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# “THE IMPORTANCE OF INTEREST GROUP INVOLVEMENT IN EMPLOYMENT DISCRIMINATION LITIGATION”\*

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Lee Epstein\*\*\*

Since the enactment of Title VII of the Civil Rights Act of 1964,<sup>1</sup> employment discrimination litigation has been utilized by many interest groups and organizations as a means by which to secure their often widely divergent policy goals and objectives.<sup>2</sup> Most studies of employment discrimination litigation focus on the cases themselves, their legal aspects, or their ramifications for further litigation or policy-making.<sup>3</sup> Here we examine the extent of interest group participation in fifty-two employment discrimination cases<sup>4</sup> and the impact of that involvement.<sup>5</sup>

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1. 42 U.S.C. § 2000 (1964) *et seq.*

2. See Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978); M. Berger, *Litigation on Behalf of Women: An Assessment*, FORD FOUNDATION REP. (1979); and K. O'Connor and L. Epstein, *An Overview of Interest Group Participation in Gender and Racially-Based Employment Discrimination Litigation* (June 11, 1981) (paper delivered at annual meeting of the Law & Society Association).

3. See, e.g., Comment, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166 (1971); B. SCHLEI and P. GROSSMAN, *EMPLOYMENT DISCRIMINATION AND THE LAW* (1976); *Symposium on Title VII: The Second Decade of Title VII Refinement of Remedies*, 16 WM. & MARY L. REV. 433, 433-566 (1974-1975); and Rabin, *The Individual in the Workplace: Directions of the Burger Court as Revealed in Its 1978-1979 Employment Decisions*, 30 SYRACUSE L. REV. 825 (1979).

4. We include for discussion only the cases resulting in a written opinion from the Court. Thus, per curiam decisions were excluded.

5. See *infra* notes 41 and 81. While differentiating between direct sponsorship of cases and submission of amicus curiae briefs in our discussion of interest group participation, both are included for study. A group's involvement as an amicus may be minimal, but cannot be ignored. For instance, there is evidence that Justices look to amicus briefs in writing their opinions (see *Roe v. Wade*, 410 U.S. 113). Thus, while amici lack the status of a direct litigant, they may affect the ultimate outcome of a case. And, many organizations, whether correctly or not, take credit for successes of direct sponsorship and find the amicus role as an important part of their overall litigation activities. See, Hull, *Advocates as Amicus Curiae: Friends of the Court Effecting Change*, Jan-Feb. 1978 AMICUS 27; Karp, *From Both to Rohauer: Twenty Years of Amicus Briefs—The Seventh Donald C. Brace Memorial Lecture on Copyright Law*, Bulletin, Copyright Society of the U.S.A. (1977); and S. Puro, *The role of the Amicus Curiae in the United States Supreme Court: 1920-1966* (1971) (unpublished Ph.D. dissertation at SUNY/Buffalo).

### *Why Interest Groups Litigate*

Employment discrimination is a costly and complex area of the law. Many of those aggrieved by discriminatory employer practices have limited resources. In Galanter's terminology, these aggrieved employees are "one-shotters": those for whom the outcome of the case may be critical. According to Galanter, however, these persons may not have the resources necessary to assert their rights via the judicial system.<sup>6</sup> Thus, for these individuals, interest group or union support may be critical. And, many interest groups and even some unions appear mindful of this representational role. For example, the International Union of Electrical, Radio and Machine Workers' (IUE) attorneys have noted that "unions can provide sorely needed financial and legal assistance" as well as "moral support and valuable information" when an employee alleges a discriminatory employment practice.<sup>7</sup>

In contrast, employers often incur only limited start-up costs when forced to defend themselves against charges of discrimination. Generally, they have retained in-house counsel knowledgeable in the art of delay (which many individual plaintiffs cannot afford) as well as the employment discrimination area more specifically. Particularly when a large company or the United States government is a party to a suit, the employer/defendant is a classic "repeat player".<sup>8</sup> While private attorneys retained by aggrieved plaintiffs may be skilled in employment discrimination litigation, the importance of technical and often highly statistical information in such litigation and the cost thereof, often places an employee (or prospective employee) plaintiff at a severe disadvantage.<sup>9</sup> For these reasons, in race and gender-based employment discrimination litigation, interest groups have played an unusually prominent role. And, at least at the level of the United States Supreme Court, interest groups advocating both employee and employer positions have made employment discrimination litigation a battleground of competing ideological and financial interests.

Hundreds of local, state, and national organizations exist to fight race and sex discrimination. Major national organizations including the National Association for the Advancement of Colored People (NAACP)<sup>10</sup> and the National Organization for Women (NOW)<sup>11</sup> have created special tax-exempt<sup>12</sup> legal defense funds to lobby and to litigate. They and the many

6. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. at 98 (1974).

7. Newman and Wilson, *The Union Role in Affirmative Action*, 32 LAB. L.J. 323 (June 1981).

8. Repeat players who participate in the litigation system over time accrue many advantages because of that status. These include "advance intelligence," "expertise," "informal relationships with individual incumbents," "credibility" (and interest in perpetuating this "bargaining reputation"), ability to "play the odds," and an ability "to play for rules as well as immediate gains." Galanter, *supra* note 6, at 97-100.

