Litigation as Lobbying
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The number of amicus briefs filed on the plaintiff and respondent sides was nearly the same—ten for the former and eight for Johnson Controls. But there were far fewer total amici (individuals and groups) on the briefs filed on the side of Johnson Controls than were found supporting the UAW. Despite the documented rise in conservative interest group litigation (O’Connor and Epstein 1983b; Epstein 1985), supporters of the employer were numerically far outnumbered in this litigation. The company’s sympathizers may have thought that an adverse outcome was unlikely and that their additional advocacy was not needed, since all prior court cases had upheld the legality of fetal protection policies. The positions taken by those who did file on behalf of Johnson Controls were essentially: pro-business (the Chamber of Commerce, National Association of Manufacturers, and Equal Employment Advisory Council); profetal rights (U.S. Catholic Conference and Concerned Women for America); industrial hygiene (National Safe Workplace Institute, Industrial Hygiene Law Project); and conservative free-market oriented litigation groups (the Washington, Pacific, and New England Legal Foundations).

While free enterprise and opposition to regulation are frequent issue areas in which conservative groups litigate, in this case, the field was made more complex by the layering of fetal rights and occupational health issues on top of employer autonomy and economic interest. Despite the fact that these groups fall neatly into the major categories of issues implicated in this case, there was not nearly as much coordination of amicus activity on this side of the case. A few groups stepped forward to articulate their views.
on the component issues of importance to them, but there was no deliberate designation of organizations to develop specific arguments, as there was on the plaintiff side. While there was a much larger number of fairly heterogeneous organizations supporting the UAW, there was actually a more striking range on the employer side when it came to prior experience and expertise with litigation. For while on one end of the spectrum there were groups like the Chamber of Commerce with a formalized litigation arm, at the other end were the industrial hygiene briefs with no prior litigation experience at all.

Another notable difference in the litigation approaches of the two sides in this case is seen in the stage at which the various amici became involved. No amicus briefs were filed on the employer side at the Seventh Circuit stage, the point at which amici first emerged supporting the UAW, and no groups filed amicus briefs at the certiorari stage urging the Supreme Court to deny review. This is despite the fact that many of the attorneys for amici that eventually filed in support of Johnson Controls on the merits professed a strong belief in the utility of filing briefs at the certiorari stage. Their absence at the certiorari stage in this case, however, stems largely from the fact that these groups were on the winning side in the lower court. Because the presence of amicus briefs serves to notify the Court of a case’s salience, those content with the status quo are better off not filing a brief and drawing the Court’s attention to a case that they would rather not see taken up. In their stated belief in the efficacy of amicus briefs influencing the Court’s plenary docket, and in their opting not to file at the cert stage

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<td><strong>Pro-business</strong></td>
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in this case, these amicus attorneys confirmed what Caldeira and Wright (1988) concluded in their study of amicus filing—that the number of briefs filed, and not whether they advocated granting or denial of certiorari, positively affected review being granted.

By definition, the company in this case was in a reactive position, unlike those on the plaintiff side who purposefully brought this suit to vindicate the claims of the affected workers and clarify the application of Title VII in this context. Nonetheless, the amici who stepped forward to support Johnson Controls followed a similar pattern to that of their counterparts on the other side. Many of the groups had many years of experience advocating in various policy venues around issues that formed the basis for this lawsuit (see Table 8). These precursor issues include legislation such as the Equal Pay Act, Title VII and the Pregnancy Discrimination Act, EEOC guidelines interpreting these statutes, and court cases from the early 1970s onward in which the law’s application was challenged and refined.

### THE BUSINESS ADVOCATES

As one would expect, several groups committed to furthering business interests came to the support of Johnson Controls in this litigation. There were two briefs filed that specifically took the position of advocating for employers: one was filed by the Chamber of Commerce, the other jointly by the Equal Employment Advisory Council (EEAC) and the National Association of Manufacturers (NAM).

In actuality, it was the Chamber’s litigating arm, the National Chamber Litigation Center (NCLC), that filed the amicus brief in *Johnson Controls.*
In describing the workings of the NCLC, Stephen Bokat, the center’s Executive Vice President, was candid in pointing out that it is a public policy law firm and not a public interest law firm. That is, the center does not profess to advocate in the public interest, but rather is avowedly devoted to furthering business interests. He echoed an observation of many academic court watchers that, while liberal groups have traditionally used the courts more, conservative groups have increasingly done so in response. The NCLC was formed in 1977, partly to counter increasing litigation activity by liberal interests. According to Bokat, the Chamber began to engage in litigation out of necessity—it could not ignore it, and its membership demanded it.

Bokat and Timothy Dyk, the outside attorney who served as the counsel of record for the Chamber’s Johnson Controls brief, both stated that NCLC does more amicus activity than direct litigation, although it does engage in both. The two agreed with many other amicus attorneys interviewed that filing briefs at the certiorari stage can have a great deal of significance, with Bokat asserting that this is where “a great winnowing out of the issues occurs.” In Bokat’s view, the NCLC is most effective when it can indicate to the Court that a case has far greater implications than other cases under consideration for review. As a broad-based group, the Chamber carries weight with the Court, as it can demonstrate that a case affects a broad segment of its membership and not just the company before the Court in the instant case. On the other hand, because of its separate structure, the NCLC can represent other parties besides the Chamber, although it does not do this frequently. There might, however, be occasions in which, for strategic reasons, the business community’s litigation posture would be better served by having an individual business as the plaintiff than the full Chamber of Commerce.

Timothy Dyk offered a more subdued assessment of the impact of amicus briefs in general, maintaining that their impact is diluted because there are so many of them, causing the Court to pay more attention to what the parties themselves say. In his view, there are so many “me-too” briefs that a creative brief may often get lost in the shuffle. Dyk stated that he believed that the Chamber’s brief in Johnson Controls presented a “novel” argument and did not fall into this redundant category. He did, however, agree with the observations regarding the certiorari stage. By the time the Court grants review to a case, in his view, many groups are drawn in “automatically” as they feel that they must have their say, and there is less strategizing involved. At the certiorari stage, more complicated judgments must be made, including whether a group wants the Court to hear a case at all. Dyk agreed that amicus participation at the cert stage makes a difference
because it in effect alerts the Court that the parties to the case are not the only ones interested in it.

Bokat said that the NCLC will always consult with the litigating parties at least minimally when filing an amicus brief, as there could possibly be sensitivities involved in the case of which the NCLC’s attorneys would not otherwise be aware. Dyk speculated that he “probably” consulted with the Johnson Controls attorneys, but that the Chamber was presenting a different theory and remained autonomous. Bokat did profess awareness of some instances where amici file briefs against the wishes of the litigating party, but said that it did not occur often and was not a large problem. Dyk again professed a somewhat different view, asserting that such unwanted amicus activity occurs more often than people admit. This, of course, was not an issue on the UAW side, as virtually all of the amici were part of what was in essence a team effort to back the union’s claim with additional legal arguments and symbolic support. But the notion of “renegade” unsolicited amicus activity in a case such as this again points to how litigation comes to take on facets of a more public lobbying effort, rather than an essentially private dispute between named parties.

Both Bokat and Dyk expressed ambivalence about coalition activity in filing briefs. While both stated that it can prove a more efficient use of resources to combine with other groups, Bokat noted that it can also be difficult if too many parties are involved (“too many chefs”). Dyk offered additional reasons to combine forces on a brief, including having greater impact on the Court and attempting not to burden the Court with too many briefs, and said that it is more typical in general to have several parties on a brief. He noted that the Chamber probably files approximately two-thirds of its briefs with others and the remaining one-third solo. The Chamber will frequently take its own position, he said, because its view is different from the litigating parties or other amici on their side.

Unlike some of the other groups that filed or joined onto briefs in this case, the decision to become involved was not an easy one for NCLC. Despite the outcomes in the lower courts, he said that there was a feeling that the case would be difficult to win, as well as a recognition that it was emotionally charged, since it implicated issues of gender discrimination, fetal rights, and industrial safety. There was also a pragmatic fear of alienating women business owners, the Chamber’s fastest-growing membership, although this fear was more theoretical than real (as Bokat did not recall hearing objections voiced by women members). The Chamber’s main reason to think twice about getting involved was thus the same as one of the primary reasons that the UAW chose to pursue the issue: responsiveness to an increasingly significant female constituency. Bokat agreed
with the speculation that responsiveness to women members was indeed what prompted the UAW’s actions in this area, noting that “unions have a horrible history as protectionist societies for white men,” a history that even exceeds that of business, while adding that real change has occurred and that unions are no longer that way.

