird 1968, 1–2).

The addition of the sex amendment did not receive a great deal of attention, however. The New York Times dismissed it as one of several “unexpected amendments” (Bird 1968, 11). It was in fact expected to be dropped when the bill was considered by the Senate, but by then women were actively defending it. President Johnson favored the amendment’s retention, and he symbolically bolstered its fortunes by officially celebrating the effective date of the 1963 Equal Pay Act (Bird 1968, 11–12). The Civil Rights bill, including Title VII with the sex discrimination provision, passed in its entirety on July 2, 1964. Because of the unexpected nature of the sex discrimination provision, there was no discernible interest group mobilization around that issue; it would be in Title VII’s implementation that group cleavages would again emerge.

In the first years following passage of Title VII, the EEOC devoted its full attention to what it saw as its legitimate mandate—removing employment barriers based on race. The sex discrimination provision was not a priority. The agency’s first executive director, Herman Edelsberg, referring to the circumstances under which “sex” was added to Title VII, publicly stated in 1966 that the provision was a “fluke” that was “conceived out of wedlock.” A cadre of employees emerged within the EEOC, however, who sought to see its mandate against sex discrimination taken seriously. They believed that a sort of women’s equivalent of the NAACP was needed to pressure the agency to fulfill its mission. The idea came to fruition when Betty Friedan and others attending the Third National Conference of Commissions on the Status of Women became frustrated that the conference would not resolve to pressure the EEOC for action on sex discrimination. On June 30, 1966, the National Organization for Women (NOW) was formed by Friedan, several former EEOC commissioners, a United Auto
Workers (UAW) Women’s Committee representative, and several present and past members of State Commissions on the Status of Women (Freeman 1975, 54–55). And so again, as the contours of the policy debate around women’s changing roles in the workforce took shape, one finds the UAW, already progressive on women’s roles in the labor force for many years,10 playing a direct role in founding one of the premier national-level women’s rights organizations. When the UAW would challenge discriminatory workplace practices known as fetal protection policies into the 1990s, NOW would be there providing support as amicus curiae. Currently known for its advocacy of abortion rights, one of NOW’s primary goals at its inception was in fact the eradication of sex discrimination in employment (McGlen and O’Connor 1983).

Not all of the EEOC’s reticence in dealing with gender discrimination emanated from lack of conviction, as there was no consensus yet on the impact of Title VII on existing protective laws for women. For the EEOC, this meant determining how to interpret the bona fide occupational qualification (BFOQ) exception to Title VII. According to this statutory provision, employers may take sex into account in hiring if sex is a BFOQ for a particular position—a bona fide occupational qualification was defined as one “reasonably necessary to the normal operation of the business.” Interpretation of this exception generated conflict among women’s groups because of its potential impact on protective labor laws for women. A broad interpretation would allow most such laws to remain in effect, while a strict reading would do away with most of them.

Several groups, among them eventual supporters of the UAW’s antifetal protection policy suit, appealed to the EEOC director for a broad interpretation, to allow “differential legislation” for females to stand. Among these eventual changeovers were the ACLU, AFL-CIO, the American Association of University Women (AAUW), the American Nurses Association (ANA), and some individual unions, including the ILGWU and the International Union of Electrical, Radio, and Machine Workers (IUE). On the other side were groups such as NOW and the National Woman’s Party (NWP), as well as the UAW, which instead argued for a narrow reading in order to strike down so-called protective laws that served to exclude women from a number of jobs. Initial EEOC policy was equivocal. “The EEOC responded to the conflict between protective legislation and the BFOQ defense by firmly straddling the middle of the road” (Mezey 1992, 43). The Commission first tried to make intent (true protection versus invidious discrimination) the litmus test without addressing the practical difficulty in making this distinction. In its first guidelines on sex discrimination, issued on December 2, 1965, the EEOC stated:
the Commission does not believe that Congress intended to disturb such
laws and regulations which are intended to, and have the effect of, protect-
ing women against exploitation and hazard. . . . The Commission will not
find an unlawful employment practice where an employer’s refusal to hire
women for certain work is based on a State law which precludes the employ-
ment of women for such work: Provided, That the employer is acting in
good faith and that the effect of the law in question is to protect women
rather than subject them to discrimination.11

This position of the EEOC essentially left the status quo unchanged
with regard to exclusionary employment practices. The following year, on
August 19, 1966, the Commission stated in a press release that where there
was a direct conflict between a state law and Title VII, the EEOC would not
make any decision, in part because the EEOC lacked any enforcement
power and could not insulate employers against such state laws.
Throughout 1966 NOW and other women’s groups pressured the
EEOC to hold hearings on establishing regulations to implement the sex
discrimination prohibition of Title VII; these hearings eventually occurred
in May 1967. In December of that year the groups picketed EEOC offices
around the country to protest the agency’s reticence around the issue of
gender discrimination. NOW also filed suit against the EEOC for its failure
to adequately enforce Title VII (McGlen and O’Connor 1983).
In February 1968 the EEOC rescinded its 1966 statement, in which it
had declined to intervene in cases regarding state protective laws, and reaf-
irmed its 1965 policy of allowing such laws considerable latitude. Reiter-
ating the rationale used in the 1965 guidelines, the Commission stated that
“where state law limits the employment of women in certain jobs, employ-
ers refusing to employ women in such jobs will not be found in violation
of the act provided that . . . they act in good faith . . . and the effect of the
legislation itself is protective rather than discriminatory.”12
On August 19, 1969, the Commission, largely in response to pressure
from the “equal treatment” women’s rights advocates, who were gaining
voice, issued a new regulation that signaled a major reversal in EEOC pol-
icy. This new rule stated that no prohibitory law could qualify as a BFOQ
exception, removing the justification of protection for exclusionary prac-
tices. “Such laws and regulations conflict with Title VII of the Civil Rights
Act of 1964 and will not be considered a defense to an otherwise estab-
lished unlawful employment practice . . .”13 But by now litigation had com-
menced.
The first federal appellate court decision to address the BFOQ and state
protective laws was Weeks v. Southern Bell,14 decided by the Fifth Circuit in
1969. At that point, Georgia’s State Labor Commission Rule 59 prohibited
women from lifting over 30 pounds on the job, and it was upon this rule that the company relied in defending its restrictive policy under the BFOQ exception. The district court agreed with the company, but the Fifth Circuit did not, stating that “an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.”