9. Note, *Evidence: Statistical Proof in Employment Discrimination Cases*, 28 OKLA. L. REV. 885 (1975); Note, *Employment Discrimination: Statistics Preference under Title VII Cases*, 30 LAB. L.J. 748 (1979). See also Berger, *supra* note 2.

10. See J. GREENBERG, *JUDICIAL PROCESS AND SOCIAL CHANGE* (1977) and C. VOSE, *CAUCASIANS ONLY* (1959).

11. See, *NOW Salutes NOWLDEF*, June 1981 NATIONAL NOW TIMES 1.

12. See generally, Note, *The Tax Exempt Status of Public Interest Law Firms*, 45 CALIF. L. REV. 228 (1972).

other groups involved in litigation have found the judiciary to be more receptive to their claims than state or national legislators.<sup>13</sup> The Justices of the United States Supreme Court themselves have recognized and legitimized the utility of these groups use of the courts. Speaking for the Court in 1963, Justice Brennan wrote: "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts . . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."<sup>14</sup>

To achieve their goals through litigation, some groups are forced to seek out prospective plaintiffs.<sup>15</sup> Other groups generally are amenable to the claims of potential plaintiffs who ask for their assistance. However, when an organization involved in litigation cannot find a suitable plaintiff, or cannot afford actually to handle litigation from the trial court stage, it often submits an amicus curiae to apprise the Court of its beliefs, to bring new information to the Justices' attention, or to buttress the claims of a like-minded organization.<sup>16</sup>

Participation as amicus curiae also appears to be enjoying increased usage by conservative and business interests. Particularly since the mid-1970's, conservative interest groups have regularly submitted friend of the court briefs to counter the claims made by their more liberal counterparts. For example, the Chamber of Commerce often appears as amicus curiae to present the Court with strong pro-business stands.<sup>17</sup>

Amicus participation, however, often lacks one element that may be critical in employment discrimination litigation: control. In Professor Robert Belton's study of public and private enforcement efforts under Title VII, he found that the success of the NAACP Legal Defense and Educational Fund (LDEF) in *Griggs v. Duke Power Co.*<sup>18</sup> was largely attributable to its control of the case as it was readied for appeal to the United States Supreme Court.<sup>19</sup> This kind of control has been the hallmark of the LDEF's strategy. Generally, the LDEF prefers to sponsor cases from the trial court level.<sup>20</sup> This provides its staff lawyers with the control that they feel is crucial to the success of a United States Supreme Court appeal.

### *Organizations That Litigate*

The NAACP and the LDEF have long resorted to the courts to seek redress from discriminatory practices. Several scholars have traced its suc-

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13. D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1959); VOSE, *supra* note 10; and Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. OF PUB. L. 287 (1968).

14. NAACP v. Button, 371 U.S. 415, 429-30 (1963).

15. In *In re Primus*, 436 U.S. 412 (1978) the Supreme Court upheld the right of an attorney affiliated with the American Civil Liberties Union to solicit clients without sanction so long as she did not do so for personal gain. The Court found that South Carolina's reprimand of the attorney violated the First and Fourteenth Amendments.

16. See generally, Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963) and C. VOSE, *CONSTITUTIONAL CHANGE* (1972).

17. See text *infra* pp. 420-22, 424.

18. 401 U.S. 424 (1971).

19. Belton, *supra* note 2.

20. See Westin, *Someone Has to Translate Rights into Realities*, 2 CIV. LIB. REV. 117 (1975).

cesses in the restrictive covenant,<sup>21</sup> school desegregation,<sup>22</sup> capital punishment,<sup>23</sup> and employment discrimination areas.<sup>24</sup> Since its initial appearance before the United States Supreme Court in 1915,<sup>25</sup> the NAACP's, and later the LDEF's expert staff's use of the test case strategy has brought it to the forefront of civil rights litigation and allowed it to stand as a model for other groups both to imitate and to improve upon. It is a regular repeat player before the Court in the employment discrimination area, as well as in most other areas involving some aspect of race discrimination.

The American Civil Liberties Union (ACLU) also litigates in race-based as well as in gender-based employment discrimination. The efforts of the ACLU, however, which appears in equally as many, if not more cases than the NAACP or the LDEF, have been the object of less scholarly attention. We suspect that this is because of its involvement in a far wider variety of issues,<sup>26</sup> the media's attention to its first amendment crusades, and the Union's preference to enter cases at the appellate, rather than at the trial court stage.<sup>27</sup> The creation of a special Women's Rights Project (WRP), however, has altered that preference in some areas of sex-discrimination as discussed, *infra*. While the WRP has sponsored more sex discrimination cases heard by the United States Supreme Court than any other interest group,<sup>28</sup> its participation generally has been limited to the filing of amicus curiae briefs in the employment discrimination area.<sup>29</sup>

While in the larger area of sex-discrimination litigation, the WRP comes closest to being an LDEF-type litigator, it lacks many of its advantages. Even though there is a greater consensus among women on the employment discrimination issue than in any other area of sex discrimination, there has been a proliferation of women's rights organizations to deal with this problem as well as other women's rights issues.<sup>30</sup> This large number of groups has affected the WRP's ability to function as consistently as the LDEF because: first, resources in this area have been divided among several

21. VOSE, *supra* note 10.

22. R. KLUGER, *SIMPLE JUSTICE* (1976); J. GREENBERG, *supra* note 10; Wasby, *Interest Group Litigation in an Age of Complexity* (1981) (paper delivered at the annual meeting of the Midwest Political Science Association); and J. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 103-53 (1978).