The Chamber’s brief argued that the federal government has repeatedly expressed concern over the dangers of birth defects due to maternal exposure to toxic substances, including lead. The brief’s main argument, however, was that the Pregnancy Discrimination Act (PDA) does not bar protective actions taken by employers such as Johnson Controls and does not foreclose employee and fetal health considerations. It argued that since fetal protection policies do not constitute impermissible disparate treatment, the issue of whether they could meet the BFOQ defense was irrelevant since they need not be judged under that strict standard. The Chamber thus attempted to use the existing law with the greatest potential to invalidate fetal protection policies to demonstrate that they were actually lawful and in fact even desirable. The brief similarly attempted to use the OSH Act as well, noting that OSHA encourages employers to institute voluntary programs to protect the health of their employees and their unborn children.5

As was hypothesized, there is a notable contrast between the arguments and even the statement of interest presented in the Chamber’s brief and its rhetoric outside the courtroom. In its statement of interest, the Chamber billed itself as the largest federation of business, trade, and professional organizations in the United States whose members are subject to Title VII and the OSH Act. The Chamber stated that it was filing because of its belief in the right of the employer to adopt fetal protection policies and other voluntary policies to safeguard the health of employees, and its view that such policies reflect both sound business practice and good corporate citizenship and are consistent with—indeed, serve—goals of applicable federal legislation.

In its promotional materials, however, the NCLC is less kind to federal policy aimed at controlling business practices. From its fifteen-year anniversary annual report (1992):

Every day the U.S. business community is challenged by disgruntled consumers, workers, and citizen action groups . . . and burdened by excessive regulation, taxation and litigation. In the halls of government, the voice of business is the U.S. Chamber of Commerce, lobbying on behalf of the 220,000 organizations that are its members. But when action is required in the courts—to overturn unfair requirements or protect against unfair charges—the voice of business is an affiliate of the Chamber, an organization
independently funded by the business community it so ably represents. That organization is the National Chamber Litigation Center.

In a membership brochure, the NCLC’s language is even stronger in its defiance of what it views as unfair and burdensome policy mandates: “In the case of The Government v. Business, NCLC is your strongest ally.” In its newsletter The Business Counsel, under a headline declaring that “Aggressive Litigation Pays Off,” rhetoric such as “NCLC won two major victories over [OSHA] . . .” and “In its fight to protect the right of employers and employees to negotiate wages and benefits without government interference . . .” is commonplace.6

The Chamber took advantage of its position as amicus for the respondent (filing later in the process) by referencing two of the amicus briefs for the UAW. The Chamber’s brief notes that the petitioners (and by extension their amici) “cannot dispute that preventing birth defects by reducing or eliminating occupational exposure to certain substances is a ‘legitimate and significant’ societal interest” (3) and cites the brief amicus curiae of the state of California to support this contention. In referencing the brief of Equal Rights Advocates, however, the Chamber instead took issue with that brief’s arguments relating to the Pregnancy Discrimination Act, noting that “we . . . reach diametrically opposite conclusions as to the purpose and scope of that statute” (7). This disagreement, as depicted by the Chamber, was because the UAW and ERA were asserting that the Act rendered all pregnancy or childbearing-related distinctions illegal, while the Chamber held that it simply applied the disparate treatment theory to pregnancy. Interestingly for the present case, during the debate over the PDA in 1977, one of the few references to the impact of the PDA on exclusion from toxic workplaces was made by the Chamber of Commerce in a prepared statement submitted for the record during the debate and also referenced during oral testimony.

Although there does not appear to have been much coordination of amicus activity on the Johnson Controls side, the NCLC may have had one of the strongest links to the respondent company; John P. Kennedy, general counsel for Johnson Controls, served at the time of this case as a member of NCLC’s Constitutional and Administrative Law Advisory Committee, which guides the litigation activity of the Litigation Center on cases falling within that domain. The employer side of the case also had engaged in some “law review lobbying” in the past. David Copus, co-counsel on the NCLC brief, had co-authored an article in 1978 in the Industrial Relations Law Journal that held that the status of exclusionary fetal protection policies under OSHA and Title VII was unclear, and concluded that if it can be
demonstrated that a hazard causes fetal harm disproportionately through maternal exposure, such policies could be lawful (Crowell and Copus 1978).

The other probusiness brief was filed jointly by the Equal Employment Advisory Council (EEAC) and the National Association of Manufacturers (NAM). Although the Chamber of Commerce filed its own solo brief, while the EEAC and NAM filed a separate brief, these three organizations are frequent partners in litigation activity. Each, however, is organized and focused in unique ways.

In some respects, the EEAC is similar to the NCLC, in that it was formed in the mid-1970s to advocate the business point of view in litigation. It also differs in some significant ways. EEAC is not an arm of a trade association but is itself a membership association of employers concerned with equal employment opportunity issues. EEAC also does not sponsor direct litigation but limits its litigation work to the filing of amicus briefs. The amount of amicus activity performed by the EEAC contrasts vividly with some of the other groups that filed in Johnson Controls. The EEAC files nearly twenty-five briefs each year, while, for example, the Industrial Hygiene Law Project (IHLP) has only filed one brief during its existence.

The EEAC filed an amicus brief in Wright v. Olin, one of the first legal challenges to fetal protection policies in the early 1980s, and filed comments in opposition to the proposed EEOC reproductive hazards guidelines in 1980. It is indeed one of the few groups, like the ACLU, that has repeat player status in terms of litigation over this particular issue. This prior involvement, and the organization’s definitional commitment to precisely the types of issues implicated in UAW v. Johnson Controls, made it a logical amicus participant in this case. Indeed, as described by Doug McDowell, the EEAC’s General Counsel, the group’s primary issues have been Title VII, the Americans with Disabilities Act, and burden of proof; two of these were central in Johnson Controls. McDowell did note that the facts in this case were rather unusual, and that the EEAC does not see many BFOQ cases. The case also did not have wide application to a lot of companies, he said, because not many firms reserve jobs by sex anymore (the very reason that the UAW attorneys relished the opportunity to pursue this case). Nonetheless, the decision to enter a brief was fairly straightforward, according to McDowell.

The National Association of Manufacturers (NAM) was the other organization on the EEAC’s brief. As a manufacturing trade association, NAM clearly had its members’ economic interests in mind when deciding to become involved in Johnson Controls. Quentin Riegel, NAM’s General Counsel, stated however that when deciding whether to engage in litigation, the organization’s first consideration is the impact of the case on all
manufacturers, not only those that are members of NAM. He said that NAM got involved in this case in order to represent all manufacturers using known reproductive hazards that wanted to exclude any class of workers. In keeping with this generalized notion of interest representation, NAM does not represent individual members in cases.8

Riegel asserted that NAM was also concerned with “harm to babies” in addition to the issue of the expenses to its members associated with accommodating women. In his view, employers should be held to a standard similar to that contained in the Americans with Disabilities Act—that of reasonable accommodation—in this case, applied to pregnancy. He did also note awareness of the pressures on employees in jobs such as these to retain those jobs. He said that the question is one of how much society wants to spend protecting anyone, which becomes an economic issue.

NAM’s litigation activity is structured somewhere in between that of the Chamber and the EEAC. It is a membership association that engages in litigation among other things, like the Chamber, but it does not have a separately defined organization that conducts its legal work. Riegel in fact indicated that NAM’s legal staff had been significantly reduced in recent years, and that the organization often utilizes outside counsel, with internal legal staff performing more review and oversight than actual drafting of briefs. He observed that NAM’s stature allows it to obtain high caliber legal services because the firms themselves benefit from doing work on the group’s behalf. Despite the reduction in internal legal staff, the organization is still filing briefs “at a record pace” of ten to twelve per year, according to Riegel. These briefs require significant effort, he said, because NAM wants them to be of high quality and will only engage in a case involving issues that are the most important to business. Consequently, NAM turns down many requests to file briefs in cases. NAM will also decline to become involved if the business point of view is already being well represented, in part out of a desire not to burden the court with superfluous briefs.

NAM’s litigation activity should also be viewed in the larger context of its other political activities. Riegel stated that NAM emphasizes lobbying Congress more than it does litigation, largely for the practical reason that Congress can always override a Court decision. It is less likely, however, to override the Court on constitutional matters, so that is where NAM focuses the litigation activity in which it does engage (as its litigation budget is small).

