Litigation as Lobbying

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Notes to Chapter 1

5. 886 F2d at 920.

Notes to Chapter 2

2. 198 U.S. 45 (1905).
7. The U.S. Department of Labor created the Women in Industry Division in 1918, which was intended to ensure the most effective use of working women during the war while maintaining decent working conditions. This division became the permanent Women’s Bureau in 1920.
8. 261 U.S. 525 (1923). This decision was a rare instance in which the Court strayed from its prior and subsequent endorsement of legal protections for women in the workforce. The opinion was more a strike against a minimum wage than it was an endorsement of women’s equality, which the Court rather facetiously claimed had been attained virtually overnight by virtue of the enactment of women’s suffrage three years earlier.
10. The history of the UAW’s stance toward women within its ranks will be explored in greater depth in the next chapter.
11. 29 CFR 1604.1(c); 30 Federal Register 14927, December 2, 1965.
14. 408 F2d 228 (5th Cir. 1969).
15. 444 F2d 1219 (9th Cir. 1971).
16. Initially, the Transportation Communications Employees Union was also named a defendant along with the company, but was not included in the appeal to the 9th Circuit.
23. The labor-feminist alliance also coalesced around advocacy of comparable worth for women’s occupations.
27. Politically sophisticated environmental groups emerged just prior to the proliferation of women’s rights groups in the 1960s.
28. Occupational Safety and Health Act, P.L. 91–596, sec. 6(b)(5).
29. Some substances that have been regulated include benzene, asbestos, vinyl chloride, and cotton dust.
30. OCAW was the plaintiff in the second major fetal protection suit, OCAW v. American Cyanamid Company (1984).
31. All but one standard issued by OSHA have prompted lawsuits challenging their legality. In most instances, the agency’s rule is upheld in court.
33. The problem was illustrated as well by an incident the previous year at Allied Chemical Company in Danville, Illinois. Believing that Fluorocarbon 22 caused fetal damage, the company laid off several women workers, two of whom had themselves sterilized in order to be reinstated. It was subsequently discovered that the substance was not indeed teratogenic (harmful to a developing fetus), and that the women’s surgery had been needless (Bronson 1979).
34. The General Duty clause states that “each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees” (29 U.S.C. s. 654 (a)(1)).
35. Interview with Joan Bertin of Columbia University, formerly of the ACLU Women’s Rights Project, November 23, 1993.


40. The 1991 Civil Rights Act returned the burden of proof scheme to that originally outlined in *Griggs v. Duke Power* 401 U.S. 424 (1971), the case in which the disparate impact standard was promulgated.


42. *Grant v. General Motors*, 908 F2d 1303 (6th Cir. 1990).

43. Also in 1990, Representative Pat Williams introduced into Congress the Employee Protection Act of 1990 (HR 4420). The bill would have prohibited employers from discriminating against employees on the basis of their refusal to submit to sterilization or to a fertility test or to refrain from procreation. The measure was not acted upon since it was eventually seen to have been obviated by the Supreme Court’s ruling in the *Johnson Controls* case.

Notes to Chapter 3


2. In another indication of the difference between the UAW and organized labor as a whole, Leonard Woodcock of the UAW sent a good luck telegram to the convention from the union, while the AFL-CIO remained silent and wary (Balser 1987).

3. Interview with Joan Bertin, formerly of the ACLU Women’s Rights Project, February 8, 1996.

4. Interview with Miriam Horwitz, April 10, 1996.

5. Interview with Beverly Tucker, July 19, 1996.

6. Interview with Carin Clauss, October 22, 1996.

7. Clauss interview.

8. Ibid.


10. Interview with Ralph Jones, June 11, 1996.

11. Interview with Susan Deller Ross, July 11, 1996.


15. 908 F2d 1303 (6th Cir. 1990).

16. Interview with Marley Weiss, October 21, 1996.

17. Horwitz interview.

18. Weiss interview.

19. Carin Clauss noted that Weiss was careful to include a male plaintiff in the suit.


22. The AFL-CIO in fact often offers to take over cases from member unions that reach the Supreme Court, as it possesses essential experience at that level that most individual unions lack.
Notes to Chapter 4

1. There were in fact several other groups that similarly changed their positions on this issue and joined in support of the UAW, including the American Association of University Women (AAUW) and the National Council of Jewish Women.