23. M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

24. Belton, *supra* note 2; Wasby, *supra* note 22.

25. *Guinn v. United States*, 238 U.S. 347 (1915).

26. See generally, Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 *YALE L.J.* 575, 575-81 (1949); Halpern, *Assessing the Litigative Role of ACLU Chapters*, in *Civil Liberties: Policy and Policy Making* (S. Wasby ed. 1976); Rabin, *Lawyers for Social Change—Perspectives in Public Interest Law*, 28 *STAN. L. REV.* 207 (1976); and F. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* (1976).

27. *Private Attorneys-General*, *supra* note 26.

28. K. O'CONNOR, *WOMEN'S ORGANIZATIONS' USE OF THE COURTS* (1980).

29. See text *infra* pp. 422-23.

30. Womens' rights groups that have been involved in litigation before the United States Supreme Court include: Equal Rights Advocates, Federally Employed Women, Human Rights for Women, National Association for Women in Mathematics, National Federation of Business and Professional Women, National League of Women Voters, National Organizations for Women, National Women's Political Caucus, Women Employed, Women's Equity Action League, Women's Legal Defense Fund, Women's Law Fund, Women's Law Project, Working Women, and Women's Rights Project of the American Civil Liberties Union.

groups.<sup>31</sup> Although the WRP is probably the best funded and consequently, the best staffed of the women's rights litigators, it has been unable to capture the large share of funds enjoyed by the LDEF. Second, this plethora of women's rights groups has made the adoption of a true test case litigation strategy difficult because it has been almost impossible for a single group to bring cases in a well ordered manner. Thus for example, the WRP has been forced to assist groups or private lawyers who have had cases accepted by the Court, when in terms of overall strategy, these cases were untimely brought. This loss of control has at times resulted in defeat for women's rights advocates.<sup>32</sup> In addition, the WRP often has been forced to act as *amicus curiae* and in that capacity to provide the Court with a fall back position to blunt the magnitude of a direct sponsor's defeat. This has happened most frequently when WRP lawyers have recognized that the Court would be unlikely to accept the position of the major party.<sup>33</sup> WRP briefs have tended to minimize losses,<sup>34</sup> but at times, have resulted in bad feelings that have made cooperation difficult among women's rights litigators—a problem the LDEF has not often had to face.<sup>35</sup>

Like the ACLU, unions have also litigated in both race-based and gender-based employment discrimination cases, in addition to their litigation in the unfair labor practice cases. Although there are several excellent histories of the union movement in general,<sup>36</sup> as well as about particular unions,<sup>37</sup> little has been written about union litigation activities,<sup>38</sup> particularly when discriminatory practices are at issue.<sup>39</sup> Nevertheless, the AFL-CIO, the

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31. Berger, *supra* note 2. Also, see generally, O'CONNOR, *supra* note 28, at 93-139.

32. For example, although Kahn v. Shevin, 416 U.S. 331 (1974) was an ACLU case, lawyers at the Women's Rights Project (hereinafter referred to as WRP) were unaware of it until after Kahn's lawyer filed a jurisdictional statement with the United States Supreme Court. Consequently, when the case was placed on the Court's docket, the WRP offered its assistance to Kahn's lawyer. WRP attorneys, however, would have preferred that the case not be heard by the Court because they were then in the process of preparing Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) for appeal. Thus, they feared that Kahn could produce a loss for women's rights advocates instead of building the four-Justice block that had found sex to be a suspect classification in Frontiero v. Richardson, 411 U.S. 677 (1973).

33. For example, in Dothard v. Rawlinson, 433 U.S. 321 (1977), a challenge to Alabama's refusal to hire women prison guards, the WRP filed an *amicus curiae* brief urging the Justices to construe the bona fide occupational qualification exception to Title VII very narrowly, if the Court was to uphold the Alabama practice.

34. See text *infra* p. 423.

35. As noted *infra*, the NAACP Legal Defense and Educational Fund (hereinafter "LDEF") has faced few competitors in the race discrimination area. And relations with the Lawyers' Committee for Civil Rights Under Law (hereinafter "LCCRUL"), which also frequently litigates in this subject area, are very cordial (see *infra* pp. 7-9). The two organizations regularly confer about cases and assist each other whenever possible. Interview with Peter Sherwood, LDEF staff attorney (June 1981).

36. P. FONER, WOMEN AND THE AMERICAN LABOR MOVEMENT (1979); E. LIEBERMAN, UNIONS BEFORE THE BAR (1950); W. FOSTER, AMERICAN TRADE UNIONISM (1947); and M. MILLER, WORKING LIVES: THE SOUTHERN EXPOSURE HISTORY OF LABOR IN THE SOUTH (1974).