Like Bokat and Dyk above, both Doug McDowell and Quentin Riegel agreed that there is value in filing amicus briefs at the certiorari phase of litigation, although McDowell was less emphatic than others, stating that the EEAC files most of its briefs on the merits. Riegel, while cautioning that
generally it is difficult to assess the impact of amici on the Court, nevertheless believes that amicus briefs have more impact at the certiorari stage, and NAM concentrates there accordingly because it is more cost effective. Once the case moves to the merits, there are generally one or two legal issues to be decided, and the litigating parties address those issues pretty thoroughly; amici at this point “add color” in his view. Riegel asserted that it is important for the Court to know the issues and groups interested in a given case, and that amici assist with this information. He added that most groups, however, lack the legal monitoring mechanism to enable early involvement.

In their brief, the EEAC and the NAM posited that following the Supreme Court’s decision in *Wards Cove Packing v. Atonio*, the various theories used to analyze discrimination claims had essentially merged and now simply required the employer to demonstrate a business justification for the challenged practice. They further argued that the business justification defense was not limited to employee ability to perform the job but encompassed legitimate safety interests of employees and third parties. In addition, the brief asserted that the burden of persuasion remained on the plaintiff at all times to create a record, establish a prima facie case of discrimination, rebut the employer’s showing, and provide a reasonable alternative to the employer’s policy. These amici also claimed that since the fetal protection policy equally protected the offspring of all employees, it was not facially discriminatory. They dismissed the evidence offered by the UAW of male-mediated reproductive risk, “based on rodent studies,” as speculative at best, and mentioned the potentially astronomical tort liability to which manufacturers could be exposed. To rebut accusations of discrimination, the brief stated that exclusion of a substantial section of the workforce actually leads to a smaller pool of qualified workers available to the company and complicates administration of the workforce, and so would not be in a company’s best interests.

In its statement of interest in the amicus brief, the EEAC described itself as “a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices . . . [whose] members are committed firmly to the principles of nondiscrimination and equal employment opportunity.” The organization thus made an attempt to employ some rhetoric favoring equal employment opportunity, even though McDowell was frank in stating that the EEAC is nearly always on the opposite side of the U.S. EEOC, the agency charged with ensuring equal employment opportunity, in litigation. Interestingly, in its annual report, the EEAC seems to strike a quite conciliatory tone toward government regulators, including the EEOC,
emphasizing its role as a resource both to its members and the public. The 1995 Report even boasted of the EEAC having provided the forum for new EEOC Chair Gilbert Casellas’s first major outside speech as chair, going on to proffer hopes of working even more closely with the regulatory agencies in 1995. The Report describes the EEAC’s activities in benign terms, such as “serves as a legal resource for its members,” “consistent emphasis on developing positions that are legally sound and that offer practical solutions,” and “highlights for officials at all levels of government the practical impact of their decisions.” NAM billed itself in the brief as “a voluntary business association of over 13,000 companies and subsidiaries, employing 85 percent of all manufacturing workers, and producing over eighty percent of the nation’s manufactured goods . . . [who] are vitally interested in workplace safety and health issues, as well as the proper interpretation of civil rights legislation” (emphasis added).

The organizations thus cited both the classic and modern functions of the amicus curiae, describing themselves as both equipped to furnish the Court with valuable information and also as directly affected by the policy outcome of the case. “The members of EEAC and NAM, and the constituents of their association members, are employers subject to various employment and labor laws, including Title VII. . . . In addition, many of the EEAC and NAM member companies manufacture or process goods that involve chemicals or substances that have the potential to harm an unborn fetus. As a result, some companies have adopted fetal protection policies, much like the policy adopted by Johnson Controls in the instant case.”

When interviewing representatives of all three of these business interest groups, each cited the other two as frequent litigation partners. NAM’s Riegel said that because NAM is a broad-based organization, its choice of litigation partners is significantly affected by the issues implicated in the case at hand. Regarding coalition activity in filing briefs in general, Doug McDowell stated that the EEAC will partner with other groups “if someone wants to come on,” but that they try to limit the number of parties on a brief to four or five—after that point, such coordination becomes “counterproductive” and the returns diminish. This view stands in direct contrast to that taken by Joan Bertin, Pat Shiu, and others on the multiparty ACLU amicus briefs, who cited a wide array of diverse interests on a brief as an asset.

While the amicus activity for Johnson Controls was not orchestrated by the respondent company, the attorneys for these business groups all indicated that they at least consulted with the Johnson Controls lawyers, and that such consultation is the norm. The EEAC’s McDowell said that their
brief’s arguments were pretty close to what Johnson Controls itself was arguing, except for the claim that the burden of proof was always on the plaintiff, where the EEAC went beyond the company’s position. He also said that while the EEAC will always consult the litigant in whose support they are filing the brief, if that litigant is not cooperative and willing to review the EEAC’s brief, the EEAC will file it anyway and the party simply forgoes an opportunity for review and input. On the other hand, he said that at times the EEAC ends up virtually writing for the litigant if the party’s own attorneys do not adequately represent its interests. McDowell added that that was not the case here, as Stanley Jaspan was “very strong” in his role representing Johnson Controls.

Like the U.S. Chamber of Commerce, the EEAC and NAM also referenced UAW amici in their brief. Since the EEAC focused heavily on EEOC policy in its brief, it also cited the amicus brief filed by the EEOC in support of the UAW. In a footnote in their brief, EEAC and NAM politely disagree with the EEOC depiction of the difference between the EEOC’s 1988 and 1990 policy statements on fetal protection policies. The EEOC brief states that the key difference is that in the latter policy, the employer bears the burden of establishing the BFOQ; the EEAC and NAM assert that the employer “ought to be able to meet its burden with identical criteria regardless of the theory,” in keeping with its overall argument that the disparate impact and disparate treatment theories had in effect merged into one framework.

The other attempt to reference opposing amici appears to have been done rather hastily, as it contained some inaccuracies. In the process of taking issue with the UAW’s contention that only pure ability to perform the job—and not safety of employees or third parties—can be taken into account by employers, the EEAC/NAM brief cites a UAW brief and “Brief of the National Organization of [sic] Women.” NOW, however, did not file its own brief: the organization was one of dozens of parties to the ACLU’s brief, while the NOW Legal Defense and Education Fund was one of the parties to the brief of Equal Rights Advocates. Based on the page citation in the EEAC brief, it appears to be the ERA brief that is being referenced. While this may have been a mere technical error, there may also have been a desire to cite an opposing organization with a higher national profile (and one sometimes categorized as espousing more “radical” feminist views), hence the citation to NOW instead of to ERA.

While the three business groups discussed here shared goals and even credit on briefs, and do so frequently, each fills a different niche in representing the interests of business. The Chamber and NAM represent businesses as businesses, with the Chamber having a more diverse membership in terms of size and commercial activity, while the EEAC has a more narrow
membership and purpose, representing businesses as employers. Thus, while the issues at stake in Johnson Controls fell within the broad spectrum of issues on the agendas of the Chamber and NAM, they formed a large part of the issue base of the EEAC, which concentrates on equal employment matters from the employer perspective. Doug McDowell explained that while the EEAC represents the business view in equal employment matters, its members do support the laws and their goals and wish to comply. The EEAC thus serves as a sort of broker, informing policymakers of the impact of employment laws on its members and in turn assisting its members in understanding and abiding by policy mandates.

THE DILEMMA OF WORKPLACE HAZARDS: THE INDUSTRIAL SAFETY BRIEFS

Like the pro-UAW side that had the APHA brief to lend scientific credence to its position, there were scientifically oriented briefs on the employer’s side as well, filed by the National Safe Workplace Institute (NSWI) and the Industrial Hygiene Law Project (IHLP). While they are two very different entities, they were similarly positioned on this case and there are indirect connections between them. Both groups, while filing on the side of the employer, were not in fact strong advocates of fetal protection policies at all but were concerned that outlawing them would be harmful in the short term.

Founded in 1987, the NSWI is very much the creation and mission of one man, Joseph Kinney, who founded the organization after losing a brother in an industrial accident. The loss of his brother inspired Kinney to adopt workplace health and safety as his personal cause, and he created the Institute to further it. He takes a very systemic view of industrial hazards, asserting that we as a society have created extensive problems with workplace exposure to hazards, causing real potential problems for future generations. The country, however, in his opinion, lacks the willingness to depart from old paradigms and to engage in dialogue to devise true solutions, including ways to compensate victims and accommodate those clearly more at risk.