Because Georgia’s Rule 59 had actually been repealed at the time of the Weeks decision, the Fifth Circuit was not able to rule on the validity of protective laws under Title VII, merely that Southern Bell’s policy did not meet the federal BFOQ test. The case that would deliver the definitive blow to state protective laws was *Rosenfeld v. Southern Pacific Co.*, a 1971 Ninth Circuit case involving California laws restricting weight lifting and overtime by women. By now the EEOC was more aggressively pursuing sex discrimination claims, for the *Rosenfeld* litigation effort was orchestrated in part by the EEOC itself and its general counsel filed an amicus brief in favor of overturning the laws. The court was clearly aware that it was in the business of creating new policy with this case, stating that “while the resulting litigation is private in form, it is intended to effectuate the policies of the legislation” (at 1222). In a dissenting opinion, Judge Chambers pointed out that counsel for the EEOC “selected” the Rosenfeld case to bring forward, and that while “the plaintiff’s counsel makes a frontal attack . . . the EEOC comes in with a flank attack by way of an amicus brief” (1,228). Both judges thus forthrightly acknowledged that this was litigation intended to have an effect on the state of the law, although each differed in his assessment of its propriety.

When the court struck down the California laws, it effectively ended the era of legally sanctioned labor policies that restricted women’s employment opportunities; prior to 1969, every state had some sort of protective legislation for women on the books (Baer 1978). “[Rosenfeld] is widely regarded as having established that ‘protective’ labor laws similar to those that survived constitutional challenges from *Muller v. Oregon* onward violate Title VII . . .” (Lindgren and Taub 1988).

But, while the law may have been moving in women’s favor, unions were progressing at varying rates. The Women’s Equity Action League (WEAL), formed in 1968, reported in 1970 that a third of the complaints it had heard to that point dealt with the failure of unions to act on behalf of their women members (Kenneally 1978). Union WAGE was formed in California by disgruntled female unionists in California. But again, some unions were ahead of the curve, with the UAW continuing to be at the forefront of progressivism in matters of gender. When the Coalition of Labor Union
Women (CLUW) was formed in 1974, Olga Madar of the UAW became its first president. The UAW also supported passage of the Equal Rights Amendment in 1970, while the AFL-CIO changed its position from opposition to support only in the mid-1970s.

Phillips v. Martin Marietta was the first gender discrimination case under Title VII to reach the U.S. Supreme Court. The Court ruled in 1971 that the company’s policy of not hiring women with young children violated Title VII, as the same rule did not apply to men. The ACLU filed an amicus brief in the case, which was largely written by, although not credited to, Susan Deller Ross, then a law student. Ross would go on to the EEOC and then to the ACLU’s Women’s Rights Project as Clinical Director, leading the coalition that worked for passage of the Pregnancy Discrimination Act (see below) and playing an instrumental role in the development of U.S. sex discrimination law.

The Court’s decision in Phillips, while a moderate victory for working women, left open the possibility of gender stereotypes qualifying under the BFOQ. It was in Dothard v. Rawlinson in 1977 that the Supreme Court took a decidedly expansive view of the BFOQ defense and ruled that concern for women’s safety was sufficient to bar them from prison guard positions. It would be fetal protection policies that would again bring the BFOQ to court, forcing the federal courts and the EEOC to grapple with its application within the context of reproductive hazards through the 1980s and into the 1990s.

In addition to pressuring the EEOC in the late 1960s, NOW and other women’s rights groups began lobbying Congress to pass the Equal Employment Opportunity Act. Prior to 1972, all that the EEOC could do upon finding instances of sex discrimination was to seek voluntary compliance. The EEO Act, which finally passed in 1972 as an amendment to the 1964 Civil Rights Act, granted the EEOC power to bring suit when it found violations. It also broadened the types of employers covered under the Civil Rights Act to include employers and unions of eight or more workers, employees of both the state and federal governments, and employees of educational institutions (McGlen and O’Connor 1983; Mezey 1992, 39–40).

Not all exclusionary employment practices of this era were broadly aimed at “protecting” women at all times; some focused only on pregnancy. As a combination of litigation and EEOC action slowly removed the legal underpinnings of straightforward sex discrimination, the use of pregnancy rather than gender as the basis for employment restrictions increased. Accordingly, the EEOC issued additional guidance, on April 5, 1972, to address pregnancy discrimination. This guidance was drafted by Susan
Deller Ross, who was then at the EEOC. The reasoning employed in the guidance was essentially the same as that eventually adopted in the Pregnancy Discrimination Act (PDA) of 1978 (also drafted in part by Ross): that pregnancy is a disability and should be treated the same as other disabilities for employment purposes. The fact that the PDA would eventually become necessary is evidence that this EEOC rule had little impact on preventing discrimination based on pregnancy, despite the agency’s enhanced enforcement capability following the 1972 Equal Employment Opportunity Act.

In the early 1970s, a cast of women’s rights litigation groups emerged to take advantage of the new developments in the law that held promise for improving women’s opportunities, not only in employment but in a number of other spheres as well. The National Organization for Women (NOW) created a Legal Defense and Education Fund (LDEF) in 1970. The ACLU formed its Women’s Rights Project (WRP) in 1971, and the Women’s Legal Defense Fund (WLDF) began operation that same year. The following year, the Center for Law and Social Policy created its own Women’s Rights Project, which would become independent as the National Women’s Law Center (NWLC). The Women’s Rights Litigation Clinic at Rutgers University was also created in 1972, as were the Women’s Law Fund and the Women’s Equity Action League (WEAL) litigation fund. The Women’s Law Project (1973) and Equal Rights Advocates (1974) followed. All of these groups would play alternating lead roles in significant cases that would define and develop women’s status under the U.S. Constitution and Title VII; many would also work in the legislative and regulatory arenas. (Their roles and their work will emerge in greater detail below.) Thus, once a degree of legislative success had been won, in the form of the Equal Pay Act, Title VII, and the EEO Act, the stage was set for the emergence of the litigating arm of the movement for expanding women’s rights. These organizations would work within the next stages of the policy process, pushing for clarification and enforcement through executive agencies and the courts to reinforce these initial gains.