37. J. BABISH, UNION AND TELEPHONES: THE STORY OF COMMUNICATIONS WORKERS OF AMERICA (1952); L. ULMAN, THE RISE OF THE NATIONAL TRADE UNION (1955); L. LEVINE, THE WOMEN'S GARMENT WORKERS (1924); E. LEVY AND T. RICHARDS, STRUGGLE AND LOSE, STRUGGLE AND WIN: THE UNITED MINE WORKERS (1977); and S. BRILL, THE TEAMSTERS (1978).

38. But see Note, *Union Liability for Employer Discrimination* 93 HARV. L. REV. 702 (1980); Note, *The Union as Title VII Plaintiff: Affirmative Obligation to Litigate*, 126 PENN. L. REV. 1388 (1978); and Newman and Wilson, *supra* note 7.

39. See *supra* note 38 and H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1977);

IUE, and several smaller unions often participate in Supreme Court litigation and consider it an important part of their "lobbying" activities. Unlike the LDEF or the ACLU, as discussed *infra*, unions do not always support those who claim race discrimination.<sup>40</sup>

### *Cases with Interest Group Participation*

#### *Race Discrimination*

All thirty-one of the race discrimination employment cases decided by the United States Supreme Court between 1970 and 1981 had some form of interest group participation.<sup>41</sup> In general, 58% (number of cases, n=18) were decided in favor of the parties alleging racial discrimination.<sup>42</sup> The Court decided against the position advanced by civil rights advocates in 35.4% (n=11) of the cases<sup>43</sup> and reached mixed results in the remaining 6.45% (n=2).<sup>44</sup>

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W. GOULD, *BLACK WORKERS IN WHITE UNIONS* (1977); Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 GEO. L.J. 457 (1962); Sherman, *Unions' Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771 (1965); Heeman, *Fighting the "Fly-Me" Airlines, 1976-1977 CIV. LIB. REV.* 48. See also, e.g., *Evans v. Sheraton Park Hotel*, 5 FAIR EEMPL. PRAC. CASE 393 (BNA) (1972); and *United States v. International Longshoremen's Ass'n*, 460 F.2d 497 (4th Cir. 1972).

40. GOULD, *supra* note 39 at 15.

41. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Delta Airlines v. August*, 450 U.S. 346 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Roadway Express v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Board of Educ. v. Harris*, 444 U.S. 130 (1979); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Washington v. Davis*, 426 U.S. 229 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Brown v. GSA*, 425 U.S. 821 (1976); *NAACP v. FPC*, 425 U.S. 662 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Love v. Pullman*, 404 U.S. 522 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

42. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Delta Airlines v. August*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Roadway Express v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *Board of Educ. v. Harris*, 444 U.S. 130 (1979); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Local 790, Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Love v. Pullman*, 404 U.S. 522 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

43. *Delaware State College v. Ricks*, 449 U.S. 250 (1981); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Brown v. GSA*, 425 U.S. 821 (1976); *NAACP v. FPC*, 425 U.S. 662 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1975).

44. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977). We consider mixed cases to be either: (1) cases where the Court

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND<sup>45</sup>

Several other patterns of interest group participation, as well as success, are evident when these cases are examined. The LDEF, for example, participated either as an amicus curiae or as a direct sponsor in 74.1% (n=23).<sup>46</sup> This high rate of participation was nearly matched by the LDEF's success rate. It won 65.2% (n=15) of its cases.<sup>47</sup> However, the LDEF was more successful when it directly sponsored a case. In those ten instances,<sup>48</sup> the LDEF won 70% (n=7)<sup>49</sup> as compared with a success rate of 61.5% (n=8) when its participation was limited to that of an amicus curiae.<sup>50</sup> For example, in *Albemarle Paper Co. v. Moody*<sup>51</sup> and *Franks v. Bowman Transporta-*

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affirmed in part and reversed in part, or (2) the Court vacated and remanded the case and no party emerged as the victor at that stage.

45. The LDEF is considered separately here from the NAACP. The NAACP has actually sponsored one race-based employment discrimination case, *New York Gaslight Club v. Carey*, 477 U.S. 54 (1980). It was the named party in *NAACP v. FPC*, 425 U.S. 662 (1976), but was represented by the Notre Dame Center for Civil Rights. The NAACP acted as amicus curiae in only five cases. Thus, because the two organizations now maintain separate agendas, only the LDEF's activities are detailed herein.

46. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Roadway Express v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Local 790, Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Washington v. Davis*, 426 U.S. 299 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Brown v. GSA*, 425 U.S. 821 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Love v. Pullman*, 404 U.S. 522 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

47. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Roadway Express v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Local 790, Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Love v. Pullman*, 404 U.S. 522 (1972); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

48. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Local 790, Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Fitzpatrick v. Bitzer*, 427 U.S. 273 (1976); *Brown v. GSA*, 425 U.S. 841 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

49. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981); *Local 790, Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Fitzpatrick v. Bitzer*, 427 U.S. 273 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

50. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Roadway Express v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *McDonald v. Santa Fe Trail Transp. Co.*, 423 U.S. 923 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Love v. Pullman*, 404 U.S. 522 (1972).