Perhaps in an attempt to appease NSWI’s natural constituency, the group’s brief cites praise from both OSHA and the United Steelworkers in its introduction. The brief even states that although the NSWI is filing in support of the respondent company, in many respects it agrees with the petitioners and the amicus brief filed by the EEOC, particularly with regard to the need for further research on reproductive hazards, the acknowledgment that there has been a bias in research to date, and the admission that
fetal protection policies are often a pretext for discrimination. The document goes on to say that on some of the implicated issues, NSWI would even go beyond the positions taken by the petitioners and their amici.

Moving to the legal arguments, the brief concedes that Johnson Controls’ policy is indeed facially discriminatory, and that the lower courts’ attempts to apply the business necessity defense when only the BFOQ was applicable was inappropriate. It is at this point, however, that the NSWI’s position diverges from its pro-employee counterparts on the UAW side. The brief states that in narrow circumstances, policies such as those of Johnson Controls should be allowed, for if we as a society are going to hold companies accountable for workplace safety and health, we must give them the authority to take such steps as are reasonably necessary to ensure it. NSWI argued that, while the burden of proof did indeed rest with the employer, the fetal protection policy in question met the BFOQ requirements of being reasonably necessary and related to the normal operation of the company’s business.

In addition to citing several different authorities to establish its credibility, NSWI also references opposing amici in the course of laying out its arguments. NSWI’s brief in fact cites the ACLU’s depiction of the dubious choice presented to women employees, the choice between “an uncertain risk of injury to unborn and perhaps unconsidered children on the one hand, and a substantial reduction in income, economic well-being, and possibly even health (due to loss of health insurance) on the other.” The NSWI brief validates this position as well as that of the employer community, thus attempting to establish its position on the moderate middle ground. Like several other amici on this side of the litigation, NSWI also outlines its agreement with the EEOC’s amicus brief in which the agency asserts that the BFOQ exception is not necessarily limited to performance-related concerns.

Kinney’s postlitigation assessment of the NSWI’s involvement in *UAW v. Johnson Controls* was brutally frank—while he believes in the position that NSWI took, he nonetheless regrets having taken it. This is because the Institute’s traditional allies within the public interest community viewed filing in support of the employer in this case as little short of betrayal and, in Kinney’s opinion, rendered him and his organization “persona non grata.” His bitterness over this experience left him with the belief that “there is no reason any public interest group should take a pro-business position” as they (business) give no credit or sense of respect in return. NSWI’s support of Johnson Controls gained it little vis-à-vis industry, thus earning it no friends while alienating former allies. Staff, friends, and hundreds of thousands of dollars in foundation money were all lost following this liti-
gation, and these former friends became enemies “over symbolic reasons” and not the reality of the issue, according to Kinney.

James Holzhauer, the NSWI’s counsel on the brief and a member of its board at the time, offered a similar if less impassioned assessment. He noted that it was very difficult for an organization working for the rights of employees to file a company-side brief, and that Kinney worried, apparently with good reason, that it would damage the organization’s emerging ties with organized labor. Both men, however, believed that a difficult and important policy issue was at stake, and that the issues were more complex and serious than other groups filing in the case made them appear.

Kinney professed cynicism that politics, rather than public interest or science, were driving the positions taken in the case. The AFL-CIO was part of the larger public interest community interested in this case that distanced itself from the NSWI as a result of the position it took, but Kinney asserts that the AFL-CIO itself was not pursuing the case because of a true belief in the issue but rather as a means of building bridges with feminist organizations. This is an outsider’s view of labor’s motivation that somewhat supports one of the hypotheses of this study, albeit from a cynical angle. While this may be largely a matter of opinion, it does cast a different and interesting light on the dynamics and relationships detailed earlier involving the ACLU Women’s Rights Project (and other women’s organizations) and the UAW and AFL-CIO.

The NSWI brief provides a striking illustration of what can be quite disparate interests between the sponsoring organization and its legal counsel. Not only did the Institute’s brief in Johnson Controls cost it allies and funding, it also resulted in a permanent rift between Kinney and Holzhauer, who were essentially cofounders of the organization. Holzhauer served as the primary lawyer for NSWI and was on its board at the time of this case. The two were actually a somewhat unconventional team to begin with, as Kinney is a rather unabashed activist while Holzhauer is a corporate employment attorney with a large national law firm, Mayer, Brown, and Platt. By his own admission, Holzhauer more frequently represents the employer than the worker, while the interests of the latter are the main constituency of the NSWI, which is for the most part much more aligned with the interests of the petitioners in this case.

Kinney openly expressed bitterness over the actions of Holzhauer following the case, accusing his former counsel of losing his public interest spirit and essentially selling out to corporate interests. Kinney believes that Holzhauer could have used his considerable influence in the business community to help the NSWI when it encountered trouble as a result of this litigation that supported business, but that Holzhauer failed to do so.
Litigation has not been a primary undertaking of the NSWI, and its only foray into this arena proved quite costly. The organization has focused more upon business practice than public policy, functioning as “a thorn in the side of corporate America” and using the media and publications rather than trying to influence policy. The group felt, however, that UAW v. Johnson Controls was an important test case and a natural one in which to become involved given the organization’s institutional concern with safety issues. Following the case, Kinney said that given the damage done to the organization’s reputation and the destruction of its relationship with similar groups, NSWI was forced to strike a very different course or cease to exist. As a result, the Institute now focuses exclusively on occupational violence issues. This case, therefore, caused a major agenda shift for this organization.

The NSWI brief amicus curiae thus presents a case of a group that struggled mightily with its public position on the issue being litigated, ultimately deciding in favor of filing against its natural constituency. This ambivalence was reflected in the document submitted to the Court, as the brief is rife with references that attempt to assuage those allies that Kinney was in fear of losing. The result, however, would indicate that the attempts at moderation were insufficient to retain those allies, nor did they win any new friends on the other side. Indeed, the NSWI’s foray into public interest litigation nearly proved fatal for the organization and caused a permanent rift between two of the organization’s founders. Clearly, no single group or constituency has a universally accepted view of what constitutes the public interest, for in this case, while most groups organized to further the rights of workers saw the company’s actions as contrary to the public interest, one group did not, and its dissent proved quite costly.

The other amicus brief filed in support of Johnson Controls from a workplace safety perspective came from the Industrial Hygiene Law Project. Like NSWI’s brief, the IHLP’s brief was largely the result of a collaboration between two people, one attorney and one industrial hygienist. Dr. Margaret Phillips brought the expertise of her profession, while Ilise Feitshans, then of Columbia University, provided the legal acumen. This brief provides a unique example of organizational amicus activity, for the IHLP did not exist prior to Johnson Controls and has not participated in litigation since. The Project was, in fact, formed for the express purpose of filing an amicus brief in this case. While it has not been formally dissolved, it has no ongoing activities and its creator, Phillips, has no specific plans to restart it.

The IHLP’s brief strongly asserted that Title VII litigation was not the proper vehicle for resolving workplace health and safety issues, that it was not at all designed for such a purpose. If any government entity is appro-
priate to address such matters it is OSHA, according to the brief, and any regulatory lapses by that agency should be dealt with by Congress rather than the courts. In fact, the brief stated, Congress had at that point clearly stated its intention to address reproductive health hazards. The brief further held that health and safety concerns essentially trumped equal employment concerns, citing the government’s obligation to protect health under the doctrine of parens patriae.

According to both Phillips and Feitshans, the IHLP was formed largely to provide a forum through which Phillips could safely express her views on the Johnson Controls case, as she was employed at the time by U.S. Steel and could not file a brief in her capacity as the company’s industrial hygienist. She felt strongly, however, that the view of the industrial hygiene community needed to be heard along with those of business, labor, and women’s rights groups, and the profession’s own associations (such as the American Industrial Hygiene Association) lacked the will to take stances on controversial political issues. While filing the brief under the IHLP name thus afforded some cover, Phillips also created the IHLP out of a recognition that an organization (or at least an organized interest) would carry more weight before the Court than would any one individual. Phillips thus underscored a similar point made by Susan Deller Ross (see chapter 4), that the issues and arguments that need to be made come first, and the organizations to carry those arguments forward come afterward. In the case of Ross, she was best qualified to author a legislative history brief, which was needed, and the Women’s Legal Defense Fund and others were called upon to provide organizational vehicles for the message. In this case, Phillips actually felt that it would have been preferable to have the established industrial hygiene organizations file the brief, but they were unwilling to take a stand—therefore, she created her own organization.