**The Pregnancy Discrimination Act**

Cases such as *Reed v. Reed* (the first equal protection challenge to a gender-based policy) and *Phillips v. Martin Marietta* in the early 1970s took aim at the most overt forms of sex discrimination in employment, and served to remove state-sanctioned sex-based exclusions from the books throughout the United States. But the focus of women’s rights advocates quickly expanded to pregnancy discrimination, which in its various forms (includ-
ing forced leave, loss of seniority, lack of medical coverage, and outright dismissal) became targets of challenge by many women’s rights groups. In 1972 the EEOC, in response to recommendations from the Citizens Advisory Council on the Status of Women and several women’s groups, adopted regulations that specifically rejected the notion that “pregnancy is unique” and warranted differential treatment of women (McGlen and O’Connor 1983). However, in subsequent decisions, the Supreme Court declined to adopt the same view, signaling both how difficult it would be to overcome some traditional notions of women’s roles and how ineffective the EEOC would be in furthering this effort.

The first major case was *Geduldig v. Aiello*, an equal protection challenge to the state of California’s exclusion of pregnancy from disability benefits. Once again, the familiar lines of cleavage emerged, as did some of the consistent participants. The ACLU filed an amicus brief urging that the state’s policy be overturned, as did the AFL-CIO, the EEOC, the International Union of Electrical, Radio, and Machine Workers (IUE), the Physicians’ Forum, and the Women’s Equity Action League (WEAL). Amici defending the status quo were the Chamber of Commerce, the National Association of Manufacturers (NAM), and the Pacific Legal Foundation, all of which appeared in similar roles in the Johnson Controls case at the Supreme Court in 1990, as well as General Electric, the Merchant and Manufacturers Association, and AT&T. Two of these opposing amici, General Electric and the IUE, would clash as litigants over this same issue shortly after *Geduldig* in the *Gilbert* case (see below). The Court in *Geduldig* upheld the constitutionality of the state’s policy, explaining that the policy was reasonable because not every risk or disability was covered, and therefore not covering pregnancy did not necessarily discriminate against women. The Supreme Court held that the state’s plan did not differentiate between men and women, but rather between “pregnant and non-pregnant persons.” Following this setback, women then turned to Title VII rather than equal protection doctrine as a means to combat pregnancy discrimination in employment.

The first test of this approach of using Title VII came in *General Electric Co. v. Gilbert*, sponsored by the IUE. This case involved the disability plan of a private employer that was similar to that of California in the *Geduldig* case. The IUE lawyers argued that a penalty on childbirth was inherently discriminatory. They were supported by amici AFL-CIO, Communications Workers of America (CWA) and Women’s Law Project, as well as the United States and the state of Ohio. GE had the backing of Alaska Airlines, the American Life Insurance Association, the American Society for Personnel Administration, repeat amicus AT&T, Celanese Corporation, the
Chamber of Commerce, NAM, Owens Illinois, and Westinghouse Electric. The employer and its allies prevailed again as the justices, citing their decision in Geduldig, disregarded the EEOC guidelines that found policies excluding pregnancy as discriminatory, and found no Title VII violation. Writing for the Court, Justice William Rehnquist stated that pregnancy need not be treated as other disabilities since it “is not a disease at all and is often a voluntarily undertaken and desired condition.” He reasoned that because pregnancy is a special problem unique to women, excluding it from coverage was not discriminatory; by contrast, including it could be construed as discriminating against men since they would not benefit by such coverage. As long as women were compensated for everything that men were, no discrimination occurred, for the sexes were being treated equally. This reasoning ignored that fact that GE’s plan covered several male-specific voluntary “disabilities” such as hair transplants and vasectomies.

The Gilbert decision created an uproar among women’s rights groups. Within a day of the decision, announcement was made of a meeting of women’s, labor, civil rights, and church organizations, and a coalition was formed—the Campaign to End Discrimination Against Pregnant Workers (CEDAPW). The campaign set its sights on a legislative reversal of Gilbert. It was co-chaired by Susan Deller Ross, at that point with the ACLU’s Women’s Rights Project, and Ruth Weyand of the IUE. This marked one of the first occasions in which women labor lobbyists worked with other non-labor women’s groups to develop policy in which they had common interests (Spalter-Roth 1990). This coalition contained over 300 groups and included the AFL-CIO, the ACLU, the IUE, NOW and the NOW LDEF, the Religious Coalition for Abortion Rights, the Women’s Equity Action League (WEAL), the National Women’s Political Caucus, and the UAW.

With the support of allies in the Carter administration, the coalition began lobbying Congress for legislation to explicitly outlaw discrimination based on pregnancy. Employers resisted having to absorb the costs of covering pregnancy disability, and groups such as the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Merchants Association, the American Retail Federation, and the Health Insurance Association of America lobbied vigorously against the proposed bill. But the feminist-labor coalition was victorious, and their efforts resulted in the passage of the Pregnancy Discrimination Act (PDA) in 1978. Because the legislation took a seemingly pro-motherhood stance, even antiabortion groups such as American Citizens Concerned for Life favored it because they saw it as encouraging women to have children rather than opt for abortions. In a striking illustration of the “strange bed-
fellows” adage, the ACCL was allied with the National Abortion Rights Action League (NARAL) in this legislative effort.