51. 422 U.S. 405 (1975).



tion Co.,<sup>52</sup> the LDEF was able to shape the course of litigation and frame the issues ultimately presented to the Court through direct sponsorship. In contrast, LDEF attorneys did not become aware of *Washington v. Davis*<sup>53</sup> until after certiorari was granted by the Court. Thus, while its attorneys were able to submit an amicus brief in *Washington*, the LDEF did not have a role at the trial court level where complicated and conflicting testimony concerning the validity of job tests were at issue.<sup>54</sup> Thus, absence of the control noted by Belton as important to LDEF success<sup>55</sup> may have played a role in at least one LDEF loss.

#### THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers' Committee for Civil Rights Under Law (LCCRUL) also has been extensively involved in race-discrimination employment litigation although in a more limited role than the LDEF.<sup>56</sup> The LCCRUL was organized at the request of President John F. Kennedy in June 1963. Its objective is to provide high quality legal representation to the nation's minorities and poor in the areas of civil rights, employment, education, and municipal services.<sup>57</sup> As part of that representation, the LCCRUL "has taken positions or expressed views on major civil rights issues,"<sup>58</sup> often in the form of amicus curiae submitted in support of those alleging race discrimination in employment. This amicus submission is frequently done after consultation with, or at the request of the LDEF, with which close ties have been formed.<sup>59</sup>

The LCCRUL has appeared as amicus curiae in 35.4% (n=11) of the race-discrimination cases discussed herein.<sup>60</sup> In the cases in which the LCCRUL filed amicus briefs, two were sponsored by the LDEF<sup>61</sup> and in

52. 424 U.S. 747 (1976).

53. 426 U.S. 229 (1976).

54. 348 F. Supp. 15 (1972).

55. See *supra* text accompanying note 18.

56. Cases with LCCRUL participation include *Delta Airline v. August*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Board of Educ. v. Harris*, 444 U.S. 130 (1979); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1975).

57. For a description of LCCRUL's activities in another area, see Shields and Spector, *Opening Up the Suburbs: Notes on a Movement for Social Change*, 2 YALE REV. OF SOC. ACT. 330 (1972), and Sherman, *The Right to Representation by Out of State Attorneys in Civil Rights Cases*, 1 HARV. C.R.-C.L. L. REV. 65 (1968).

58. Correspondence with William L. Robinson, Director, LCCRUL, July 8, 1981.

59. Interview with Sherwood, *supra* note 35.

60. *Delta Airlines v. August*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Board of Educ. v. Harris*, 444 U.S. 130 (1979); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

61. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

five others the LDEF also participated as *amicus curiae*.<sup>62</sup> In terms of its total *amicus* participation, the LCCRUL supported the victorious party in seven cases.<sup>63</sup> In all but two of these, the LDEF was present either as a direct sponsor or *amicus curiae*.<sup>64</sup>

LCCRUL sponsorship has been limited to two cases in this area.<sup>65</sup> In the one case it won, *Chandler v. Roudebush*,<sup>66</sup> its position was supported by an LDEF *amicus* brief. This joint effort led the Court to find that federal employees alleging race discrimination under Section 717 of the Civil Rights Act of 1964 were entitled to a trial *de novo* on the merits and not simply judicial review of the administrative proceedings.<sup>67</sup>

While the LCCRUL enjoys an excellent success rate (61.5%, n=8) its victories cannot be attributed to control.<sup>68</sup> One factor important to its success may be the prestige of its membership. Two former United States Attorneys General, ten former presidents of the American Bar Association, and many well respected lawyers volunteer their services to the LCCRUL<sup>69</sup> making it a repeat player with the resultant advantages.<sup>70</sup>

Cooperation with the LDEF also appears to be important. Interestingly, while the Court decided outrightly against black interests in only three cases in which the LCCRUL participated,<sup>71</sup> the LDEF was absent in all three. This nonparticipation of a frequent and well respected litigator could "cue" the Court as to the LDEF's distinterest or discomfort with the issues presented.

62. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

63. *Delta Airlines v. August*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Board of Educ. v. Harris*, 444 U.S. 130 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

64. *Delta Airlines v. August*, 450 U.S. 346 (1981); *Board of Educ. v. Harris*, 444 U.S. 130 (1979).

65. *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1975).

66. 425 U.S. 840 (1976).

67. *Chandler v. Roudebush*, 425 U.S. 840 (1976). *Chandler* was filed with *Salone v. United States*, 511 F.2d 902 (10th Cir. 1975), *vacated*, 426 U.S. 917 (1976), which was an LDEF sponsored case. LCCRUL and LDEF attorneys decided in advance to file them on the same day for additional impact. The Court accepted *Chandler*, which had the lower docket number, but this cooperation exemplifies the close relationship between the two organizations. Sherwood interview, *supra* note 35.

68. *Delta Airlines v. August*, 450 U.S. 346 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Board of Educ. v. Harris*, 444 U.S. 130 (1979); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

69. Brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* submitted in *Mobile v. Bolden*, 446 U.S. 55 (1980).

70. *Galanter*, *supra* note 6.

71. *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1975). Cases resulting in mixed results, see *supra* note 44, were *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977).