Phillips was frank in her admission that filing on the side of Johnson Controls was a strategic decision based on the way she thought the Court would rule in the case. Since it was a conservative Court, she reasoned that it would be more sympathetic to the company’s position, and filing on the side of the company would increase the chances that the brief would be “read and heard.” Her view of the case was less one of two opposing sides than of an opportunity—or indeed a need—to speak for industrial hygienists whose work would be directly affected by the outcome. The constituency that the IHLP brief was representing was the professional industrial hygiene community, not necessarily workers themselves, or women, or employers. Indeed, although the IHLP “supported” the employer in this litigation, Phillips stated that she was glad that the Court rejected Johnson Controls’ reasoning, although she viewed Blackmun’s
opinion that companies were immune from liability if they conformed to safety regulations as naive.

Feitshans, the attorney on the brief, also mentioned several strategic decisions made by the group, including their citing of Dr. Morton Corn of Johns Hopkins University as a toxicology expert because he had a more conservative reputation than Dr. Eula Bingham, who would also have been a logical choice given her past tenure as head of OSHA.13 So, like several of the briefs on the UAW side, the composition of the team advocating a position on a brief is often as much a part of the message as the legal arguments contained within. The IHLP also deliberately kept its statement of interest in the brief as innocuous as possible in order to mask the fact that they were representing the views of that “renegade” industrial hygiene faction.

In a bit of a reversal of the situation in the National Safe Workplace Institute, with the IHLP it was the attorney of the pair who was more zealous. While Phillips and Feitshans made several of the same points in discussing the case, Feitshans was more dramatic in her depictions of the circumstances facing the Project and the faction of the industrial hygiene profession that IHLP represented. While Phillips cited the desire to appear before the Court as an organization instead of an individual as primary in leading her to form IHLP, Feitshans cited only the need for a “safe” forum through which to speak out safely on the absence of scientific risk assessment being employed in the debate over fetal protection policies. Feitshans asserted that the traditional male industrial hygiene community was simply not interested in the issue, and that the women’s movement was only interested in the political aspects.14 She viewed the work performed through the IHLP as epitomizing how movements are created and function, the essence of grassroots, single-issue politics. She saw her role as attorney as being the “translator of the voice of this renegade faction of the industrial hygiene profession.” Feitshans went so far as to characterize the politics of the Johnson Controls case as a “conspiracy of silence,” speculating that OSHA did not want this case to go forward because of the preexisting “blemish” of the Cyanamid case, in which several women wound up sterilized.

Feitshans corroborated Phillips’s depiction of the IHLP’s kind of neutrality as to the outcome of the specific case. Feitshans had spoken extensively with Marsha Berzon, counsel for the UAW, who thought that IHLP should be filing on the UAW side. Feitshans did, however, cite a more broadly “public interest” reason for the IHLP’s involvement in the case than did Phillips, claiming that they were “without question representing the needs of working women, from which all else followed.” While this might indeed seem to place the group with the petitioners, as Berzon wished, Phillips and Feitshans believed that simple adherence to non-
discrimination doctrine without valid scientific risk assessment was unsound public health policy.

There was at least an indirect relationship between the two industrial safety amici beyond their similar circumstances. Feitshans in fact revealed that she nearly went to work for Joseph Kinney at the National Safe Workplace Institute but ended up choosing a position at Columbia University instead. She stated that she advised Kinney on what to do in this case, advice that he might reconsider in retrospect. In any event, these two groups that filed workplace health and safety-oriented briefs had similar characteristics and informal connections.

IHLP’s brief, like several others on the Johnson Controls side, cites the EEOC’s amicus brief to support its own position, specifically the EEOC’s statement that the BFOQ is not “absolutely unavailable for a sex-based fetal protection policy.” This it is able to do in good faith, as IHLP’s own argument takes a middle-ground position: neither wholesale exclusion of women nor complete dismissal of the known reproductive risks are wise policy choices with regard to the toxic workplace. While the EEOC did file on the side of the petitioners in this case, the agency nonetheless did not adopt the position that fetal protection policies are simply illegal in all forms, a fact that IHLP sought to highlight for the Court.

Thus both briefs that focused primarily on the technical and scientific aspects of the company policies in question were filed by organizations that were largely the efforts of a few key individuals. But the IHLP clearly falls on the far end of the spectrum in terms of experience in the litigation arena. Standing in contrast to organizations like the Chamber of Commerce’s fully staffed and active Litigation Center, the IHLP’s brief was signed by Feitshans’s father, Jack Levy, as he was currently a member of the Supreme Court bar, a requirement for the counsel of record on an amicus brief. Phillips marveled at how accessible the litigation process was: “What impressed me about the process was that a handful of people could do it.... Filing a brief is within the reach of a small group, which is quite remarkable, given how expensive other types of political action can be.” This presents an interesting twist on the notion that the courts are available to and used primarily by groups disadvantaged in other political forums (Birkby and Murphy 1964; Cortner 1966; Wasby 1984), for in this case a segment of a well-established professional community broke off and formed an independent faction in order to express a dissenting view, and found the judicial process amenable.

It is interesting to note that a case that centered on workplace health hazards generated so little amicus activity on the part of established industrial hygiene organizations, and also that the federal Occupational Safety and
Health Administration (OSHA) was not involved either. Other health and safety groups that did participate, all on the side of the UAW, included: the Central New York Council on Occupational Safety and Health; the Massachusetts Coalition for Occupational Safety and Health; the New York Council on Occupational Safety and Health; the North Carolina Occupational Safety and Health Project; the Occupational and Environmental Reproductive Hazards Clinic and Education Center; the Philadelphia Area Project on Occupational Safety and Health; the Rochester Council on Occupational Safety and Health; the Santa Clara Center on Occupational Safety and Health; the Silicon Valley Toxics Coalition; the Toxics Use Reduction Institute; and the Western New York Council on Occupational Safety and Health.

FETAL RIGHTS

While the notion of fetal rights played a central role in *UAW v. Johnson Controls*, unlike the expected probusiness interest group amicus participation that materialized, there was not a parallel reaction by the traditional pro–fetal rights organizations. The groups that stepped forth to articulate the fetal rights position were not single-purpose pro-life organizations. Groups like the National Right to Life Committee, that are dedicated to eliminating abortion and advancing the cause of fetal rights, did not weigh in. Instead, it was the U.S. Catholic Conference and Concerned Women for America (CWA) that carried the fetal rights banner to the Court. During the debate over the Pregnancy Discrimination Act in the late 1970s, a strange alliance of feminist and pro-life interests had emerged, the former supporting the legislation to eliminate barriers to women’s employment, while the latter saw penalties against pregnancy in the workplace as creating an incentive for abortion. To the extent that the fetal protection policy issue invoked many of the same concerns, pro-life interests may have opted out of this litigation because they could not support the elimination of a concern for fetal health but were wary of supporting what could be perceived as an “antipregnancy” position.

According to Jordan Lorence, then head of its legal department, the CWA entered this litigation primarily to ask the Court to recognize that there are legitimate nondiscriminatory situations in which women are treated differently than men—thus the specific merits of the case were of secondary concern. Lorence also allowed that an additional motivation was the potential to have a non-abortion case that would undercut the reasoning of *Roe v. Wade* that fetuses had no legal standing. In this aspect, the organization was seeking both an incremental and a more philosophical
victory, and one more in keeping with its overall organizational mission. Jane Hadro, the brief’s author, explained that her role was to craft the brief after the decision to become involved had been made by others (Jordan Lorence and Beverly LaHaye, the organization’s president). Hadro surmised that CWA joined this litigation because the organization is “very pro-life” and it wanted the Court to affirm that it was legitimate for employers to “consider the child.” In fact, she said, since Johnson Controls had won at the lower court levels, CWA “may have simply wished to get the perspective of the child put forth.” Their primary goal may not have been to influence the outcome, which they thought was likely to be a victory anyway, but rather to espouse a policy position not being articulated by any other groups. In Hadro’s view, CWA would be providing the Court with yet another reason to uphold the judgment below. This confirms an observation made in the group litigation literature, that the outcome is not always the central concern of parties that litigate—sometimes putting a particular position on the record is considered a sufficient victory (Epstein and Rowland 1991).