The Pregnancy Discrimination Act amended Title VII of the 1964 Civil Rights Act to include discrimination based on pregnancy, childbirth, or related medical conditions. While the impetus for enactment of the PDA was the Gilbert decision concerning an employer disability plan, the Act more broadly bans disparate treatment of pregnant women for all employment purposes. Now Title VII, the accidental law that had come to play a vital role in dismantling gender-based employment barriers, was broadened to include in its purview forms of exclusion based on women’s childbearing capacity.

Ironically, the first Supreme Court case to involve the PDA found a company policy to be in violation of the statute because it discriminated against men. The case was Newport News Shipbuilding & Dry Dock v. EEOC24 in 1983, and involved differential pregnancy benefits for female employees and the wives of male employees. A male employee brought suit, and then the United Steelworkers followed with a similar charge on behalf of other men at the company. Amici supporting the company included the Chamber of Commerce, Emerson Electric, the National Railway Labor Conference, and the Equal Employment Advisory Council (EEAC). The Chamber and the EEAC would turn up again on the side of Johnson Controls in the case study below. Supporting the union and the EEOC were the United Teachers–Los Angeles, the American Association of University Women, and the AFL-CIO. The AFL was represented by, among others, Marsha Berzon, who would later serve as lead counsel at the Supreme Court level for the UAW in the Johnson Controls case (and now serves on the Ninth Circuit Court of Appeals).

The PDA stated that pregnancy could not be treated less favorably than other disabilities, but left open the question of whether it could be treated more favorably. This debate would be addressed by the Supreme Court nearly ten years after the act’s passage in California Federal Savings & Loan v. Guerra,25 which concerned mandatory reinstatement of female employees returning from childbearing leave when such reinstatement was not guaranteed to employees returning from other disabilities. In its decision, the Court essentially held that pregnancy may be treated different from other conditions if “different” equals better, but not if it equals worse.

Perhaps even more significant than the actual decision was the rift that this case created in the women’s rights community, characterized by many as the “East Coast–West Coast” split. The classic disagreement between “equal treatment” and “special treatment” feminists resurfaced, as these legal activists were bitterly divided over how pregnancy should be treated.
The East Coast, or equal treatment wing, urged that pregnancy be treated no better and no worse than other conditions, as they were afraid of the potential implications of revisiting “special” or “protective” measures for women that had historically proved to be quite restrictive. Proponents of this view that filed briefs in the *California Federal Savings & Loan* case were the ACLU WRP, the NOW LDEF, the Women’s Law Project, the National Women’s Law Center, and the Women’s Legal Defense Fund (WLDF). The West Coast faction held that this approach ignored the very real differences between men and women associated with pregnancy and that it was more harmful to women to ignore their pregnancy-related needs. Groups on this side of the issue included Equal Rights Advocates, the California Teachers Association, the Mexican-American Legal Defense and Education Fund (MALDEF), the Northwest Women’s Law Center, and the San Francisco Women Lawyers Alliance. Virtually all of these groups would be reunited in opposition to a different manifestation of pregnancy discrimination—fetal protection policies.

**PROTECTION FOR ALL: THE EMERGENCE OF OCCUPATIONAL SAFETY AND HEALTH POLICY**

Before turning to the advent of fetal protection policies, which really marked the next iteration of employer practices designed to restrict women’s employment, a brief digression is in order to set the development of federal occupational health and safety policy alongside this account of policy developments over women’s rights in employment. As the preceding discussion illustrated, the tension between women’s roles as the bearers of children and as participants in the paid labor force has a long history, as does the evolving relationship between women and organized labor. When the conflict reemerged in the context of corporate fetal protection policies in the late 1970s and early 1980s, it did so in an era with a new federal regulatory dimension.

*Occupational Safety and Health as a Federal Concern*

Until 1967 occupational safety and health policy was primarily within the purview of the states, with little federal involvement. Moreover, enforcement of state regulations was weak, in part due to fears of driving away businesses (Mendeloff 1979). There was a Bureau of Occupational Safety and Health within the Department of Health, Education, and Welfare (HEW), but it was a small research office and had no regulatory authority. By the close of the 1960s, however, this would all change. “Occupational safety and
health became a political issue in the 1960s as a result of the intersection of a complex set of social forces, including rank-and-file discontent over work, union efforts to reform existing state programs, middle-class movements for environmentalism and consumer product safety, and White House interest in the development of a new policy agenda” (Noble 1986).

In 1967 the Department of Labor included a proposal for a federal occupational safety and health bill in a package of legislative proposals submitted to the White House, commencing the process that would eventually result in the 1970 Occupational Health and Safety Act. President Johnson’s 1968 State of the Union Message signaled that occupational safety and health was to become part of his program that year (Kelman 1980). Following the presidential message, the administration’s occupational safety and health bill was introduced into Congress. Hearings were held in committees in both houses, beginning on February 1, 1968, in the House in a subcommittee of the Education and Labor Committee.

It was at this point that interest group involvement began, which took the expected form of unions versus business groups. Representatives from many international unions, as well as George Meany for the AFL-CIO, testified in favor of the bill; Chamber of Commerce and National Association of Manufacturers representatives argued against it. The Chamber claimed that unions were attempting to create a labor “czar” with potentially lethal power over U.S. business, and in its magazine Nation’s Business warned that unemployed welfare clients would become OSHA inspectors to seek revenge on American capitalism.26 Despite this initial interest on the part of the administration, Congress, and interested political groups, the occupational safety and health issue became overshadowed by the turbulent events of 1968 (including Johnson’s withdrawal from the presidential race) and the bill was not reported out by either chamber.