## UNIONS

The litigation activities of unions in the race-discrimination area are also interesting. Unlike the LDEF and the LCCRUL, which always advocate the interests of those claiming race discrimination, the pattern of union involvement is inconsistent in terms of their support of race claims. Unions adopted "anti-black" positions in 55.5% (n=5) of the nine cases in which they participated.<sup>72</sup> In several cases, however, unions were charged with discriminating against black union members and thus forced to defend themselves or their procedures against charges of race discrimination.<sup>73</sup>

Regardless of the racial stance adopted by unions in the Court, they experienced success rates above those of all other repeat players in this area, including the United States government.<sup>74</sup> Whether unions were direct sponsors or amicus curiae, they won eight of the nine cases in which they participated. They won all four of the cases in which they filed as amicus curiae<sup>75</sup> and four of the five they sponsored.<sup>76</sup> Thus, control also does not appear necessary to union success. However, all of the four cases that unions appeared in as amici were sponsored either by an interest group, business association, or the United States government.<sup>77</sup>

## CONSERVATIVE GROUPS

Both the direction and nature of conservative groups' participation in Supreme Court race-based employment discrimination litigation is in sharp contrast to the LDEF. Conservative groups consistently have advocated anti-employee, anti-plaintiff positions before the Court. And, unlike the LDEF, their litigation activities have been limited to appearance as amicus curiae. Both the Equal Employment Advisory Council (EEAC) and the

72. Cases with union participation include (anti-black positions denoted with \*): *Fullilove v. Klutznick*, 448 U.S. 448 (1980); \**California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); \**International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Local 790, Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); \**Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); \**Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975).

73. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) where black employees wished to bargain independently with an employer concerning employment discrimination issues; *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) where the union was charged with perpetuating discrimination by its collective bargaining agreement; *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) where the Teamsters were charged with perpetuating the effects of past discrimination in their seniority system.

74. See generally R. SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* (1971) and Puro, *supra* note 5. In the employment discrimination area, when race claims were at issue, the United States government won 76.9% of the cases in which it appeared. O'Connor and Epstein, *supra* note 2 at 11.

75. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

76. *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Local 790, Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). The AFL-CIO was on the losing side in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

77. *Griggs* was sponsored by the LDEF; *Emporium* involved a business interest charged with discriminating by a local community organization; *California Brewer's Ass'n* involved a trade association; *Fullilove* was involved with the United States government.

Chamber of Commerce of the United States have been particularly active in this area of the law.

The EEAC was founded in 1976 by individual employers and trade associations to present their views to the judiciary "concerning equal employment opportunity and affirmative action."<sup>78</sup> It regularly submits amicus curiae briefs in employment discrimination cases where statistical information is in question. It has filed this type of brief in eight race discrimination cases<sup>79</sup> compiling a 50% success rate.<sup>80</sup> While not as high as the LDEF's success rate, this figure is impressive given that the EEAC has had little time to build experience or prestige with the Court. And, its success stands in sharp contrast to that of the Chamber of Commerce.

The Chamber of Commerce is the largest association of business and professional persons in the United States, and as such, considers itself the "principle spokesman for the American business community."<sup>81</sup> However, its efforts, at least in terms of its ability to convince the Court to find for employers, have been uniformly unsuccessful. The Chamber filed amicus curiae briefs in eight cases.<sup>82</sup> In six, it adopted a pro-employer stance and sided with the losing party in each.<sup>83</sup> In one of the two cases won by the Chamber, it supported white employees who alleged racial discrimination when they were dismissed from their job and a similarly situated black employee was not.<sup>84</sup> Thus, although they were on the same side as the LDEF in *Emporium Capwell Co. v. Western Addition Community Organization*,<sup>85</sup> they were clearly advocating the interests of white employees and not an expansive reading of civil rights statutes.

The Chamber's low success rate may be due to its frequent advocacy of anti-civil rights positions, as well as its hard-line beliefs. Several groups, most notably the LDEF in the race-discrimination area, appear willing to compromise.<sup>86</sup> Some even go so far as to provide the Court with a fall back

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78. Equal Employment Advisory Council (EEAC) pamphlet (untitled, n.d.).

79. *Delta Airlines v. August*, 450 U.S. 346 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1981); *California Brewer's Ass'n v. Bryant*, 444 U.S. 509 (1980); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Local 790, Int'l Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

80. *Delaware State College v. Ricks*, 449 U.S. 250 (1981); *California Brewer's Ass'n v. Bryant*, 444 U.S. 598 (1980); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 324 (1977).

81. Brief of the Chamber of Commerce of the United States as amicus curiae in *Marshall v. Barlow's, Inc.*, 434 U.S. 949 (1977).

82. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

83. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

84. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

85. 420 U.S. 50 (1974).

86. See for example the LDEF's amicus brief for petitioner submitted in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

position whether they sponsor a case or appear as an amicus.<sup>87</sup> The Chamber, however, is not known for its use of that particular tactic.

Thus, when race-discrimination claims have been at stake, interest group, unions and business associations have played a major role in bringing these cases to the Supreme Court as sponsors and in presenting widely divergent views to the Justices. Some groups, most notably the LDEF, LCCRUL and unions, have found the Justices to be particularly receptive to their arguments. And, perhaps most surprisingly, unions are highly successful litigators, even when, unlike the LDEF or the LCCRUL, they adopt anti-civil rights stances.