At the time of *UAW v. Johnson Controls*, CWA had a Legal Department of four attorneys, including Lorence and Hadro, and engaged actively in litigation. The group’s newsletter at the time contained a regular Litigation Report feature, updating members on cases in which CWA was involved. When CWA had this department, Lorence stated, litigation was a major emphasis and was quite effective. The group’s strategy was to carve out particular policy areas, such as religious liberty or equal access, work to set favorable precedent in a region or judicial circuit, and then move on. For the most part, CWA attempted not to duplicate the efforts of other groups but rather to support them and focus elsewhere. When asked if raising the organization’s profile could have been (or was ever) a motivation to file a brief in a major case, both attorneys dismissed this possible goal as both impractical (Hadro) and a “low class tactic” (Lorence). Lorence conceded that other groups do this, filing briefs simply to show off to their constituents and overemphasizing the significance of their participation, but he expressed disdain for this use of the amicus process.

CWA’s was the more adamant of the two fetal rights briefs in its stance regarding rights of the unborn. Hadro explained that she wrote the brief to represent the interests of the child, which she considered to have been overlooked by the other participants in the litigation, including those on the employer’s side. CWA thus “took up the gap” in the interest representation function by championing fetal rights. CWA’s brief was the only one to substitute the term fetal protection policy with “child protection policy” throughout the document. Hadro stated that it would have been inconsistent with both the organization’s beliefs and her own not to alter the lan-
language that way, as language is very important in the legal arena and since they believe that fetuses are children.17

The brief on the whole attempts to blend an argument that government and society are increasingly recognizing the rights of the fetus with legal arguments relating to Title VII, asserting that protection of the unborn itself qualifies as a BFOQ. The brief further states that policies that treat men and women differently are not as a rule discriminatory, and refers to the lower court decisions that upheld fetal protection policies. The brief thus achieves a mix of strong pro-life rhetoric with technical legal arguments made by courts and other parties in the case.

Beyond that, Hadro and Lorence both agreed that there was not much to be gained in using impassioned rhetoric with the Court. Hadro said that not only was it unwise but, in this case, she also felt it to be unnecessary, as the case was strong enough on the facts. Lorence more adamantly stated that it indeed would be “crazy, imprudent” not to tone down rhetoric because the Court is institutionally conservative and infrequently institutes major paradigm shifts. Restrained legal arguments are more suited to the kind of incremental change fostered by the judiciary.

The language of CWA’s amicus brief confirms the perspectives of the two attorneys. From the statement of interest:

[CWA’s purpose is] to preserve, protect and promote traditional Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

CWA is concerned with the unwarranted employment discrimination against women, as well as the health and well-being of children, both born and unborn. The child protection policy at issue in this case is very important in an industry which has demonstrated ill-effects on unborn children due to prenatal exposure to lead. CWA believes that Title VII of the Civil Rights Act of 1964 was broadly enacted to proscribe discrimination in employment, but that it is not so broad as to prohibit employers from adopting policies which protect unborn children from work-place hazards. Based upon the record in this case, CWA supports the child protection policy at issue and urges this Court to affirm the ruling of the Seventh Circuit Court of Appeals.

The statement attempts to strike a judicious balance between women’s employment rights and the rights of potential fetuses.

Interestingly, in its own literature, CWA asserts that the autonomy of parents in the rearing of their children is being increasingly threatened by
the federal government. From a 1991 newsletter: “There is a battle being fought over who should have greater control of the children—mom and dad or the government. But God’s Word clearly states that parents are responsible for the care and instruction of their children. We must fight and stand strong to maintain our rights as parents.” In the debate over fetal protection policies, however, parental (and particularly maternal) autonomy was an issue raised by the plaintiffs, who argued that company fetal protection policies denied freedom in childbearing decisions to women employees.

When asked about the opportunities and challenges presented by amicus coalitions, Lorence observed that his attitude about working with other groups has changed over time. While initially he favored working solo (perhaps more out of “ego” than anything else, he confessed), Lorence now prefers coalition activity (what he termed a more “mature” attitude). In his opinion, the Court is impressed by coalitions, particularly those that cut across traditional ideological lines. In this regard, he professed agreement with the ACLU attorneys who also stressed a belief in diverse coalitions. Lorence said that frequently in high-profile cases, parties to litigation that want to say more than they are able in their own briefs will solicit amicus support and coordinate such activity so that there is comprehensive coverage of all relevant issues. Jane Hadro concurred, offering that the job of the amici is to take one point within the larger case and elaborate on it, presenting extra information (“beefing up a point”) for the Justices that the parties cannot make themselves. However, this seems to have occurred on the plaintiff side, and not on the employer side.

Lorence did also note, however, as did Stephen Bokat of the NCLC, that coalition briefs can be difficult from a practical standpoint because of the need to accommodate many diverse views. Because of this, he said that CWA often adopted a “take-it-or-leave-it” attitude with would-be allies, as there was frequently little time to “quibble over details.” Lorence also offered a quite candid view of CWA’s relationship with other parties in litigation in general, which he termed the “ugly relative principle.” CWA, he said, is viewed by some as being an extreme right-wing organization, and not one that all litigants want supporting them publicly. While he ran the group’s litigation department, he would as a matter of policy consult with the attorneys for a party on whose behalf CWA intended to file an amicus brief. Lorence was frank in stating that there were occasions when CWA was asked not to file, and that they complied with such requests. This could be one reason that the organization is more frequently a litigant itself than an amicus party. This is the flip side of the observation made earlier that who is on a brief often matters nearly as much as what the brief
says: sometimes, a group’s absence can prove more beneficial than its presence, simply due to its public ideological profile.

Like its fellow organizations supporting Johnson Controls, CWA challenged not only the UAW itself but also one of its supporting amicus briefs, that of Equal Rights Advocates. As several other pro-employer amici did, CWA took issue with ERA on its own terrain, interpretation of the Pregnancy Discrimination Act (PDA). In this instance, CWA disputed ERA’s contention that Congress had fully explored the issue of exclusion of women from toxic work environments during its deliberations over the PDA in 1977. ERA asserted that Congress was aware that passage of the legislation would proscribe exclusionary fetal protection policies, while CWA argued that this particular policy outcome was only briefly touched upon during the PDA hearings.

The U.S. Catholic Conference (USCC) was Concerned Women for America’s unofficial partner in articulating the pro-life position in Johnson Controls. The USCC is rather unique among the organizations that filed in the case, as it is not an interest group in the traditional sense. Its members are the Catholic Bishops in the United States, making its formal constituents quite a narrow class. Affiliated with the National Conference of Catholic Bishops (NCCB), the U.S. Catholic Conference is the arm under the General Secretariat charged with “carrying forward the Church’s work in society,” while the National Conference deals with the internal concerns of the Church. The USCC is, in fact, described as the “public policy agency of the bishops.” The committees of the USCC that develop policy and programs for the USCC have nonbishop members, including lay people.

According to Mark Chopko, General Counsel to both the USCC and the NCCB, Johnson Controls was an unusual case in that it involved conflict between policy issues in which the conference is usually engaged. The conference strongly supports workplace rights, unions, and collective bargaining; indeed, strengthening the rights of workers has been a “strong historical interest of the Conference.” In this regard, the USCC would many times not be fully in accord with some of its fellow amici in this case, the overtly pro-business Chamber and NAM. It is rare, Chopko said, to find a case in which these various issues of concern to the USCC collide—why should anyone’s health be risked at all? The case caused significant “soul searching,” Chopko admitted, “because of the gut-wrenching, life and death issues, not just for unborn children but for women [economic security issues].” Thus, while it espoused a pro-life position, the USCC displayed considerably more conflict about its involvement on the fetal rights side of the equation than did Concerned Women for America, which viewed it as vital that the voice of the fetus be heard through its brief.
According to Chopko, the USCC has a “long tradition of seeking to persuade the courts on matters of importance to the Church and its people . . . engaging in litigation as needed.” The form of engaging, however, is limited almost exclusively to filing amicus briefs—the conference is almost never a litigant itself. The USCC’s internal process, according to Chopko, is such that it first tries to decide why the Court has taken a case when it is considering its own involvement as an amicus party. The Conference attempts to determine which issues are central to the Justices, and then how those issues are relevant to the USCC and how the Conference can contribute to the case’s resolution. As a result, Chopko said, the USCC does not file in every case, does not “lend its name to causes” and is “very particular about what we write on.” He views its role as amicus as that of alerting the Court to questions contained in the case that are not obvious. Chopko described his role as Counsel as that of a “translator,” communicating the views of the bishops to policymakers. This process of communication, he claims, is “the essence of effective lawyering.” His goal, he says, is to “try to create public policy receptivity to the bishops’ arguments” wherever needed. Again, both the classic and current functions of the amicus are invoked—advising the Court and advocating for an outside interest.