The legislation was reintroduced in Congress in 1969 by Democrats who had initiated it the year before. By now, however, there was a Republican administration in office, which countered with its own version of an occupational safety and health bill. The administration version differed from the Democratic one in several ways, including the organizational form of the regulating authority and the process of setting penalties for violations. The Republican measure was designed in part to lure blue-collar workers over to their party from the Democratic Party, which was increasingly being identified with the radical left. With the introduction of a parallel Republican measure, the impetus was present for legislation to be enacted in some form. Business groups that had opposed the legislation the previous year came out in favor of the administration’s bill, while unions increased their commitment to the original Democratic version.
Occupational safety and health became a divisive partisan issue in Congress, where Republicans boycotted House Education and Labor Subcommittee sessions in an attempt to keep the Democratic bill from being reported out. Floor fights ensued in both houses over the major controversial differences between the two proposed bills, including where to locate the regulating authority, how centralized that authority would be, who would set standards and who would enforce them. Votes on amendments were highly partisan. However, the final bill that was voted on after the amendment process—a bill that resembled the Democratic more than the Republican version—was approved 384–5 in the House and 83–3 in the Senate in mid-December of 1970. Having publicly committed itself to the issue of occupational safety and health, the administration did not want to oppose passage of federal legislation; President Nixon signed the Occupational Safety and Health Act on December 29, 1970. The Occupational Safety and Health Administration (OSHA) became an agency within the Department of Labor, headed by an Assistant Secretary of Labor for Occupational Safety and Health, one of seven presidentially appointed assistant secretaries for Labor.

While the major push for occupational safety and health legislation came from unions, whose membership was most directly affected, other forces allied themselves with this agenda as well, both directly and indirectly, by pushing other related social policy changes.

As they did in the movements for consumer product safety and environmental regulation, middle-class reformers and radicals played a role in the demand for workplace regulation. . . By calling attention to noneconomic issues and the indifference of many industrial corporations to the environmental effects of their market activities, [writers and reformers] prepared public opinion for workplace reform. . . [I]n coalition with labor groups, environmental and public-interest lobbyists intervened at key junctures in the legislative battle over the OSH Act and helped mobilize wavering senators and representatives. The public health professionals and medical doctors who worked with unions and rank-and-file workers were particularly influential because they were able to counter the antistatist views of the industry-oriented private professional organizations. (Noble 1986, 77)

The combined efforts of progressive social forces and technical experts (public health and medical professionals) that bolstered the unions’ efforts toward attaining health and safety protections through legislation provide a telling backdrop for the later litigation over workplace reproductive hazards, which also involved organized labor and the support of many of these same forces and professionals (see chapter 4).
The OSHA Lead Standard

OSHA is generally charged with two functions: promulgating standards regarding workplace conditions and conducting inspections to monitor compliance with these standards. The OSH Act states that for toxic substances or other harmful physical agents, OSHA “shall set the standard which most adequately ensures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.” This language, particularly the phrase “to the extent feasible,” both grants OSHA a considerable degree of discretion and virtually ensures a legal challenge when standards are proposed, as employers and unions have continually disagreed on how to define feasibility.

At its inception, the agency adopted wholesale a number of existing federal and industry consensus standards. Because the process of developing a standard is so complex and time-consuming, very few new ones have been adopted by OSHA. Between 1971 and 1984, fifteen standards were implemented, and not all of them actually set exposure levels. The effect has been that only a handful of toxins are regulated, while there are approximately 2,000 known or suspected carcinogens at use in the workplace (Noble 1986, 177–80).

Until the late 1970s, OSHA could find no friends among either labor or business groups. Employers have always opposed the imposition of health and safety standards, which are costly to implement and whose effectiveness they question. Prior to 1977, labor groups criticized the agency for not being stringent enough in passing and enforcing regulations. However, in 1977 President Carter appointed Dr. Eula Bingham, a cancer researcher with close ties to the trade union movement, as head of OSHA. This, combined with increasing political hostility to government regulation, served to bring organized labor into the role of defender of the beleaguered agency. During this time, unions had suffered political setbacks in labor law reform and on other issues, and subsequently defense of OSHA came to assume a prominent place in union political activity as labor refocused its efforts (Kelman 1980).

While the OSHA standard-setting process has been less than expeditious, one standard that was implemented, with a significant amount of accompanying controversy, was for exposure to lead. Originally proposed in 1974, the standard was not adopted in its final form until four years later. The original proposed regulation contained a provision for requiring periodic pregnancy tests for female workers, a provision that caused concern among many women’s groups (Bell 1979).
Much of the debate over the proposed lead standard centered around a “rate retention” provision. Such provisions in health regulations prevent workers affected by symptoms of occupational disease from being transferred to lower-paying jobs or laid off. Not surprisingly, the Steelworkers Union and the Naderite Health Research Group supported inclusion of the rate retention provision in the 1977 hearings on the lead standard. The Lead Industries Association (LIA), the American Iron and Steel Institute, and other business groups opposed the provision. In early 1978 the LIA softened its position to favoring a modified version of the proposed standard. However, the Battery Council International, representing employers like Johnson Controls, continued to oppose the proposed rule, claiming that it “would put out of business the majority of firms in the battery industry” (McCaffrey 1982).

After a delay by the Council on Wage and Price Stability and the Council of Economic Advisors, the final standard was prepared for release on November 13, 1978. It included the controversial rate retention provision, to be phased in over five years. At the request of organized labor, it included provisions for outside review of blood lead levels (by noncompany doctors). The Health Research Group and the UAW voiced their approval of the rule, while industry groups lamented that it would be economically destructive (McCaffrey 1982). So the business and labor adversaries that had been accustomed to meeting in the legislative arena were facing one another in the rulemaking process as well, contesting industry’s obligation to protect its workers from hazards. The judicial arena would be just around the corner, as the clashes over gender discrimination and health and safety policy manifested themselves in the struggle over reproductive hazards in the workplace.