### *Gender-Based Discrimination Cases*

Since passage of the Civil Rights Act of 1964, several women's rights groups have litigated gender-based employment discrimination claims.<sup>88</sup> However, the form and extent of their participation has been more limited than that of the LDEF in the race-discrimination area. In fact, only the WRP has participated in a majority of the gender-based employment discrimination claims that have reached the United States Supreme Court.<sup>89</sup> While the National Organization for Women (NOW) is more widely known for its activities on behalf of women, it has co-sponsored only one United States Supreme Court case, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.<sup>90</sup> The attorney litigating on behalf of the Commission on Human Relations requested that NOW intervene at the Supreme Court level because he believed that this joint sponsorship would highlight the sex-discrimination aspects of the first amendment case.<sup>91</sup> Thus, while NOW was listed as a co-sponsor of the case, it did not have the kind of input into the course of litigation that most sponsors, who try a case at the trial court level, actually possess.

NOW or its Legal Defense and Education Fund's participation as amicus curiae also has been less extensive than that of the WRP. It has participated as amicus curiae in seven sex-discrimination employment cases.<sup>92</sup> In five of those, however, its participation was limited to signing on an amicus

87. See *supra* note 86 and WRP amicus brief in *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

88. *County of Washington v. Gunther*, 452 U.S. 161 (1981); *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77 (1981); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Davis v. Passman*, 442 U.S. 228 (1980); *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *reh'g denied*, 414 U.S. 881 (1973); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

89. See *infra* notes 90 and 95.

90. 413 U.S. 376 (1973), *reh'g denied*, 414 U.S. 881 (1973).

91. O'CONNOR, *supra* note 28 at 104-05.

92. *County of Washington v. Gunther*, 452 U.S. 161 (1981); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1980); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

curiae submitted by another organization.<sup>93</sup> While this is evidence of inter-women's rights organizational cooperation, it does indicate that employment discrimination litigation has not been the focus of NOW's energies in the judicial forum.

In contrast to NOW, the WRP, while also only sponsoring one case, *Turner v. Department of Employment Security*,<sup>94</sup> appeared as an amicus curiae in 57% (n=12) of the gender-based discrimination cases.<sup>95</sup> In terms of success, it won *Turner* as well as 58.3% (n=7) of the cases in which it appeared as an amicus curiae.<sup>96</sup> Three of those losses, however, involved some aspect of pregnancy discrimination,<sup>97</sup> which has generated tremendous conservative interest group participation in opposition to women's claims.<sup>98</sup>

Interestingly, however, the chances of the Court adopting a pro-women's rights stance in the employment discrimination area were reduced drastically when the WRP was not a participant. Of the seven cases with no WRP involvement,<sup>99</sup> the arguments of those alleging sex discrimination were accepted by the Court in only 42.8% (n=3) of the cases,<sup>100</sup> as compared to a 61.5% success rate when the WRP was present. While this could mean that its lawyers stay out of cases they believe are "losers", this is not necessarily the case. For example there is evidence that even when WRP attorneys believe that a case should not be before the Court, they have filed amicus curiae briefs or lent support to the direct sponsor to lessen the negative impact of the potential decision.<sup>101</sup>

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93. *County of Washington v. Gunther*, 452 U.S. 161 (1981); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

94. 423 U.S. 44 (1975).

95. *County of Washington v. Gunther*, 452 U.S. 161 (1981); *Davis v. Passman*, 442 U.S. 228 (1980); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), *reh'g denied*, 414 U.S. 881 (1973); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

96. *County of Washington v. Gunther*, 452 U.S. 161 (1981); *Davis v. Passman*, 442 U.S. 228 (1980); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), *reh'g denied*, 414 U.S. 881 (1973); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). There were mixed results in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) and *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

97. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

98. See text *infra* pp. 424-425.

99. *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77 (1981); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980); *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

100. *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77 (1981); *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977).

101. See, *supra* note 87. See also discussion of WRP sponsorship assistance to the Southern Poverty Law Center in *Frontiero v. Richardson*, 411 U.S. 677 (1973) and to private counsel in *Vorchheimer v. School Dist. of Philadelphia*, 430 U.S. 703 (1977). O'CONNOR, *supra* note 28 at 113 and 124-25.

## UNIONS

Union activity in the gender-based claims area is more consistent than was evidenced in the race area. Contrary to the mixed support for race claims, unions participated on the side of women's rights groups in every employment case they entered at the level of the U.S. Supreme Court. The IUE in particular, has been especially concerned with the effects of gender-based discrimination on its members. Even Lane Kirkland, the president of the AFL-CIO, has noted the leadership position that the IUE has taken through its efforts to alleviate wage discrimination.<sup>102</sup>

Unions' success rates in gender-based litigation, however, is far lower than that in the race area. Of the ten cases with union participation,<sup>103</sup> the Court adopted the resolution urged by the union in only 50% (n=5).<sup>104</sup>