The Catholic Conference’s brief, like CWA’s, makes supportive statements about equal employment opportunity for women and attempts to strike a conciliatory tone, “rejecting absolutist approaches” that completely favor one imperative (equal opportunity or protection of the unborn) over the other. The overall argument made by the USCC’s brief is that health and safety of the unborn must be considered as legitimate as other concerns when resolving this complex issue. The following is from the statement of interest in the brief.

The Conference advocates and promotes the pastoral teaching of the Bishops in such areas as domestic social development, fair employment and antidiscrimination policies, family life, and the rights of the unborn. . . . Values of particular importance to the Church are the protection of the dignity of work, family life, equal opportunity, and unborn life. These interests are implicated in the instant case.

This case presents novel, sensitive, and complex public policy concerns for the Court. This amicus has long supported efforts here and elsewhere to oppose employment discrimination; all persons must have full opportunity to work with safety and dignity. In addition, when unborn lives are threatened with injury, this amicus has supported efforts to protect them. Here, some would propose the Court create conclusive presumptions favoring one or the other interest. . . . This amicus rejects both absolutist approaches.
Rather than engage in a discussion about whether and to what extent rights are in conflict, this Court should seek ways that oblige employers to take into account the lives and safety of workers and their unborn children. We insist that equal employment opportunity for all individuals cannot come at the expense of threats to their children.

The particular purpose to which this Brief is addressed is limited. . . . Without compromising any of our traditional policies and interests, this amicus writes only for the limited purpose of showing that such a policy may be not only reasonable but lawful under the Title VII bona fide occupational qualification defense.

To support its contention that protection of fetuses should qualify as a BFOQ, the brief cites selected public policy examples (sometimes going back as far as 1959) that are meant to demonstrate a strong public interest in protecting the health and safety of the unborn. The brief includes a discussion of abortion as the “main exception to this public policy.”

In a press release issued the day of the decision, Chopko again reiterated the USCC’s commitment to “the importance of the rights of women in the workplace” and “equal employment opportunity for all individuals.” Echoing the theme of the amicus brief, the statement continued by stating that “we are concerned about the consequences of workplace and products hazards and protection of the environment. I am disappointed that the Court did not include the safety of unborn children—our future—as a legitimate consideration in deciding Title VII cases. I hope that, in the future, courts and legislatures can find ways to accommodate both of these concerns.”

Chopko stated that USCC generally does not participate in coalitions in its litigation work but rather that it has a tradition to do things itself. The primary reason, he said, is “selfishness”—a concern with how decisions are made, how strategy is set—and thus more a matter of practicality than doctrine. There is a postulate in some academic treatments of interest group litigation that control over litigation activity is directly related to success, and that groups prefer to participate as direct parties for that reason (O’Connor 1980; Epstein 1985; Tushnet 1987). Chopko’s statements would indicate that some group litigants agree, and that it applies to amicus brief activity as well. Of course, “success” can be defined many ways, even when discussing direct litigants with a real stake in the outcome of a case—sometimes, the goal is publicity or credibility, or the establishment of credentials within the judicial forum.

The USCC addressed two of the UAW’s amici in its brief—the EEOC and Equal Rights Advocates (ERA). The EEOC brief is referred to in a foot-
note in which the USCC states that it agrees that fetal protection policies are “more logically scrutinized under the BFOQ defense,” and again in another footnote in which the Conference cites the EEOC brief’s acknowledgment of the “social value of fetal protection.” ERA, in contrast, has its arguments challenged in a lengthy footnote on essentially the same issues contested by CWA. ERA had contended in its own brief that the Pregnancy Discrimination Act (PDA) should be interpreted as prohibiting employer fetal protection policies. The USCC specifically takes issue with ERA’s argument that because the PDA can be interpreted as prohibiting employers from firing or refusing to hire women who have independently elected to undergo abortion, then it also should be read to prohibit employers from attempting to minimize the risk to the unborn from its own manufacturing activities. The USCC argues that since the PDA allows employers to exclude abortion from health benefits plans, it follows that the PDA cannot be read to require that an employer cannot prevent an employee from exposing unborn children to harm in its workplace.

Perhaps in an attempt co-opt some of the stature of the opposing sides’ amici, the USCC’s brief also cites an American Public Health Association publication that urges attention to parental health and safety prior to conception in order to ensure giving birth to healthy children. The USCC brief even references statements by “union officials [that] have specifically recognized the importance of safety measures for the unborn: ‘Investments in children and their families are essential to this nation…. As important, our prevention principle has the greatest meaning here: a dollar spent early in life to prevent early damage yields substantial savings for the society and for the individual downstream. The investment must begin before the child is born.’” The brief continues by citing law professor Wendy Williams’s seminal 1981 article analyzing fetal protection policies, but merely the part that states that fetal health must become a corporate concern. She does not state that corporate concern be manifested through exclusionary policies. The brief thus cites experts and stakeholders from the “other side” of the case, but in a selective way, so as to appropriate these individuals’ authority and lend it to the USCC’s own arguments. And so, while the Catholic Conference may be somewhat unique in the world of organized interests, it does not hesitate to engage other groups on their own terrain.

FREE MARKET ADVOCATES

The final group of participants on the company side consisted of the conservative legal foundations. Their issues overlapped somewhat with those
that brought the other pro–Johnson Controls amici to the case, but their arguments had a distinct flavor. These groups do not have “constituents” per se who would have been adversely affected by a ruling for the union, as one could argue was the case with the pro-business groups and the industrial hygiene and workplace safety advocates. Rather, their reasons for supporting the company were more ideological. These organizations also exist with virtually no other purpose than to engage in litigation, in contrast to fellow amici like the Catholic Conference or the Chamber of Commerce, which have numerous other functions.

One of these groups, the Pacific Legal Foundation (PLF), was the first and is considered a model of conservative public interest law firms (O’Connor and Epstein 1989). Just as the Chamber of Commerce entered the litigation arena in the 1970s in response to what it saw as increasing anti-business litigation, groups like PLF formed to counterbalance the groundswell of liberal public interest law. PLF urges the concept of limited government and makes opposition to regulation its primary focus. For example, the group helped to invalidate gender and racial minority preferences in city contracts in San Francisco in the late 1980s, representing white males whose equal protection rights, it argued, were being infringed upon by such governmental preferential treatment.22

The New England Legal Foundation (NELF) was created not long after PLF and was modeled on the California group. Among its purposes are to “assure that economic considerations are appropriately represented in judicial and administrative proceedings.”23 As described by Stephen Ostrach, NELF’s Legal Director, the two foundations are “in the same kingdom but different species.” While PLF did inspire the formation of NELF, he said, the latter is more focused on business issues (such as tax law, labor law, and property rights) than on political issues. In this sense, according to Ostrach, UA W v. Johnson Controls was “more up NELF’s alley than PLF’s,” even though the “driving force [for their joint brief] came from Sacramento [PLF].”24

The Pacific Legal Foundation was one of the repeat amicus players in the area of gender discrimination in employment litigation. PLF, along with the Chamber of Commerce and NAM, was an amicus party in Geduldig v. Aiello, urging the Court to allow the exclusion of pregnancy from disability coverage. In that litigation, it faced two of its adversaries in UA W v. Johnson Controls: the EEOC and the ACLU. According to Anthony Caso, Director of Litigation for PLF, the organization got involved in Johnson Controls because it thought that business was being placed in an “untenable position,” having to protect its employees from injury but being sued for taking what it saw as necessary steps to do just that. Ostrach dis-
played less conflict over the issues at stake in the case than did Caso, who allowed that it was at least a “delicate issue.” Ostrach proffered that it was “lunacy that a company would have to go out of business because a woman wants to work with lead.”

When asked who he envisioned himself and PLF as representing in this case, Caso responded that the organization “really takes to heart the moniker of public interest.” They viewed their position in this case as furthering that philosophy, which includes a belief in individual rights and limited government. In this case, the rights being championed were those of employers vis-à-vis the government’s regulatory authority over employment practices. Ostrach further put the organization’s litigation into context, explaining that NELF and other similar organizations are increasingly looking to the agency rule-making process as the point at which to try to influence policy. The rationale, he described metaphorically, is that it is “easier to shape the law when it is still clay than to ask the courts to smash the vase later.”