6. Interview with Joan Bertin, February 8, 1996.

7. Ibid.

8. See Table 6 for a listing of the parties to the certiorari brief. Those that joined different briefs at the merits stage are noted. In addition, the ACLU picked up a number of new organizations when it filed again at the merits stage—see Table 4 for a listing of all the parties to the ACLU brief on the merits.

9. This may occur, for example, when a brief is written by someone who is not a member of the Supreme Court Bar—a member of the Bar may be retained to serve as counsel of record.


11. Interview with Nadine Taub, October 29, 1996.

12. Interview with Pat Shiu, November 2, 1995.

13. The ELC had also already signed onto the ACLU’s amicus brief supporting certiorari, and the decision to file a separate brief under the auspices of ERA to elucidate the PDA legislative history was made somewhat late in the game, so ELC would have had to in effect abandon the ACLU brief to which it was already committed to move over to join the other women’s rights brief.

14. Ibid.

15. At times, a philosophical difference between women’s rights activists on the two coasts has become visible, as those on the East Coast have tended to take a more “pure equality” view, while West Coast feminists have embraced a “difference” approach, advocating recognition but not subordination of gender differences—a strategy that the other wing views as potentially leading back to restrictions based on difference.

16. The organization is now the National Partnership for Women and Families.

17. Interview with Donna Lenhoff, August 26, 1996.


23. The Chamber may in fact be viewed as the ERA coalition’s adversarial counterpart in the Johnson Controls litigation in the area of the legislative history of the PDA.
26. Interview with Manuel Medeiros, April 10, 1996.
27. Manuel Medeiros, on the other hand, felt that since the two cases involved the same company and policy California probably would have been preempted by the federal decision.
32. Interview with Katherine McCarter, April 23, 1996.
35. Interview with Marianne Lado, April 2, 1996.
37. Lado interview.
38. Interview with Charles Shanor, July 18, 1996.
39. Berzon interview.
40. Shanor interview.
42. Berzon interview.

**Notes to Chapter 5**

1. Dyk was with the firm of Jones, Day, Reavis, and Pogue. He is now a judge on the Federal Circuit.
2. Interview with Stephen Bokat, February 14, 1996. There are of course cases involving Chamber members litigating against one another; in such instances of inter-member conflict, the NCLC will decline to become involved.
4. Bokat interview.
5. The use of the term _unborn children_ demonstrates use of language similar to the other parties supporting Johnson Controls who employed more of a fetal rights approach.
6. _The Business Counsel—A Quarterly Update of the Activities of the National Chamber Litigation Center_ 17, no. 2 (Winter 1995).
7. For other accounts of the EEAC’s litigation activity, see Epstein (1985) and O’Neill (1985).
8. Interview with Quentin Riegel, February 8, 1996.
11. Interviews with Kinney and Holzhauer.
12. Interview with Margaret Phillips, March 5, 1996.
13. The American Public Health Association, by contrast, in its amicus brief supporting the UAW, did use Dr. Bingham as an expert reference.
Notes

15. Interview with Jordan Lorence, February 15, 1996.
17. Hadro interview.
19. 4th Street, NE (pamphlet published by the NCCB/USCC), June 1995.
20. Interview with Mark Chopko, February 15, 1996.
24. Interview with Stephen Ostrach, June 12, 1996.
25. O’Connor and Epstein 1989, 204.
26. WLF may have thus unwittingly endorsed the view of exclusionary fetal protection policies furthered by opponents of such policies, who often dub them “corporate protection policies” out of a belief that they are indeed intended more to shield companies from suits than they are to shield fetuses from lead or other toxins.

Notes to Chapter 6

1. Interview with Judith Kurtz, April 18, 1996.
2. The amicus briefs for the UAW were all filed between May 23 and June 1, 1990; those for Johnson Controls were filed on either July 17 or July 19.
3. James Holzhauer of Mayer, Brown, and Platt in fact stated that the justices maintain lists of amicus organizations that they feel to be credible, and seek them out when reviewing amicus briefs.
4. These were the appellate courts that had rendered decisions in, respectively, *Wright v. Olin*, *UAW v. Johnson Controls*, and *Hayes v. Shelby Memorial Hospital*, all fetal protection cases.