After the release of the lead standard, the Labor Department (in which OSHA is located) was sued by the United Steelworkers, the Oil, Chemical, and Atomic Workers (OCAW), and the Lead Industries Association (LIA). The two unions claimed that the standard was inadequate, falling short on several key provisions, while the LIA, representing all industries affected by the standard, charged the opposite. The LIA challenged OSHA’s rulemaking procedures, the standard’s substantive provisions, and the evidence used to develop and support the standard. It argued that OSHA had exceeded its statutory authority in including the medical removal provision and had issued a standard that was too stringent (Maschke 1991, 10). The case was argued in late 1979, and in August 1980 the D.C. Circuit Court upheld the regulation as it was issued. However, the ruling, and the gender-neutrality of the rule, did not prevent many companies from adopting policies excluding women from occupational exposure to lead.
FETAL PROTECTION POLICIES

During the 1970s, while the Pregnancy Discrimination Act eventually codified how childbearing was supposed to be treated in the employment context, a modified form of “protective” employment discrimination began to appear on the industrial scene, one that signaled “the emergence of a major new civil rights and civil liberties issue that poses medical, legal, economic and moral dilemmas” (Shabecoff 1979). Fetal protection policies, ostensibly designed to protect the potential or actual fetuses of female production workers, proliferated and often excluded virtually all women from a number of industrial jobs. National publicity and legal challenges to such policies at prominent companies served to bring these policies into public view.

Early Litigation

One of the first fetal protection cases to receive public attention involved the Bunker Hill Company, an Idaho mining firm. In 1975 the company adopted a policy barring women who could not prove that they were sterile from working in areas exposed to lead. The EEOC conducted an administrative investigation, upon which it asked the women concerned to recognize that lead exposure had potentially harmful effects and to agree to the company’s exclusionary policy. After the Occupational Safety and Health Review Commission (OSHRC) ruled that OSHA did not have the statutory authority to investigate exclusionary policies, the agency dropped a citation against Bunker Hill (Maschke 1991, 8–9).

In 1978 American Cyanamid Company instituted a policy in its plant in Willow Island, West Virginia, that restricted jobs at the plant involving lead exposure to men or to women not capable of bearing children. Five female employees subsequently had themselves sterilized in order to retain their jobs with American Cyanamid.33 As a result, the union representing the women at American Cyanamid, the Oil, Chemical and Atomic Workers Union (OCAW), filed suit against the company charging it with sex discrimination in employment at Willow Island.

Unlike the other cases that were brought concerning fetal protection policies, the case of OCAW v. American Cyanamid Company was not brought as a Title VII suit but rather as a violation of the OSH Act itself (although thirteen individual women filed a separate civil rights suit as well). After the company instituted its exclusionary policy, OSHA issued the company a citation in October 1979 for violation of the general duty clause of the OSH Act.34 Following extensive administrative litigation,
OSHRC dismissed the citation on April 28, 1981. The Commission ruled that the hazard alleged by OSHA was not intended by Congress to be covered by OSHA, and that the choice of sterilization was due to external economic factors and not the fault of the company. The case was then appealed to federal court, where Joan Bertin of the ACLU’s Women’s Rights Project represented the women plaintiffs. By this time the Coalition for the Reproductive Rights of Workers (CRROW) had been formed and joined as amicus curiae supporting the union and the women; the Washington Legal Foundation filed in support of Cyanamid, as it would for Johnson Controls several years later.

During the litigation, industry asserted that engineering controls sufficient to protect fetuses were too expensive and therefore not feasible. Dow Chemical Company’s director of health and environmental services, Perry Gehring, stated: “The difficulty and cost of implementing good industrial hygiene shouldn’t be used as a blanket excuse to exclude women. But if the cost is going to rise exponentially to reach a certain low level for uniquely fetal toxins, then it’s justified to take women out of the workplace” (Bronson 1979). Dr. Robert Clyne, Cyanamid’s medical director, stated simply that “there’s no practical, feasible level to protect the fetus primarily. We’d bankrupt American industry” (Bronson 1979). The D.C. Circuit ruled against OSHA and upheld the company’s exclusionary policy.

As a result of interest in the issue generated by the American Cyanamid case, pressure grew for federal policy to counter the trend of excluding women from jobs based on their childbearing capacity (Singer 1980). The new sense of unity that had been forged between feminist activists and trade union women in the fight for the PDA continued between these two constituencies that had traditionally often found themselves at odds (Petchesky 1979). This growing activism and resistance to company exclusionary practices, and in particular the American Cyanamid case, was embodied in CRROW, which formed in the spring of 1979. It comprised representatives from: unions (including OCAW, which initiated the coalition, the United Steelworkers, the United Rubber Workers, the Amalgamated Clothing and Textile Workers Union, the International Chemical Workers, the Coalition of Labor Union Women, and the UAW); the women’s health and reproductive rights movement (the Alan Guttmacher Institute, the Reproductive Rights National Network, Planned Parenthood, the Association for Voluntary Sterilization); and civil rights groups (NOW, the National Employment Law Project, Equal Rights Advocates, the Women’s Legal Defense Fund, the Center for Law and Social Policy, and the ACLU). The coalition’s purpose was to resist sex-based exclusionary policies, pressure companies to eliminate reproductive hazards affecting all
workers, and devise alternative solutions (such as temporary leaves and transfers) when hazards to reproduction are encountered (Petchesky 1979, 241).

**A Failed Attempt at a Regulatory Answer**

This public pressure led the EEOC and the Labor Department’s Office of Federal Contract Compliance Programs (OFCCP) to propose guidelines on reproductive hazards and fetal protection policies in 1980, at the tail end of the Carter administration. The guidelines were intended to prevent employers from excluding women from jobs based on reproductive risks unless the substance in question posed no similar reproductive risks to men, and would have allowed for exclusionary policies for pregnant women as a last resort only. Although it is up to OSHA to ensure that workers have safe and healthy workplaces, the EEOC is charged with preventing employers from adopting discriminatory employment practices. In this case, OSHA helped to develop the proposed EEOC guidelines on reproductive hazards and would have provided technical assistance in enforcement.

The proposed guidelines generated a tremendous amount of controversy, drawing criticism from both sides of the issue. Labor and women’s rights advocates contended that they were insufficient, as they still allowed employers considerable leeway in adopting exclusionary policies. CRROW was concerned that the temporary emergency exclusion provision in the guidelines would not adequately protect women workers, as it did not provide for retention of earnings and seniority. Unions, such as the United Steelworkers, criticized the companies’ insistence on trying to achieve a liability-free workplace at the expense of women (Bayer 1982b). Other supporters of the goal of the guidelines, if not the form in which they were proposed, included the American Nurses Association and the state of Massachusetts.