Ostrach was yet another public interest attorney to note the value of amicus filing at the certiorari stage. In his view, once a case is before the Supreme Court, “the Justices know what they need to know.” Filing an amicus brief at the certiorari stage can really demonstrate the importance of a case, he asserted. Ostrach applied his reasoning about rule making to the litigation context, offering that it is advantageous for groups to become involved as early as possible, as one is better off defending a judgment than attempting to reverse it. Ostrach stated that the courts see that their job is to affirm decisions—otherwise, they would invite too many appeals. Therefore, he concluded, appellee is the desired position in which to be. He also noted that lower court judges truly appreciate amicus briefs, as they do not see many of them and briefs demonstrate that there is significant interest in a case.

The brief filed jointly by PLF and NELF urged a departure from normal Title VII analysis in cases involving the prevention of reproductive harm, as “this case fits neatly into none of the traditional modes of analyzing Title VII claims.” They conceded that fetal protection policies are not facially neutral—and therefore not eligible for a disparate impact analysis—but asserted that the BFOQ framework that only allows for ability to perform the job would be at a socially unacceptable cost in this case. “Reproductive health cases,” the brief argues, “are a class unto themselves.” In their view, the issue before the Court was “whether an employer is required to put aside concerns about its employees’ children’s health.”

The brief relies heavily upon citations to EEOC policy to support its contention that the Court should allow fetal protection policies to be
judged under the business necessity defense usually reserved for disparate impact cases. The EEOC policy that it uses, however, is that issued in 1988, and not the revised 1990 policy that stated that the BFOQ was the proper defense. The PLF brief relegates this distinction to a footnote and characterizes it as mere relabeling of the policy, and also does not mention that the EEOC is itself an amicus party in support of the UAW in this case. (PLF's was in fact the only amicus brief on the side of Johnson Controls not to cite at least one opposing amicus brief.) Thus the PLF brief attempts to co-opt the authority of the very agency whose power it wishes to curtail, by attempting to use the EEOC's own policy statements to support the PLF/NELF position.

PLF's statement of interest in its brief exhibits the expected restraint of Supreme Court briefs and emphasizes its public interest orientation: “PLF is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community” (emphasis added). But, like other groups involved in this litigation, PLF's promotional materials convey a different tone than that used when addressing the Court. From a membership brochure, dire warnings such as “Regulatory Horrors—Are You Next?” and “government at all levels has always acted to limit our freedoms, intrude into our lives and narrow our rights” are meant to appeal to potential supporters. Notably, the list of things that PLF opposes includes both “discriminatory practices based on race, sex, or national origin” and “unreasonable regulations which lack common sense.” Although it does not make an explicit statement in its brief, PLF is on record as supporting nondiscrimination, as are most groups filing on behalf of Johnson Controls.

Caso said that it was more typical for PLF to file briefs solo, but that, in general, groups banding together on briefs is common. He also asserted that often the value of a brief lies more in who files it than in the substance of its arguments, a notion that was supported by the strategic alignments crafted by many of the amici on both sides of this case. The purpose of the brief thus becomes one of indicating to the Justices who is affected beyond the instant parties more than highlighting previously unseen issues. Stephen Ostrach of NELF was forthright in admitting that NELF became a co-signatory to the brief with PLF “because we were asked” by PLF, who thought the brief would be more effective with multiple signatories.
Indeed, Ostrach observed that “95 percent of the time groups get involved with briefs because they are asked, either by a party in the litigation or by other amicus groups looking for names.”

The other brief in this category was filed solo by the Washington Legal Foundation (WLF), which is similar to the above two groups in that it was founded during the same era (mid-1970s) for the same purpose: to provide a counterbalance to the increasing presence of liberal public interest law firms. WLF both participates directly in litigation and files amicus briefs. According to Daniel Popeo, the organization’s founder, WLF files briefs “to counter the ACLU and NAACP LDF,” both of whom were present as adversaries in Johnson Controls. The organization describes itself (within its amicus brief) as “promoting the free enterprise system and the economic and civil liberties of individuals and businesses.” WLF was one of only two amici in OCAW v. American Cyanamid, one of the first cases involving employer fetal protection policies. WLF filed in support of the company, while the Coalition for the Reproductive Rights of Workers (CRROW) filed for the plaintiff. Thus WLF was one of the few repeat amicus players in fetal protection policy litigation on the employer side (see Table 8). Its interest in the issue having been established early on, it is not surprising to find the organization participating as the issue moves to the High Court.

In its brief, WLF focuses almost exclusively upon the issue of tort liability to a company that exposes fetuses to hazardous chemicals. From the statement of interest: “Amicus will present arguments supporting tort liability as a BFOQ defense to a charge of sex discrimination; those arguments will not be presented by the other parties.” The brief contends that not only is “catastrophic” tort liability a very real possibility, but also that such liability can be a defense to a Title VII charge (and that neither OSHA nor Title VII compliance would preempt a toxic tort liability suit). The language employed in the brief is in fact noteworthy: WLF asserts that “Johnson Controls’ fetal protection policy protects it from a very real threat of tort liability that could put [the company] out of business” (5). The Foundation thus turns around the notion of “protection,” applying it to the company as well as to potential offspring. WLF argues that tort liability should be both a business necessity and a BFOQ defense, obviating the issue of which legal framework is used to evaluate fetal protection policies. The brief attempts to dismiss certain of the points raised by the UAW side, such as risks to the male reproductive system (“irrelevant to the case at bar”) and discriminatory intent (“one can assume that the marketplace places an equal value on men and women as employees”).

WLF cited several opposing amici in its brief, including the NAACP (one of its self-proclaimed traditional rivals), Trial Lawyers for Public Justice, and
the brief filed for the state of Massachusetts. WLF cites the NAACP to actually bolster its own position, noting that the NAACP and the National Black Women's Health Project “wax eloquent in their brief on the dangers to employees and their offspring posed by exposure to toxic chemicals” (5). WLF thus uses the NAACP's tactic of presenting extensive evidence of toxic harms to workers, and in particular minority workers, and portrays it almost as a concession to one of WLF's points (that workplace toxic exposure is a gravely serious problem for employees). Where the two groups differ, of course, is in their prescribed remedy for the problem.

WLF also takes on the pro-UAW amicus brief that functioned as its most direct counterpart, that of Trial Lawyers for Public Justice, which also focused primarily on the tort liability issue. While TLPJ argued that a toxic tort claim would be difficult to win because of problems of proof and causation, WLF countered that because Johnson Controls has admitted that lead exposure poses a risk to fetal health, a potential plaintiff would have less difficulty establishing cause. Finally, WLF challenges both TLPJ and Massachusetts in their assertions that male-mediated fetal damage poses an equally significant threat in the workplace. They do not, however, take issue with the substance of that argument, but merely assert that the UAW did not establish a record regarding this issue below and therefore waived the opportunity to do so.

CONCLUSION

Given the declarations of support for equal employment opportunity in all of these briefs supporting the employer, it is clear that groups favoring exclusionary fetal protection policies do not feel comfortable stating simply that women's childbearing function legitimates a form of employment discrimination. Rather, they feel obligated to affirm their own commitments to equal employment opportunity before explaining why this type of employer practice should be nonetheless condoned. While the rhetoric is thus different from the era in which women's childbearing roles automatically trumped other endeavors, the outcome, exclusion from jobs, remains the same.

Even without a concerted strategy to garner amicus support, or even any effort at all, Johnson Controls had nearly as many briefs filed in its support as did the UAW, albeit with fewer co-sponsors. Like the UAW side, the employer's amici fell along certain issue dimensions, providing the Court with more extensive arguments favoring retention of fetal protection policies. There was far less coordination on the company side between organizations, which is not unusual for conservative groups, and each side
obviously desired opposite outcomes. But there were also many similarities between the two sets of organized interests that lined up on either side. Both sides: utilized strategic coalitions on their briefs (whether as sponsoring organization or expert witness) as part of the message they took to the Court; seized upon similar subissues like tort liability and the intent of the PDA (while adopting opposite postures); recognized the need for organizational backing for individual viewpoints; and saw the outcome as important to others besides the parties to the case.

As Epstein (1985) observed, the litigation campaigns of conservative groups, many of whom formed for avowed reactionary reasons, “have evolved from emotional exercises to professional, well-planned drives” (xii). Because of this, she notes, the courts are increasingly adjudicating claims between competing groups rather than discrete parties, as there is now more likely to be an array of organized interests on both sides. This has implications for the role of the judiciary as a policy-making forum, rather than an arbiter of narrow disputes.