It should be noted, however, that several union losses involved pregnancy discrimination claims,<sup>105</sup> a type of gender-based discrimination that has been of particular concern to the IUE,<sup>106</sup> yet an issue that many of the Justices have been unwilling to recognize as sex-discrimination, thus limiting the opportunity for the IUE or other groups to win these cases. For example, the IUE sponsored *General Electric Co. v. Gilbert*,<sup>107</sup> in which the Court concluded that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."<sup>108</sup> This decision, while a major loss for the IUE and women's rights advocates, however, triggered a massive lobbying effort that resulted in passage of the Pregnancy Disability Act, an amendment to Title VII, which overruled *Gilbert*.<sup>109</sup>

## CONSERVATIVE GROUPS

Those supporting or representing women who allege sex discrimination have experienced considerable opposition from conservative groups. In particular, the Chamber of Commerce and airline companies consistently advocate positions against women's interests. The Chamber, for example, participated as amicus curiae in 35% (n=7) of the 20 cases.<sup>110</sup> And, its suc-

102. Newman and Wilson, *supra* note 7 at 324.

103. *County of Washington v. Gunther*, 452 U.S. 161 (1981); *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77 (1981); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

104. *County of Washington v. Gunther*, 452 U.S. 161 (1981); *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77 (1981); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

105. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

106. As early as 1954, the International Union of Electrical, Radio and Machine Workers proposed a contract clause that called for employer paid hospitalization benefits that would cover pregnancy and childbirth. Newman and Wilson, *supra* note 7 at 326.

107. 429 U.S. 125 (1976).

108. 429 U.S. at 136.

109. 92 Stat. 2076 (1978).

110. *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77 (1981); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Liberty*

cess rate was higher than that it achieved when race discrimination was at issue. In the gender-based discrimination area, the Chamber won 42.8% (n=3) of the time.<sup>111</sup>

While the Chamber participated in the full range of gender-based cases, airline companies generally limited their opposition to those involving pregnancy discrimination, an area in which an adverse decision could have far ranging, industry-wide ramifications. Of the five cases with some form of airline participation,<sup>112</sup> 60% (n=3) involved pregnancy discrimination claims.<sup>113</sup> Two of those, *Liberty Mutual Ins. Co. v. Wetzel*,<sup>114</sup> and *General Electric Co. v. Gilbert*,<sup>115</sup> challenged practices that if not sustained could have been costly to airlines. Thus, in each the airlines stressed the potential importance of the decision and ultimately won. Thus, airline involvement in an area in which the Court has been unwilling to find sex discrimination, has given airline companies a combined success rate of 60%.

The success of airlines in Supreme Court litigation, however, may be due to another factor: cooperation.<sup>116</sup> In several of the cases in which business interests acted as direct sponsors, their cases were supported by numerous amicus curiae briefs. For example, in *General Electric Co. v. Gilbert*, twenty-one airlines signed onto a brief supporting General Electric's position. This kind of cooperation, the economic resources that these companies can devote to litigation and the potential wide ranging impact of judicial extension of pregnancy benefits have contributed to airline success.

Thus, just as when race discrimination was alleged, claims of gender-based discrimination also have resulted in group conflict. The WRP is clearly the premier litigator in this area even though its participation has been limited to amicus curiae. NOW and the IUE have also appeared as amicus curiae in several cases, each, but their impact on the Court, at least in this area, has been negligible. Airlines, particularly in the pregnancy discrimination area, also have been repeat players, but far more successful than the IUE.

### Conclusion

This paper examined the involvement of interest groups in gender-based and race-based Supreme Court litigation. Interest group involvement was extensive. While interest groups represented parties in 100% of the cases, the nature and extent of their participation varied. And, although generally different groups emerged to support the claims of aggrieved blacks and of aggrieved women, the Chamber of Commerce argued against both groups.

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Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Board of Educ. v. LaFleur, 414 U.S. 632 (1974).

111. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974).

112. Northwest Airlines, Inc. v. Transportation Workers, 451 U.S. 77 (1981); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1975); Board of Educ. v. LaFleur, 414 U.S. 632 (1974).

113. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1975); Board of Educ. v. LaFleur, 414 U.S. 632 (1974).

114. 424 U.S. 737 (1975).

115. 429 U.S. 125 (1976).

116. For the importance of cooperation see VOSE, *supra* at notes 10 and 16, Shields and Spector, *supra* at note 57, Berger, *supra* at note 2, at O'CONNOR, *supra* at note 28.



Additionally, while both sets of cases evidenced interest group activity, the nature of that activity was remarkably different but resulted in similar proportions of pro-rights decisions by the Court. In the race discrimination area, two groups, the LDEF and the LCCRUL, play a major role. In contrast, only the WRP in the gender area can be characterized as a major participant even though its involvement was limited to that of amicus curiae in all but one case.

While the WRP's success contradicts Belton's conclusions about the importance of control, its success (and that of other groups representing those who claim gender-based discrimination) may be due to the nature of the cases heard by the Court in the two related areas of employment discrimination. While the gender-based discrimination cases are clearly more difficult in terms of proof than those turning on constitutional questions (i.e. *Reed v. Reed*<sup>117</sup> or *Craig v. Boren*<sup>118</sup>), the race-based cases involve extremely complicated issues of intent and procedure. Thus, control may be more important in the race area because of the complex nature of the cases.

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117. 404 U.S. 71 (1971).

118. 429 U.S. 190 (1976).