Industry also weighed in on the proposed rules; among those responding were the U.S. Chamber of Commerce, the Chemical Manufacturers Association, the Pharmaceutical Manufacturers Association, the Lead Industries Association, the Battery Council, AT&T, General Motors, DuPont, Dow Chemical, Exxon, Shell Oil, and Union Carbide. Business interests almost uniformly opposed the proposed guidelines, asserting that the EEOC and OFCCP were exceeding their authority and expertise, that fetal health was always more important than women’s economic opportunity, that companies would be subjected to an unacceptable risk of tort liability, and that male exposure to toxins was not as much a danger as...
maternal exposure. Other outright opponents of the guidelines were the American Industrial Hygiene Association, the American Petroleum Institute, Air Products and Chemicals Inc., Borg & Warner Chemicals, the EEAC, Ethyl Corporation, the Mechanical Contractors Association of America, Monsanto, NALCO Chemical, Pennzoil, and the Synthetic Organic Chemical Manufacturers Association.

Because of strong opposition from business, as well as complaints from women’s rights activists and labor that they were not strong enough, the guidelines were politically vulnerable. Eleanor Holmes Norton, then head of the EEOC, was reluctant to push for further action. Eventually, fearing that officials of the new Reagan administration would alter the proposed guidelines for the worse if left in pending form, advocates urged their withdrawal instead. The guidelines were withdrawn as the new administration took office. Between the members of CRROW and the multitude of industry interests that weighed in on the proposed EEOC guidelines, this thwarted policy measure ranks close behind *UA W v. Johnson Controls* in the amount of interest group activity generated. Many of these groups would square off again when the failure to enact EEOC policy ensured that the issue would resurface in court.

The same year (1978) that American Cyanamid adopted its exclusionary policy, Olin Corporation implemented its own “fetal vulnerability” rule. This policy excluded all women of childbearing age, which it defined as between five and sixty-five, from jobs involving exposure to known or suspected abortifacient or teratogenic agents. When employees brought suit against the company over the policy, the Fourth Circuit Court became the first appellate court since passage of the PDA to review a Title VII sex discrimination claim based on a pregnancy exclusion. Amici for Theresa Wright (and other similarly situated workers) included: AFSCME, the ACLU, the Committee for Abortion Rights and Against Sterilization Abuse (CARASA), the Coal Employment Project, the Coalition for the Medical Rights of Women, CRROW, the Employment Law Center, Equal Rights Advocates, the International Chemical Workers Union, OCAW, Planned Parenthood, the Reproductive Rights National Network, the UAW, the United Rubber Workers, Women Employed, and the Women’s Legal Defense Fund. Many of these groups were part of CRROW (which joined as an amicus party), but chose to also sign on separately. Olin was supported by the EEAC, American Cyanamid Company, the Chemical Manufacturers Association, and the Lead Industries Association.

In deciding *Wright v. Olin*, the appellate court applied the disparate impact standard in assessing Olin’s exclusionary fetal protection policy, rather than considering the policy facially discriminatory, an instance of
disparate treatment invoking the narrow BFOQ defense. Judged under the
more lenient disparate impact standard, where the employer need only
show a “valid business necessity” for the practice in question, Olin Corpo-
ration prevailed in the suit, decided in 1982. The court ruled that fetuses
were in the same legal class as business licensees and invitees, whose safety
is a legitimate concern of the employer; the policy could therefore be con-
sidered a valid business necessity. The court also held that the Pregnancy
Discrimination Act did not transform all pregnancy-based distinctions
into instances of disparate treatment. The court in its decision did not
mention OSHA’s gender-neutral lead standard.

Johnson Controls, a manufacturer of car batteries, had instituted its
own exclusionary fetal protection policy in 1982, the year that Wright v.
Olin was decided in favor of Olin Corporation. Johnson Controls’ policy
prohibited women from working in jobs involving exposure to lead unless
they could prove that they were unable to bear children. The company
adopted the policy after several women employed there became pregnant
with blood levels above 30 micrograms/dcl. This was within the limits of
OSHA’s lead standard, which called for a maximum level of 35, although
the agency recommended that workers considering having children should
maintain levels below 30. In April 1984 the United Auto Workers filed a
class action Title VII suit against the company on behalf of several female
workers (one of whom was sterilized in order to retain her job) and one
male who attempted to obtain a temporary transfer when he wished to
become a father. The U.S. District Court for the Eastern District of Wis-
consin granted summary judgment for the company on January 21, 1988,
employing the reasoning of the Olin decision.

On October 3, 1988, the EEOC published its first “Policy Guidance on
Reproductive and Fetal Hazards,” consistent with the Commission’s pat-
tern of following the lead of the courts in fashioning its own policy. The
guidelines declared that any exclusionary practice based on a reproductive
hazard that is limited to one sex is unlawful under Title VII. They
addressed the applicability of the more lenient “business necessity” defense
in challenges to fetal protection policies, stating that in order to meet this
defense employers must demonstrate that a substantial risk to the fetus
exists and that it occurs only through maternal exposure, and that there are
no less restrictive alternatives to exclusion of women from the workplace.

The Johnson Controls decision from Wisconsin was appealed by the
UAW to the Seventh Circuit. At this point, interest group involvement
began, with the American Public Health Association, the ACLU, and the
Employment Law Center supporting the UAW as amici. Sitting en banc,
the court on September 26, 1989, affirmed the Wisconsin District Court’s
summary judgment for Johnson Controls and ruled 7–4 in favor of the company. The decision stated that the fetal protection policy was “reasonably necessary to the industrial safety-based concern of protecting the unborn child from lead exposure.” The Seventh Circuit employed the reasoning adopted by the Supreme Court in the recently decided case of Wards Cove Packing Co. v. Atonio and placed the burden of proving discrimination on the employees challenging the fetal protection policy. It stated, in effect, that while the company must indicate a valid business necessity for the questioned policy, it is up to the employee to disprove the company's claim.

The decision was accompanied by strong dissents from two of the most conservative members of the court, Judges Easterbrook and Posner. Judge Easterbrook called the case “likely the most important sex-discrimination case in any court since 1964, when Congress enacted Title VII.” The dissenters argued that “fetal protection” policies are facially discriminatory and should be held to the narrow BFOQ standard.

In January 1990 the EEOC issued additional policy guidance on reproductive hazards in response to the Seventh Circuit’s decision in Johnson Controls. The guidelines, which essentially instructed EEOC compliance officers outside of Seventh Circuit jurisdiction to disregard the court’s ruling, were issued just before the Johnson Controls case was appealed to the Supreme Court. Supplementing those issued in 1988, the new EEOC guidelines were critical of the Seventh Circuit’s ruling and rejected the court’s finding that the burden of proof should be on the employee. The EEOC stated that fetal protection policies were facially discriminatory and that the employer should be held to a narrower BFOQ defense, rather than that of business necessity. The agency’s guidelines indicated that in cases that it handles, employers will be required to show that such policies are reasonably necessary to the normal operation of their business, based on objective evidence (a supposed good faith intention of protecting employees’ offspring or attempting to avoid liability would be an insufficient defense). In March the Supreme Court granted certiorari in Johnson Controls.

Before the High Court was to consider the case, however, two other cases on the issue of fetal protection policies were decided. The first, decided at the end of February 1990, came in the California Court of Appeal and also involved Johnson Controls. The second was a Sixth Circuit case, Grant v. General Motors Corporation, decided in July, a ruling that prompted the litigants in the pending Johnson Controls case to file additional briefs to the Supreme Court. In both of these cases, the respective courts applied the more stringent disparate treatment standard in reviewing the companies’ fetal protection policies, and found that they
failed to meet the narrow BFOQ defense.42 Like Johnson Controls and the earlier American Cyanamid and Olin cases, these two cases also involved exposure of employees to lead.

On October 10, 1990, the Supreme Court heard oral arguments in International Union, UAW v. Johnson Controls. The court issued its unanimous 9–0 decision the following March, attracting considerable media attention. The ruling held that the company’s policy was facially discriminatory and classified employees on the basis of potential for pregnancy, which constitutes explicit discrimination under Title VII as amended by the Pregnancy Discrimination Act (PDA). Justice Harry Blackmun’s opinion for the court stated that even a benevolent motive such as protecting employees’ offspring does not negate the discriminatory effect of the policy, and that the BFOQ standard must apply. He stated that Title VII’s BFOQ provision, the PDA, legislative history and case law all prohibit employer discrimination based on the capacity to become pregnant, and that unconceived fetuses are neither customers nor third parties whose safety is essential to the operation of the business. The decision went on to assert that the company’s professed concerns for the next generation do not establish sterility as a bona fide occupational qualification, and that therefore the fetal protection policy could not meet the BFOQ defense. The opinion also noted that the employer’s possible tort liability for damage to a fetus and the associated costs do not figure into the decision, that the incremental costs of hiring members of one sex do not justify discrimination.

Although the decision was 9–0, the justices were not entirely unified in their reasoning. Four justices wrote two concurring opinions, in which they stated that not all such fetal protection policies would necessarily fail Title VII scrutiny. Justices Byron White, Anthony Kennedy, and William Rehnquist asserted that some such policies could meet the BFOQ defense, and that employers could cite potential tort liability as a valid reason for exclusion of female employees. In his own concurrence, Justice Antonin Scalia also stated that costs may be taken into consideration when ruling on a BFOQ defense.

Women’s rights groups and unions hailed the decision as a victory. UAW President Owen Bieber declared that “this important decision by the nation’s highest court is a major victory for working women and women’s rights.” The AFL-CIO press release similarly stated that the ruling was “a major victory for working women” and indicated that “women workers cannot be relegated to second-class status in the workforce.” Business groups, on the other hand, were predictably disappointed. A National Association of Manufacturers press release stated that the “Supreme Court decision leaves employers with a difficult choice—continue operations
knowing of unavoidable risk to the unborn, or cease doing business altogether.” A statement from the U.S. Catholic Conference said that it was “disappointed that the Court did not include the safety of unborn children—our future—as a legitimate consideration in deciding Title VII cases.” Following its historical pattern of reacting to judicial policy directions, the EEOC issued a new policy guidance to reflect the Supreme Court’s ruling in *Johnson Controls*. Issued in June 1991, the new policy, which superseded previous EEOC documents pertaining to fetal protection policies, stated that policies that exclude members of only one sex from the workplace for the purpose of protecting fetuses could not be justified under Title VII.

**CONCLUSION**

The foregoing account reveals that the social and political debate around how to address reproductive hazards in the workplace has deep roots in the history of labor unions and women’s roles in both society and the work force. The notion of protecting women on the job, either for their own well-being or that of their offspring, is not at all new, and has figured prominently in the struggle of both business and organized labor to accept women among their ranks. Once the laws changed, beginning the modern era of sex discrimination law, other interest groups began to appear on the policy landscape as well, joining the fray as the interpretation and implementation of these new laws went forward. Thus the cast of groups that have appeared in the numerous examples of legislation, rulemaking, and litigation around this issue has fluctuated but contains a number of consistent participants. The ACLU, the AFL-CIO, the UAW, and the array of women’s rights legal groups have continued to push the law to expand women’s opportunities. The Chamber of Commerce and several major corporations, who saw their economic well being threatened, pushed back at every turn. Through shifting venues, the underlying issue of how to accommodate women who bear children in the male-dominated world of paid employment has been contested by a core cast of interest groups with varying sets of allies. These players will emerge in fuller detail in the ensuing chapters. The history reviewed above will place the *UAW v. Johnson Controls* litigation and its myriad group participants into a perspective that will help to illustrate how group litigation fits into the overall policy process that is highly permeated by organized interests.